

July 21, 2004

Jennifer J. Johnson  
Secretary  
Board of Governors of the  
Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue N.W.  
Washington, D.C. 20551

Re: Docket No. OP-1198  
Proposed Interagency Guidance on Overdraft Programs

Dear Ms. Johnson:

Heritage Bank appreciates the opportunity to comment on the proposed Interagency Guidance on Overdraft Protection Programs issued by the member agencies of the FFIEC.

**What is an ODP Program?**

The proposed guidance refers to ODPs as “a credit service” but the proposed guidance lacks a definition as to what constitutes an ODP Program. The process of naming and defining the service is best addressed in Regulation DD. Under proposed amendments announced in May regarding Regulation DD addresses but does not define “overdraft protection program.” That proposal also addresses but does not define an additional term “automated overdraft services.”

Obviously, definitions must be provided. In effect, it needs to be made clear whether the guidance is relevant to any financial institution that pays overdrafts or only those financial institutions that actively promote their ODP programs.

**Safety and Soundness**

The original request for information made no mention of any concerns that OPS’s represented a safety and soundness issue. The guidance states “institutions providing overdraft protections programs should adopt written policies and procedures adequate to address the credit, operational and other risks associated with these types of programs. Prudent risk management practices include the establishment of express accounts eligibility standards and well-defined and properly documented dollar limit decision criteria. Institutions also should monitor these accounts on an ongoing basis and be able to identify individual consumers who may be excessively reliant on the product or who may represent an undue credit risk to the institution.”

Financial institutions that have credit approved ODP Programs in place currently do not monitor these accounts for excessive usage. These accounts are monitored for over-limit and delinquent status.

The suggestion that overdrafts more than 30 days in duration should be automatically charged off assumes many facts not in evidence. Industry standards currently acknowledge that when a “real” loan is 90 days past due and not in the process of collection that the loan is put on non-accrual and not charged off.

When a checking account is “charged off” the standard practice is to give the consumer 7-14 days advance notice of the account closure in order to give time for outstanding checks to clear. If consumers are to continue to receive this courtesy letter the letter would have to be sent 7-14 days prior to the end of the 30 day period. The decision to charge off the overdraft would have to take place in 2-3 weeks after the overdraft took place.

Losses should be recognized in a timely manner but 60 days is a more realistic timeframe.

Finally, the charge off begins the formal collection process and the signal to report the consumer's information to a negative data base. Because the charge off triggers negative consequences to the consumer, the guideline timelines are not favorable to the consumer.

### **Best Practices**

Guidance from the federal regulatory agencies on the details of ODP programs is highly desirable. I am concerned how a mechanism described as "Best Practices" and adopted on an interagency basis will be handled in on-site examinations. There is no statutory or regulatory mandate for interagency guidelines on this topic.

Following are the comments based on the individual bullets included in the request for comment:

**Avoid promoting poor account management. Do not market the program in a manner that encourages routine or intentional overdrafts; rather present the program as a customer service that may cover inadvertent consumer overdrafts.**

The only suggestion I have is to remind consumers that an "Overdraft Protection Program" does not protect the consumer from actual overdrafts.

**Fairly represent overdraft protection programs and alternatives. When informing consumers about an overdraft protection program, inform consumers generally of other available overdraft services or credit products, explain to consumers the costs and advantages of various alternatives to the overdraft protection program, and identify for consumers the risks and problems in relying on the program and the consequences of abuse.**

I believe most financial institutions demonstrate quality customer service by fully explaining all the product benefits and conditions to consumers on all available products.

**Train staff to explain program features and other choices. Train customer service or consumer complaint processing staff to explain their overdraft protection program features, costs, and terms, including how to opt out of the service. Staff also should be able to explain other available overdraft products offered by the institution and how consumers may qualify for them.**

This bullet reiterates the previous bullet. The "opting out" of the service is detailed in a later bullet.

**Clearly explain discretionary nature of program. If the overdraft payment is discretionary, describe the circumstances in which the institution would refuse to pay an overdraft or otherwise suspend the overdraft protection program. Furthermore, if payment of overdrafts is discretionary, information provided to consumers should not contain any representations that would lead a consumer to expect that the payment of overdrafts is guaranteed or assured.**

Clearly representations that would lead a consumer to expect that payment of NSF items is guaranteed or assured would be misleading advertising and be a violation under Regulation DD. This situation could reflect a commitment from the financial institution to loan money and therefore would trigger the application of Reg Z.

**Distinguish overdraft protection services from "free" account features. Avoid promoting "free" accounts and overdraft protection services in the same advertisement in a manner that suggests the overdraft protection service is free of charges.**

Reg DD has restrictions which prohibit misleading advertising. Avoiding advertisements that suggest ODP is “free” is already required by law and is appropriate. The suggestion that “free” accounts and ODPs should not be mentioned in the same advertisement is useless. This statement should be deleted.

**Clearly disclose program fee amounts, Marketing materials and information provided to consumers that mention overdraft protection programs should clearly disclose the dollar amount of the overdraft protection fees for each overdraft and any interest rate or other fees that may apply. For example, rather than merely stating that the institution’s standard NSF will apply, institutions should restate the dollar amount of any applicable fees in the overdraft protection program literature or other communication that discloses the program’s availability.**

Regulation DD provides consumers with adequate information. Consumers are told the specific amount of the NSF fee in the account disclosures in written form at account opening. If the NSF fee is changed the consumer receives written notice of this fee change 30 days in advance. NSF charges imposed are shown on the consumer’s periodic statement. Any interest rate that might apply would be subject to advance disclosure under Regulation Z. I feel that it is important to make certain that the consumer understands that fees will apply and the circumstances under which they are imposed. This proposal will replicate needless printing expenses when fees change.

**Clarify that fees count against overdraft protection program limit. Consumers should be alerted that the fees charged for covering overdrafts, as well as the amount of the overdraft item, will be subtracted from any overdraft protection limit disclosed, if applicable.**

I feel again that this disclosure should be adequate if received at the account opening.

**Demonstrate when multiple fees will be charged. Clearly disclose, where applicable, that more than one overdraft protection program fee may be charged against the account per day, depending on the number of checks presented on and other withdrawals made from the consumer’s account.**

No comment

**Explain check clearing policies. Clearly disclose to consumers the order in which the institution pays checks or processes other transactions (e.g. transactions at the ATM or point-of-sale terminal).**

The term “check clearing policies” should probably be modified to read “order of payment” to include internet banking, EFT’s scheduled loan payments, wire transfers, etc. that do not fall under the definition of a check.

Any bank will pay the items on which it is already liable first and it will pay checks processed through another financial institution last. Usually EFT items are paid before checks arriving by cash letter. As the number of checks processed in the United States continues to decline and with Check 21 a disclosure focusing on the lowest payment priority order seems to be outdated.

**Illustrate the type of transactions covered. Clearly disclose that overdraft protection fees may be imposed in connection with transactions such as ATM withdrawals, debit card transactions, preauthorized automatic debits, telephone-initiated transfers or other electronic transfers, if applicable. If institutions’ overdraft protection programs cover transactions other than check transactions, institutions should avoid language in marketing and other materials provided to consumers implying that check transactions are the only transactions covered.**

This bullet should be deleted. Electronic payments make up an increasing large portion of the retail payment system and it is reasonable to assume that consumers know that an EFT will overdraw their account by the same dollar amount if they had written a check instead.

**Provide election or opt-out of service. Obtain affirmative consent of consumers to receive overdraft protection. Alternatively, where overdraft protection is automatically provided, permit consumers to “opt-out” of the overdraft program and provide a clear consumer disclosure of this option.**

If a consumer does not “opt-out” an NSF item presented for payment would be paid if the item is within the program’s boundaries. If the consumer does opt-out, this same debit would be returned unpaid. In both situations an NSF fee would be imposed.

Return of the item could cause financial and reputational harm to the consumer. The same item may be sent through the clearing system a second time. This would generate additional NSF fees with no hope of the payment of the item if the funds are not available.

Whenever a consumer opts-out of an overdraft protection program usually it is because the consumer does not fully understand the service. Opting-out is simply not a good business choice for any consumer. I suggest that this bullet be deleted and any emphasis on any opt-out be moved.

If this provision remains, I suggest adding some verbiage similar to: “If a consumer requests an “opt-out” all debits that all presented against insufficient funds will be returned unpaid and the consumer may incur merchant charges, interruption of services and damages to their reputation in addition to other consequential damages.” I believe this disclosure would protect the consumer from making a foolish decision.

**Alert consumers before a non-check transaction triggers any fees. When consumers attempt to use means other than checks to withdraw or transfer funds made available through an overdraft protection program, provide a specific consumer notice, where feasible, that completing the withdrawal will trigger the overdraft protection fees. This notice should be presented in a manner that permits consumers to cancel the attempted withdrawal or transfer after receiving the notice. If this is not possible, then post notices on proprietary ATMs explaining that withdrawals in excess of the actual balances will access the overdraft protection and trigger fees for consumers who have overdraft protection services. Institutions may make access to the overdraft protection program unavailable through means other than check transactions.**

The ATM's should disclose the account balances by current balance and available balance which includes the current balance and any available balance under the overdraft protection program. This allows the consumer the choice to continue with the transaction.

I don't feel that by posting notices on proprietary ATM's, this would be beneficial to consumers. What if they are using a non-proprietary ATM's? They are not notified.

Programming changes could result in the following notice: The proposed transaction will overdraw your account. If your financial institution has approved this transaction, it may impose its “insufficient funds fee” which was disclosed to you. Do you wish to continue? The fee for using a foreign ATM and then the NSF would then both be charged.

**Prominently distinguish actual balances from overdraft protection funds available. When disclosing an account balance by any means, the disclosures should represent the consumer’s own funds available without the overdraft protection funds included. If more**

**than one balance is provided, separately (and prominently) identify the balance without the inclusion of overdraft protection.**

I agree that the current balance and the available balance (current balance including available overdraft protection funds) should be separate.

The agencies need to be more specific in indicating whether the overdraft protection funds should be included for those banks that offer check verification services.

**Promptly notify consumers of overdraft protection program usage each time used. Promptly notify consumers when overdraft protection has been accessed, for example, by sending a notice to consumers the day the overdraft protection program has been accessed. The notification should identify the transaction, and disclose the overdraft amount, any fees associated with the overdraft, the amount of time consumers have to return their accounts to a positive balance, and the consequences of not returning the account to a positive balance within the given timeframe. Institutions should also consider reiterating the terms of the overdraft protection service when the consumer accesses the service for the first time. Where feasible, notify consumers in advance if the institution plans to terminate or suspend the consumer's access to the service.**

Triggering a first use notification with expanded terms would be difficult and serve no real purpose. What about the consumer that has gone maybe a year without using the overdraft protection program – would a reminder notice be required?

Most banks still send NSF notices and the additional verbiage could be pre-printed on the notice. A suggestion is to expand the notice to state something like “the bank is not obligated to pay future NSF items.”

Providing consumers with advance notice of termination or suspension is good business practice. This notice would normally be associated with not following the terms of the overdraft protection program.

**Consider daily limits. Considering limiting the number of overdrafts or the dollar amount of fees that will be charged against any one account each day while continuing to provide coverage for all overdrafts up to the overdraft limit.**

I don't feel that a financial institution should be responsible for daily limits. How is the financial institution to know the specific financial needs of a consumer on any given day?

**Monitor overdraft protection program usage. Monitor excessive consumer usage, which may indicate a need for alternative credit arrangements or other services, and should inform consumers of these available options.**

The lack of a parallel requirement to monitor consumer borrowings with any other type of credit makes this illogical. Financial institutions do not monitor what usage a HELOC is used for or an overdraft line of credit that was credit approved. Some consumers might suggest as long as the fees are paid that it is none of the bank's business. I agree.

This bullet should be deleted.

**Fairly report program usage. Institutions should not report negative information to consumer reporting agencies when the overdrafts are paid under the terms of overdraft protection programs that have been promoted by the institution.**

This bullet needs further clarification.

## **Conclusion**

I believe that by dictating that financial institutions treat overdraft protection programs as loans, will negatively affect the consumers that have negative credit history and are not able to qualify for regular credit products. Instead of overdraft protection programs being a better solution to payday loans and other outrageous high cost loans being sold to the uneducated consumers, overdraft protection programs will begin to look like these products as financial institutions find ways to make the product pay for the reporting burdens that will be the effect of these guidelines.

Respectfully submitted,

Kris Welch  
Compliance Director  
Heritage Bank  
1020 Century Drive  
Louisville, CO 80027  
720-274-5119