American Bankers Association

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Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW,
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June 28, 2010

Re: OTS-2010-0008
Proposed Supplemental guidance on Overdraft Protection Programs

Dear Sir or Madam,

The American Bankers Association[1] is pleased to submit our comments to the proposed Supplemental Guidance on Overdraft Protection (Supplemental Guidance) issued by the Office of Thrift Supervision (OTS) the OTS[2] released for comment to update its Overdraft Guidance issued in February 2005. It states that the proposal is designed to "complement rather than replace" the 2005 Overdraft Guidance and encourages institutions to review overdraft protection programs to confirm that they are operated in a manner that is "effective, compliant with the law, and fair to consumers."

ABA supports OTS's efforts to harmonize, consolidate, and streamline its overdraft protection guidance to ensure consumer choice and understanding and provide clear direction and instructions to depository institutions. We agree with many of the OTS's proposed suggestions, and agree, for example, that it is useful to highlight the overdraft-related provisions of Regulation E (Electronic Fund Transfer Act), and Regulation DD (Truth in Savings Act) in any Overdraft Protection Guidance. However, we believe that the proposed guidance is premature, given the recent, far-reaching and significant changes to Regulation E addressing debit card overdrafts that go into effect in July, 2010. In addition, rather than harmonizing or consolidating, the proposal piles on another separate, at times inconsistent, layer to the existing, multi-layered regulatory

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.3 trillion in assets and employ over 2 million men and women. Included in our membership are 503 savings associations regulated by the OTS with combined assets of $695 billion.

[2] Go to: http://www.ots.treas.gov/_files/482132.pdf or http://edocket.access.gpo.gov/2010/pdf/2010-10006.pdf

scheme and creates confusion and uncertainty. The result will be more opportunity to misinterpret the guidance, compliance complication, and uncertainty for institutions as well as examiners. In addition, the overall direction of the proposal is at odds with consumer testing that finds consumers overwhelmingly want important payments paid (especially bill payments by check and ACH) and are willing to pay an overdraft fee for the service. The approach of the proposal also appears to move away from efforts to ensure consumers receive digestible information about important terms and conditions and avoid information overload. Finally, the proposal to characterize failure to adopt best practices as unfair or deceptive is contrary to the Federal Reserve Board's (Board) and the OTS's rejection, after public comment, to address concerns about overdrafts under an unfair or deceptive acts or practices (UDAP) analysis.

For these reasons, we recommend that the OTS delay adoption of its proposed Supplemental Guidance until the impact of the amendments to Regulation E is examined and understood and work with the other agencies (or the new Consumer Protection Bureau currently under Congressional consideration) to update and replace, rather than merely supplement, the original Overdraft Protection Guidance so that it addresses any new issues, provides consistency among regulators, and facilitates compliance. To the degree that there are critical, discrete issues to address sooner, e.g., marketing practices with regard to second chance accounts, OTS can convey the message using alternative methods, as it has.

The proposal to issue "Supplemental Guidance" is premature, especially given the basis for the new rule and the Board's findings with regard to consumer preferences. Application of the proposed Supplemental Guidance prior to experience with implementation of the new rules will confuse customers, institutions, and examiners without any benefit to consumers generally.

With Regard to the Foundation of the New Rules.

The Board recently adopted a very strong, pro-consumer rule under its Electronic Funds Transfer Act authority that addressed the main concerns raised by Congress, consumer groups, regulators, and the media with regard to overdrafts, that is, debit card overdrafts. This was the end result of an extensive notice and comment process initiated as a UDAP rule-making in which the OTS was a full partner with the Board and the National Credit Union Administration (NCUA.) In substituting Regulation E for a UDAP solution, the Board, the OTS and the NCUA recognized certain key features and realities about overdraft accommodation practices in the current consumer financial market place. The OTS should allow time to learn how the new rule works before adopting additional requirements that may not be useful or helpful.

First, in drafting the final Regulation E rule, the Board conducted testing and evaluated other data that led it to recognize that overdraft accommodation practices provided benefits that bank customers valued and for which they were willing to pay. ***Consumer testing has consistently found that consumers want, appreciate, and expect important payments to be paid and not returned.*** The Board found that most of the participants in its focus groups were not surprised banks offered overdraft protection, understood that they would be automatically enrolled, and indicated that the overdraft coverage was a positive feature for those who need it or for particularly important transactions. [3] The Center for Responsible Lending in its January 2007 survey found a similar attitude among consumers; over 92 percent, when asked, said they would like the bank to pay an item even though there were insufficient funds and they were willing to pay something for it. [4] ABA's survey found that of the 20 percent of consumers who had paid an overdraft fee in the last year, 85 percent were glad their bank did so.[5]

Indeed, there are good reasons customers value having the payment made, even it if means incurring an overdraft fee. Customers value the ability to avoid the embarrassment, hassle, costs, and other adverse consequences of having a check or automatic electronic payment returned. Whether made by check or electronically, returning a payment to a merchant, mortgage company, landlord, government agency, or utility usually means the customer pays additional fees charged by the person receiving the payment and suffers other adverse consequences. In addition to avoiding additional fees, through overdraft protection, customers avoid the inconvenience of having to resolve the issue and arrange a second payment. They also escape the risk that their landlord, merchant, or other payment recipient will in the future refuse their checks or electronic payments and insist on a cashier's check or cash. Customers avoid having adverse information reported to a negative "bad check" database.

After all, the origin of paying overdrafts was to accommodate "good" customers. Good customers expect their institution to know that they are "good

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3 "Review and Testing of Overdraft Notices," submitted by Macro International Inc. to the Board of Governors of the Federal Reserve System, December 8, 2008. "Most participants were not surprised that a depository institution would offer overdraft protection of this type." Eight of the nine participants indicated that they would keep the overdraft coverage, because they wanted to ensure that important transactions went through." (Page 8.) (Page 8.) " "Almost all indicated that they would want their cable bill covered, because having this bill paid would be worth paying an overdraft fee." (Page 9.) "Participants generally indicated that the overdraft coverage described in the disclosure was a positive feature for those who needed it, or for particularly important transactions." (Page 14.)

4 See attachment to attachment 1, July 30, 2008 ABA letter to OTS and Board regarding UDAP proposal.

5 See ABA Overdraft Fee Study, Ipsos U.S. Express Telephone Omnibus, (July 11-13, 2008).

for the overdraft" and are offended and sometime infuriated when their institutions' actions indicate that they do not trust them to repay. Moreover, the automated programs adopted in recent years represent an effort to identify and accommodate *all* "good" customers in a manner that promotes consistent treatment of customers. The automated systems mean that the decision is not reliant on the subjective opinion of or personal relationship with a branch manager.

Second, and of particular significance in moving the regulatory initiative away from a UDAP solution, was the recognition that ***customers have a responsibility for conducting their transactions within their means and an obligation to be informed about their account balance*.** After all, consumers may easily avoid overdrafts --and most do—by keeping track of their account, keeping a cushion, linking to another account, or setting up alerts when their balance is low. Moreover, the bottom line is that customers are in the best position to know what their "actual" balance is – only they know what checks they have written, automatic payments they have authorized, and debit card transactions they have approved. The bank will not be aware of checks written, automatic payments scheduled, or even some debit card transactions until they reach the bank. It is important not to reinforce the incorrect and harmful notion that customers may assume that institutions are aware of all transactions that the customer has authorized and that it is not necessary for customers to keep track or use other available options to manage their accounts. Managing the account is not only important for avoiding overdrafts, but also for controlling spending and protecting against identify theft and fraudulent activity. Regulations should not encourage customers to assume they may simply put their account on automatic pilot and rely on the institution to be their private accountant.

Indeed, in 2005, OTS joined the other depository institution regulators in endorsing the interagency consumer brochure, "Protecting Yourself from Overdraft and Bounced-Check Fees," distributed with a press release that noted: the *best way to avoid* overdraft and bounced-check fees is to manage accounts wisely. That means keeping an up-to-date check register, recording *all electronic* transactions and automatic bill payments, and monitoring account balances carefully. (Emphasis added.) The brochure itself describes *nine* different ways to avoid such fees, the second bullet point of paying special attention to electronic transactions being emphasized in bold print. The fundamental validity of this consumer responsibility was an inescapable rebuttal to the unfounded assertion that overdraft fees were unfair because they were not reasonably avoidable.

Rather than pursue an unwarranted and unsubstantiated UDAP solution, the agencies concurred in the Board's alternative to address more directly the kernel of concern about overdraft accommodation practices as they applied to electronic transactions and expressly abandoned their UDAP rule-making initiatives in favor of the Board's Regulations E and DD amendments.

In brief, final Regulation E was based on consumer preferences and a recognition of bank customers' role and control in managing accounts and avoiding overdrafts. The OTS should allow time for the impact of the new rule to be understood before adding or changing the rules, especially based on a UDAP analysis, which may have retroactive application and significant liability.

With Regard to Elements of the New Rules.

Amended Regulation E and the associated changes to Regulation DD were based on extensive consumer testing and public comment. The new Regulation E provides that depository institutions may not impose an overdraft fee for ATM or one-time point-of-sale debit overdrafts unless the customer expressly consents, or opts-in. This is a pivotal requirement of the new rules that places "standard overdraft practices"[6] on a different plane from other deposit account features by empowering customers to elect to receive the benefits of overdraft accommodation but starting them in the default position of not receiving such coverage. Holding all other features of any particular account type constant, the customer may voluntarily choose to obtain the benefits of an institution's standard overdraft practices.

Perhaps even more significant than the opt-in provision is the unfettered freedom preserved by the regulation for customers to revoke their opt-in "at any time." Thus, opting-in to debit card overdraft protection, unlike, for example, other contracts such as cell phone contracts, creates no commitment on the part of customers. ***Customers may always change their mind without consequence or cost.***

In other words, the policy "nudge"[7] is clearly against overdraft protection for ATM and one-time debit card transactions. However, the key to "libertarian paternalism" is to preserve the consumer's right to choose to move away from the policy default position. In this case, the customer's choice is doubly protected by requiring opt-in and protecting virtually unlimited non-abusive, opt-in revocation. No greater empowerment of consumer choice can be created than what Regulation E establishes by protecting the customer's freedom to opt-in and to revoke opt-in.

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[6] "Standard overdraft practices" is the term defined in the rule, but "standard overdraft services" is the term used in the mandatory opt-in notice.

[7] Cass R. Sunstein, Richard H. Thaler, *Nudge (*New Haven & London: Yale university Press 2008)

The final rule in fact protects consumers even when the institution does not knowingly pay debit card overdrafts. For various reasons, debit card overdrafts may occur that the institution cannot stop. For example, some merchants, to save time and money, will check to verify a card's validity, but not actually request approval for the transaction. The debit card transaction is then later presented to the institution and paid, even though there are insufficient funds. In this case, even though the customer authorized the transaction and received the goods, the institution may not impose a fee unless the customer has opted-in.

In amending Regulations E and DD, the Board has defined a new baseline of fairness that has precipitated changes in the business model for standard overdraft protection services and for the transaction accounts they protect. Introducing supplemental and sometimes inconsistent requirements will reduce consumer choices and confuse consumers and compliance efforts with little if any benefit.

With Regard to the Transition to the New Rule.

The new rule has meant significant operational changes, business model adjustments, and customer communication challenges in a relatively short time period. Many institutions have made basic re-evaluations of their position on offering standard overdraft services based on the new rules. Some institutions have discontinued offering debit card overdraft services, while others have introduced it. Those offering debit card overdraft services after the effective date had to ensure that significant changes to core processors were made in order to distinguish "recurring" debit card transactions from one-time debit card transactions so they are treated differently for purposes of overdraft decisions. Even those institutions who had never knowingly paid debit card overdrafts had to make adjustments and incur costs to ensure that fees are not charged for debit card overdrafts that the institution cannot avoid.

Two overriding policy points follow from the fundamental business changes precipitated by the new rules. First, no agency has a clear picture of the full variety of options customers will be offered by their bank or their bank's competitor in a world predicated on mandatory opt-in and unfettered opt-in revocation. All that is certain is that prevailing practices and account features will be different than they are today. In other words, there is no adequate record upon which to base the invention of new duties mid-stream during the current implementation process. We do not yet know the gaps, if any, that should be addressed. To guess at the predominant practices of the industry or its customers is to tilt at imaginary windmills. Second, imposing new requirements and potential costly liability in effect means having to incur twice, and probably three times when unfounded policy guesses prove wrong, extensive compliance costs during a fragile economic environment with no measurable benefit to consumers generally.

Furthermore, the new rule means that consumers have been receiving information about changes to various aspects of overdraft programs along with the opt-in information. Complicating the rules and terms of overdraft protection programs in the midst of implementing the new rule impacts not only depository institutions, but more importantly, their customers. Having only just received new information and instructions about the overdraft protection – and having made a choice based on that information – customers will again be hit with new changes, which will create confusion and frustration. For example, having made a decision based on their understanding that they must opt-in for covered debit card overdrafts, but not for checks and ACH transactions, they may be met with yet another notice that will contradict the earlier information and their understanding. In addition, they might receive another disclosure related to changes in the maximum number of overdrafts that contradicts earlier but recently conveyed information.

Moreover, the inconsistency with Regulation E and Regulation DD will leave both institutions and examiners confused and uncertain. For example, may the disclosures of the proposed Supplemental Guidance about payment order and the impact of fees on the overdraft protection amount be contained in Regulation E's opt-in notice? Or, may – or must -- they be disclosed with the Regulation DD disclosures? Or, must they be included in all communications to consumers? Must customers be able to opt-in for check overdrafts even though Regulation E's opt-in notice is limited to certain debit card overdrafts? Must any such check and ACH overdraft opt-in notice be a notice separate from the Regulation E opt-in notice related to debit cards? How does the OTS's proposed requirement to provide information about options to overdraft protection services fit with similar provisions in the Regulation E opt-in notice and Regulation DD requirements to provide certain information with any overdraft protection promotion? These are just some of the examples of how the proposal clouds compliance.

The simple fact that institutions and examiners now must look at a fourth document – the original Overdraft Protection Guidance, which OTS states is not being replaced, revised Regulations DD and E, and now the Supplemental Overdraft Protection Guidance -- strains any good faith effort to understand the combined overdraft requirements by both institutions and examiners. The challenge is exacerbated by the fact that the proposed Supplemental Guidance does not address the fact that many provisions in the original Overdraft Protection Guidance have been supplanted by Regulations DD and E and the proposed Supplemental Guidance, which means wading through the original

Overdraft Guidance to sort out what has been supplanted by new regulations and guidance.

For these reasons, OTS should also not proceed with its premature and independent proposal of issuing Supplemental Guidance.

***Revision of the 2005 guidance and harmonization with changes to new regulatory requirements and market experience should be done on an interagency basis*.**

OTS is correct in recognizing that there is value in updating its 2005 Overdraft Protection Guidance and the parallel Interagency Overdraft Protection Guidance. However, in doing so, the OTS should finally join the other agencies to create a uniform statement of federal depository institution oversight of standard overdraft services. Whatever the policy motivation was for OTS to eschew articulating the legal risks of overdraft protection programs in 2005, there is no longer a valid reason to create separate and different requirements for savings association charters going forward.

Today the same third-party vendors and core processors that facilitate overdraft protection programs for banks perform the same functions for savings associations and credit unions. All insured depositories compete in a common marketplace and offer a comparable variety of standard overdraft protection services options. The rules and supervisory expectations should be consistent across all insured depository institutions.

Neither is the recent enforcement action by OTS with regard to a particular institution's overdraft protection program a sufficient reason for OTS to undertake its sweeping proposed Supplemental Guidance. While ABA supports transparency in supervisory expectations and enforcement policy, such operating guidelines should reinforce industry-wide standards and not be an excuse for failing to coordinate either examinations or enforcement standards across the federal banking regulatory agencies. If enforcement cases do not speak for themselves, then perhaps OTS should return to the enforcement practices that characterized its actions when it spoke plainly in the Notices of Charges for cases it initiated in the early 1990's to clean up after the thrift crisis.

Finally, the OTS should work cooperatively with all of its agency colleagues to achieve a level regulatory playing field. The OTS should support the Board's new rules and respect the line it has drawn about what should be tackled when. OTS's proposal recognizes by its redundancy with the new Board rules that much of the current Overdraft Protection Guidance has been superseded by recent rule-making. It is also evident that OTS's initiative is dependent on both Board and FDIC research, yet OTS has inexplicably proposed its own Supplemental Guidance when those it depends upon seek an interagency solution.

It is contrary to the predominant spirit of regulatory reform that seeks to establish a uniform voice for consumer protection regulation for OTS to be a maverick on a subject with which it has so much common cause with the other Federal Financial Institutions Examination Council agencies. We do not recommend either OTS or the agencies delay action to await the erection of some future bureaucracy, but ABA strongly urges the agencies to coordinate and issue a single interagency guidance update on overdraft protection program practices predicated on experience with the newly implemented Board rules which set the core requirements for standard overdraft protection services going forward.

Disclosures and communications about bank accounts and overdraft protection options should be simple and digestible for consumers.

Any disclosure requirements should be clear as to their meaning and not clutter general disclosures so that customers miss important information**.** In developing updated interagency guidance, the agencies should strive to promote disclosures about bank accounts and overdraft protection options that are simple and digestible. Any disclosure requirements related to overdraft protection services should be clear as to their meaning, limited to overdraft promotional materials, and not clutter general disclosures so that customers miss important information. Moreover, to facilitate compliance and provide more clarify, generally, disclosure requirements should be addressed in Regulations E and DD.

The proposal, as written, makes consumer disclosures and compliance confusing and unclear. In effect, it imposes various new and additional requirements to provide information related to overdraft services, such as information related to payment order, alternatives to overdraft protection services, the impact of fees on the amount available, and demonstrations of when multiple fees will be charged. However, the proposal is unclear about where and when this information should be provided. While this information may be important for those customers who find managing their account challenging and thus may overdraw the account, disclosure rules should be designed and targeted to avoid information overload so that customers do not overlook information that is most important to most customers. Accordingly, overdraft protection disclosures should not be highlighted in general account disclosures or general marketing material, but limited to materials specifically related to the marketing of overdraft protection.

Moreover, any disclosure requirements related to overdraft protection should be addressed in Regulation DD, which already requires that certain information be contained in any overdraft protection promotion. We note that the Board is currently reviewing and intending to address any issues related to payment order, including potential disclosure. Accordingly, the OTS should wait for the Board's review and not create the potential for another inconsistency. If the concern is related to advertisements of "second chance" accounts, the OTS could address it specifically and narrowly.

Future interagency overdraft protection guidance should promote simplicity in disclosures for consumers by itself being succinct and streamlined.

ABA concurs with the banking agencies that there remains value in the current Overdraft Protection Guidance. In its *ADApTing Your Overdraft Program*, an outline for members to follow in implementing the new rules, ABA specifically advised bankers that the Joint Agency Guidance on Overdraft Programs had continued relevance and should be part of their efforts for achieving program revision compliance. Nevertheless, ABA believes that the agencies could promote clarity and reduce confusing redundancy by updating the guidance to summarize the new rules, eliminate the recitation of practices that have been subsumed by those rules, refine existing practices guidance where still appropriate under the new baseline standards, and articulate considerations that institutions should apply where any new compliance gaps are identified.

Comments to the specific provisions.

III. Specific Overdraft Practices

The OTS proposal addresses the content of marketing and consumer communications regarding overdraft protection service. These proposed provisions include adding to the information already required to be provided to consumers, prohibiting the marketing of accounts with overdraft protection as an account that will help avoid future financial challenges, and imposing new restrictions on the use of the term "free." In addition, the proposal "recommends" certain programs features and operational practices:

1. Opt-in for all overdrafts, including checks and automated electronic payments such as ACH;
2. Limits on aggregate fees;
3. Not changing payment order on a customer-by-customer basis to maximize overdraft fees;
4. Monitoring of overdraft protection program usage payment order; and
5. Not reporting negative information to "credit reporting agencies" when overdrafts have been paid as agreed.

In many instances, failure to adopt the specific "recommendation" is deemed to be unfair or deceptive. The OTS is also specifically requesting comment on whether it should adopt standards related to the amount of overdraft fees.

As already noted, we urge the OTS, in conjunction with the other agencies, to ***replace,*** rather than supplement the existing Overdraft Protection Guidance to make the meaning of the Overdraft Protection Guidance clear, consistent with regulations, and manageable. We also suggest that the agencies not be constrained by the existing structure and headings and instead re-structure the Overdraft Protection Guidance and delete, insert, and modify headings as appropriate to reflect the current regulations, practices , and guidance. Final guidance should list and explain separately the overdraft protection-related provisions of Regulation E and Regulation DD, including the specific sections of each regulation sections. It is not necessary, as proposed, to create a separate descriptive heading if the only discussion is a reference to the regulation. This will streamline the guidance and help institutions ensure that they have reviewed all the relevant sections.

A. Marketing and Consumer Communications

Recommendations that are redundant with Regulation DD should not be separately listed practices.

Several of the recommended practices with respect to marketing and consumer communications in the original OTS Overdraft Protection Guidance have been subsumed by amendments to Regulation DD. ABA believes that any new interagency guidance would do better to cover such elements as part of its summary of Regulation DD standards rather than being interspersed as stand-alone recommendations or best practices. Accordingly, ABA recommends that OTS and the agencies not replicate the following former recommended practices under separate headings, but instead cover their substance as reflected in Regulation DD's requirements:

- Clearly explain the discretionary nature of the program
- Clearly disclose program fees
- Illustrate the type of transactions covered
- Disclose account balances to distinguish consumer funds from overdraft funds.

We also recommend that the revised Overdraft Protection Guidance include references and section numbers to overdraft protection services provisions contained in both Regulation DD and Regulation E.

OTS's analysis that the failure to abide by best practices results in UDAP violations as applied in several instances in the proposal is unfounded in law and unwise in policy.

ABA disputes the analysis articulated by OTS in describing the failure to abide by various proposed Best Practices as being deceptive or unfair under Section 5 of the Federal Trade Commission Act and opposes OTS converting aspirational Best Practices into mandatory requirements through such unfounded application of UDAP standards. While we will address specific failures in our discussion of the respective proposals, ABA expresses its opposition to OTS's general approach here.

OTS's history with the recommendations contained in the Overdraft Protection Guidance is different than that of the other banking agencies. In issuing its 2005 Guidance, OTS declined to characterize overdraft protection practices as credit and did not join the other agencies in describing the legal risks to be managed in operating overdraft programs. Accordingly, OTS declined to adopt expressly UDAP as the foundation for, or the authority to enforce, its recommended Best Practices. Nowhere did OTS suggest that failure to follow recommended Best Practices were either violations of UDAP or the OTS advertising rule. OTS's posture was to make the Best Practices aspirational and to apply supervisory oversight accordingly. ABA, having itself articulated a series of industry best practices in 2003 (and been cited in the OTS guidance for doing so), found little difference between the two versions of best practices and supported the OTS and Joint Agency initiatives.

As noted previously, since adoption of the current Overdraft Protection Guidance, the agency, the industry and the marketplace have evolved. Of particular significance in terms of the legal basis for supervising overdraft programs, there was an interagency initiative by the Board, the OTS, and the NCUA to explore that appropriateness of applying UDAP unfairness theories to the regulation of overdraft protection practices. The result after extensive comment by parties on both sides of the discussion was a regulatory decision apparently concurred in by OTS to proceed down a separate regulatory path by having the Board amend Regulations E and DD and to focus on debit card transactions. ABA's comment letter actually recommended this change of course as superior to the pursuit of the unfounded UDAP theories advanced by the agencies. Most of the ABA's analysis of the 2008 UDAP proposal remains relevant and we attach our prior letter as an appendix to this comment, so that it is incorporated into this record and, hopefully, read again by OTS. (See attachment 2.)

ABA continues to believe that the power of either industry articulated best practices or agency recognition of such best practices is to encourage banks to evaluate their markets—both customers and competitors—and to design sustainable products or services that provide value to customers in a responsible manner. There is no single set of features for any product that meets this aspiration, but the process of considering best practices and selecting among various design features yields a range of products for a variety of consumer needs and promotes choice in a competitive market. It is certainly not the purpose of UDAP to dictate or override such diversity of consumer choice. Rather, like the Community Reinvestment Act with its encouragement mission, best practices are intended to encourage banks to aspire to certain conduct, not compel them through an enforcement mechanism.

ABA considers the OTS conclusion that the failure to provide the information recommended by several of the proposed best practices is a deceptive practice is fundamentally flawed for the following reasons:

- First and foremost the standard for deceptive practices requires a representation or omission to be "***likely*** to mislead consumers acting reasonably…." Yet OTS repeatedly and insufficiently asserts that the conduct only "may mislead a consumer." This does not meet the legal threshold for a deceptive practice under Section 5 of the Federal Trade Commission Act (FTC Act).

- Second, the supposed materiality of the alleged deceptive practices to the decision to make a particular transaction is, as under the fairness test, rebutted by the fact that customers have the individual responsibility to manage their finances and are in a superior position to the institution with respect to knowing expected inflows and outflows of funds. Consumers are "acting reasonably" when they act responsibly in managing their accounts.

- Third, the materiality of information to a particular decision cannot be properly evaluated by ignoring the information contained in account disclosures. An advertisement about a product's use cannot be considered deceptive because it omits information disclosed before the product is delivered for use. A customer "acting reasonably under the circumstances" is not free to ignore the information in an account agreement or associated disclosures received after the advertisement, but before use of the product. Selective or partial use by the customer of all the information made available by the institution is not a proper basis for concluding that a material misrepresentation has occurred, especially on the basis of an omission theory.

- Fourth, in the absence of a targeted marketing or communication effort, the reasonable consumer under the circumstances is the typical customer in the usual circumstances, not a particular type of customer in a particular circumstance.

- Fifth, OTS's behavioral assertions are founded on no record evidence. OTS cites no consumer studies conducted by them, nor even a statistically valid sampling of supervisory experience.

With the above, general arguments in mind ABA comments further on the specific OTS proposals not already addressed:

Fairly represent overdraft protection programs.

The OTS presents its concerns about marketing overdraft programs to those who have had difficulty managing accounts in the past and stresses that the "need to review the consequences of overuse of overdraft services is heightened where associations target consumers who have experienced financial difficulties." It advises that institutions "should avoid marketing accounts covered by overdraft protection in a manner that leaves the impression that the accounts are designed to help avoid future financial challenges, especially when contrary information is omitted." The proposal continues,

> For example, it would be a material misrepresentation to market an account as particularly suitable for those with prior credit or bank account problems without informing consumers of significant overdraft fees associated with an account. . . Failing to provide such consumers with fee information appears to significantly impair their ability to determine whether an account meets their needs.

We agree with the concept that institutions marketing ***specifically*** to those who have had trouble managing accounts in the past should ensure that the target audience understands any significant overdraft fees. Moreover, we believe that OTS's enforcement action on this basis sent a strong message to all institutions with regard to this type of marketing. This point should be addressed in any replacement Overdraft Protection Guidance issued jointly with the other agencies (or by the new consumer protection bureau). However, it should be clear that its application is limited to marketing targeted at "second chance" customers and that it does not apply to marketing intended for the general population or other specific groups simply because some within the general or other target group might have mismanaged accounts in the past.

Provide information about alternatives when they are offered.

The proposal suggests that in addition to providing information about alternatives when informing consumers about an overdraft protection program as suggested in the current Overdraft Protection Guidance, institutions should address "how the terms, including fees, for these services or products differ." We agree that interested consumers should obtain complete information so as to make an informed choice. However, in light of the Regulation E opt-in notice, it is not clear the proposal's goal nor how this provision aligns with that new opt-in notice that includes information about alternatives to debit card overdraft protection. In addition, providing automatically such detailed, additional information seems contrary to the Board's attempts to ensure that the disclosures related to debit card overdraft to consumers are brief and simple so that they are easily understood and likely to be read.

The primary concern raised with regard to overdraft fees related to debit card overdraft fees, because some consumers may not expect a debit card transaction to be approved if there are not sufficient funds. Accordingly, the Board amended Regulation E to require customers to opt-in to covered debit card overdrafts and require a short, easy-to-understand disclosure about the option. At the very top of that notice, there must be a statement explaining and listing alternatives to standard overdraft plans, such as a link to an overdraft line of credit or saving account, "which may be less expensive." The notice must invite the customer to inquire about other options. This notice is short, informative, and designed to gain the attention of those who are interested and/or concerned that they may overdraw their account – whether it is by debit card or other means -- without overloading all customers with information that is not of interest to them. Those interested, will then receive additional information. This appears to be an effective way to inform consumers of choices.

The proposal, however, seems to invite more detail, text, and clutter, increasing the likelihood that customers will disregard or discard the detailed information. Moreover, such an open-end requirement in addition to the Regulation E notice makes it unclear what institutions are expected to do. Do they provide the additional information about alternatives on the Regulation E notice or should it be a separate notice? How much information is enough without overwhelming the customer?

While the Regulation E opt-in notice is only provided if the institution offers debit card overdraft services, debit card overdraft fees were the main focus of complaints and concerns and indeed research has shown most people want check and ACH overdrafts paid. Thus, Regulation E's notice with information about less expensive alternatives will reach the target audience. In addition, the notice uses a simple format that will inform those who need more information without distracting those who do not. Before handing to all consumers another layer of notices, we suggest that the OTS allow consumers to respond to the new Regulation E notices and policy changes and then determine if consumers want and need additional paper.

The OTS proposal also suggests that "an affordable small dollar term loan might serve as an alternative to fee based overdraft protection," and references the FDIC's small dollar loan model. However, we note that the FDIC's 2009 report found these programs so far to be unprofitable generally.[8] Virtually all the banks in the FDIC pilot program concede that these loans cost more than the venue they produce. The FDIC's just released 2010 report draws no conclusions about profitability. Rather, it notes that such loans offer a "useful business strategy for developing or retaining long-term relationships."[9]

Distinguish overdraft protection programs from "free" account features.

Regulation DD already prohibits institutions from promoting free accounts and overdraft protection programs in the same advertisement in a way that suggests overdraft protection is free. Specifically, Comment 230l8(a)-10(v) of the Official Staff Commentary provides that institutions may not advertize overdraft services for which there is a charge in an advertisement that uses the word "free" to describe the account unless the advertisement clearly indicates that there is a cost associated with the overdraft service. The proposed guidance goes further, in effect, prohibiting use of the term "free" (for any account feature) if there is an overdraft fee at all, regardless of whether the overdraft service is being promoted in the advertisement. The proposal provides:

> [I]t would be a material misrepresentation to use marketing that focuses on account features that are "free" or inexpensive, but omits information about the cost of each overdraft transaction. This is particularly true when consumers have been automatically enrolled in programs that charge a significant fee for each overdrawn transaction. The net impression of such marketing may be to mislead consumers acting reasonably under the circumstances to believe that the total cost of the account (including overdraft protection) is free or inexpensive and to be unaware that engaging in overdraft transactions will result in the assessment of significant overdraft fees.

The proposal concludes that such circumstances are deceptive and violate UDAP and the OTS advertising rule. In effect, the proposal not only prohibits in advertisements a description of account features as "free" if there is any overdraft fee, but calls into question the ability to advertize any checking account or account feature as free if there are *any* fees at all associated with the account, including overdraft and NSF fees.[10] ABA opposes OTS and the agencies articulating any aspirational recommendation or mandatory standard that goes beyond the pronouncements in Regulation DD.

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8 "The FDIC's Small-Dollar Loan Pilot Program: A Case Study after One Year." (page 33).

9 "A Template for Success: The FDIC's Small-Dollar Loan Pilot Program," p 33.

10 The proposal notes, "This is particularly true when consumers have been automatically enrolled in programs that charge a significant fee for each overdrawn transaction." However, it does not limit the provision to these circumstances nor explain the meaning of "significant."

First, this proposed provision will mislead consumers who will assume that features have a cost when in fact they are free, to their detriment. Second, it will harm consumers by encouraging over-disclosure and advertisement clutter so consumers are more likely to overlook important information. Third, it will discourage institutions from offering free checking accounts. Fourth, the proposal is inconsistent with Regulation DD's acceptance of what is considered a free account. Finally, its application to all overdraft protection services, not just debit card overdraft protection services, is inconsistent with consumer expectations and preferences and with Regulation E.

Under the proposal, it is a material misrepresentation if an institution labels account features as free if the institution charges overdraft fees for any transaction, (whether debit card, check, or ACH). Thus, for example, if an institution advertized that debit cards or online banking are "free," but charged an overdraft fee to pay a mortgage –or a debit card overdraft of a customer who has opted into having such transactions paid -- the advertisement would be misleading under the proposal.

Such an approach may in fact mislead consumers and cause them to miss an opportunity to avoid fees. For example, at one time, many institutions charged fees for debit cards, debit card transactions, and online banking. Under the proposal, an institution that in fact was not charging such a fee, would not have been able to bring this attractive offer to the attention of the public by using the term "free." As such, consumers would reasonably conclude that in fact there is a fee for these features. Not knowing that in fact the feature was free, consumers would have continued to pay at their own institution rather than inquiring into the account with the free feature.

Moreover, the proposed approach will have the impact of providing less valuable information and cluttering the advertisements so that information important to most consumers is completely obscured. Because the proposal calls into question the ability to advertize any checking account or account feature as free if there are any fees at all associated with the account, the only safe approach to satisfy examiners and avoid costly allegations of and liability for deceptive practices, is to not only include overdraft fees in advertisements of "free" features or "free accounts," but also fees for *any* account feature or associated service. It is not clear where the line is and which fees should be disclosed. The likely result is a panoply of all fees, some which may or may not be more important to customers than overdrafts fees such as fees for card replacements, paper checks, stop payment orders, wire transfers, cashier's checks etc. Advertisements for checking accounts would begin to resemble those for pharmaceuticals: pages of warnings and rapid and incomprehensible oral recital of all fees. The obvious alternative is to not offer free accounts or free features, to the detriment of consumers.

The proposal should recognize that it is understood that advertisements, whether for a bank account or any other product, are designed and intended to spark an interest, not provide all the information appropriate for making final decisions. Just as consumers do not make decisions to purchase a car, carpet, phone, or television based solely on an advertisement, consumers should not substitute bank account advertisements for the Regulation DD and other disclosures that list in a clear and conspicuous manner fees associated with the account.

The proposal would also impose additional pressure to discontinue free checking accounts. As noted, the alternative to avoiding the risk of omitting a fee or providing an incomprehensible advertisements is to refrain from offering what in fact are free accounts, which today are widely available, as GAO has found. [11] Pursuant to the Truth in Savings Act, passed in 1991, accounts may not be advertized as "free" if a minimum balance must be maintained to avoid a periodic fee. The Truth in Savings Act and Regulation DD make a reasonable assumption that the accounts will be used in a certain fashion and that "free" does not mean that there may never be a fee for any service connected with the account. For example, there is a reasonable assumption that people will manage the account and monitor and keep track of their transactions and money. There is also a reasonable assumption that fees may be imposed, for example, for the cost of check printing, ATM use, balance inquiries, and stop payment orders.

However, in contrast, under this proposal, an account potentially is not deemed "free" unless customers have access to all account services or related account services without charge. To assert that an account is not really free if there is the potential for an overdraft fee (or any other fee) is like saying that parking isn't really free if there is any time restriction. Such a strict construction means there is little incentive to offer what is, as a practical matter, a valuable, free account. If the institution may not use the term "free," it loses the marketing value of offering a free account, so the institution might as well charge a monthly or other fee. So long as those fees are clearly disclosed, as they must be under Regulation DD and contract law, there is no need to be so prohibitively restrictive about the use of the term "free."

Adopting an approach inconsistent with the Truth in Lending Act and Regulation DD also creates confusion, not only for compliance officers but for examiners. As noted, Regulation DD permits accounts to be described as "free" so long as there is no minimum balance requirement in order to avoid a periodic fee. In addition, it permits describing accounts as free in advertisement promoting overdraft protection services so long as overdraft costs are noted.

[11] "Bank Fees," January 2008. http://www.gao.gov/new.items/d08281.pdf

The proposal calls into question whether institutions may use the term free as permitted under Regulation DD by calling into question the ability to use the term “free” in any account advertisement without disclosing every potential fee the customer might incur. In effect, the proposal would make it impossible, as a practical matter, to use the term “free” to describe any account and not risk an examiner’s citation for a violation.

Furthermore, the proposal notes that it is “particularly true” that marketing that focuses on “free” or “inexpensive” without providing information about overdraft fees is when customers are *automatically enrolled* into overdraft protection. Given that Regulation E now prohibits automatic enrollment for most debit card overdrafts, the provision is clearly targeted at the traditional, historical, and expected practice of paying check and ACH overdrafts on a discretionary basis without specific consent. The proposal’s approach to automatic enrollment into ACH and check overdraft protection seems to ignore studies that indicate people expect and want institutions to pay such overdrafts, particularly those related to important payments, and that they are willing to pay for it. To the extent that OTS asserts that use of “free” in connection with accounts that provided standard overdraft services for checking, ACH and recurring debit should be different when such coverage is opt-in versus when it is opt-out, ABA strongly disagrees and urges OTS and the agencies to conform to the standards applied under Regulation DD in such circumstances.

Finally, OTS improperly applies FTC Act precedent when it suggests that describing certain features as “free” in one bundled account package as opposed to how they are described in another is deceptive based on the “2 for 1” case precedent. Clearly, changing prices of one product to misrepresent the price (not cost) of a combination purchase is entirely different than pricing two separate bundles of features in two different account offerings. Consumers presented with a choice about whether they prefer an account with overdraft fees, but no maintenance fees or an account with maintenance fees, but no per item overdraft fees is not deceived when the second account bundle is described as having “free” overdraft protection and the first is described as “free maintenance.” A consumer acting reasonably under the circumstances has all material information to make a choice—and the institution is the one who suffers from adverse selection by having the chronically overdrawn customer choose the “free” overdraft protection account.

Clarify that fees will reduce the amount of overdraft protection provided.

The proposal restates the current Overdraft Protection Guidance that institutions alert consumers that overdraft fees and overdraft items will be subtracted from the overdraft protection limit disclosed. The proposal deems failure to do so to be deceptive because failure to do so might cause a consumer to proceed with a transaction on the basis that it will be covered by the overdraft protection, when in fact the transaction will be denied or the item returned. It appears that this disclosure is not limited to overdraft promotional materials and must also be contained in all general account disclosures and advertisements.

As noted in our general comments about OTS's deceptive practices analysis, the vagueness of the assertion of where and when the omission occurs for it to be deceptive is a fundamental obstacle to reaching a valid UDAP conclusion that a consumer acting reasonably under the circumstances is deceived. In addition, the OTS performs an incorrect analysis of materiality when it presumes that a consumer is making a conscious choice to overdraw when the reality is that standard overdraft protection services are explicitly disclosed as discretionary and are intended for inadvertent overdrafts or situations of uncertainty about one's balance. OTS provides no evidence that the predominant profile of the reasonable consumer is one who intends to overdraw—clearly the purchaser of the apocryphal cup of coffee is not intending to overdraw. Furthermore, as a general matter, the industry does not promote these plans as designed for those who set out to overdraw knowingly their accounts—and OTS does not prove otherwise. In other words, typical customers overdraw because they mistakenly believe they have money in their account, not because they consciously believe they have not yet exceeded the generally unknown and/or variable discretionary overdraft allowance. Therefore, OTS's deception analysis is predicated on an incorrect view of what constitutes the reasonable consumer acting under ordinary circumstances. There is no UDAP violation.

As noted earlier, the OTS should balance the need to disclose this kind of detail in all account disclosures, including marketing, with the goal of providing account information most important to most consumers in a digestible, meaningful manner. To avoid any suggestion or examiner assertion that the institution is engaged in deceptive activities, the natural and safe response is to over-disclose and include this detail in all materials – which ultimately is not consumer-friendly. Given that the Board has already addressed the core issue associated with overdrafts – debit card overdrafts – and requires that consumers receive a special opt-in notice, it is not necessary to include and highlight this information in every document or advertisement related to checking accounts. Moreover, if it is determined that such information should be contained in overdraft marketing materials, the matter should be addressed under Regulation DD which already contains provisions requiring certain disclosures in overdraft protection promotional materials.

Demonstrate when multiple fees will be charged.

The current Overdraft Protection Guidance recommends that institutions "promoting overdraft protection programs" clearly disclose that more than one overdraft fee may be charged each day. The proposal continues that omitting such information is deceptive, "whether a saving association promotes overdraft protection or not." The provision appears a bit contradictory, appearing initially to apply only to institutions that promote overdraft protection, but then stating that it applies whether or not the institution promotes such programs.

As with our comments to the other provision requiring additional overdraft protection program information, the OTS should balance the effectiveness and value to consumers of providing such detail in any and all general disclosures and marketing. If it is determined it is appropriate to include this information with overdraft protection marketing materials, the matter should be addressed under Regulation DD to facilitate compliance and ensure consistent regulations.

In any case, the failure to omit an explicit multiple fees statement from an advertisement that states a per item fee for overdraft is not actionably deceptive. Customers will receive the account fee disclosure that will state whether the overdraft fee is per item long before they get their debit card and inadvertently incur their first overdraft. The UDAP standards require a consumer to act reasonably under the circumstances which means to act based on information about the costs and benefits of the account provided at account opening. A consumer acting reasonably is not one who selectively relies on marketing information that is subject to interpretation and disregards the terms of use agreement that accompanies the product obtained and that clarifies the incidence of the charge.

Explain the impact of transaction–clearing policies.

The current Overdraft Protection Guidance recommends that institutions must also explain that transactions may not be processed in the order in which they occur and that the order of processing and clearing may affect the total amount of overdraft fees charged. The proposal encourages institutions to clearly disclose their processing and clearing policies and provides that failing to disclose both the processing order and the impact on overdraft fees is deceptive and violates both the FTC Act prohibition against deceptive practices and the OTS's advertising rule.

We agree that disclosing generally that the processing order may impact the total amount of fees should, where applicable, be encouraged as an aspirational practice. However, a provision that makes not accurately disclosing payment order "deceptive," especially when it is not clear exactly when and where it is to be disclosed, ignores the history of legal challenges to both payment order and disclosure of payment order. In effect, it will be virtually impossible for an institution to comply without either violating the Supplemental Guidance or inviting an expensive lawsuit or both. Moreover, while consumers may understand and find useful general information, such lengthy detail in potentially all account information materials simply numbs them and discourages review of any materials.

Satisfying a requirement to disclose "clearly" processing and clearing policies is virtually impossible. As is demonstrated by significant litigation related to payment order descriptions and practices, payment order explanations can be difficult if not impossible to explain completely and accurately without going into excruciating detail. For decades, institutions have been sued for paying one way or the other and for not paying precisely as disclosed. For these reasons, payment order explanations are either very general or incredibly detailed and would not comply with the proposed requirement.

Moreover, the complexities that payment settlement order generates due to the myriad circumstances that can effect presentment, system delivery and technical processing defy the reasonable customer's ability to sensibly act on. In other words, disclosure of a detailed clearing policy will only invite unwarranted reliance by those consumers who think they can game the system in the face of unknown contingencies instead of actually responsibly managing their funds to keep from spending more than they have. The days when people's parents taught them to successfully "play the float" are long gone and suggesting that one can outwit the payment system to spend money that is not there should not be the message inferred from a clearing policy disclosure.[12]

For these reasons, we believe that a general explanation that payment order might affect the number of overdraft fees imposed is sufficient: it alerts the consumer to the consequences without overloading them with complicated information and without subjecting institutions to litigation and violations they will not be able to avoid. Accordingly, ABA urges OTS and the agencies to reconsider the policy value of encouraging institutions to disclose clearly processing order and clearing policies in anything but the most general manner.

Beyond the practical implications of requiring such a detailed disclosure, the OTS's assertion that omitting a clearing policy disclosure constitutes deception is fatally flawed. The analysis assumes a default order for consumers that is not proven and is highly questionable. On what record does OTS assert that omitting a payment order disclosure leads a consumer to believe that "transactions will be processed in the order in which they have occurred?" Can OTS really believe that in the absence of a payment order disclosure consumers think that when they mail a check to the phone company and then walk to the ATM across the street from the mailbox that the check will clear before the ATM

[12] Imagine e.g., "if x then y except when z occurs in relation to w for a debit card transaction larger than a check unless there was a scheduled ACH before 8:00 pm."

withdrawal? ABA believes that calm reflection suggests that in the absence of a clearing policy most people will think that transactions clear when they clear – an order they cannot predict or guess correctly. In the absence of a processing order disclosure, the customer has no basis to think banks will organize in any particular order by size, type, or chronology. Omission does not create a presumptive reliance on any particular clearance c order for UDAP purposes. Consequently, if they do not want to overdraw their accounts, they should not presume to spend more than they are confident has already appeared in their account, given the hold policies that Regulation CC applies to their deposits.

For these reasons, we believe that a general explanation that payment order might affect the number of overdraft fees imposed is all that an aspirational recommendation should require; it alerts consumers to the consequences without overloading them with complicated information and without subjecting institutions to litigation and violations they will not be able to avoid.

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

The current Overdraft Protection Guidance advises institutions to promptly notify consumers of overdraft protection program usage each time used. The proposed Overdraft Protection Guidance provides that failing to do so, "including failing to provide a consumer with the information necessary to return the account to a positive balance" is deceptive. The rationale is that consumers may be misled into believing that the balance is positive and influence their decision whether to make a deposit or proceed with a transaction that may cause an overdraft and fee. In addition, the proposal adds, "Where technologically feasible to do so, real time notification should be provided." It is not clear whether institution must offer, for example, e-mail alerts, in-person notices, or text or phone messages.

We agree that institutions should notify consumers promptly when an overdraft occurs and believe that the vast majority of institutions currently do so. However, the proposed requirements for avoiding charges of and liability for deceptive practices are dangerously vague, given that making an "incorrect" judgment will draw a charge of deception or unfairness. Yet, providing clarity in the proposal means imposing rigid and inefficient standards and locking in current technology. This provision again illustrates the difficulty and limitations of classifying failure to follow best practices as an unfair or deceptive practice. Institutions need absolute clarity given the consequences, but may end up with inefficient, costly, intractable, and ineffective solutions.

The provision requires that "where technologically feasible to do so, real time notification should be provided." This seems to suggest that email, phone, and/or text message are all required as all are arguably "technologically feasible." Given that all are arguably "technologically feasible," must all institutions now provide multiple options, whether or not they currently communicate using any or all of these channels? If it is "technologically feasible" to notify by email or text message, how must institutions provide notification for customers who do not have or have not agreed to such communication channel? Must they phone those customers? Other issues arise. For example, the Federal Communications Commission is currently considering a proposal that in effect would prohibit entities from calling or texting customers absent a laborious consent form that consumers are unlikely to agree to. (See attachment 2.)

Moreover, the proposed requirement to provide real-time notification by regulation in effect absolves consumers from responsibility for managing their accounts, which is easier and easier to do given the multiple instant-access channels available and sends the inaccurate and harmful message that it is the institution that is responsible for managing its customer's account rather than the customers'. As already noted, overdrafts are easily avoidable and most customers avoid them. And the new Regulation E requirement to opt-in for debit card overdraft protections means that people need do nothing to avoid completely debit card overdraft fees, the source of the concern and complaints about overdraft fees. Requiring that institutions use resources to provide "instant" notification from multiple channels for the relatively small percentage of people who overdraw means imposing the cost of account mismanagement on those who manage their accounts well.

Many institutions will immediately mail a paper notice of an overdraft, which arrives in a timely fashion. Of course, many institutions may choose to provide various real-time options as a matter of customer service, and we agree it should be encouraged. However, encouraging a best practice and providing flexibility is very different from a vague mandate coupled with threats of unfair or deceptive practices charges with significant adverse consequences. For these reasons, we recommend that the Overdraft Protection Guidance focus on best practices rather than unfair or deceptive labels that will lock institutions into existing technologies so as to encourage flexible and effective practices.

Inform consumers when access to overdraft protection services will be or has been reinstated after suspension.

The proposal adds a new provision that it is deceptive to fail to "notify" consumers about the "circumstances" in which overdraft protection may be reinstated after suspension, e.g., when a deposit clears the outstanding overdraft and fee balance. We agree that institutions should generally ***disclose***

to (rather than "notify") their customers when overdraft protection may be reinstated after suspension (e.g., a deposit clears the account) so that they do not mistakenly overdraw their account on the incorrect assumption that sufficient funds are in the account because the transaction was approved. However, the detail and depth of such a notice should be balanced with the length and importance of other required disclosures and the goal of ensuring disclosures are digestible and likely to be read. As we believe that consumers readily understand that the overdraft service is usually automatically available once the account has additional funds, any notice should be brief and general. In addition, any notification must also comply with requirements to ensure that customers understand that the institution's approval is discretionary and not guaranteed. Institutions should not have to disclose what factors they use for individual transaction decisions or in determining a customer's continued eligibility.

As with other proposed provisions, however, our concern is that this notice requirement suffers from the same vagueness that in effect is a trap for unavoidable violations and will lead to information overload. When, how, and what must the institution disclose to avoid a deception allegation? Must institutions explain every conceivable situation when protection may be reinstated? What if the institution's policies or practices change? When the failure to comply is deemed to be deceptive, the only safe route then is to over-disclose in all communications, which is not useful or helpful to consumers.

The draft is also confusing because initially it appears that it envisions a general notice rather an event-triggered disclosure be provided with each reinstatement. However, the proposed language, "Failure to provide this information, particularly when a consumer has been previously notified that overdraft protection has been suspended," suggests a specific notice upon reinstatement, not a general disclosure about practices. Equally, use of the term "notify" rather than "disclose" suggests a notice upon reinstatement.

We also do not believe that notice upon every reinstatement should be required. While many institutions provide notices of formal suspension and reinstatement, for example, based on excessive use or failure to bring balance to positive status, it is only when more formal action is taken, not, for example, simply because overdraft protection is again available because the account has a positive balance due to a deposit. Indeed, consumers readily understand that the overdraft service is again automatically available once the account has funds, and presumably, they are aware of deposits they make. This is what consumers expect. Accordingly, notices are not necessary each time the service again becomes available.

In many cases, requiring a notice of reinstatement logically requires a notice of suspension to avoid confusing consumers. Providing notices each time the service is not available and again when it is available, would create a flurry of unnecessary notices that overwhelm and confuse consumers. Institutions already provide notices of the overdraft, which should be sufficient to alert customers of the status of their accounts and availability of overdraft protection.

In addition, any such notice requirement might make institutions more conservative about formally suspending overdraft protection services for excessive use or abuse, which seems contrary to the intent of the proposed supplemental guidance.

We are also concerned that requiring a notice each time the service is available and not available again reinforces with consumers the notion that they have no responsibility for managing their account or monitoring transactions for spending and other reasons.

B. Program Features and Operation

1. Provide consumer choice.

The proposal notes the new Regulation E requirements that customers obtain the affirmative consent before an institution may impose an overdraft fee for an ATM and one-time debit card overdrafts. The OTS recommends in the proposal that as a best practice, institutions also provide opt-in to transactions outside the scope of Regulation E's requirement, i.e., to check and ACH transactions. The proposed guidance does not state that failure to do so is unfair or deceptive. However, it does relate opt-in to ensuring an informed choice. This premise opens up the possibility that failure to have opt-in for check and ACH overdrafts impairs the consumer's decision and is consequently deceptive or unfair.

As discussed earlier at length, this "suggestion" that institution's offer opt-in for check and ACH overdraft protection seems at odds with consistent consumer research that indicates the vast majority of consumers expect and appreciate having such overdrafts paid because they tend to be important payments. Accordingly, the "default" should be that check and ACH transactions will automatically be covered by overdraft protection, as consumer have come to expect and overwhelmingly welcome.

2. Reasonably limit aggregate overdraft fees.

OTS notes that the 2005 Overdraft Guidance advised institutions to *consider* providing a daily cap on overdraft fees as a best practice. ABA believes that the need for this practice is attenuated as a result of the opt-in and unfettered revocation of opt-in afforded by the new rules. This protected affirmative choice enables consumers to manage their exposure to overdrafts caused by small debit transactions that could trigger multiple daily fees when the customer is being inattentive to their balance status. Customers who do not want to risk paying overdraft fees for small debit transactions or find after incurring such multiple fees that they prefer to avoid such occurrences in the future are perfectly free to opt-out or revoke their opt-in and establish a hard cap against such fees.

Nevertheless, ABA does not oppose an aspirational recommendation that banks "consider a daily cap on overdraft fees." In fact, today many banks have provided for such caps and others are planning on introducing such caps to their programs. While the presence of caps may influence some customers about whether they should opt-in or not, there is no basis under UDAP to conclude that failing to implement a daily cap on overdraft fees is unfair. As we demonstrate in our 2008 comment, overdraft fees are reasonably avoidable by consumers exercising reasonable care in managing their transaction accounts. OTS and the other banking agencies jointly issued and endorsed a consumer brochure that provides a number of easy ways for consumers to avoid overdrafts. ABA believes that such advice remains relevant and has itself updated the interagency brochure to cover the options distinguished in the new rules. (See *Understanding Overdraft Options*, an ABA Bank Stuffer available at http://www.aba.com/Products/StatementStuffers.htm)

OTS's expressed concern for a subset of customers who may have limited options for obtaining alternative overdraft services does not change the unfairness analysis, since the ultimate choice of refusing coverage for overdrafts is readily available and its exercise makes incurring overdraft fees reasonably avoidable. In any case, there is nothing that the institution does to impair the customer's decision about electing coverage or trigger a specific series of multiple overdrafts that meets the established standards for a UDAP violation.

The Interagency UDAP Guidance states in paraphrase of the FTC Act Unfairness Statement, "The agencies will not second-guess the wisdom of particular consumer decisions. Instead, the agencies will consider whether ***a bank's behavior*** unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making." (Emphasis added.) Whether a bank establishes any daily cap—let alone the specific caps proposed by OTS—does not constitute bank behavior impairing the customer's voluntary decision whether to elect overdraft protection coverage or when to use it.

OTS's unfairness analysis is also flawed when it weighs consumer harm against benefits to consumers and competition. When establishing a standard for overdraft programs in general, it is not appropriate to conduct cost benefit analysis by eliminating the benefits to the entire market. The value of providing overdraft protection to all customers of the savings association industry is a function of the value of all the transactions that are processed in accordance with customer payment preferences measured by the full amount of the transaction, not the amount of the overdraft. When homeowners pay their $1000 monthly rent by debit card and overdraw by $30.00, they are getting the full benefit of paying $1,000 on time for their $25.00 fee. These benefits add up over the entire market, even if some customers pay too much for the apocryphal cup of coffee. OTS, as the agency that asserts the unfairness of not implementing its proposed caps, must build the factual record that in the absence of such restrictions, the costs to a few exceed the benefits to the many and are not reasonably avoidable.

Another flaw in OTS's analysis is the strong suggestion that it is influenced by prior public policy. The entire predicate to the discussion of limiting aggregate fees is expressed as OTS' prior history on insisting on "reasonable fees." Yet, it is accepted that public policy should not be the motivating basis for an unfairness conclusion. While OTS may have plenary authority to dictate pricing calculations on savings association products under Home Owners Loan Act, asserting such authority within the UDAP framework does violence to established FTC Act section 5 precedent upon which other agencies depend.

Finally, ABA finds the OTS proposal of particular caps to be vague and arbitrary. We believe that this is due in no small measure to the fact that the agency is working from its experience with a single enforcement case and a handful of supervisory instances arising from facts pre-Regulation E amendment. As we have urged earlier, ABA strongly advocates that OTS base any forward looking overdraft protection guidance on industry experience in implementing the new rules rather than on facts under past prevailing circumstances. The world of overdraft protection programs under opt-in debit promises to look considerably different than it did in the years before.

The proposal specifically highlights two circumstances where the harm outweighs the benefit: where the "consumers' aggregate overdraft fees" exceed:

- the average daily balance of their accounts or
- the overdraft limit on their accounts.

The proposal is not specific, but it appears that the proposal is referring to the "monthly" aggregate overdraft fees."

While we agree that caps can be encouraged, and the trend is the industry is increasingly to adopt them, the proposal suffers from the same shortcoming regarding vagueness when failure to comply is deemed to be unfair or deceptive. It is difficult to see how an institution could be confident of compliance, even with the proposed examples of when harm outweighs the benefit. In effect, an examiner, state attorney general, or other may always challenge any fee under the proposed standard. The “right” fee is a moving, subjective target. The only safe alternative is to charge no fee, that is, pay no overdrafts, even though consumers have consistently indicated that they want important payments paid and are willing to pay for the accommodation, especially those who have expressly asked for the service, which they must now do for debit card overdraft protection.

The vagueness of the proposal is not offset by the specific examples related to average daily balances and amount limits as nothing indicates that they are “safe harbors.” Indeed, the proposal, having suggested them as standards, then curiously notes that the OTS would not expect most institutions to reach such levels. Further, the proposal does not state that caps based on the proposed standards are *not* unfair or deceptive, so they may be challenged.

In addition, there is no indication of why or how these standards were selected. Nor do they present practical solutions. For example, many institutions vary the “limit” on a daily basis based on programs that rely on patterning to inform them about the needs and eligibility of the customer based on “safe and sound” practices. Thus, is will not be feasible to limit the aggregate fees based on the overdraft limit.

Equally, the average daily balance standard is vague and arbitrary. The proposal does not indicate over what period the “average daily balance” is to be calculated. It also appears to assume that those with low average daily balance have low income. It many cases, customers keep low checking account balances because excess funds will usually earn a higher rate of return if placed elsewhere. Many accounts with low average daily balances also have a lot of activity with regard to deposits and payments, suggesting that the account holders are not low income. [13]

Ultimately, ABA believes that any aspirational recommendation to consider applying daily caps may be a component of a future interagency overdraft guidance proposal, but that the OTS should not impose prescriptive

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[13] We also question the OTS’s assumption that low income people are more likely to overdraw than others. Moebs Services has found that the only reliable predictor of who will overdraw an account is credit score. (See attachment 3.) This makes some intuitive sense as those who have difficulty managing one financial product may also find challenging managing another finance product. While the FDIC suggested that low income customers are disproportionately impacted, it relied on a geographic surrogate and conducted no apparent account review to confirm the validity of its surrogate. Nor delve deeper into some intuitive inconsistencies with the data.

standards that handicap the savings association charter under either HOLA or UDAP. Nor should a future joint agency guidance piece on fee caps or pricing raise unwarranted unfairness allegations that create undue industry-wide litigation risk when any real offending practices are case specific.

3. Monitor overdraft protection program usage.

Noting the current Overdraft Protection Guidance warning that posting order should not be unfair or manipulated to inflate fees, the proposal explains, "Such a situation would occur, if for example, a savings association varied its transaction-clearing rules on a daily, customer-by-customer basis in order to maximize each customer's fees." The OTS adds that "such fee generation not only fails to benefit the market, it suggests a lack of transparency: economically rational consumers would likely move their accounts to other institutions if they understood that their transactions were being posted in an unfair manner." Accordingly, such practices are "unfair."

We are not aware of any institution that varies payment order on a customer-by-customer basis. We understand that the Board's staff is exploring this very issue and urge OTS and the other agencies to coordinate their findings in this area before articulating a supervisory expectation or requirement.

4. Monitor overdraft protection program usage.

The proposal restates the importance of monitoring overdraft protection usage as both a safety and soundness consideration and best practice. We agree that institutions should monitor overdraft protection usage as a matter of safety and soundness and best practices. However, institutions should not be required to suspend overdraft protection services based on an arbitrary, regulatory standard. Different institutions and different customers will have different standards appropriate to their situation and consumers should not be denied services they want, value, and are able to manage.

5. Fairly report program usage.

The proposal notes that the current Overdraft Protection Guidance advises savings associations against furnishing negative information to "credit" reporting agencies. However, in fact, the current guidance refers to "consumer reporting agencies," which include not only credit reporting agencies, but also, for example, ChexSystems, a negative date base for deposit accounts. The proposal warns institutions of new rules to go into effect July 1, 2010 that will require furnishers to implement written policies and procedures regarding the accuracy and integrity of the information furnished to consumer reporting agencies. The proposal adds, "Furnishing negative information to CRAs when overdrafts are paid under the terms of an overdraft protection program may not be accurate because such information may not reflect the terms of the account or the consumer's performance and other conduct with respect to the account." We agree that institutions should furnish accurate information when reporting to consumer reporting agencies and understand that institutions do not report negative information on customers who have repaid overdrafts as agreed under overdraft protection programs. However, institutions should not be inhibited from reporting accurate, even if negative, information, for example, that an account was closed for failure to pay overdrafts as agreed. Institutions do not seek to find inappropriate reasons to close accounts, and indeed, examiners encourage institutions to take appropriate action when customers do not manage their accounts or repay overdrafts.

ABA believes the OTS's use of UDAP in this proposal is inappropriate for additional reasons.

In addition to the legal shortcomings of OTS's UDAP analysis identified previously, ABA has these additional concerns about the OTS's invocation of UDAP authority in this guidance.

- OTS asserts the deceptive or unfair nature of particular practices in categorical terms that are clearly prescriptive and therefore are essentially rule-makings. OTS has the ability to issue UDAP rules, but it must meet Administrative Procedures Act and other rule-making requirements when doing so. Proceeding in the veiled manner it does here is legally deficient.

- As ABA noted during the 2008 UDAP rule-making, conclusory statements about UDAP vulnerabilities increases private litigation risk and should be appropriately conditioned when applied to the industry in general as opposed to the specific facts of a particular enforcement record.

- ABA has been a supporter of uniform UDAP rule-making where warranted and when conducted in a risk-preventive manner. By the same token, generalized UDAP pronouncements by one agency without the others' contribution and concurrence is disruptive policy-making for an industry whose members should compete on a level regulatory and supervisory playing field as envisioned in Congress' mandate to the FFIEC.

Specific request for comment regarding limits on fees.

The OTS is asking whether it should adopt standards regarding the overdraft fees similar to those adopted by Congress for credit card penalty fees. Congress amended the Truth in Lending Act to require that credit card penalty fees be "reasonable and proportional to such omission or violation." It is not clear what the policy motivation or statutory authority for OTS to adopt a similar standard for overdraft fees nor do we believe it appropriate or necessary.

While institutions have historically paid overdrafts for good customers as an accommodation, and it may be appropriate to do so, the amount of the fee is intended to encourage customers to manage and monitor their accounts and maintain a positive balance. A positive balance is the desired goal of both the institution and the customer. Because the fee is intended as a deterrent, rationally and intuitively, we expect that the amount of a fine does impact behavior, much as parking tickets discourage illegal parking. If parking illegally in rush hour were $10, we would expect many would find commuting times much longer. Indeed, the government and many businesses use penalties in order to influence taxpayer or consumer behavior. The IRS, for example, not only uses potential imprisonment to ensure taxpayers pay taxes and also file their returns on time, it also imposes penalties for filing late or not paying in full. Taxpayers who do not file their returns by the due date usually pay 5 percent of the unpaid taxes for each month or part of a month that a return is late, not to exceed 25% of unpaid taxes.[14]

Moreover, setting the rate too low may actually encourage the behavior the fee is intended to discourage, as studies have demonstrated. For example, a study showed the reaction of parents when a flat $3 fee was imposed on parents arriving more than 10 minutes late to retrieve their children from day care. The result was not fewer late parents, but rather the opposite: more late parents than when there was no charge for late retrieval. The number of parents arriving late actually doubled.[15] The fee in fact became a *license* to arrive late. A more substantial fee was warranted to actually reduce late retrieval behavior.

Measuring the threshold amount when a penalty fee becomes effective is challenging. First, for any test or standard, the deterrence amount will be on a sliding scale. The threshold will not be the same for everyone, and it is not clear where an appropriate cut-off should be. Second, there may be significant shortcomings to any "empirically derived, demonstrably and statistically sound" model or similar model that reasonably estimates the effect of the amount of the fee on the frequency of an overdraft that will make it difficult if not impossible to use.

Thus, if the fee is not set high enough to provide an incentive to monitor an account, customers are less likely to monitor and manage their accounts. However, monitoring a checking account is important not only to avoid

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14 See http://www.irs.gov/newsroom/article/0,,id=205326,00.html

15 Steven .D. Levitt Stephen J. Durner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* (HarperCollins, New York 2005) pp 15, 16, 19.

overdrafts, but to avoid over-spending and detect identity theft and other types of fraud. In effect, without a penalty fee, there is less reason to manage the account and spending.

Moreover, if the fee is not sufficient to recover costs, including the potential for a loss, check and ACH transactions will simply be returned, which is not a consumer-friendly result, given that consumer testing has found consumers want such payments paid, given the adverse consequences of returned payments.

Finally, if fees are properly disclosed, understood, and avoidable, they are arguably "reasonable" as the customer is making the choice. Indeed, debit card overdrafts because of Regulation E are by definition "reasonable" if one gives any credit to consumers who are actually agreeing to pay them: the customer, after clear disclosure of the fees and alternatives to avoid overdraft fees, must expressly request the option to pay for debit card overdrafts. Who better to decide than the informed person agreeing to pay the fee?

Conclusion.

ABA appreciates the opportunity to comment on this important matter. We support updating and replacing the original Overdraft Protection Guidance and agree with many of the concepts set forth in the proposed Supplemental Guidance. We strongly recommend, however, that the OTS work with the other agencies to replace rather than supplement existing guidance. Updated guidance should integrate changes to Regulations E and DD rather than add one more, separate layer of overdraft regulations. Moreover, advertisement requirements and disclosures to consumers should be addressed in Regulation DD and should be noticeable, clear and brief so that consumers will be likely to read and understand them. New guidance should also recognize that consumers overwhelmingly want important payments, such as check and ACH transactions, paid, even if it means incurring a fee. Finally, for numerous reasons, UDAP is not the appropriate mechanism to address overdraft protection programs, especially under a document identified as "Guidance." Instead, the Overdraft Protection Guidance should offer best practices that are aspirational rather than mandatory to ensure flexibility and continued consumer understanding and choice.

Regards,

Nessa Feddis

Nessa Eileen Feddis

Attachment 1

Comment Letter to Board and OTS regarding

UDAP Proposal

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July 30, 2008

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Board of Governors of the Federal Reserve System
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Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
ATTN: OTS–2008–0004

Re: BOARD Docket No. R–1314; OTS Docket No. OTS–2008–0004; Unfair or Deceptive Acts or Practices; 73 *Federal Register* 28904; May 19, 2008 (UDAP Proposal)

Ladies and Gentlemen:

The American Bankers Association (ABA) provides these comments on the rule proposed by the Federal Reserve Board (Board), the Office of Thrift Supervision (OTS) and the National Credit Union Administration (NCUA) covering Unfair or Deceptive Acts or Practices (UDAP) involving overdraft protection service fees. ABA brings together banks of all sizes and charters into one association that works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $12.7 trillion in assets and employ over 2 million men and women.

ABA members across the board are concerned about this UDAP Proposal and its possible effect on banks' abilities to safely and soundly exercise their risk-based discretion to pay inadvertent customer overdrafts that are otherwise reasonably avoidable when depositors follow prudent account management practices. ABA has long demonstrated its leadership on this issue by sponsoring the 24-page booklet, *Overdraft Protection: A Guide for Bankers,* that sets forth important principles to consider to guide our members and to benefit our customers. Our membership believes that the banking industry has acted in the best interests of its customers and the payments system by making overdraft accommodation available.

Although the UDAP Proposal covers both credit card practices and overdraft service fees, we address these matters in separate letters to underscore that we believe that overdraft practices have been improperly swept up in the UDAP regulation initiative. Our comments represent the input of banks of all sizes and charters and reflect the strong position of our Board of Directors and our other policy making bodies. We believe that reform in this area should travel a different path.

SUMMARY OF COMMENTS

The banking industry has always exercised discretion to cover overdrafts for good customers. Today, banks have developed safe and sound programs that extend this discretionary accommodation to the vast majority of our customers. Bank overdraft accommodation practices are successful because they provide desirable back-up for customer payment decisions, and they are sustainable because people want the bank to recognize that when they inadvertently overdraw their account they can be trusted to make it right and are prepared to pay for the bank's accommodation.

ABA strongly disputes the assertion of the proposal that these overdraft accommodation practices and their associated fees are unfair because the fees cannot be reasonably avoided without elaborate opt-out mechanisms. This errant assertion is belied by long-standing principles of banking law that expect depositors to be responsible for their own account management. In fact, as the banking agencies themselves have publicly recognized and espoused, the best way to avoid overdraft fees is to manage personal bank accounts wisely—keeping track of your paper and electronic transactions and monitoring changes to your balance.

ABA believes that the mainstream practices that banks follow in the area of overdraft accommodation do not merit being a target for the agencies' precedent setting exercise of their self-initiated Federal Trade Commission Act (FTCA) rule-making authority. Banking industry overdraft accommodation practices do not trip the standards that should be applied for determining when banking behavior is unfair under the FTCA, and for that reason alone the proposal should be withdrawn, or certainly not pursued within the UDAP context. Most troubling is the analytical underpinnings of the proposal's assertion that customers cannot be expected to know with perfect certainty their precise account balance at all times and consequently should be absolved from responsibility for managing their accounts or conducting their transactions. This premise is anathema to the fundamental assignment of responsibilities that have been established by federal and state payments law, and its adoption under the authority of UDAP rule-making threatens to impact adversely virtually all banking fees and payment obligations dependent on customer behavior.

The agencies must take special care in establishing appropriate standards for this inaugural exercise of banking agency initiated FTCA Section 18(f)(1) rule-making, need to take special care in establishing appropriate standards to conclude that the banking industry's mainstream overdraft practices are not unfair to customers, and they need to be equally careful to pursue any reform of consumer protection for debit card transactions within the established regulatory framework for electronic transactions, funds availability and account disclosures.

GENERAL BACKGROUND

Americans enjoy the most affordable, efficient, and accessible banking system of any country in the world. Today, customers can open a checking account with a minimal deposit and have access to the entire menu of payment services – at little or no cost. They can write checks, use debit cards to withdraw cash or make purchases, pay bills, and make fund transfers online at any time, day or night, from virtually anywhere in the world. For customers, such an easy and convenient service, however, is not without important responsibilities.

In the best of all worlds, people would only write a check or make an electronic payment when there are sufficient funds in their bank accounts to cover the transaction. Of course, this is not a perfect world. There are also many different ways for consumers to make payments today, which service, while convenient for them, increases the importance of keeping track of what payments they have made and what resources are available to them in their bank accounts to cover those transactions.

Keeping track of transactions is critical to avoiding overdrawing an account. Doing so is part of good financial management and an important responsibility of using any transaction account. Writing transactions in your checkbook or ledger is, of course, the best way to track transactions. This is even more important today with the variety of ways that customers can make transactions.

The Federal Financial Institutions Examination Council (FFIEC) reiterated the importance of personal financial management in the Interagency consumer resource brochure, "Protecting Yourself from Overdraft and Bounced-Check Fees," distributed with a press release that noted "the *best way to avoid* overdraft and bounced-check fees is to manage accounts wisely. That means keeping an up-to-date check register, recording *all electronic* transactions and automatic bill payments, and monitoring account balances carefully." (Emphasis added.) The brochure itself describes *nine* different ways to avoid such fees, the second bullet point of paying special attention to electronic transactions being emphasized in bold print. This brochure was intended to be consumer friendly, and available free on the agencies' websites for downloading so organizations could add their logo for distribution to clients and customers.

The bottom line is that customers are in the best position to know what their actual balance is – only they know what checks they have written, automatic payments they have authorized, and debit card transactions they have approved. Simply put, customers are in control of their finances and can avoid overdraft fees.

However, even if individuals do not keep an accurate, up-to-date record of their transactions and balance, it is easy to check the most recent balance. Customers can – and should – check their transactions and balances often by phone, at the ATM, online, or even using the Internet browser on their phone or other handheld devices. Knowing the balance – and what transactions have been authorized by the customer, but have yet to be processed and are not reflected in that balance – are very important to avoid overdrafts.

Over time, however, customers have sought and appreciated having flexibility against occasional error. This is why banks have traditionally paid overdrafts on a discretionary basis, based on the historical activity of the account and the likelihood that the accountholder will cover the overdraft. Today's "bounce protection" or overdraft accommodation programs are basically the latest, customer-driven innovation of this traditional practice. The primary difference is that many of the more recent overdraft protection practices rely on ***automated*** systems. The advantage of the automation of the historical practice of paying overdrafts on a discretionary basis is that it reduces costs associated with case-by-case assessment and manual intervention and promotes consistent treatment of customers.

Customers who find it challenging to manage their accounts and avoid overdrafts have other options available to them. Many avoid overdrafts by maintaining a cushion in the account to cover transactions they may have forgotten about or not written down in the checkbook. Others, for example, arrange for overdrafts to be covered by automatic transfers from a savings account or to a credit card account. Still others establish a line of credit to cover overdrafts. In contrast to simple overdraft accommodation provided as a courtesy by banks, these are legal agreements where the bank is *obligated* to pay overdrafts and customers must complete applications and be subject to the bank's underwriting standards to quality. Customers may also arrange to have the bank send them electronically daily notices of their balances and alerts warning them when their balance falls below a set amount. What works best for one customer may not work as well for another. And room must be preserved for future innovation to meet changing customer demands or to take advantage of new technologies.

Overdraft protection is an important service for our customers, and we believe customers should understand the process, the responsibilities to track deposits and withdrawals, and any fees associated with overdrafts and options to avoid them. Banks can and do provide convenient access to account information today to help customers manage their financial flows, but ultimately it is consumers who are in the best position to track and manage their accounts and choose among the overdraft options available to them.

Customers value depository institutions paying their overdrafts.

Ever since banks first introduced transaction accounts, the issue of how to deal with overdrafts was front and center. Obviously, the management and control of deposits and withdrawals are in the hands of the customer.

In most cases, the customer initiating a payment transaction wants to complete it and appreciates the bank paying it, even if there are insufficient funds. Indeed, ABA's recent survey found that of the 20 percent of consumers who had paid an overdraft fee in the last year, 85 percent were glad their bank did so.[1] The Center For Responsible Lending in its January 2007 survey showed a similar attitude among consumers: Over 92 percent, when asked, said they would like the bank to pay it and were willing to pay something for it. (See attached.) It is also typically the case that even with the bank's fee, the costs of rejecting the transaction and returning the check – including the inconvenience, embarrassment, and fees charged by the merchant or payment recipient – is greater.

Today, with so many transactions taking place, overdraft protection practices are automated with specific criteria and limits on the coverage. Usually, the amount paid is between $100 and $500, depending on account history, under certain circumstances. Examples of typical criteria for eligibility for the service include:

- Minimum monthly deposit;
- Periodic direct deposit;
- No delinquencies with the bank;
- Age of account;
- Average balance; and
- Maximum number of overdrafts over a certain period of time.

The advantages of the automation over the historical practice of paying overdrafts on a discretionary basis are that it reduces costs associated with case-by-case assessment manual intervention and promotes consistent treatment for all customers.

Banks explain to customers that the bank ***may*** honor overdrafts. That does not nullify the fact that *knowingly* making a payment without having available funds to cover it is not only a dangerous financial practice, it is illegal.

Nevertheless, customers value banks' practice of paying overdrafts. Indeed, they expect it. They value the ability to avoid the embarrassment, hassle, costs and other adverse consequences of having a check bounce or transaction denied. Whether made by check or electronically, returning a payment to a merchant, mortgage company, or credit card company, usually means the customer pays additional fees charged by the person receiving the payment. Through overdraft accommodation services, customers avoid the inconvenience of having to resolve the issue and arrange a second payment. They also escape the risk of having adverse information reported to a credit bureau or "bad check" database. Moreover, inasmuch as the customer pays a fee whether the bank pays the item or returns it unpaid, customers typically appreciate the depository institution paying items when there are insufficient funds.

Customers also value having debit card point of sale transactions approved even when there are insufficient funds. For example, many consumers would rather their depository institution authorize the debit transaction than face the consequences of

[1] See ABA Overdraft Fee Study, Ipsos U.S. Express Telephone Omnibus, (July 11-13, 2008).

not being able to pay for a meal they have just consumed or the groceries that have been rung up and bagged.

Customers understand the timing of transactions and how to manage within the overdraft accommodations provided by the bank. For example, some customers are aware of and avail themselves of the fact that even with debit card transactions, there is often some window of opportunity to deposit funds ***after*** a transaction is made. For example, some people in some situations may be able to make a purchase in the morning with their debit card – uncertain about their available funds at that time – and transfer or deposit money into their account before the books are closed for that day to cover the shortfall.

Customers have many options to avoid overdraft fees.

It is important to emphasize that customers have options to avoid overdraft fees. As discussed earlier, customers can avoid overdrawing their accounts by keeping track of their transactions, which banks are employing new technologies to make easier and easier to do.

Customers can check account activity and balances online or by phone. Even if they do not keep an accurate up-to-date record, customers can check their available balance just prior to a transaction by phone, at the ATM, or using the Internet browser on their handheld device. They can also arrange to have overdrafts paid through an overdraft line of credit, credit card, or savings account. Depending on the individual customer's behavior and habits, these latter options can be less costly than overdraft fees, but customers must meet underwriting standards of the bank to qualify (which includes a credit check) or have a savings account at the bank.

Many consumers avoid overdrafts by keeping a cushion of funds. In addition, depository institutions commonly permit customers to opt out of having overdrafts authorized or paid. However, they usually still have to pay a bank overdraft fee as well as any merchant or payee's fee for any returned item. In addition, the option generally means that *all* non-sufficient funds transactions, not selected types of transactions, such as debit card transactions, will be returned or denied.

Depository institutions will often waive the fee for an initial or occasional overdraft. After the first incident, the consumer is then aware that debit card transactions may cause an overdraft and can take appropriate steps to avoid them. Of course, customers dissatisfied with their bank's services have many other banks to choose from in our very competitive industry.

Banks follow responsible overdraft protection practices.

As automated overdraft accommodation programs became more prevalent and people's experiences with them increased, questions and concerns arose about how some of these promoted accommodation programs work and how best to avoid overdraft fees.

ABA responded to these concerns in a March 21, 2003, letter sent to all ABA members from Ken Fergeson, the ABA Chairman-Elect at the time. The letter advised ABA members to exercise caution with regard to overdraft practices and offered specific suggestions. Subsequently, ABA partnered with Alex Sheshunoff Management to publish and distribute to all ABA members more extensive information, the 24-page *Overdraft Protection: A Guide for Bankers*.

These documents drew banker attention to suggestions that depository institutions:

- Disclose costs and terms in the agreement fully and conspicuously;
- Make clear that the depository institution is not promising to pay items; Avoid encouraging customers in marketing materials, advertising, and communications, to overdraw;
- Monitor accounts for frequent use of the service and take appropriate actions in these situations;
- Inform customers of other ways to handle overdrafts, such as lines of credit and automatic transfers; and
- Proactively offer an opt-out to customers.

In 2005, the banking agencies adopted their *Overdraft Protection Program Guidance* (Guidance) that reflects many of the industry's recommendations. The agencies' Guidance addresses legal and safety and soundness issues and also includes best practices. Specifically, the Guidance recommends as best practices that depository institutions:

- avoid promoting overdrafts;
- fairly represent overdraft protection programs and alternatives;
- train staff to explain program features and choices;
- clearly explain the discretionary nature of the program;
- clearly disclose program fees;
- demonstrate when multiple fees will be charged;
- explain impact of transaction clearing polices; and
- illustrate the types of transactions covered including card transactions, preauthorized automatic debits, telephone-initiated transfers, and other electronic transfers.

The Guidance offers specific best practices related to program features and operations. For example, depository institutions should:

- provide election or opt-out of service;
- alert consumers before a transaction triggers any fees where feasible, e.g., at the teller window;
- prominently distinguish balances from overdraft protection funds availability;
- promptly notify consumers of overdraft protection program usage each time used;

- consider daily limits on consumers' costs;
- monitor overdraft protection program usages; and
- fairly report program usage.

One issue of concern has been repetitive use of overdraft accommodations by customers. Banks do, as expected in the Guidance, monitor excessive use, and notify customers of other available options for managing their accounts. The Guidance also requires suspension of services when "there is a lack of timely repayment of an overdraft." Bankers follow these practices closely, with many institutions suspending overdraft accommodation when an outstanding balance exceeds 30 days. This means customers who have difficulty managing their account and avoiding overdrafts will not get into debt for any extended period of time or fall into a "cycle of debt" due to overdrafts.

The Federal Reserve Board went further to address concerns about customers' understanding of the cost of overdrafts by amending Regulation DD (Truth in Savings). Specifically, the regulation requires depository institutions that "promote" overdraft protection to disclose in periodic statements the total dollar amount of fees for paying overdrafts and the total dollar amount for fees for returning items unpaid. These totals would have to be provided for the statement period and *for calendar year to date.* All depository institutions would also have to specify to customers the categories of transactions for which an overdraft fee may be imposed, including, for example, ATM withdrawals and point-of-sale debit card transactions.

We believe that the industry's initiative, along with the agencies' Guidance and important changes to Regulation DD, have established a set of mainstream practices that characterize successful and beneficial overdraft protection practices. *There has been no evidence provided by the proposing agencies that demonstrates that their supervisory experience with these regulatory standards has been unsuccessful in properly managing UDAP risk in the implementation of overdraft protection programs.* Certainly there is no basis to reverse field now by labeling the thousands of banks that provide this service—and have observed the Interagency Guidance—as engaging in unfair practices just because they have not implemented the elaborate opt-out requirements suggested in this proposal.

LEGAL BACKGROUND

The Board and the OTS have based their proposed rule on Unfair or Deceptive Acts or Practices (UDAP Proposal) on the authority bestowed by the Federal Trade Commission Act Section 18(f)(1), 15 U.S.C. 57a, and the standards for unfairness that Congress codified in 1994 with respect to the FTC's exercise of such authority. We note that the statutory authority of Section 18(f)(1) provides that the Board and OTS "shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices."

The current UDAP rule-making will establish the founding principles of unfairness analysis for all banking practices and must be approached with extreme caution to guard against serious adverse unintended consequences for industry operations, customer service value and market innovation with respect to and beyond the particular circumstances covered by the current proposal. While the agencies have relatively recently issued supervisory guidance subscribing to the basic principles applied by the FTC to determine unfairness, this rule-making will elevate those supervisory standards to a regulatory level. Although the Board and OTS have previously adopted the FTC's Credit Practices Rule (Regulation AA), this will be the first exercise of the independent rule-making authority bestowed by FTCA Section 18(f) on the Board and OTS in the more than 30 years of its existence. Its precedent-setting nature cannot be over emphasized, invoking the need for extreme care.

The Board and OTS are, as a legal matter, writing on a blank slate since the standards for unfairness contained in the FTCA (15 U.S.C. 45(n)) are expressly imposed only on the FTC. Despite being added in 1994 at a time when the FTCA already granted the Board and OTS their independent rule-making authority, the unfairness provision of the amended Act is directed only at the FTC[2]. Nevertheless, the Board has previously subscribed to these standards for supervisory purposes and the OTS has acknowledged their applicability as the basis for this proposal.

ABA concurs as a policy matter that the four elements of unfairness recited in 15 U.S.C 45(n) constitutes an appropriate starting point for establishing banking agency UDAP precedent. However, banks were excluded from FTC jurisdiction, and the banking agencies were granted authority in its stead, because there are important distinctions regarding regulatory oversight between the closely supervised banking industry and the unsupervised commercial market that are particularly relevant when developing UDAP precedent for banks. ABA believes that prime among those distinctions is the safety and soundness obligation imposed on banks. Safety and soundness is the operational and supervisory imperative that must be accounted for within any UDAP framework to be constructed by the rule-making banking agencies.

ABA recommends that, at a minimum, safety and soundness considerations be incorporated as part of the countervailing benefits prong of the FTC unfairness test. This would make the test include consideration of countervailing benefits to consumers, to competition and to bank or industry safety and soundness.

This implied extension of the FTC unfairness standards is not the only addition that should be made to the analytical components used by banking agencies in exercising FTCA unfairness rule-making authority. Application of FTC UDAP unfairness standards to banking transactions must also be done with recognition that the payments system is a special franchise that is already heavily regulated and whose

[2] Nothing in section 18(f) expressly requires either the Board or the OTS, when acting on their own initiative, to be myopically focused on the FTC unfairness standards published in 1980 and codified as expressly applicable to the FTC in 1994 under 15 U.S.C. 45(n)—both of which events occurred after the Board and OTS were granted authority to do rule-making under the FTCA and neither of which purport to constrain the 18(f) agencies for rule-making or enforcement purposes.

component parts work in an integrated fashion to achieve operational efficiency, reliability, speed, financial soundness, security and exceptional consumer convenience. FTCA Section 18(f) acknowledges that the banking sector has unique circumstances by expressly providing the Federal Reserve Board with the power to diverge from FTC UDAP rule-making on the basis that applying regulatory standards developed in the commercial market to banks "would seriously conflict with essential monetary and payments systems policies of such Board."

The Expedited Funds Availability Act (EFAA) and its implementing Regulation CC have been the federal baseline for funds availability and the cornerstone for both bank and consumer expectations. They establish when funds from deposits must be available to customers and also firmly recognize that certain holds are necessary and appropriate in order to protect and manage the payment system. In addition, they ensure that bank customers have sufficient information to understand when funds are available by requiring multiple disclosures in multiple locations. The Electronic Funds Transfer Act and its implementing Regulation E assign to the Board the responsibility "to provide a basic framework establishing the rights, liabilities and responsibilities of participants in electronic fund transfer systems." According to the EFTA, "the primary objective of this [law] is the provision of individual consumer rights." As such, both Regulation CC and Regulation E embody precisely the type of payments systems policy that section 18(f) mandates that the Board guard against impairing when developing UDAP rules.

It follows that neither the Board nor the OTS should exercise their UDAP rule-making authority under 18(f) in a manner that undermines monetary or payment systems policies and that in the interests of comity both should include this consideration among their enumerated standards for exercising such authority.

OVERDRAFT ACCOMMODATION FEES ARE NOT UNFAIR

The Board and OTS proposals are based on a premise that "assessing overdraft fees before the consumer has been provided with notice and a reasonable opportunity to opt out of the institution's overdraft service appears to be an unfair act or practice under 15 U.S.C. 45(n) and the standards articulated by the FTC." ABA contests this assertion and believes that the predominant practices by which banks provide overdraft accommodation and assess fees for paying overdraft items are not unfair under standards appropriate under Section 18(f).

In conducting their analysis both the Board and OTS invoke the FTC unfairness standards that derive from the FTC's Unfairness Statement as subsequently codified in 15 U.S.C. 45(n). Succinctly stated, the FTC may not declare an act unfair unless:

(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 to competition.

In addition, the FTC may consider established public policy, but public policy may not serve as the primary basis for its determination that an act or practice is unfair.

Although they cite the FTC Unfairness Statement, as the analysis proceeds the agencies do not explicitly consider either general sources of public policy nor the Section 18(f) mandate covering monetary or payment systems policies. We will treat each of the five elements ABA believes are relevant to a banking agency UDAP unfairness analysis below:

Overdraft accommodation fees are not substantial injuries.

As the Board and FDIC note in their 2004 Interagency Guidance on Unfair or Deceptive Acts or Practices by State-Chartered Banks (Interagency UDAP Guidance), substantial injury usually involves monetary harm and includes situations of a small harm to a large number of people. It is instructive that the FTC Unfairness Statement (adopted as the source of the unfairness portion of the Interagency UDAP Guidance) describes substantial injury in terms more reflective of harmful effects than are present in the overdraft accommodation proposals. For instance, the statement reads, "In most cases a substantial injury involves monetary harm, as ***when sellers coerce consumers*** into purchasing unwanted goods or services or ***when consumers buy defective goods*** or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction. ***Unwarranted health and safety risks*** may also support a finding of unfairness." (Emphasis added.) Charging market rates disclosed at time of contract seem anathema to the label "injury." Although a $7.95 monthly charge to all Orkin customers may be an injury when applied in breach of a termite service contract[3], imposing fees fully disclosed in accordance with the prevailing regulatory scheme and applied pursuant to the express terms of an account agreement cannot fairly be called an "injury."

Fees for covering overdrafts are in the account agreement and new customers are informed of these fees as well as any maintenance fees and non-sufficient funds (NSF) fees at account opening. These disclosures are specifically mandated by Regulation DD (Truth-In-Savings Act) and as a matter of state contract law. Customers understand that it is their responsibility to balance their accounts—and the fees provide both an incentive to do so and a user charge when they inadvertently fail to do so. In other words, customers know in advance what the rules and the costs are for overdrawing an account—all without a prescribed opt-out notice.

Giving customers a better deal cannot be considered injury. In the case of overdraft accommodation, charging someone the same (or lower) fee for *honoring* a check (or ACH or recurring debit card charge) as for *refusing payment* when funds are not sufficient, cannot be classified as an injury to the customer. To do so turns the notion of injury on its head. In the case of overdraft accommodation the monetary impact of the fee is less than the combined charge of an NSF charge for refusing payment and the likely additional merchant charge for writing a bad check—and that does not include the costs involved if the refused payment is proffered by the merchant a second or third time with similar results. It is not an injury if the

[3] *In re Orkin Exterminating Co.,* 108 F.T.C. 263 (1986), *aff'd, Orkin Exterminating Co. V. FTC,* 849 F.2d 1354 (11th Cir. 1988).

consumer's behavior is assessed less money in total than it would be assessed in the absence of the practice—in this case discretionary risk-based accommodation of an overdraft by check, ACH or recurring debit card charge. Such an overdraft fee is neither coercive nor injurious. Rather, it is the price for a bank accommodation—for a bank taking a risk when fulfilling a customer's payment instruction, rather than denying a transaction. In other words, overdraft accommodation is a benefit, not an injury.

Although the same net difference in charges does not currently exist for the payment of debit card present point-of-sale (POS) or ATM transactions, the fee assessed continues to be a known previously disclosed amount. Even if one concludes that there is a monetary harm in these limited instances, this distinction in circumstances does not re-cast fees for overdrawn checks, ACH or recurring debit card payments as injuries. The agencies should not fudge the analysis when establishing precedent that will become the yardstick of future cases yet unimagined.

At this point it must be concluded at a minimum that overdraft accommodation fees are not injuries under the standards the agencies have established to define unfair practices—and this analytical failure dooms a finding of unfairness with regard to them.

Overdraft accommodation fees are reasonably avoidable.

Under the UDAP unfairness standards adopted by the Board and OTS for this rule-making, the concept of not reasonably avoidable is linked to whether the bank has created an impediment to customer action to avoid an "injury." The Interagency UDAP Guidance states in paraphrase of the FTC Unfairness Statement, "The agencies will not second-guess the wisdom of particular consumer decisions. Instead, the agencies will consider whether ***a bank's behavior*** unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making." (Emphasis added.)

The analysis presented by the agencies claims no bank behavior that creates or takes advantage of an obstacle to customers' abilities to manage their own accounts and to *reasonably* avoid overdrawing them. In fact, the analysis purporting to show that fees are not reasonably avoidable is woefully deficient, citing one example where the "consumer cannot know with any degree of certainty when funds from a deposit or a credit for a returned purchase will be made available" as proof that consumers often lack sufficient information about key aspects of their account. Neither the example, nor the assertion it is meant to illustrate, however, constitutes a bank behavior that "unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making."

Our whole retail banking system relies upon the acknowledgment that people are responsible for managing their own bank accounts and their own financial affairs—and it is not unfair to expect that they do so. Knowing what moneys are in their accounts has always been the responsibility of the accountholders. Furthermore, from the beginning of banking the movement of funds has always meant that there will be a certain amount of uncertainty about what the account balance is at any precise point in time. Indeed, customers are in the best position to know their balance as only they know what transactions they have made, including those that have not yet reached the bank or been processed.

Today, people have more current information and tools than ever before, but the basic challenge remains and the onus on personal responsibility must remain. People know the transactions they have conducted—not the bank that can only find out after the fact. Overdraft accommodation programs have been very popular with our customers; specifically because they offer customers a convenient means of addressing occasional uncertainties in their account balances due either to customer oversight or to the timing of receipts into and payments from their accounts. Rather than being an obstacle to customer choice, overdraft programs are tools to accommodate customer choices.

Although not a Commission document, the paper entitled, "The FTC's Use of Unfairness, Its Rise, Fall and Resurrection," by Howard Beales, III, written when he was FTC Director of the Bureau of Consumer Protection, provides persuasive additional guidance for applying the reasonably avoidable standard: "If consumers could have made a different choice, but did not, the Commission should respect that choice. For example, starting from certain premises, one might argue that fast food or fast cars create significant harms that are not outweighed by countervailing benefits and should be banned. But the concept of reasonable avoidance keeps the Commission from substituting its paternalistic choices for those of informed consumers."

Those who choose to manage their accounts with little or no balance as a cushion take a risk that they will sometimes be wrong either through bad arithmetic or the uncertain presentment of multiple transactions through different channels from a variety of sources. This may result in an "inadvertent" unavailability of funds, but it is precisely for this reason that overdraft accommodation is provided by banks *as a benefit to customers*. Customers can improve the chances of avoiding overdrafts by managing their accounts through a variety of means (see FFIEC brochure). These include keeping careful, up-to-date track of transactions; keeping a "cushion" for occasions when mistakes are made; arranging for the checking account to be linked to a line of credit, savings account, or credit card; or arranging for the bank to send an alert when the balance falls below a set amount or a daily notice showing the balance.

Being able to *reasonably* avoid an injury does not mean being able to *absolutely* avoid and act with perfect knowledge. Millions of people conduct billions of transactions a day without overdrawing their accounts. People go years without incurring an overdraft. Perfection cannot become the standard for what it means to reasonably avoid a fee in the banking business. As we have previously noted, all of the banking agencies joined in publishing a consumer brochure, "Protecting Yourself from Overdraft and Bounced-Check Fees," distributed with a press release that noted "the *best way to avoid* overdraft and bounced-check fees is to manage accounts wisely." It is unreasonable that—without withdrawing the brochure—the agencies can conclude that their own advice on the "best way" to avoid fees is not a reasonable way to avoid fees.

Overdraft fees are also reasonably avoidable by selecting other account packages, electing the use of alternative overdraft protections for which one may qualify or by selecting another bank that offers a more favorable mix of features or prices. Many banks also voluntarily offer an opt-out from their overdraft accommodation services. However, the existence of these alternative options in the market does not change the fundamental fact that overdraft fees are reasonably avoidable by customers applying normal financial prudence—and the occurrence of the inadvertent overdraft is not rebuttal thereof.

It follows that overdraft fees incurred through any channel are reasonably avoidable and their assessment cannot be considered unfair if one is faithful to the FTC standards for exercising UDAP authority.

Overdraft services provide countervailing benefits to consumers and competition that outweigh the costs in fees.

As the Interagency UDAP Guidance states, "…[T]he injury must not be outweighed by any offsetting consumer or competitive benefits that are also produced by the act or practice. Offsetting benefits may include lower prices or a wider availability of products or services. Costs that would be incurred for remedies or measures to prevent the injury are also taken into account in determining whether an act or practice is unfair. These costs may include the costs to the bank in taking preventive measures and the costs to society as a whole of any increased burden and similar matters." As ABA has indicated above, safety and soundness impacts of an institutional or industry nature are also appropriately considered as countervailing benefits.

Bank overdraft accommodation programs are popular with our customers because the benefits outweigh the disadvantages and they are sustainable because people want the bank to recognize that when they overdraw their account they can be trusted to make it right. People want their authorized transactions paid and demonstrate that by expressing their satisfaction when it happens[4]. As a recent survey of 1,000 respondents revealed, 85 percent of customers who overdrew their accounts said they were happy that their bank covered their overdraft. Transaction accounts are at-will arrangements. Customers can change banks at any time for any reason—and do. Banks compete for new customers and to retain existing customers. Losing a customer is costly in terms of the outlay spent on attracting a new customer. A program that on-net harms customers has no longevity because it generates no lasting value for either party.

As previously demonstrated, covering overdrafts is less costly to customers than the alternative of refusing payment and returning items. Paying items rather than returning them helps customers avoid adverse credit experience and fees imposed by

[4] See ABA Overdraft Fee Study, Ipsos U.S. Express Telephone Omnibus, (July 11-13, 2008).

disappointed payment recipients, including merchants, creditors, and the government. If checks are returned, payment recipients may be less willing to accept checks from those customers in the future. For example, some landlords and creditors demand cashiers' checks after a payment has been returned for insufficient funds.

Refusing to cover POS transactions has similar implications for the consumer at the check-out counter. What trust would a merchant have in accepting a check from a customer who has just been refused for a debit card purchase? The merchant already knows the account does not have enough money to cover the purchase in question. (Is the merchant going to believe the customer only exercised a partial opt-out option?) The consequences of a failed payment transaction, together with the impact of the embarrassment of having an item returned or denied should not be under-estimated—especially when an increasing percentage of customers use debit cards as their primary payment method, often carrying no other payment means.

Overdraft fees have their own value in terms of signaling the cost of lax personal account management. After all, people should be encouraged to manage their accounts and not to overdraw them. The overdraft fee is set to discourage overdrafts, while not precluding the ability to complete a transaction made at the customer's instruction at a known and competitive cost. This is a pro-market effect and represents a countervailing benefit.

In this period of market stress, it is even more important to consider the safety and soundness implications of regulatory rule-making. Banks' financial welfare derives from a diversified mix of services and loans. Imposing unnecessary compliance costs impairs bank efficiency and financial strength. Burdening a popular bank service by imposing compliance costs to establish unnecessary new controls, new forms, new procedures and new monitoring will only raise the costs of providing those services without improving most consumers' welfare. In other words, unnecessary regulatory erosion of bank earnings affects financial soundness, conceivably further eroding system safety. This constitutes a significant factor that needs to be weighed in considering countervailing benefits
For these and other reasons described by other commenters, assessing fees for paying overdrafts is a practice with extensive countervailing benefits that outweigh the fees themselves. By the three standard measures of unfairness, overdraft accommodation is not an unfair practice.

Consideration of public policy militates against making overdraft fees unfair.

Although it is incorporated in the Interagency UDAP Guidance as an element of unfairness analysis, the agencies have failed to apply the public policy factor in developing the proposal. According to this Guidance, "Public policy, as established by statute, regulation, or judicial decisions may be considered with all other evidence in determining whether an act or practice is unfair. …. [T]he fact that a particular practice is affirmatively allowed by statute may be considered as evidence that the practice is not unfair. Public policy considerations by themselves, however, will not serve as the primary basis for determining that an act or practice is unfair." The FTC

Unfairness Statement recites this additional guidance: "…[S]tatutes or other sources of public policy may affirmatively allow for a practice that the Commission tentatively views as unfair. The existence of such policies will then give the agency reason to reconsider its assessment of whether the practice is actually injurious in its net effects."

A relevant source of public policy to consider in evaluating whether a bank's handling of overdrafts is unfair is the Uniform Commercial Code (UCC). UCC Section 4-303(b) provides that "items may be accepted, paid, certified, or charged to the indicated account of its customer in any order." Official Comment 7 to the section includes the following observation in support of this payment order discretion: "The drawer has drawn all the checks, the drawer should have funds available to meet ***all*** of them and has no basis for urging one should be paid before another." (Emphasis added.) This official policy pronouncement recognizes that customers are the initiators of account activity and the burden is on them to have available funds. The UDAP Proposal's rationale that a customer cannot know with certainty the funds in its account improperly reverses the assignment of responsibility established by fundamental commercial law to manage one's own funds availability. It is immaterial whether that must be done under conditions of absolute certainty or marginal uncertainty. Accordingly, UCC policy militates against the agency's assertion of unfairness.

Another more direct source of public policy on overdraft practices is the *Overdraft Protection Program Guidance* in similar versions issued separately by OTS and jointly by the other banking agencies. As described previously, this Guidance, accompanied by amendments to Regulation DD, established requirements and best practices that delineated how banks should safely, soundly and compliantly conduct their overdraft accommodation services.

For the past several years, the industry has followed this Guidance and executed its overdraft accommodation services in a compliant manner. None of the supervisory agencies have reported any systemic deficiency in the industry's observance of the Guidance. Yet, despite this record, the agencies have precipitously reversed gears to target overdraft accommodation services. Taking mainstream industry practices endorsed by the agencies a scant three years ago, and labeling them unfair illustrates the inappropriateness of the use of UDAP authority in these circumstances. It is one thing for regulators to conclude that new guidelines or regulatory standards are appropriate going forward; it is quite another to conclude that compliance with earlier standards is now somehow unfair.

Asserting that overdraft accommodation is unfair undermines established federal payments policy.

Section 18(f) of the FTCA expressly recognizes the Board responsibility to exercise its rule-making authority to avoid any serious conflict with essential monetary and payments systems policies of the Board. Although this charge is recited as a limit on the Board's obligation to adopt rules initiated by the FTC, it would be absurd for the Board to ignore this obligation when it, or the other empowered banking agencies, initiate their own rule-making. Similarly, the OTS, in applying the public policy criteria of the standard 4 element test of unfairness, should also consider the payments policy implications of using its UDAP authority.

The Expedited Funds Availability Act and Regulation CC heavily regulate the process by which checks are handled, funds are made available, and consumers are advised thereof. Yet, despite the fact that much of the unfairness argument asserted by the agencies revolves around payment systems and funds availability, there is no consideration of the extensive existing regulatory notice requirements informing customers when funds from their deposits will be available. ABA contends that Regulation CC is the foundation for what customers should expect about the availability of their funds and accordingly, establishes customers' responsibilities to manage their accounts in accordance with that knowledge. Application of a UDAP unfairness rule for overdrafts disrupts this framework by interposing a shift in expectations for customer responsibilities by excusing the role Regulation CC bestows on them to understand the limits of funds availability.

Although the Electronic Funds Transfer Act (EFTA) and Regulation E heavily regulate the process by which electronic payments are executed, and consumers' rights are protected, the agencies have not considered this body of law in developing an opt-out for ATM or POS debit card transactions. ABA contends that using a generic trade practices authority such as UDAP that requires joint agency action to implement a uniform legal standard instead of using the more direct regulatory authority intended to govern electronic transactions ultimately detracts from, and works to the detriment of, the EFTA framework.

ABA believes that both the Board and OTS should reconsider using UDAP to address overdraft practices. From a close reading of the proposal, it is apparent that concerns really revolve around debit card transactions—a purely electronic payment systems issue. Regulation E affords the ability to address all of the relevant debit card concerns and to reach beyond the banks themselves to the merchants that are a necessary part of any effective process. Using UDAP instead of Regulation E undermines the continuity of electronic transactions law and needlessly divides the law that governs such payments into more dispersed authorities that complicate achieving coordinated policy, uniform rules and consistent enforcement.

UDAP AND THE PROPOSALS ON PARTIAL OPT-OUT AND DEBIT HOLDS

ABA contends that the preceding analysis proves that customers are not injured in net affect by mainstream overdraft accommodation practices and in any case can reasonably avoid overdraft fees by engaging in prudent account management consistent with long standing public policy. Accordingly, there is no foundation for the assertion that assessing overdraft fees without an advance or continuing opt out choice or notice is unfair. Without this foundation the proposals on partial opt-out and debit holds under UDAP also fail.

The agencies seek additional comment on aspects of the partial opt-out. First, a rule that only compels an opt-out covering only ATM and POS transactions, if predicated on

UDAP, is still flawed for the reasons recited in the previous analysis. In addition, the technical hurdles that currently exist to implementing such a limited opt-out generate costs that further outweigh the benefits of such a rule.

Even accepting for the sake of argument the proposal's unfairness analysis, a full opt-out eliminates the offense and a partial opt-out cannot be separately compelled. Even if the only unfair practice were assessing fees for accommodating debit/ATM overdrafts without offering opt-out, the bank would not be compelled by UDAP to offer a tailored opt-out instead of a general opt-out of its accommodation practices that encompassed debit/ATM as well as other transactions. A partial opt-out cannot properly be enforced under UDAP because the exercise of partial opt-out is only an election of a discretionary overdraft service and is <u>not</u> a contractual promise to pay overdrawn checks and ACH transactions. Consumers cannot effectively say, "Do not pay my POS, but pay my checks," because they have no right under law to write bad checks and compel the bank to pay them. In other words, UDAP cannot be used to require the provision of overdraft accommodation for checks or ACH under the guise of a partial opt-out of debit transactions.

Currently, banks that allow customers to opt out of having overdrafts paid are only able to provide an opt-out on an "all-or-nothing" basis, that is, within the limits of their systems; overdrafts from all payment channels are returned or denied. While technically, with enough time and money, it may be feasible to allow customers to opt out by payment channel, for the vast majority of banks this is not an easy or inexpensive task. Moreover, it is a regulatory cost that will increase in relative terms for smaller institutions. Indeed, the cost differential could be so significant that smaller institutions will be forced to decline to offer customers overdraft accommodation rather than carry the costs of an expensive multi-option program.

More problematic is that the challenge is not just distinguishing debit card transactions from ACH, but also distinguishing card present POS transactions from recurring payment uses of debit cards. The technical challenges are not matters of simply implementing existing fixes. Because there really is no readily available methodology for offering a partial opt-out that can distinguish between card present POS and scheduled recurring payments that mimic ACH, there is no reasonable horizon that can be projected for achieving compliance with such a requirement. As the Board has recently noted in connection with mortgage practices amendments to Regulation Z, if banks are not provided a reasonable time to make changes to their operations and systems they would incur excessively large expenses that would be passed on to consumers. Conversely, such mandates would cause the bank to cease engaging in the accommodation service altogether thereby depriving the majority of customers who would elect the coverage and the benefits thereof. Such compliance costs that are passed on to consumers are a recognized countervailing factor under the standard unfairness criteria. Therefore, the countervailing compliance costs and implications for service outweigh any limited benefit of a limited POS opt-out for the foreseeable future.

Additional countervailing obstacles arise to making an effective partial opt-out for debit transactions. For example, even under a partial opt-out process, there will still be instances when banks will end up paying debit card transactions that may cause an overdraft. The proposal recognizes two such occasions. But more exist. For example, banks may not be able to avoid overdrafts caused when deposited checks are returned unpaid. In such a case, a customer who has made a deposit and relied on Regulation CC availability rules may spend funds by debit card that ultimately are not collected. This would result in an overdraft that the bank could not have stopped (absent a longer hold.)

Unavoidable overdrafts can also arise when computer systems go down. In these cases, customers often continue to have access to their funds based on an approximation of their prior balance, not on their actual balance. However, when the debit transaction is later presented, there may not be sufficient funds to pay the obligation and an overdraft occurs. These are just a couple of many examples of numerous contingencies that may arise in payment processing that can result in unintended debit overdrafts even though no overdraft accommodation program is in place.

It would be unsafe and unsound for banks to assume these risks of debit card overdrafts without appropriate compensation. Were banks to change their practices to minimize these occasions—such as not permitting the use of debit card when systems go down—customers with adequate funds (i.e., most customers by far) would be unnecessarily denied use of their payment option of choice. Under some circumstances, it may even be necessary to re-design account features or re-price the account bundle to properly manage the bank's risks from overdrafts that arise due to the limitations of the systems. This and similar countervailing effects demonstrate why existing bank overdraft accommodation of debit transactions are not unfair.

The debit holds proposal is fraught with problems. First, it is predicated on circumstances that involve two parties that are not encompassed by the current reach of the proposal—card systems and merchants. These are key players in the debit hold story. In fact, the more one studies the situation, the more one realizes that the supposed problem is on its way to a market solution. Recent changes by Visa to processing options for fuel merchants will reduce the time between authorization and clearance. This process will allow any holds to be cleared within two hours. This fast turnaround will enable many banks to decide not to place a hold on automated fuel dispenser transactions in view of the fact that a final transaction message will be transmitted in a known short time frame thereby minimizing risk exposure.

Second, the complexity of debit holds defies simple solutions and exacerbates the expense of developing alternatives. Numerous exceptions would need to be devised to address the variety of presentation contingencies—and they would all further complicate the operational and compliance challenges of implementation. This reality translates to countervailing compliance costs that outweigh the benefits that might come from implementing changes. Third, the complexity of debit holds practices defies detailed disclosures that customers can readily understand. Rather, the path should be to pursue simplification and encourage merchants (like many hotels have done) to advise patrons that use of debit cards may impact their funds availability earlier than, and beyond the amount of, their final transaction. This could be more readily achieved under Regulation E.

Fourth, the proposal's legal analysis underestimates the countervailing impact on the processing systems banks use when exercising their overdraft accommodation discretion. The agencies claim to "understand that financial institutions charge overdraft fees in part to account for the potential risk the institution may assume if the consumer does not have sufficient funds for a requested transaction [and need] to protect against potential losses due to non-payment," the proposed provision does not adequately address the risk arising from the consumer conducting transactions subsequent to the one that generated the hold and while that hold is outstanding. The agencies fail to recognize that restricting when in the decision-making process banks can charge fees for overdrafts that follow in time those debit card authorizations that generate open holds creates a burdensome and unworkable clearance and fee assessment process.

ABA urges the agencies to withhold issuing any final rule on debit holds to provide time for the market to implement its responses. Then it would be appropriate for the agencies to investigate the resulting operational realities. Should there be a continuing need for proscriptive rules; ABA urges that they be proposed under Regulation E where all the relevant parties can be reached within the scope of a single rule-making.

APPLYING UDAP ANALYSIS TO OVERDRAFTS HAS MULTIPLE DRAWBACKS

Banks generally desire clarity and certainty in their compliance obligations. ABA appreciates the agencies' effort to try to bring greater certainty to the application of UDAP to overdraft accommodation practices. Unfortunately, Section 18(f) UDAP rule-making authority has several disadvantages that can lead to unintended and disruptive policy consequences that undermine its value as a tool for establishing uniform standards. Although the agencies have tried to limit these adverse impacts by crafting rule text that does not declare particular practices to be unfair, the assertions contained in the proposal's supplementary information legal analysis undermine this care.

Litigation and Supervisory Risks. Although Section 18(f) restricts rule-making authority under the FTCA, the banking agencies have no exclusive right of enforcement for UDAP standards. Many state laws empower Attorneys General or private parties to sue banks for unfair business practices and to modify the federal standards as suits their particular jurisdictions and state legal precedent. In other words, full implementation of the proposed rule may still leave banks vulnerable to action by other agencies or individuals if, in promulgating the rule, the banking agencies conclude or assert in justification of the rule that overdraft protection fees are not reasonably avoidable and are not outweighed by countervailing benefits.

At the risk of belaboring the point, it is important to understand that if the Board and OTS articulate a finding, conclusion or authoritative assertion that overdraft protection fees are unfair, then significant litigation and regulatory risk could very possibly be generated not only for future but for current programs that today are in full compliance with regulatory mandates and guidance. For example, if the Board and OTS authoritatively find that applying overdraft protection fees without advance opt-out is unfair, Attorneys General, private litigants and even the other state and federal banking agencies will be able to invoke that conclusion in litigation and supervision—including potentially retroactively—against activities that heretofore have been fully consistent with existent statute and regulatory guidance. Findings or conclusions contained in the rule-making analysis will also be asserted as binding precedent by persons invoking the banking agencies' own complaint processes established under 18(f). In other words, since the proposed rule derives from the same section of the FTCA as compels banking agency consumer complaint offices, the regulatory standards articulated under a rule-making are bound to become the basis of creative assertions of liability in the complaint process.

The analysis contained in the proposal, if allowed to stand, will have a far-reaching effect and serious adverse consequences for a broad range of banking practices (besides overdraft accommodation) that have been industry standards. Moving forward, such action, will operate to chill innovation. The analysis of the reasons why overdraft fees are unfair without advance and continuing opt-out amounts to an argument that absolves customers of their obligation to be financially responsible for managing their transactions. The rationale for concluding that overdraft fees are not reasonably avoidable—the assertion that customers cannot know with certainty their own account balance—threatens, for example, fees associated with customers failing to fulfill their responsibilities to manage their own bank account: e.g., NSF and minimum balance maintenance fees.

Opt-out versus options. The fundamental issue is whether customers have reason to know the consequences of their banking activity. Account agreements recite the conditions on which fees will be assessed for certain actions. Notice provides the requisite level of knowledge to enable consumers to avoid overdraft fees even if the account is subject to the bank's accommodation practices. Experience demonstrates that customers successfully act on that knowledge.

Understanding that point, it is not possible to assert convincingly that an opt-out notice is required to avoid action that as already avoidable. That is to say, no remedy is needed for action that already has remedies and can be avoided under current conditions. There are, therefore, no legal grounds under UDAP for the regulators to prescribe a specific opt-out formula as a remedy.

The remedy that is already available is not just an opt-out *per se*, but rather the availability of other *options* to overdrawing accounts or incurring overdraft fees. That is, even if there are policy reasons to provide individuals with additional choice, opting out is not the only alternative. Establishing a right of opt out creates an affirmative right to alter the features of the account as offered by the bank. There is nothing in the unfairness analysis in the proposed rule that compelling argues for the bank to provide choice through the specific opt-out formula—what possibly could be compelled is a *choice* that does not include overdraft accommodation. The bank can offer a different account bundle of features and fees that excludes accommodation, e.g., a minimum balance account without overdraft protection. Indeed, for safety and soundness reasons, banks should not assume the risks arising from an account that has opted out, such as unknowingly paying overdrafts without appropriate compensation. They should be able to adjust practice, prices, and product designs to reflect the risks and costs of opt-out as well as limitations of the systems.

Requiring opt out as *the* solution to avoiding fees under a UDAP theory threatens to convert bank accounts into government-designed cafeteria plans. While some banks may voluntarily offer opt out, market options that allow the bank to bundle features should not be excluded as a response to overdraft accommodation choice. Indeed, the agencies should make clear there is no unfairness rationale that compels offering opt-out versus offering other accounts that exclude the overdraft accommodation feature. Experience continues to teach us that customer services are best designed through the dynamic market-place interaction of customer demand and bank efforts to design services most effective in meeting customer demand. That dynamic is absent from the regulatory process, which is why regulatory action should refrain from designing services and options for customers.

Other considerations about a regulatorily prescribed opt out. Furthermore, it bears reminding that by definition banks are not required to honor payments ordered by customers for accounts containing insufficient funds. It is an accommodative service provided by banks.

Under a regulatory regime that *prescribes* an opt-out right, failure to opt-out can suggest an entitlement that does not exist in as much as the underlying service is a discretionary accommodation made in the fullness of the bank's risk management authority. On the other hand, it must be understood that even where a customer has opted out of overdraft accommodation, there can be instances where the bank is committed to pay an electronic transaction that happens to settle out of funds. Even if the bank is denied the ability to assess a fee, customers must accept that they are still liable for the overdraft.

Requiring an explicit notice of opt-out at account opening essentially converts all overdraft accommodation services—however minor or informal—into promoted plans—a boundary that prior policy guidance viewed as a trigger exposing banks to more risk and imposing new duties. Eliminating this boundary sends a signal to all banks that there is nothing to lose by promoting formal overdraft protection programs since all the compliance obligations are imposed in either case. This seems a strange result for a proposal intended to de-emphasize overdraft usage.

We do not see how a mandate to offer opt-out repeatedly to a customer can be justified as a prescribed remedy under UDAP. What "opt out" means, in the context of this proposal's analysis, is nothing more than the ability to decline the bank's accommodation in advance or in the future. As long as a customer's ability to decline the accommodation service (e.g., by changing accounts or electing other options) is made known initially, the ability to reasonably avoid fees through opt-out is assured. No more elaborate compliance method is legally necessary.

COMMENT ON TRANSACTION CLEARING PRACTICES

While the UDAP Proposal does not address transaction clearing practices, the agencies solicit comment on the impact of requiring banks to pay smaller dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees on a customer's account. Under such an approach, the agencies suggest that a bank could use an alternative clearing order, provided that it discloses this option to the customer and the customer affirmatively opts in.

Overdraft fees are calculated based on following clearance systems designed to provide payment processing efficiencies that reflect technical capabilities, customer preferences, and the varied risks banks face for handling different payment channels. These systems, and the clearance order they generate, change as bank risk decisions vary, as technological advances occur, as payment channel mix alters to capture customer usage trends, and as legal liabilities evolve.

Not surprising, the result of such a complex analysis is a variety of approaches within the industry. Many banks clear different items using different rules at different times during the day to take advantage of different processing capabilities. Some electronic items are cleared in real-time, while others are presented in batch by particular networks. There are banks that clear checks after electronic items and others that intersperse them. There are banks that clear checks by check number order; others clear high to low; and still others clear low to high. Transactions conducted at teller lines may clear differently than transactions conducted at ATMs, through the mail, via lockbox, or by ACH. There is simply no one way that banks currently process payments and no one way that could be imposed on all banks that would achieve payment system efficiency. In a world that is moving toward near real-time clearance for transactions conducted in the on-line electronic environment, imposing a rule that requires a payment order based on looking back to the size of all same-day items is a payments disaster that is absolutely contrary to real-time processing. Conducting separate payment processing order calculations for fee purposes amounts to inefficient and burdensome redundancy and for that reason is not commonly found in the industry.

It would be operationally very hard to give individual customers the right to alter the bank's clearance process. In addition, many of these clearance processes are too complex to explain in understandable terms in any customer disclosure.

Moreover, ABA believes that regulatory consideration of payment processing order is a matter that should only be made through the Board's normal payment systems authority. Interposing a UDAP rule on such fundamental payment systems issues would be extremely disruptive and an unjustifiable application of UDAP authority.

PROMOTING RESPONSIBLE OVERDRAFT ACCOMMODATION PRACTICES.

ABA and its members have long been proponents of responsible overdraft accommodation practices. ABA's co-sponsored 24-page *Overdraft Protection: A Guide for Bankers* has been in existence for five years and has been explicitly endorsed by the OTS in its "Guidance on Overdraft Programs."[5] ABA continues to believe that industry best practices and the agencies' Guidance on overdraft protection programs have resulted in fair and responsible overdraft accommodation practices. We believe that the record of the agencies' supervisory experience supports this conclusion. Accordingly, we do not think that rule-making is necessary to maintain or improve on this track record.

There is another lesson relevant to the UDAP proposal on overdraft fees that can be learned from the existing agency Guidance on overdraft programs: effective standards can be established for conducting transactions responsibly by enunciating appropriate practices for mitigating UDAP risk without specifying the definitive unfair being prescriptive in defining practices. For instance, the agency Guidance contains a description of various legal risks and concerns that provide a policy predicate for the enumeration of best practices. This was done by being suggestive without being prescriptive regarding any particular service or practice. Using agency guidance authority rather than formal rule-making preserves both supervisory flexibility and the ability of banks to respond to customer interest, market demands, and changing technologies. Banks can receive instructive directions so that banks can better make risk-based compliance judgments.

The current proposal falls short of such an optimally flexible approach. For example, it is noticeably different from existing Regulation AA language that includes declarative rules that specifically describe particular practices as "unfair" in the rule's text. In contrast, the current proposal recites prescriptive requirements under headings that are labeled "unfair" but that nowhere actually recite in the rule text that a given practice is unfair. Unfortunately from the bank's perspective (supported by past litigation experience), the supplementary information is replete with assertions, findings and conclusions that define existing practices to be in fact unfair. This undoes the preventive rule approach by supplying virtually the same definitive specification that a declarative rule would provide and exposes banks to material litigation and new compliance risks for current mainstream practices.

Although ABA acknowledges that the agencies have limited legal latitude to issue preventive rules under FTCA Section 18(f) and could proceed by additional guidance, we believe the better course is to recognize that UDAP is not the preferred legal or policy basis for regulating overdraft fee practices. Instead, it is better to approach reform by building out from Regulations E, CC, and DD. Such regulatory authorities are, after all, the foundation of existing payment system, deposit account, and consumer protection requirements. Interposing a UDAP regulation that requires joint agency action to reach the same scope is less efficient and presents serious complicating risks not present, or that are more attenuated, under the other regulations.

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[5] The OTS stated as follows: "For savings associations interested in further reading on the subject of best practices, OTS recommends an American Bankers Association publication entitled, "Overdraft Protection: A Guide for Bankers."" 70 Fed. Reg. 8429 (Feb., 18, 2005)

Conclusion

In summary, ABA believes that the Board, the OTS, and the NCUA should proceed cautiously in establishing unfairness rules under their UDAP rule-making authority. UDAP situations are often characterized by case specific facts that defy industry-wide generalization. In exercising their FTCA Section 18(f)(1) rule-making authority, the agencies must be mindful to apply standards that properly consider the unique attributes of the banking sector and take extra care in performing their analysis, because it will have precedent setting application far beyond the particular practices at issue.

Ultimately providing overdraft accommodation is not an injury but a benefit and any associated fees are reasonably avoidable by customers exercising normal care—the kind described in Federal Reserve and Interagency consumer publications. Our customers see real value when the bank stands behind their payment decisions, and they understand that the fee is a source of compensation to the bank for that accommodation. Whether paper or plastic, analog or digital, wired or wireless, customers have the tools to manage their accounts and the responsibility to track their transactions. Bank overdraft accommodation is a convenience that customers who use it value and one that they can avoid if they choose by exercising common care as the vast majority of customers do every day.

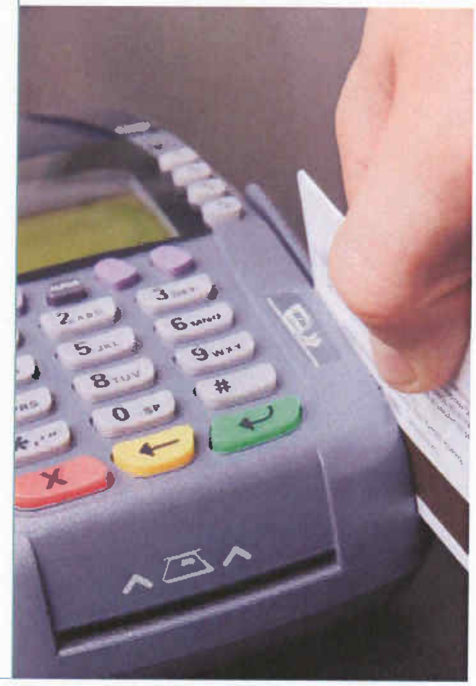
ABA urges the agencies to take special care in considering appropriate standards for this inaugural exercise of banking agency initiated FTCA Section 18(f)(1) rule-making. We ask the agencies to conclude that the banking industry's mainstream overdraft practices are not unfair to customers. We therefore recommend that any new regulatory mandates for consumer protection for debit card transactions be evaluated within the established regulatory framework for electronic transactions, funds availability, and account disclosures.

ABA appreciates the opportunity to provide our comments on this significant proposal and is prepared to provide additional information for your consideration upon request. If you have further questions, please contact Nessa Feddis at (202) 663-5433.

Sincerely,

Ed Yingling
President and CEO

Attachment to ABA comment letter.



Debit Card Danger:

Banks offer little warning and few choices as customers pay a high price for debit card overdrafts

Eric Halperin, Lisa James and Peter Smith
Center for Responsible Lending

January 25, 2007

CENTER FOR RESPONSIBLE LENDING

www.responsiblelending.org

13. Say you made a purchase and did not have enough in your checking account to cover it. Given the following choices, how would you want your bank to handle your overdraft?

N=2140

	Number	Overall Percent	Percent of those who did know	Percent with Preference
Give me an overdraft line of credit with a $5 transfer fee and a 19% annual interest rate (about $1.50 per month for a $100 overdraft)	820	38%	45%	54%
Put the overdraft on my credit card and charge me a $5 fee plus 25% annual interest (about $2 per month for a $100 overdraft)	101	5%	6%	7%
Pay the overdraft for me, charge me a $25 fee, and take the money I owe out of my next deposit	499	23%	27%	33%
Refuse to debit my account for more money than I have in it, return the check unpaid, and charge me a $25 insufficient funds fee	94	4%	5%	6%
I do not have a preference	308	14%	17%	
Don't Know	318	15%		

14. Do you or have you ever received benefits from a government source such as Social Security disability, retirement benefits, veterans' benefits, unemployment, workers compensation, or TANF (Temporary Assistance for Needy Families) cash assistance?

N=2138

	Number	Overall Percent
Yes	814	38%
No	1306	61%
Don't know	18	1%

15. Has your bank ever deducted a portion of these benefits to pay your overdraft fees?

N=814

	Number	Overall Percent	Percent Applicable
Yes	69	8%	13%
No	452	56%	87%
Not Applicable, I was not charged any overdraft fees	256	31%	
Not Applicable, I do not/did not have a bank account	13	2%	
Don't Know	24	3%	

Attachment 2

Comment Letter on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	**)**	
	)	
Rules and Regulations Implementing the	**)**	**CG Docket No. 02-278**
Telephone Consumer Protection Act of 1991	**)**	**FCC number 10-18**
	)	

COMMENTS OF THE FINANCIAL SERVICES ROUNDTABLE,
THE AMERICAN BANKERS ASSOCIATION,
AND THE CONSUMER BANKERS ASSOCIATION

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May 21, 2010

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EXECUTIVE SUMMARY

Efficient, effective communications are essential if financial institutions are to serve their customers and comply with their regulatory obligations. Fraud alerts, notices of address discrepancies, data security breach notifications, delinquency notifications and loan modification outreach, and other time-critical, non-telemarketing communications must reach large numbers of customers promptly and at reasonable cost. Only automated calling – not manual dialing by live agents – can meet these requirements in a timely and effective manner. And, as wireless service continues to replace the wireline telephone as consumers' communication method of choice, an increasing percentage of those automated calls must be placed to mobile devices.

As technology and consumer preferences change, regulation must adjust. The Commission should seek to reduce rather than increase the burdens on automated customer communications. Specifically, the Commission should decline to adopt the proposed written consent requirement for automated non-marketing calls to the very wireless numbers that customers have voluntarily provided to the callers. The proposed rule is irrelevant to the goal of harmonizing this Commission's rules with those of the Federal Trade Commission, serves no public interest purpose and overturns almost two decades of Commission guidance concerning the means by which called party consent to receive automated calls may be obtained. Rather than impose new constraints on automated calling, the Commission should confirm that businesses may place automated calls to customers' wireless contact numbers, and also should confirm that automated dialing technologies that do not generate numbers randomly or sequentially are not automatic telephone dialing systems for purposes of the Telephone Consumer Protection Act.

DISCUSSION

I. THE COMMISSION SHOULD NOT ADOPT INCREASED RESTRICTIONS ON AUTODIALED NON-MARKETING CALLS TO WIRELESS NUMBERS

The Financial Services Roundtable (the "Roundtable"),[1] the American Bankers Association ("ABA")[2] and the Consumer Bankers Association ("CBA")[3] support the goal of harmonizing this Commission's telemarketing regulations with those of the Federal Trade Commission. However, the proposed, new restrictions on autodialed and prerecorded calls to wireless telephone numbers are irrelevant to that purpose and threaten substantial harm to consumers and the economy.

A. Automated Service Calls And Text Messages Provide Critical Consumer Service And Protection Needs

Today's mobile citizenry finds value in wireless connectivity. In the 21st century, cell phones are not just conveniences; they are becoming the principal means by which people stay connected to family, friends and providers of essential goods and services.

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1 The Financial Services Roundtable is an association of financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

2 The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees.

3 The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services – banking services geared toward consumers and small businesses. 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.

Of all the institutions with which people must stay connected, their banks are among the most vital. Consumers value being connected to their banks for many purposes, including prevention of fraud and identity theft, notice of security breaches, and notice of missed payments. Automatic telephone dialing systems enable financial institutions to provide these important communications to large numbers of consumers quickly, efficiently and economically. Several examples of the direct benefits these communications provide to consumers, and that would be lost if these communications could not efficiently be made, are summarized below.

(1) Enhanced Consumer Security

With identity theft and fraud losses at all-time highs,[4] financial institutions are relentlessly pursuing fraud detection and prevention capabilities, a key component of which is autodialed calling to customers' wireline and mobile telephones, including text messaging to customers' mobile devices, to alert customers to out-of-pattern account activity and transaction requests. One large payment card issuer reports that it places 1,300,000 "suspicious activity" calls, and an additional 60,000 text messages concerning suspicious activities at point of sale, per month. Prompt action by both the customer and the institution following these incidents is crucial to limit identity theft and restore use of the card. Not surprisingly, consumers value card issuers' efforts to contact them immediately: a 2010 survey by SoundBite Communications reports that 89% of

[4] A recent Javelin Strategy & Research study reports that total annual fraud losses in 2009 were $54 billion, a 12.5% increase over 2008. The fraud incidence rate rose from 4.3% to 4.8% in one year. *2010 Identity Fraud Survey Report: Identity Theft Continues to Rise – New Accounts Fraud Drives Increase; Consumer Costs at an All-Time Low* (Javelin Strategy & Research, February, 2010).

consumers prefer to receive alerts about suspicious activity through multiple channels, including text, phone calls to mobile and residential lines, email and letter.[5]

Section 501(b) of the Gramm-Leach-Bliley Act, as well as the breach notification laws of 46 states and the District of Columbia, require financial institutions to establish response and customer notification programs following any unauthorized access to customers' personal information.[6] Autodialers and prerecorded messages permit banks to quickly contact large numbers of customers to alert them to threatened security breaches, enabling customers to monitor their accounts and take appropriate defensive action. Call automation technologies also are used to place the many calls required to help affected customers with the resolution of fraudulent charges.

(2) Reduced Consumer Fraud

For those individuals who are or may be victims of identity theft, section 605A of the Fair Credit Reporting Act provides a right to place fraud alerts on their credit reporting agency files. These alerts, like the active duty alerts filed by deployed military personnel, notify all prospective users of a consumer report that the consumer does not authorize the establishment of any new credit plan or extension of credit without verification of the consumer's identity. Further, section 605A expressly directs financial institutions to call consumers to conduct this verification:

> If a consumer requesting the alert has specified a telephone number to be used for identity verification purposes, before

[5] Andrew Johnson, "Text or Phone, Just Get the Alerts Out," *American Banker* (Apr. 6, 2010).
[6] Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338, § 501(b); *see, e.g.,* Cal. Civ. Code § 1798.29; Fla. Stat. § 817.5681; 815 ILCS § 530/10(a); NY CLS Gen. Bus. § 899-aa; N.C. Gen. Stat. § 75-65; Rev. Code Wash. § 19.255.010.

> authorizing any new credit plan or extension described in clause (i) in the name of such consumer, a user of such consumer report shall contact the customer using that telephone number.[7]

Financial institutions rely on the efficiency of autodialers and other automation technologies to contact these consumers quickly, with the goal of verifying identity and immediately accommodating the customer's request. For those customers who have provided a mobile telephone number in the fraud or active duty alert, the inability to use automated calling methods is likely to delay the bank's ability to contact the customer, resulting in embarrassment – or worse – for those customers.

(3) Consumer Protection and Fee Avoidance

Financial institutions use autodialed telephone communications to protect customers' credit and help them avoid fees. Customers may be alerted by voice or text about low account balances, overdrafts, over-limit transactions or past due accounts in time for those customers to take action and avoid late fees. These reminder calls and texts also help consumers avoid late payments, accrual of additional interest, and negative reports to credit bureaus. Autodialed calls that deliver prerecorded messages are the quickest and most effective way for these courtesy calls to be made, providing an opportunity for the customer to take timely corrective action.

In addition, financial institutions increasingly use autodialed and prerecorded message calls to reach out to consumers experiencing financial hardship. Their goal is to initiate early conversations with customers who are behind on their credit obligations to inform them of alternative payment arrangements that the bank can offer. Autodialed and prerecorded messages permit large numbers of such calls to be placed, freeing customer

[7] Fair Credit Reporting Act § 605A, 15 U.S.C. § 1681c-1.

service representatives and loss mitigation specialists to devote their time to working with individual borrowers. Banks hope that these efforts will prevent consumers from falling prey to fraudulent for-profit debt settlement companies and will prevent litigation that is in no one's interest. These efforts, when successful, also promote the soundness and stability that financial institutions are required by statute and regulation to maintain.

Finally, failure to communicate promptly with customers who have missed payments or are in financial hardship can have severe, adverse consequences for those customers. Customers that are not reached and that fail to resolve their payment issues are more likely to face repossession, foreclosure, adverse credit reports and referrals of their accounts to collection agencies. Prompt communication is a vital step in the process of avoiding these harmful consumer outcomes.

(4) More Mortgage Modifications

Financial institutions also rely upon automated calling methods to reach out to the millions of consumers who are encountering difficulty paying their mortgages. Autodialers and prerecorded messages are used to initiate contact with delinquent borrowers, to remind them to return the paperwork needed to qualify for a modification, and to notify borrowers that a modification is being delivered so the that the package will be accepted.

Avoidance of foreclosure and stabilization of the housing market are public policy priorities of the Obama Administration, implemented specifically by the Home Affordable Mortgage Program ("HAMP"), which (among other obligations) requires financial institutions to make at least four phone calls in a 30-day period to first-line borrowers who are potentially eligible for the program.[8]

(5) Better Customer Service

Financial institutions also rely upon the efficiency of autodialed and prerecorded message calling to provide other valued and important customer services. Autodialed calls often are made as a follow-up to resolve customers' service inquiries. For example, if a customer inquiry requires account research a customer service representative often completes the necessary research and places an autodialed follow-up call to the customer. Autodialed and/or prerecorded calls also are initiated to remind customers that a credit card they have requested was mailed and must be activated. Finally, autodialed and/or prerecorded calls are placed to customers who have applied for secured cards, or who have opened deposit accounts, to remind them to fund the account and/or return documents to the bank to permit the continued maintenance of the account.

(6) Service to Insurance Policyholders

All states require drivers to have automobile insurance or proof of financial responsibility, and insurers are required to give written notice 10-30 days in advance before terminating policies for failure to pay. Using an autodialer and a prerecorded message helps ensure the consumer is aware of the need to make payment in time to avoid a lapse of their auto policy, avoid late fees, and avoid driving without legally-required liability insurance.

Similarly, life insurance policies require advance written notice of cancellation. If a policy lapses for non-payment, some individuals may no longer be eligible for life

[8] *See* U.S. Department of the Treasury Supplemental Directive 10-02 (March 24, 2010).

insurance or may have to pay substantially more for that insurance. Use of the autodialed and recorded message or text messages helps avoid nonpayment cancellation of the life insurance. Finally, obtaining life insurance can be a lengthy process with extensive paperwork. Autodialers allow life insurance companies to follow-up on missing paperwork to ensure that coverage is created.

(7) Protection from Life Threatening Disasters

Many property insurance companies rely on the speed of autodialers and recorded messages to notify their customers when a catastrophe is imminent. In the event of a major catastrophe, such as a hurricane or wildfire, additional information may be provided about how and where to file a claim. Furthermore, immediately after these disasters, wireline phone use may be unavailable, claim locations may have changed and normal communications may not be operating. Similarly, autodialers and recorded messages may also be used by insurers to give information regarding the National Flood Insurance program. For example, when floods are predicted for a specific area due to excessive snowmelt or spring rains, insurers notify their existing customers that do not have flood coverage about the flood risks and the mandatory 60-day waiting periods before flood coverage is effective.

B. The Proposed Rule Will Prevent Critical Service Calls From Being Made And Will Increase The Cost Of Those Calls That Are Made

In order to place the millions of customer service calls that must be made every year, and to do so at acceptable speed, accuracy and cost, financial institutions must use the most efficient communications technologies available, including automated dialing systems and delivery of prerecorded messages.

Notably, automated dialing and prerecorded messages permit substantial cost savings; increases in those costs would likely be passed on to consumers in the rates and fees charged for mortgages, credit card accounts and other financial services. Autodialing systems also promote legal compliance. For example, to ensure compliance with the Fair Debt Collection Practices Act's prohibition against harassment or abuse, financial institutions program autodialers with restrictions on the frequency of collection calls and the hours at which those calls are placed. With these technologies, the Fair Debt Collection Practices Act's consumer protections are observed more efficiently than would be the case if the associated calling decisions were made by human agents.[9] Similarly, automated methods ensure that heavy volumes of time-critical notifications can be made while customers still have time to take the required action.

An increasing percentage of these calls must be placed to wireless devices. Notably, the percentage of customers who use mobile devices as their primary means of personal and business communication, including those who have ceased to subscribe to wireline telephone service altogether, has grown dramatically in recent years. The percentage of households that are wireless-only increased by approximately five percentage points in just 12 recent months, from 17.5 % in the first eight months of 2008 to 22.7 % of households in the first six months of 2009.[10] Not surprisingly, the

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[9] Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p. Automated calling also is used to avoid collections calls to federal disaster areas.

[10] U.S. Department of Health and Human Services, National Health Information Survey (December, 2009). The number of wireless-only households increases when the data are confined to younger Americans. Nearly one-half of adults aged 25-29 years live in

percentage of customers who furnish wireless telephone numbers as their sole or primary point of contact, when applying for accounts or making service inquiries, is equal to or exceeds this percentage. Accordingly, artificial regulatory obstacles to the normal use of these technologies for business-to-consumer communications are obstacles to the wireless revolution itself, including the goals set out in this Commission's National Broadband Plan.[11]

The existing restrictions on automated and prerecorded calls to mobile telephone numbers already complicate the task of efficient customer communication. For example, a bank that needs to send its customer a fraud alert must determine whether the contact number to which the alert will be sent is a wireline or wireless number. If the number is wireline, the call may simply be made using the most efficient method available. If the number is wireless, the call may not be made if the dialing method meets the (less than clear) statutory definition of an automatic telephone dialing system, or if the call will deliver an artificial or prerecorded voice message, unless the called party has given prior express consent to receive those calls.

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households with only wireless telephones, and approximately one-third of adults aged 30-34 live in households with wireless telephones only. *Id.*

[11] This Commission's National Broadband Plan makes wider deployment of wireless services, including the allocation of substantially more radiofrequency spectrum for use by those services, a high priority. That policy is expressly based on the critical importance of wireless services to the health of the economy. As the National Broadband Plan points out, the "contribution of wireless services to overall gross domestic product grew over 16% annually from 1992-2007 compared with less than 3% annual growth for the remainder of the economy." *Connecting America: the National Broadband Plan* (Federal Communications Commission, March, 2010) p. 75. Imposition of additional regulatory burdens on beneficial uses of wireless communications is inconsistent with the goals of the National Broadband Plan and impedes, rather than encourages, the growth of this vital sector of the U.S. economy.

In the nearly two decades since the TCPA was enacted, financial institutions have minimized the adverse impact of the autodialer restriction by integrating compliance into their day-day-day business practices. In complying with the prior express consent requirement, in particular, financial institutions have been guided by the FCC's consistent findings that: (1) prior express consent to receive an autodialed or prerecorded voice call at a mobile number may be given orally or in writing; and (2) a business may contact a customer at a mobile telephone number provided to that business by the customer.[12] Accordingly, some financial institutions have created and use application forms that ask customers to designate the numbers at which they wish to be contacted. Some financial institutions also use calling scripts in their telephone conversations with prospective and existing customers that are written to request and obtain contact numbers, including mobile numbers, at which the institutions may contact those customers. These compliance efforts have resulted in an "installed base" of millions of customer consents obtained in accordance with this Commission's guidance over nearly two decades of TCPA implementation orders. There is no evidence, in the record of proceedings before this Commission or elsewhere, that these practices have deceived or abused consumers in any way.

If the Commission replaces its longstanding guidance with the elaborate prior express consent obligations set out in the *NPRM*, financial institutions and other businesses will be faced with difficult compliance choices, all of which will have adverse consequences for the institutions and their customers. If the new rule is applied

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[12] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992) (*"1992 TCPA Order"*) ¶ 31; *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 23 FCC Rcd 559 (2008) (*"ACA Declaratory Ruling"*) ¶ 1.

retroactively, businesses must either forego important and valued communications with existing customers whose consents might not pass muster under the new rule, must incur extraordinary expense to call those existing customers manually, or must undertake an enormous, costly, and in large part futile effort to re-contact existing customers and replace consents already obtained with new consents. Even if the rule is only applied prospectively, many of the service calls that financial institutions now make will be discontinued or made by inefficient and costly manual means. Even if institutions decide to obtain consents from new customers to make automated calls under the new rules, the more burdensome consent procedure the Commission proposes will complicate, and therefore increase the cost of, the initiation and maintenance of customer relationships.

1. The Retroactive Compliance Burden

If the Commission decides to make the new requirements retroactive, financial institutions must decide how to treat the many thousands of customers who already have consented to receive calls at their wireless numbers. As a practical matter, a program of re-contacting all of these customers for the purpose of obtaining new, written consents pursuant to the required disclosure and signature requirements would be enormously expensive and would achieve only meager success.[13] Accordingly, many institutions will choose simply to eliminate many of the non-marketing communications programs they now maintain, or will continue those programs using less efficient manual methods,

[13] The efforts of telecommunications carriers to obtain "opt-in" consents under this Commission's customer proprietary network information rules suggest the cost of such an undertaking and the meagerness of the likely results. Notably, a US West campaign to obtain such consents "was only able to obtain an opt-in rate of 29 percent among residential subscribers, and at a cost of $20.66 per positive response." T. Lenard and P. Rubin, *Privacy and the Commercial Use of Personal Information: The Case of Customer Proprietary Network Information* (Progress & Freedom Foundation 2007), p. 6.

resulting in significant reductions in call volumes and significant contraction of important and valued customer communications.

The scale and cost of the retroactive compliance effort will not be reduced by use of electronic signatures. Compliance with the Electronic Signatures in Global and National Commerce (E-SIGN) Act carries with it its own compliance burdens and technical requirements that would add complexity rather than minimize burdens. Only a minority of financial institutions' customers have online accounts, and even those customers likely will make a limited response to online requests for consent. Customers that lack online accounts are not likely to visit a financial institution's website, establish their identities and select user IDs and passwords for the limited purpose of consenting to the receipt of autodialed calls at their wireless telephone numbers. For those customers, the attempt to obtain electronic consent will be a costly detour that will have to be supplemented with the mailing of physical forms, few of which will be returned.

2. The Prospective Compliance Burden

Prospective-only adoption of the proposed, new regulation also will force financial institutions to make hard choices that will be of no benefit to consumers. Financial institutions generally obtain customer contact information when an account relationship is initiated. In accordance with current Commission guidance, application forms (whether provided in paper form or online) typically require customers to provide contact numbers and generally include language to the effect that the customer consents to be contacted by the institution at any number the customer provides. Similarly, when customers apply for accounts over the telephone, the financial institutions' representatives may request a contact numbers and ask for the customer's consent to be contacted at the number provided.

The proposed rule will preclude or substantially complicate these procedures. Consents obtained over the telephone no longer will be sufficient, necessitating an additional step in the transaction for the sole purpose of obtaining the customer's consent to be contacted at a number the customer already has provided for that purpose. Similarly, application forms must be revised to include elaborate disclosure language, which apparently will have to be set out separately with a signature separate from the one the customer provides to indicate assent to the application generally.[14] Finally, lack of consumer appreciation of the range of valued customer services provided by means of autodialed and prerecorded messages may lead few to consent initially, requiring additional costly outreach efforts.

Besides the adverse impact of the proposed rule on customer application and information request procedures, the proposed requirement that businesses may not condition a transaction on the customer's consent to receive autodialed calls ensures that a non-trivial percentage of customers will not consent and will have to be contacted by manual methods. The added costs and inefficiencies of manual methods likely will force financial institutions to conclude that many of these valuable calls should not be made at all. Where calls continue to be made, reliance on outdated manual methods will degrade service, complicate regulatory compliance and increase the cost of the services that financial institutions provide.

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[14] As with the consent process for existing customers, the use of electronic signatures would be at most a partial solution to this problem, applicable only to customers who apply for accounts – or choose to do business – online.

C. There Is No Legal Or Public Interest Basis For Increased Autodialer Requirements

Given the serious harms that the proposed rule will cause to businesses, consumers and the public, its adoption could be justified only if unavoidably required by law or policy. The record is devoid of any such justification.

1. The Proposed Rule Is Not Mandated By Law

The *NPRM* devotes a single paragraph to the proposed, radical change in requirements for automated calls to wireless numbers.[15] That paragraph points to no consumer complaints, new legal developments, changes to public policy, or other sufficient reasons for such a sweeping reversal. In fact, the paragraph contains not even a citation, in the text or in a footnote, to the past Commission orders that the *NPRM* now proposes to abandon. The only rationale provided is that if "prior express consent" now will be interpreted to require written consent for prerecorded telemarketing calls to residential numbers, that phrase should have the same meaning when applied to automated non-telemarketing calls to wireless numbers.

This reasoning would be conclusive if the TCPA, the Administrative Procedure Act or other relevant authority required a particular piece of statutory language to mean the same thing wherever it appears. As the Commission's own rulemaking practices show, there is no such requirement. For example, in its Customer Proprietary Network Information ("CPNI") rules, the Commission defines the single word "approval" as requiring different actions in different circumstances, depending upon the strength of the

[15] *NPRM*, ¶ 20.

privacy interests that different approvals will affect.[16] Similarly, as discussed further below, the Commission historically has imposed different "prior express consent" requirements for automated calls to wireless numbers and for prerecorded voice telemarketing calls to residential numbers.[17] This approach is necessary and appropriate: when an agency has discretion to interpret statutory language, the agency must do so in a way that best serves the interests the statute was written to advance.[18] If the Commission takes that approach here, it will find that its longstanding guidance concerning automated calls to wireless numbers – not the proposed, new rule -- best serves the intent of Congress.

2. The Proposed Rule Would Not Advance The TCPA's Purpose

The TCPA is primarily a privacy statute, written to protect consumers from intrusive and unwanted telemarketing calls, but it also has other purposes. For example, the restrictions on automated calls to emergency and healthcare-related numbers were

[16] Section 222 of the Communications Act generally permits a carrier to use, disclose or permit access to a customer's CPNI only to provide the telecommunications service from which the information is derived or services necessary to, or used in, the provision of such service, except "with the approval of the customer." 47 U.S.C. § 222(c)(1). Recognizing that disclosures of CPNI to third parties or for marketing of non-communications services present stronger privacy issues than access, disclosure and use of CPNI by a carrier or its affiliates to market communications-related services, the Commission requires "opt-in" approval for the former and only "opt-out" approval for the latter. 47 C.F.R. § 64.2007(b). In adopting these approval requirements, the Commission quite properly exercised its discretion to interpret a statutory term differently in different circumstances, where necessary to serve the statutory purpose.

[17] *See* pp. 20-21, *infra.*

[18] "[I]t is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes." *Verizon California, Inc v. Federal Communications Commission*, 555 F.3d 270, 276 (D.C. Cir. 2009), *citing Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990), and *Weaver v. United States Information Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996).

written to protect public safety as well as privacy.[19] Similarly, the restrictions on automated calls to wireless numbers expressly were written, not only to protect privacy, but to control the shifting of telemarketers' advertising costs to consumers by the use of random and sequential generators to run mass calling campaigns.[20] This last restriction, in particular, arguably was appropriate in 1991, when wireless service was expensive, relatively rare and almost never used by consumers as their primary means of telephone communication.

In keeping with the autodialer restriction's statutory purpose, the Commission always has taken a common-sense approach to its interpretation. This is what the Commission did in 1992, when it decided that a customer's decision to provide a wireless contact number to a business constituted consent to receive calls from that business at the number provided.[21] The Commission's decision correctly balances the consumer cost and privacy interests Congress wanted to promote. A customer who provides a wireless number already has weighed the costs, in privacy and calling charges, of receiving calls from the business at that number, and has decided to incur those costs as the price of receiving the corresponding benefit. A business that acts in accordance with this decision is not intruding unexpectedly on the consumer's privacy or imposing unexpected calling costs. Accordingly, as the Commission correctly decided, the intent of the statute is satisfied by the customer's act of providing a wireless contact number to the caller.[22]

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[19] *See Rules and Regulations Implementing the Telephone Consumer Protection Act*, 18 FCC Rcd 14014 *("2003 TCPA Order")* ¶ 133 (citing S. REP. No. 102-178 at 5, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972-73 (1991).
[20] *Id.*
[21] *1992 TCPA Order*, ¶ 31.
[22] *Id.*

The Commission came to a similar common-sense decision 15 years later, when ACA International asked for a declaratory ruling on the question of autodialed collections calls to customer-provided wireless numbers. The Commission quite reasonably concluded that customers who provided wireless contact numbers in connection with an account expected collection calls concerning that account to be placed to the numbers they had provided.[23] Although the *ACA Declaratory Ruling* was specifically directed to collection calls, the underlying principle was the same one the Commission had announced in 1992: customers who provide a contact number to a business expect the business to contact them at that number.

Just as reasonably, the Commission has imposed different "prior express consent" requirements for artificial or prerecorded voice calls that are made for telemarketing purposes by a caller that does not have an existing business relationship with the called party. In this context, the Commission presently requires written consent if the called party's residential telephone number is listed on the national do-not-call registry.[24] This differential treatment of prior express consent has a common-sense basis: consumers who have provided a number to a business in connection with an existing business relationship ("EBR") can be assumed to expect calls from the business in connection with that relationship; but the act of providing a number to a business with which no such relationship exists, where the consumer already has declared his or her general intention not to accept telemarketing calls, is less likely to constitute consent to be solicited by that business. Accordingly, the Commission has imposed a more rigorous consent requirement in those cases.

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[23] *ACA Declaratory Ruling*, ¶ 10.
[24] *NPRM*, ¶¶ 13-14.

Similarly, the Commission's tentative decision, in the *NPRM*, to impose even stronger consent requirements for prerecorded telemarketing calls to residential numbers rests on an arguable basis. As the *NPRM* points out, the record of comments submitted to the Federal Trade Commission called into question the premise that consumers expect to receive prerecorded telemarketing calls from businesses on the strength of EBRs with those businesses.[25] On the basis of that record, the FTC has decided that prerecorded voice calls to consumers' residential telephone numbers should be based upon the consumers' prior express consent, regardless of the presence of an EBR, and that the consent should be in writing pursuant to clear and conspicuous disclosures and accompanied by the consumers' signatures.[26]

Based upon the comments filed with the FTC, and in order to harmonize the two agencies' rules, the Commission proposes to adopt the same regulation for telemarketers not subject to FTC jurisdiction, and to require prior express written consent even for consumers that have not listed their residential telephone numbers on the do-not-call registry.[27]

None of this, however, supports the extension of identical requirements to automated, non-telemarketing calls to wireless numbers. The record in the FTC's telemarketing proceedings does not address that question, and the reasoning on which this Commission relied in 1992 and 2008 remains as sound now as it was then. Now, as then, it is reasonable to conclude that when customers provide wireless numbers in

[25] *Id.*, ¶ 15.
[26] *Id.*
[27] *Id.*, ¶ 16.

connection with existing accounts, they expect to be contacted at those numbers for legitimate purposes connected with those accounts.

Against this background, the proposed rule is a costly, inefficient solution in search of a problem. There is no basis to suggest that a customer who gives a business a mobile contact number will be abused, as a cost-shifting matter or as a privacy matter. Indeed, banks depend upon forging strong relationships with customers, and will not risk alienating them by placing excessive or unnecessary calls.

On the statutory issue of cost shifting, giving the consumer the power to choose to be contacted inefficiently merely substitutes one form of inappropriate cost-shifting for another. The customer, by providing the wireless number, already has agreed to incur wireless charges in connection with legitimate calls from the business to which the number was provided. If the customer then refuses to consent to be contacted at that number by automated means, the customer does not avoid any cost to himself, as the call still can be placed manually. However, that decision *does* impose substantial, additional cost on the business. In the aggregate, millions of such decisions might result in useful calls not being made at all, or will increase the business's overall customer service costs. This is the reverse of the principle the autodialer rule is intended to promote – *i.e.*, that the power to make a decision should lie with the person who will bear the associated cost.[28]

There also is no reason to believe that forcing financial institutions to give their customers the option of being contacted by manual means will do anything to protect

[28] Of course, all increased costs of doing business ultimately are borne by the consumer. But, under the proposed rule, the customer will not know this when he or she decides to be contacted inefficiently.

consumer privacy. Regulatory compliance and customer needs still will require financial institutions to alert customers to unusual requests and transactions, resolve address discrepancies, alert customers to data security breaches, request missing information on account applications, and attempt to avoid late fees, adverse credit references and foreclosures by calling customers who are overdue on payments. A customer's refusal to permit automated calls to his or her wireless contact number will not necessarily prevent those communications from being made (although it might, if the compliance burden forces the financial institution to abandon some customer service calling programs), but it will require that all calls to that customer will be costlier and that some might not be made in a timely fashion.

Since the TCPA was enacted, the Commission has interpreted that statute's autodialer rule in a manner that prevents unauthorized cost-shifting and protects consumer privacy, as the statute intends. The Commission should continue to do so now, by declining to adopt the proposed amendments to its regulations.

Finally, the Commission should take this opportunity to clarify a matter that has resulted in needless – in fact, essentially frivolous – litigation against legitimate businesses. Specifically, the Commission should confirm that a customer consents to be contacted by a business at a number voluntarily provided to that business, regardless of the point in the customer relationship at which the number was provided. There is no reason, from the standpoint of a customer's intent, to distinguish between a consent given at the start of the relationship and a consent given at any point during the relationship. To the extent language in past Commission orders has given a contrary impression, that misimpression should be removed.[29]

3. The Proposed Rule Is Not Necessary For Regulatory Consistency

Under the FCC's present rules and orders, a telemarketer may make a commercial, artificial or prerecorded voice call to a residential telephone number if the calling party and called party have an established business relationship or if the caller has obtained the called party's prior express consent (which in certain circumstances may be obtained orally) to make such calls.[30] Under the Federal Trade Commission's amended Telephone Sales Rule ("TSR"), in contrast, a telemarketer subject to FTC jurisdiction may make such a marketing call only if the called party has given prior express consent in writing, even if the telemarketer and the called party have an established business relationship.[31] The Notice of Proposed Rulemaking (*NPRM*) concludes that resolution of this regulatory inconsistency is in the public interest.[32]

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[29] Apparently, some plaintiffs have placed undue emphasis on the FCC's statement, in the *ACA Declaratory Ruling,* that "prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, *and that such number was provided during the transaction that resulted in the debt owed." ACA Declaratory Ruling,* ¶ 10 (*emphasis added*). The apparent argument of these plaintiffs is that a number provided voluntarily by a customer to a business at a later time in the customer relationship does not constitute prior express consent. This interpretation of the Commission's rule is without merit, and is contradicted by the FCC's more general statement, in the *1992 TCPA Order,* that businesses "will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached." *1992 TCPA Order,* ¶ 31.

[30] 47 C.F.R. § 64.1200(a)(2)(iv); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, Second Order on Recon., 20 FCC Rcd 3788, 3804, ¶ 40 (2005).

[31] *Telemarketing Sales Act, Final Rule,* Federal Trade Commission, 73 Fed. Reg. 51164-01 (2008); *see also* http://www.ftc.gov/os/fedreg/2008/august/080829.tsr.pdf.

[32] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278 (Notice of Proposed Rulemaking rel. Jan. 22, 2010) (*"NPRM"*).

However, because the FTC's TSR applies only to telemarketing, the goal announced in the *NPRM* will be sufficiently served by adoption of the proposed express written consent and related requirements for prerecorded voice telemarketing calls.[33] No change is required to the FCC's present treatment of collections calls, fraud alerts and other non-telemarketing communications that are not subject to the TSR. Notably, regulatory consistency does not require the Commission to decide, as it suggests in paragraph 20 of the *NPRM,* that the more burdensome prior written consent obligations it proposes to extend to prerecorded telemarketing calls also should extend to autodialed or prerecorded voice calls that are placed to consumers' mobile devices for non-marketing purposes.[34] Adoption of this proposal will exacerbate rather than reduce the present differences in the regulatory treatment of calls to wireline and mobile numbers, which already are anachronisms in the age of the wireless revolution.

II. THE COMMISSION SHOULD CLARIFY ITS CLASSIFICATION OF DEVICES AS AUTOMATIC TELEPHONE DIALING SYSTEMS

The pending *NPRM* offers the Commission an opportunity to revisit issues that continue to complicate compliance with the TCPA. Perhaps the most critical of these issues is the confusion surrounding the kinds of systems and devices that constitute

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[33] In addition to adoption of the prior express written consent requirement and elimination of the established business relationship exception, the *NPRM* tentatively concludes that the FCC's rules on artificial or prerecorded voice calls to residential numbers should be revised to state: (1) that health care related calls subject to the Health Insurance Portability and Accountability Act are exempted; (2) that such calls must include an automated, interactive mechanism by which a consumer may opt out of receiving future prerecorded messages from a seller or telemarketer; and (3) that the maximum percentage of live sales calls that a telemarketer may drop or abandon will be calculated on a "per campaign" basis. *NPRM* ¶¶ 33-36, 37-43, 44-47. The commenters take no position on these proposals.

[34] *NPRM*, ¶ 20.

automatic telephone dialing systems ("autodialers") for TCPA purposes. The Commission should align its interpretation, which now is both obscure and overbroad, with technological and business reality.

That effort begins with the statute, which defines an automatic telephone dialing system as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[35] The TCPA's autodialer restriction incorporates this definition when it prohibits certain calls "using any automatic telephone dialing system . . ."[36]

The intention of the autodialer definition is clear: it is intended to control the use of technologies that do not merely facilitate dialing of numbers stored in databases compiled for a specific purpose (such as lists of numbers of a business's existing customers), but that create numbers at random or in sequence. Such devices are ideal for contacting large numbers of persons with whom the caller has no relationship, and that the caller has no reason to believe might be interested in the subject of the call. Any interpretation of the definition that ignores this "random or sequential number generator" criterion misses the entire point of the definition.

Unfortunately, the Commission has committed this very error by sweeping devices into the definition that merely automate the dialing of calls contained in databases of numbers that were not generated by a random or sequential algorithm. Notably, in 2003 the Commission made the following statement:

> [I[n order to be considered an "automatic telephone dialing system," the equipment need only have the "capacity to store or produce telephone numbers." It is clear from the legislative history that

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[35] 47 U.S.C. § 227(a)(1).
[36] *Id.* § 227(b)(1)(A).

> Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies . . . Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of "automated telephone dialing equipment" and the intent of Congress.[37]

By adopting this reading of the statutory definition, the Commission substituted vague observations in the legislative history for the law's plain language, and adopted an interpretation of "automatic telephone dialing system" that ignores the narrow statutory definition in favor of a definition that is essentially boundless.

The consequences of the Commission's approach have grown more harmful as technology has advanced. Notably, the "capacity to store or produce telephone numbers" has become ubiquitous across a wide range of business and consumer products and services. Even a modern smartphone, of the kind carried in millions of pockets and purses, has this capacity. Similarly, businesses commonly use equipment that includes a wide range of storage and dialing capacities, not all of which might be used in a particular calling campaign. If any use of a device with this latent "capacity" invokes the autodialer restriction, then businesses and ordinary consumers are unknowingly violating that restriction every day.

Also, automated communications technologies have advanced significantly since 2003 in the purposes for which they can be used. Autodialers now operate in conjunction with sophisticated software to help ensure compliance with call abandonment rules, federal, state and company-specific do-not-call lists, calling hour restrictions, restrictions on calling during holidays and emergencies, and to meet TCPA record-keeping requirements and avoid misdialed numbers. As the Commission pointed out in its *2003*

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[37] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (Report and Order 2003) ¶ 133.

TCPA Order, Congress anticipated the need for the FCC "to consider changes in technologies" in its interpretation of the statutory restrictions.[38] If the Commission follows that guidance in the present proceeding, it will confirm that a prohibition against use of automated dialing systems to make otherwise lawful calls to mobile devices no longer serves the public interest.

The Commission has an obligation to provide guidance with which affected parties can comply, and to avoid guidance that prevents beneficial applications of technology that are consistent with the plain language of the law. Accordingly, the order adopted pursuant to the *NPRM* should confirm what the TCPA says: *i.e.*, that the autodialer restriction: (1) is directed at equipment with the capacity, not just to store or produce telephone numbers, but to store or produce telephone numbers using a random or sequential number generator and to dial such numbers; and (2) that the autodialer restriction is triggered, not just when that latent capacity is present, but when the random or sequential number generator is used to place calls.

CONCLUSION

The proposed, new express prior consent obligations for automated calls to mobile telephone numbers serve no public-interest purpose and will interfere drastically with the ability of financial institutions to engage in vital communications with customers. The commenters urge the Commission to confirm its existing guidance on the question of prior express consent to place non-telemarketing calls using autodialers and artificial or prerecorded voice messages, and to confirm that common and beneficial call-

[38] *2003 TCPA Order*, ¶ 132.

automation systems that do not generate called numbers on a random or sequential basis may be used to place such calls.

Respectfully submitted,

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May 21, 2010

Attachment 3

Moebs Services Report

Who Uses Overdrafts?

1.4 Billion errors out of 77 Billion total checking transactions annually are how many times some Americans make errors on their checking accounts every year. In 2008 this cost checking account users $36.7 Billion in fees at a median cost of $26 per overdrawn transaction. A bit over half of the 130 Million checking accounts used by American consumers incur one of these errors resulting in fees. Interestingly, about 9% of those who make these account errors pay about 90% of the fees.

Who are these people?

Bankers, analysts, consumer groups, academia, and numerous other researchers continue to seek the answer to who overdraws their checking accounts. The closest and most accurate have been banks and credit unions who have studied their checking account consumers. Yet financial institutions have looked at only their markets. The investigation of this behavior has not been national in scope, at least accurately or conclusively.

Moebs $ervices has collected over 1,000,000 checking account users in all four major regions of the country from banks and credit unions along with their demographic information. We examined this extensive data set to find what demographic features or financial characteristics correlate to having overdraft behavior.

While numerous factors were examined, to achieve a high degree of correlation, all but one failed to achieve an acceptably high degree of precision to use as a decision factor. This high precision and correlation factor was FICO score, or what is commonly called credit score. The lower the FICO score the higher the incidence of overdraft behavior and the more overdrafts.

Equally important to this finding was the determination of all other factors having no importance to overdraft behavior. Gender, age, occupation, income, and wealth were found not to correlate to overdraft behavior. It truly can be concluded those doing overdrafts are unrelated to specific groups: men or women, senior citizens or students, military personnel or physicians, rich or poor, and high or low wealth.

The FICO score is the driving empirical piece of data used in the patented (12/684,291) Debit $coring process and algorithm of Moebs $ervices, Inc. which produces a consumer friendly and institutionally satisfying approach to the use of overdrafts without bias or manipulation.