

From: "hayleyr" <RHayley@metairiebank.com> on 07/20/2004 11:15:41 AM

Subject: Overdraft Protection Programs

July 20, 2004

Via Electronic Mail

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Ave.
Washington, D.C. 20551

Re: Overdraft Protection Guidance; Docket Nos. OP-1198, 04-14, 2004-30

Dear Ms. Johnson:

This comment letter is submitted on behalf of Metairie Bank & Trust Company in response to the notice of proposed guidance ("Proposed Guidance") and request for public comment by the Federal Reserve Board ("FRB"), Office of the Comptroller of the Currency ("OCC"), Federal Deposit Insurance Corporation ("FDIC"), Office of Thrift Supervision ("OTS"), and National Credit Union Administration ("NCUA"), published in the Federal Register on June 7, 2004. The Proposed Guidance is intended to assist depository institutions in the disclosure and administration of overdraft protection services. Metairie Bank & Trust Company appreciates the opportunity to comment on this important matter.

The Proposed Guidance provides that "overdraft balances should generally be charged off within 30 days from the date first overdrawn." With regard to federal credit unions, a 45-day period generally applies under existing rules that apply to those entities. The Proposed Guidance also states that even if an institution allows a consumer to cover an overdraft through an extended payment plan, the 30-day charge-off provision would apply. We disagree with this proposal, and believe that it is not necessary to achieve safe and sound banking practices and also could adversely impact consumers. Most consumers seek to repay overdrafts as quickly as possible. Banks actively pursue the prompt payment of overdrafts through the use of written and oral notices to consumers. However, numerous circumstances can arise in which consumers simply are unable to repay overdrafts in full within 30 days of the overdraft. If an account must be charged off within 30 days, it can be more difficult to collect payment for such amounts. Alternatively, if an institution is not required to charge off an account until day 45, the likelihood of collection in that "additional" 15-day period can be enhanced because consumers may be far more willing to pay a sum before it is charged-off. Thus, we believe adoption of a 45-day charge off period, which also would be consistent with the time period that applies to federal credit

unions, could enhance the ability of institutions to collect overdrafts and actually enable better risk management practices.

The Proposed Guidance also provides that, with respect to reporting requirements, overdraft balances should be reported as loans and overdraft losses should be charged against the allowance for loan and lease losses. The Proposed Guidance also states that when an institution routinely communicates the available amount of overdraft protection to depositors, the amounts should be reported as “unused commitments” in regulatory reports. We respectfully disagree with this approach and believe that it is more appropriate to net overdraft balances against deposits because no agreement exists with respect to the overdrafts. Furthermore, negative balances occur daily at institutions, without regard to overdraft protection programs, and these balances are not classified as loans nor are they subject to immediate charge-off policies. We believe that overdraft balances should be treated the same way. In addition, to the extent these balances are not treated as loans, available amounts also should not be reported as “unused commitments” in regulatory reports.

The Proposed Guidance states that when overdrafts are paid, credit is extended. We disagree with this statement. Courts have reviewed this question and have generally concluded that an overdraft is not credit under the Truth in Lending Act, unless it is a line of credit established by written contract. There does not appear to be any reason to include this statement since the guidance implicitly notes that overdrafts are not covered by Regulation Z because the fees are not considered finance charges. Finally, the FRB’s recent proposed amendments to Regulation DD, which solely covers deposit accounts and not credit, makes it clear that overdraft programs are not credit.

The Proposed Guidance states that the prohibition in the Equal Credit Opportunity Act (“ECOA”) against discrimination “applies to overdraft programs.” While we believe that institutions should not discriminate against persons on the basis of race and other factors, we do not believe that the ECOA should be deemed to apply to overdraft programs. In particular, the ECOA applies to credit extensions and credit is defined as the “right” granted by a creditor to a person to defer payment of debt. The overdraft programs described by the Agencies do not involve a “right” granted by institutions. Also, as discussed above, because overdraft programs are part of deposit accounts, as the FRB’s recent amendments to Regulation DD provide, these programs also cannot be deemed credit. For these reasons, we believe that ECOA does not apply to overdraft programs.

As for the suggestion that institutions “explain to consumers the costs and advantages of various alternatives to the overdraft protection program” and identify the risks and problems in relying on the program and the consequences of “abuse”, we believe this suggestion micro-manages the way in which, and customers to whom, institutions provide information, and is unnecessary. In addition, providing a detailed cost-benefit analysis of the alternatives to overdraft programs could require the creation of a lengthy and complicated document. Institutions make available significant information about their products and services, including lines of credit and other products. This information is made available through numerous channels, such as their websites, via telephone, and in branches. It is simply unnecessary and inappropriate for the Agencies to dictate the marketing approaches used by institutions. As a result, we recommend deletion of

this provision.

We also oppose the inclusion of the provision requiring institutions to explain their check clearing policies. Check clearing policies are, at most, only tangentially related to an overdraft program. This provision is outside the scope of the purpose of providing information about overdraft programs and should be deleted. In addition, such policies can be very detailed because they relate to checks and other channels through which consumers can withdraw funds, and the Agencies suggestion of a “clear” disclosure could require a lengthy and detailed document.

We strongly oppose the suggestion that institutions require consumers to “opt-in” before providing overdraft services or, alternatively, permit consumers to opt-out of an overdraft program. Consumers are fully apprised by institutions when institutions may honor an overdrawn item, instead of returning the item unpaid and having a merchant or other party assess a fee, in addition to the “NSF” fee charged by the account-holding institution. Providing an “opt-in” notice to consumers for overdraft programs would work hardship on consumers and would result in consumers paying greater amounts for checks returned unpaid (due to merchant fees, for example). Furthermore, there is no basis for requiring the provision of an “opt-out” notice to consumers. This would impose significant costs and burdens on institutions and likely would result in significant litigation, due to the potential creation of a consumer “right,” by the provision of such notices. For example, questions could be raised as to whether the notice is clear, the scope of the right, and numerous other issues. We urge the Agencies to delete this provision.

We also strongly oppose the suggestion that institutions provide a notice to consumers, “when feasible” before completing a transaction, that a transaction may overdraw an account, for the reasons discussed below. First, it is unclear what “when feasible” means. Technologically, an institution could not implement such a requirement, and any such approach would require the expenditure of extraordinary sums. Also, because systems that permit access to funds do not operate in “real time,” it is simply impossible to know whether, at the time of a withdrawal, a specific transaction will overdraw an account because of the processing of other deposits and withdrawals.

We also disagree with the suggestion that institutions post a notice at their ATMs explaining that withdrawals in excess of the balance of funds in a consumer’s account will access the overdraft protection program. We believe such a notice would confuse or mislead consumers, and should not be adopted. There are already so many notices required at ATMs that the inclusion of another notice would add to the confusion and possibly mislead consumers. The Agencies should not adopt this provision.

Finally, as to the provision that institutions promptly notify consumers of overdraft protection usage each time overdraft services have been triggered, we recommend the agencies modify this provision. In particular, we believe the reference to sending a notice to consumers “the day” the overdraft program has been accessed is not possible in many instances. We recommend this provision simply suggest that institutions “promptly” notify consumers of the overdraft. In addition, it may be desirable for notice to be provided through means other than email or by a

paper notice, such as by telephone, to ensure speedy notice is provided. This provision should clarify that such notice can be provided orally, if that is deemed the most effective means of “delivery” by the institution.

Metairie Bank & Trust Company appreciates the opportunity to comment on this important matter. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact Richard A. Hayley, VP/Compliance Officer, at (504) 834-6330.

Sincerely,

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