



June 28, 2010

Regulations Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2010-0008

Regs.comments@ots.treas.gov

Dear Sir or Madam:

The Consumer Bankers Association (CBA)¹ offers these comments on the Proposed Supplemental Guidance on Overdraft Protection Programs (the Proposal) of the Office of Thrift Supervision (OTS) to update the Guidance on Overdraft Protection Programs (Overdraft Guidance) issued by the OTS on February 18, 2005. We are grateful for the opportunity to comment.

The OTS states that the 2005 Overdraft Guidance was issued to provide “Best Practices” intended to improve overdraft protection programs; and, as noted, the OTS is providing the proposed Supplemental Guidance “to clarify its supervisory expectations and the application of relevant laws and regulations,” given the considerable changes in the “legal landscape” since 2005. We appreciate the importance of the issues being addressed, and the need for the OTS to update the Overdraft Guidance in light of the changes that have occurred since its issuance. We fully support transparency and clear disclosures, but we are concerned with a number of aspects of the OTS Proposal. In this comment letter, we will describe our major concerns with the Proposal as issued.

¹ The Consumer Bankers Association (“CBA”) is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation’s largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry’s total assets.

First, we are concerned with the timing of this Proposal: We respectfully suggest that you withdraw it and reconsider it at a future time if necessary. The Federal Reserve Board (FRB) has just concluded a set of overdraft protection rules under Regulation E (Electronic Funds Transfer Act) and Regulation DD (Truth in Savings Act). These rules call for financial institutions to give all customers the right to “opt in” to any courtesy overdraft features on their accounts, and provides for a number of other strong new substantive rules and disclosure requirements. Many of these proposed guidelines are already superseded by the new regulations. The Proposal identifies many of them. Furthermore, the changes that are mandated by the regulations are just now being implemented by financial institutions. The implementation process and the ways in which markets and consumers respond to these new rules through the development of new products and services and the manner in which consumers respond by opting in, changing accounts, etc., will also have an impact on whether new guidance is needed. Seeking comment on proposed new guidelines now is premature. We therefore encourage you to reconsider the issuance at a later date.

Second, we are concerned with the manner in which the OTS has chosen to address what were “best practices” in 2005 as potentially unfair or deceptive acts or practices (UDAP). The agency defines an act or practice as “unfair” if: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers themselves; and (3) the injury is not outweighed by countervailing benefits to consumers or competition. An act or practice is “deceptive” if (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) the information is material to consumers. This is the same set of definitions that have been employed by the other regulatory agencies. The OTS states that it has adopted these standards to provide a useful method of analysis.

Though we agree the issues being addressed are worth consideration, from a legal perspective, the OTS has provided little or no analysis to support its assertion that the particular practices being described in the Proposal are either “deceptive” or “unfair” under the FTC Act. The practices being outlined, which were aspirational in the Overdraft Guidance, would become, in the breach, a potential violation of the law, subjecting the institution to civil liability. Once the agency calls these practices unfair or deceptive in final guidance, the assertion can be used to buttress potentially costly

liability claims. Even institutions that try to comply could face retroactive liability for perfectly legal practices before. Although technically applicable only to OTS-regulated institutions, statements by the OTS can be cited as an example of the federal government's position and can become a model for other entities to adopt.

Should the OTS wish to create unfair or deceptive practices regulations instead of best practices guidance, we would encourage it to do so in concert with the other agencies which have joint authority to issue regulations under the FTC Act, rather than acting on its own initiative in this area. Doing so would provide uniformity that would benefit consumers, and it would permit the OTS to take full advantage of the consumer testing and analysis that was done by the Federal Reserve Board as it developed its overdraft regulations under Regulation E and Regulation DD.

Finally, in the event the OTS, preferably with the other agencies, chooses to adopt rules to deal with unfair or deceptive practices, we would urge much greater clarity, so that institutions can manage risk effectively and consumers can obtain uniform disclosures. When describing practices as ideal or encouraged, as in the Overdraft Guidance, a certain amount of vagueness is appropriate and offers the flexibility necessary to develop practices that are appropriate to the institution and its customers. However, when a violation is subject to liability, as it would be under the Proposal, there is a need for greater clarity in the rules. Throughout the Proposal, we are troubled by the vagueness of the principles being espoused. For example, the Proposal states that the 2005 Overdraft Guidance recommended that associations "alert" consumers that fees charged on overdraft, as well as the overdraft items themselves, will be subtracted from the overdraft protection limit disclosed. It then goes on to say: "Failing to explain the treatment of such fees is deceptive." Yet the attempt to comply with this simple assertion is fraught with danger. Is the OTS saying that the institution must alert the consumer in some manner? What form of explanation is required? When should it be provided? Is it enough to disclose the information at account opening or must it be highlighted in some way?

Similarly, the Proposal would require the institution to "promptly notify consumers of overdraft protection program usage each time used." The failure to do so, including the failure to provide consumers with the information necessary to return the account to a positive balance, would become a deceptive practice. Once again, from a risk management perspective, this provides a dangerously vague set of standards on which to

draw up a compliance policy. The Proposal even adds, as an addendum, that “where technologically feasible to do so, real time notification should be provided.” This is a worthwhile suggestion, but by stating it in the context of a deceptive practice rule, it is troubling. Many institutions do not have the latest technological advances, and many consumers may prefer not to be reached using cutting-edge technology. These are only a few of the many examples throughout that would create liability because the OTS is asserting UDAP principles.

There are numerous other examples of this same problem throughout the Proposal. In fact, we could say much the same thing about all of the concepts that the OTS describes in the Proposal as unfair or deceptive. They are all worthy of consideration, but if the OTS chooses to rule on these matters, it should (a) do so only after the new regulations have gone into effect and the manner in which the industry complies subsequently is studied; (b) work jointly with the other regulatory agencies to ensure uniformity that would most benefit consumers; and (c) provide clear and unambiguous rules for industry compliance, based on a thorough analysis of the need for regulation.

Thank you for the opportunity to provide our comments. We would be happy to provide any additional information or respond to any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Zeisel". The signature is written in a cursive, flowing style with a prominent initial "S".

Steven Zeisel
Vice President and General Counsel