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Marissa K. Briggs
Vice President and Associate Counsel

August 6, 2004

Ms. Jennifer J. Johnson
Secretary
Board of Governors
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

RE: FFIEC Interagency Guidance on Overdraft Protection Programs
Federal Reserve System Docket Number OP-1198

Dear Ms. Johnson:

Thank you for the opportunity to comment on the proposed Interagency Guidance on Overdraft Protection Programs issued by the Federal Financial Institutions Examination Council (FFIEC) (the "Proposed Guidance").

Manufacturers and Traders Trust Company understands many of the concerns expressed in the Proposed Guidance regarding promotion of overdraft protection programs in a misleading manner; however, we are concerned that the Proposed Guidance may be too broad and unnecessarily sets forth practices that are not realistic and that may be used unfairly in litigation against banks that offer traditional types of overdraft services. We have outlined our specific concerns and comments below.

I. General Comments:

The Proposed Guidance distinguishes between traditional ad-hoc discretionary overdraft services offered by banks ("Traditional Overdraft Services") and actively marketed overdraft programs that the FFIEC believes tend to promote overdraft services in a way that encourages customers to overdraw their accounts ("Overdraft Programs"). However, we are concerned that these two classes of overdraft services are not sufficiently defined and that the significance of the distinction with respect to the application of the Proposed Guidance is unclear.

Consequently, we suggest that the Proposed Guidance define Overdraft Programs in a manner that clearly distinguishes them from Traditional Overdraft Services. Most of the characteristics of "overdraft protection programs" listed in the Proposed Guidance are features of both Traditional Overdraft Services and Overdraft Programs. The key distinguishing features of Overdraft Programs are the extent to which such programs are marketed to consumers and the fact that banks inform customers of their aggregate dollar limit under the program (*i.e.*, the items discussed in the first bullet point on the list). All of the other listed items might well be features

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of either Tradition Overdraft Services or Overdraft Programs. Accordingly, we recommend that the Proposed Guidance specifically define Overdraft Programs rather than referring to a non-exclusive list of characteristics, most of which are shared with Traditional Overdraft Services.

We believe that much of the Proposed Guidance should not apply to Traditional Overdraft Services and respectfully request that this be clarified. It seems to us that many of the safety and soundness considerations and legal risks may apply equally to Overdraft Programs and Traditional Overdraft Services; however, many of the best practices appear to be targeted at perceived problems with Overdraft Programs. Traditional Overdraft Services have been offered responsibly by banks for many years and do not warrant the types of additional cumbersome and costly practices described in the best practices provisions. Accordingly, we respectfully request that the Proposed Guidance be clarified to indicate that it does not apply to Traditional Overdraft Services or, at a minimum, that the best practices do not apply to Traditional Overdraft Services.

II. Safety and Soundness Considerations:

The FFIEC requests comment on whether it is appropriate to expect banks to charge off overdraft balances within 30 days from the date the account is first overdrawn. We echo the concerns of many other institutions that this time period is too short. We currently allow a longer period of time before charging off overdraft balance; however, we have a risk-based procedure for placing holds and limiting our exposure to additional withdrawals while a customer's account remains overdrawn. In our experience this system has appropriately protected the bank from risk while permitting the bank sufficient time to recover amounts owed by customers. We believe that charging off overdraft balances within 30 days would also be detrimental to customers as, in many cases, they would incur additional cost in establishing new accounts and negative information might be reported to credit bureaus or other organizations that compile customer information (e.g., E Funds ChexSystem).

111. Legal Risks:

The Proposed Guidance seems to suggest in several instances that overdraft protection amounts to the extension of credit. For example, in the discussion of the Truth in Lending Act, the Proposed Guidance indicates that “[w]hen overdrafts are paid, credit is extended.” We suggest that this statement be eliminated from the Proposed Guidance as the ensuing discussion indicates that TILA and Regulation Z generally would not cover overdraft protection programs. This statement could be misleading and appears to be contrary to the Federal Reserve Board's position in its recent proposed amendments to Regulation DD.

IV. Best Practices:

In the section of the Proposed Guidance titled “Principal Elements of the Guidance” the FFIEC indicates that “Guidance sets forth best practices that serve as positive examples of practices that are currently observed in, or recommended by, the industry.” We are concerned that this could

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create an inaccurate public perception of what is standard practice for the banking industry. In point of fact, it is our understanding that many of the listed best practices are not in common use and are not recommended by most in the industry. While some of the best practices are laudable, we are concerned that the Proposed Guidance implies that responsible banks should be adhering to all of these practices when some are not practical.

Clearly explain the discretionary nature of program.

While we whole-heartedly agree that banks should disclose the discretionary nature of any discretionary overdraft service, we question the advisability of indicating that banks should disclose “the circumstances under which the institution would refuse to pay an overdraft or otherwise suspend the overdraft protection program.” We share the concerns of other banks that this may confuse customers and lead them to believe that if they avoid the circumstances listed, the bank will pay all overdrafts. This is not accurate and to convey such a message would be a disservice to customers. Instead, we suggest that any disclosure to customers emphasize the bank’s discretion in determining whether or not to pay an item.

Clearly disclose program fee amounts.

The Proposed Guidance suggests that all marketing materials and information provided to consumers that mentions overdraft protection programs should specify the amount of the fees for each overdraft and any other related fees or interest rates. We think that this may be unnecessarily broad. Generally, banks disclose their fees on separate schedules that are frequently updated. This is an effective way to communicate fee information to customers because the customer can easily locate all relevant fees in a single document. This approach also prevents banks from having to revise their many agreements, disclosures and marketing materials each time a fee changes. We think that the typical system of disclosing fees on a separate schedule is most effective and efficient and recommend that the Proposed Guidance be amended to eliminate the suggestion that banks should disclose specific fees on each piece that mentions overdraft services.

Explain check clearing policies.

We strongly disagree with the suggestion that banks disclose their check clearing policies. These policies are separate from a bank’s overdraft service and can be complex and confusing, especially when the check clearing policy is integrated with the policies for processing other types of transactions. We question whether most banks would be able to describe their transaction processing policies in a clear and concise manner in any case. We certainly do not believe that this should be included as “best practice” for overdraft protection services.

Provide election or opt-out of service.

We are very concerned by the suggestion that banks require customers to “opt in” or “opt out” of overdraft protection services. Implementing such a program and tracking such information

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would be cumbersome and costly for banks and could be a disservice to consumers who, in general, benefit from and appreciate overdraft protection services.

Alert consumers before a non-check transaction triggers any fees.

The Proposed Guidance states that, “where feasible,” banks should notify customers that a particular transaction will overdraw the customer’s account before the customer completes the transaction. As an initial matter, we question what is meant by the phrase “where feasible?” Developing the capability to provide such information would be costly. At what point might the cost make the project “not feasible?” More importantly, due to the fact that transactions are cleared at the end of the day, it is impossible to provide a consumer with accurate balance information regarding whether a transaction will overdraw the account before all transactions for the day have been processed. The balance information provided and any conclusion regarding whether a transaction will overdraw the account are very likely to be inaccurate at the time a customer makes an ATM, POS, or even teller-assisted transaction. We are concerned that it may be misleading to provide this information in many cases.

This paragraph also notes that notices could be posted on “proprietary ATMs explaining that withdrawals in excess of the actual balance will access the overdraft protection program and trigger fees for consumers who have overdraft protection services.” This statement could be misleading because any consumer who overdraws his or her account will likely be assessed a fee, regardless of whether they have overdraft protection services. In addition, stating that the overdraft protection program “*will*” be accessed does not reflect the discretionary nature of most overdraft services and could mislead a consumer into believing that his or her overdraft will automatically be covered.

Prominently distinguish actual balances from overdraft protection funds availability.

It is impossible for banks to provide an “actual balance” in a system that does not **operate** in real time. Therefore it would be misleading to label any balance provided to a customer as an “actual balance.” This terminology suggests that the balance provided represents what is actually in an account at the time in question; however, any such balance does not reflect outstanding items.

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

The Proposed Guidance also indicates that banks should promptly notify consumers that overdraft services have been triggered and provides an example that a bank might send a notice “the day” that the overdraft *occurs*. As a practical matter banks may not determine that a transaction resulted in an overdraft until after all items have been processed for the day. If this practice remains in the Proposed Guidance, rather than specifying a particular time in the example, we suggest that the example remain general and provide that such notice might be provided promptly after the bank *determines* that there has been an overdraft.



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Consider daily limits.

We do not object to the idea that a bank should *consider* whether to apply daily limits of the sorts mentioned in the Proposed Guidance; however, we would prefer that this practice be omitted from the list. If a customer overdraws his or her account on a number of occasions on a single day, paying the overdrafts will likely benefit the customer and, whether a bank pays an item or not, the costs of processing the item remain.

Monitor overdraft protection program usage.

It would be difficult for banks to monitor customer usage and identify on an individual account basis the most appropriate alternative credit or other products. In fact, it would be difficult to determine whether a particular customer is even eligible for alternative options.

Once again, we thank you for the opportunity to comment on the Proposed Guidance. Should you have any questions regarding our comments, please do not hesitate to contact Marissa Briggs (716-842-2366) or David Burstein (212-350-2580).

Sincerely,

A handwritten signature in blue ink that reads 'Marissa K. Briggs'. The signature is stylized and includes a large initial 'M' and 'B'.

Marissa K. Briggs