



JAMES D. MACPHEE  
*Chairman*  
SALVATORE MARRANCA  
*Chairman-Elect*  
JEFFREY L. GERHART  
*Vice Chairman*  
JACK A. HARTINGS  
*Treasurer*  
WAYNE A. COTTLE  
*Secretary*  
R. MICHAEL MENZIES SR.  
*Immediate Past Chairman*

CAMDEN R. FINE  
President and CEO

June 28, 2010

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

Re: Proposed Supplemental Guidance on Overdraft Protection Programs  
(Supplemental Guidance) to update the Guidance on Overdraft Protection  
Programs previously issued on February 18, 2005

Dear Sir or Madam:

The Independent Community Bankers of America (ICBA)<sup>1</sup> appreciates the opportunity to comment on the Office of Thrift Supervision (OTS) proposed Supplemental Guidance to address overdraft protection programs.

### **Background**

The OTS previously issued Guidance on Overdraft Protection Programs (Overdraft Guidance) Feb. 18, 2005 (70 FR 8428). The guidance explained the agency's concerns about how overdraft protection programs had been implemented and suggested best practices for financial institutions to follow. The Office of the Comptroller of the Currency (OCC), the Federal Reserve Board of Governors (Federal Reserve), the Federal Deposit Insurance Corporation (FDIC), and the

---

<sup>1</sup>*The Independent Community Bankers of America represents nearly 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.*

*With nearly 5,000 members, representing more than 20,000 locations nationwide and employing nearly 300,000 Americans, ICBA members hold \$1 trillion in assets, \$800 billion in deposits, and \$700 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at [www.icba.org](http://www.icba.org).*

National Credit Union Administration (NCUA) followed suit, issuing similar guidance on Feb. 24, 2005, with many of the same suggested best practices (70 FR 9127).

The OTS proposed Supplemental Guidance, if adopted, would convert many of the current best practices recommendations to requirements with failure to comply resulting in violations of the Federal Trade Commission (FTC Act) prohibition against unfair or deceptive acts or practices. This guidance is proposed to supplement, rather than replace, the OTS existing guidance. The OTS has stated that savings associations should continue to provide overdraft protection in conformity with the risk management advice contained in the Overdraft Guidance.

Most of the best practices contained in the original Overdraft Guidance would be updated by this proposed Supplemental Guidance. These provisions deal with marketing and consumer communications, and program features and operation. The proposed Supplemental Guidance also addresses the practice of informing consumers when access to overdraft services will, or has been, reinstated after suspension – a provision not addressed in the original Overdraft Guidance.

### **ICBA Position**

While ICBA understands the OTS objective of protecting consumers from unfair or deceptive acts or practices, we strongly urge the OTS to table this proposal for several reasons.

First, we do not believe it is prudent or fair for the OTS to proceed with finalizing the proposed Supplemental Guidance given the new regulatory requirements governing overdraft protection imposed by amendments to Regulation DD (Truth in Savings) and Regulation E (Electronic Fund Transfers).

The Regulation DD amendments, effective January 1, 2010, add requirements designed to ensure consumers receive disclosures regarding the aggregate total of all overdraft and return fees for the statement period and year-to-date. The amendments also improve consumer balance information provided via automated systems by prohibiting banks from including in the balance amount funds available from overdraft coverage services unless there is prominent disclosure of the amount attributable to overdraft coverage funds.

The industry is in the final stages of implementing the Regulation E rule, effective July 1, 2010, which prohibits financial institutions from charging consumers (both existing and new account holders) a fee for paying overdrafts on ATM and non-recurring Point-of-Sale (POS) debits unless the consumer affirmatively consents, or opts in to overdraft coverage for these transactions.

Financial institutions of all sizes and charter types have spent countless manpower hours and dollars to comply with the new rules. Now is not the time to

subject financial institutions to additional regulatory uncertainty and burden as the financial services industry makes good faith efforts to provide overdraft coverage that is in compliance with the new rules.

Instead of proceeding with additional regulatory requirements, ICBA strongly urges the OTS to institute an educational program to raise banker awareness regarding consumer complaints and examiner findings related to the offering of overdraft coverage programs.

Second, the OTS should not proceed with finalizing the proposed Supplemental Guidance as such action would create a bifurcated regulatory framework for overdraft services – one framework for savings associations and one for the remainder of the industry. It would be gravely unfair to subject one segment of the industry to new and additional requirements.

Third, the industry and the banking agencies are operating in a time of extreme uncertainty given the impending enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 which establishes a new regulatory framework for savings associations and consumer protection by merging the OTS and the OCC and forming the Consumer Financial Protection Bureau. ICBA strongly urges the OTS to take no additional action on this proposal to provide some certainty regarding the regulation of overdraft services as the OCC and FDIC determine the regulations that each will enforce following the transfer, and to provide the Consumer Financial Protection Bureau the opportunity to organize and perform an assessment of the industry's compliance with existing regulatory requirements.

Fourth, ICBA is gravely concerned that elements in this proposed Supplemental Guidance will do a great disservice to consumers. The vast majority of community banks provide overdraft coverage – either automated or on an ad hoc basis, to their customers. Those that offer the service report that it is one that customers want and appreciate and regard it as an extension of providing the highest level of service. These services offer consumers the assurance that an accidental overdraft will not result in a bill being returned unpaid or a merchant-imposed fee being levied.

If regulatory barriers and requirements become too burdensome, community banks will discontinue these services. And, as a result, would be more likely to reject a check or transaction, exposing consumers to fees far greater than overdraft fees currently imposed by community banks.

Again, ICBA strongly urges the OTS to table this proposal for the reasons cited above.

## Summary of ICBA Comments

Below, please find a summary of our general comments in the unfortunate event the OTS nonetheless proceeds with adoption of the proposed Supplemental Guidance.

- ICBA strongly urges the OTS to understand and factor in the distinction between the overdraft coverage practices of community banks and larger financial institutions. In doing so, ICBA strongly urges the OTS to exempt ad hoc or non-automated overdraft coverage services from the final Supplemental Guidance.
- ICBA strongly urges the OTS to seek input about operational and other technical issues from community banks before taking additional steps to finalize the proposed Supplemental Guidance.
- ICBA urges the OTS to conduct extensive consumer testing on the necessity for further guidance relating to overdraft protection services. Consumer testing will better enable the OTS to develop best practices that are beneficial to consumers.
- ICBA strongly urges the OTS to make the Supplemental Guidance more consistent with the format of the previous 2005 Guidance, and to communicate the additional and amended best practices as actual practices, and not requirements under the FTC Act or the OTS Advertising Rule. If this is not done, the OTS must provide greater specificity for any stated practices that, if violated, would be expressly deemed to be violations of the FTC Act or the OTS Advertising Rule.
- ICBA strongly urges the OTS to apply the Supplemental Guidance only to financial institutions that actively promote overdraft protection programs, and not to financial institutions that merely provide automated or ad hoc overdraft protection as a courtesy service to their customers. If the OTS wishes to address overdraft programs that are not promoted to customers, then ICBA urges the OTS to draft a separate guidance or regulation that is not a supplement to the 2005 Guidance.
- ICBA strongly urges the OTS to ensure that the Supplemental Guidance does not impede financial institutions' ability to provide overdraft coverage services to their customers. If community banks are forced to abandon or significantly alter these services due to regulatory burden and the inability to reduce the commensurate risk, the result could lead more consumers into becoming unbanked or relying on other products such as prepaid debit cards and check cashing services, which have higher fees and foster unsound financial habits.

- ICBA recommends elimination of the requirement that financial institutions provide information about alternative overdraft services as the Regulation E rule already requires this and redundant guidance would create unnecessary confusion.
- ICBA strongly opposes the proposed extension of consumer choice to checks and ACH. Extending the opt-in to checks and ACH would be detrimental to consumers as both forms of payment are used primarily for recurring payments such as mortgage and utility payments. Return checks and ACH payments are costly to the consumer because the merchant and biller charge return item fees.
- ICBA vehemently opposes any efforts to fix prices for overdraft fees which are priced to protect financial institutions and as a deterrent to encourage consumers to engage in more financially-responsible practices.
- ICBA strongly opposes the proposed best practice of explaining the impact of transaction-clearing policies because it fails to take into account that many financial institutions also manually intervene to review overdrafts and to decide which checks or other debit transactions to pay first based on their specific experience with a customer.
- ICBA urges the OTS to clarify that “technologically feasible” refers to the feasibility of that particular financial institution, and not the banking industry as a whole with regard to prompt notification of overdraft protection program usage.
- ICBA requests that transaction-clearing practices be written to allow financial institutions to manually, on a customer-by-customer basis, change transaction clearing policies at the request of the customer or for the customer’s benefit.
- ICBA requests the OTS incorporate ICBA comments regarding specific overdraft practices. Please reference our summary comments on pages 9 and 10.

ICBA comments are addressed in greater detail below.

### The Business of Community Banks.

If the OTS deems it appropriate to finalize the proposed Supplemental Guidance, ICBA strongly urges the OTS to understand and factor in the distinction between the overdraft coverage practices of community banks and larger financial institutions.

Many community banks offer overdraft services that are not automated – meaning that overdrafts are reviewed on an ad hoc basis by financial institution staff to determine which overdrafts should be paid or returned the next business day. This review is done as a customer service and is based on knowledge of the individual customer. It is common for community banks to contact customers to discuss overdrafts and ascertain when customers are able to make deposits. In most instances, this is widely appreciated by community banks’ customers who avoid the embarrassment of a returned check, costly late fees or merchant returned check fees, and possibly the cancellation of a valuable service or contract (e.g. utility or insurance).

ICBA understands the OTS concern that some financial institutions may be using overdraft protection as a way to generate higher fees and revenue for the financial institution -- often at the customer’s expense. This is not, however, a practice of community banks whose business model is predicated on personalized customer service tailored to their customers’ needs. If community banks were to engage in “price-gouging” tactics, community banks would have greater difficulty doing business in their communities.

#### Industry Outreach in Developing Supplemental Guidance.

ICBA strongly urges the OTS to seek input about operational and other technical issues from community banks before taking additional steps to finalize the proposed Supplemental Guidance. While we acknowledge the importance of reviewing comment letters and consumer complaint data when writing rules and guidance, we are concerned that there was not enough industry outreach conducted, particularly to community banks, when developing the proposed Supplemental Guidance. Industry outreach to financial institutions is especially important for this proposed Supplemental Guidance given that many of the current best practice recommendations would become requirements with failure to comply resulting in violations of the FTC Act and OTS Advertising Rules.

Given the significant impact these rules will have on many financial institutions, ICBA strongly encourages the OTS to conduct industry outreach meetings throughout the country to engage financial institutions of all sizes in discussions about the impact this guidance would have on the banking business.

ICBA has serious concerns that these dramatic requirements, if finalized without a thorough knowledge of community bank business practices, will result in excessive regulatory burden for community banks and will force many to stop providing overdraft coverage and return checks or other debit transactions with insufficient funds to cover the transactions.

While some consumers may have paid excessive overdraft fees at their larger financial institutions, our members tell us that overdraft coverage -- whether

automated or ad hoc—is well-received by their customers. This consumer perspective is not represented in agency complaint data, confirming the need for nationwide industry outreach for a more accurate picture of how this service is administered and how much it can help consumers.

Furthermore, ICBA welcomes the opportunity to meet with OTS staff to discuss our comments in more detail, or alternatively, to organize a meeting in Washington with community bankers and OTS staff so that our members can share their specific experiences with providing overdraft coverage and the operational difficulties and compliance costs related the proposed Supplemental Guidance.

Consumer testing should be conducted before the Supplemental Guidance is finalized.

The provisions addressed in the proposed Supplemental Guidance are quite extensive and will pose significant costs and operational changes for financial institutions.

Throughout the proposed Supplemental Guidance, the OTS cites the FDIC Study of Bank Overdraft Programs (FDIC Study) as justification for many of the changes. However, there is no evidence that any consumer testing regarding the use and preference of overdraft protection was conducted. Information regarding consumers' understanding, usage and value of overdraft service is vital to developing effective and sound consumer protections. If these provisions were merely best practices or recommendations offered by the OTS based on the FDIC Study or the agency's field experience during examinations, it may be less important that extensive consumer testing be conducted.

The Federal Reserve conducted this type of extensive consumer testing when it developed the Regulation Z amendments regarding credit card account disclosures, and is also conducting extensive consumer testing as it develops Regulation Z amendments regarding loans secured by dwellings. Given the extensive changes to the regulatory framework governing overdraft services since the issuance of the 2005 Guidance, ICBA believes it is very necessary that similar consumer testing be conducted by the OTS and ICBA urges such before final Supplemental Guidance is published.

Further specificity must be provided if provisions will violate the FTC Act or the OTS Advertising Rule.

The OTS specified that this proposed Supplemental Guidance is designed to complement the Overdraft Guidance published by the financial services agencies in 2005. The 2005 Guidance provided an explanation of the potential legal risks associated with the irresponsible marketing and operation of overdraft protection programs and also provided best practices that financial institutions should take

into consideration, particularly with regard to promoted overdraft protection programs.

These best practices were written very broadly as a guide for financial institutions, and were not legal requirements imposed by the Guidance. Unlike the OTS proposed Supplemental Guidance, the 2005 Guidance did not explicitly state that violation of the best practices would be deemed a violation of the FTC Act or the OTS Advertising Rule.

ICBA strongly urges the OTS to make the Supplemental Guidance more consistent with the format of the previous 2005 Guidance, and to communicate the additional and amended best practices as actual practices, and not requirements under the FTC Act or the OTS Advertising Rule.

If the OTS wants to require these practices under law, the requirements must be written more specifically so that financial institutions have guidance on how to comply. Compliance for financial institutions will be unattainable under the current structure of the proposed Supplemental Guidance. Also, examiners will have little guidance in how to examine financial institutions for violations, allowing too much subjectivity into the examination process, and putting financial institutions on an unlevel playing field.

The proposed Supplemental Guidance should only apply to financial institutions that actively promote overdraft protection programs.

The proposed Supplemental Guidance, which is intended to complement the 2005 Guidance, should remain consistent with the 2005 Guidance and only apply to financial institutions that actively promote their overdraft protection programs. As the 2005 Guidance articulated, the financial services agencies were not concerned with overdraft protection programs that were ad hoc or automated because such services were not promoted by financial institutions. The agencies expressly stated that the purpose of the 2005 Guidance and best practices was to address the actively promoted overdraft protection programs, while acknowledging that the best practices “may also” be useful for other methods of covering overdrafts.

ICBA strongly urges the OTS to clarify in the Supplemental Guidance that the best practices and requirements are written for institutions that actively promote overdraft protection programs. If the Supplemental Guidance is designed to complement the 2005 Guidance, then this consistency must be maintained for clarity. If the OTS wishes to address overdraft protection programs that are not promoted to consumers, then ICBA urges the OTS to draft a separate guidance or regulation that is not a supplement to the 2005 Guidance.



### Effect on the Unbanked.

ICBA understands that the intent of the OTS is to provide greater protections to consumers by further regulating fees. This is clearly being done to address the few cases that have resonated with Congress and the federal agencies regarding consumers being charged excessive fees. ICBA understands the need to address this concern, but, implores the OTS to recognize that community banks do not engage in these types of practices with their customers because to do so would contradict their business model of preserving customer relationships.

Nevertheless, a great concern ICBA has with this proposed Supplemental Guidance as currently drafted is that it will make it more difficult, especially for community banks, to provide overdraft services, including overdraft protection on checks, to their customers and will lead to the complete elimination of this customer service. As a result, consumers will incur returned-item fees as well as higher merchant fees and any merchant late fees for late payments resulting in untimely payments due to returned items. The lack of this customer service will lead more consumers to become unbanked or to rely on other products such as prepaid debit cards which have higher fees and foster unbanked habits. If the OTS and the other financial services agencies want to encourage greater financial literacy among consumers, it should be their goal to ensure that financial institutions can provide services to their customers without extensive regulatory burdens. This proposed Supplemental Guidance and the subjectivity with which it is written would only further discourage financial institutions from providing any overdraft protection services, which will greatly disadvantage their customers.

ICBA strongly urges the OTS to ensure that the Supplemental Guidance does not impede financial institutions' ability to provide overdraft coverage services to their customers. If community banks are forced to abandon or significantly alter these services due to regulatory burden and the inability to reduce the commensurate risk, the result could lead more consumers into becoming unbanked or relying on other products such as prepaid debit cards and check cashing services, which have higher fees and foster unsound financial habits.

ICBA is also concerned that by increasing the risk related to overdrafts would result in financial institutions revising their account opening policies to be more stringent to mitigate this increased risk. Such standards would result in the unintended consequence of increasing the amount of unbanked consumers and forcing them to rely on costly services such as debit cards and check cashing services.

### **Comments on Specific Overdraft Practices**

Below, please find a summary of our comments on specific overdraft practices covering marketing and consumer communications and program features and operation.

- *Fairly represent overdraft protection programs.* There must be greater specificity as to how to comply with this provision, especially since the violation would be deemed violation of the FTC Act.
- *Provide information about alternatives when they are offered.* Given the Regulation E rule adopted by the Federal Reserve in November 2009, the OTS should withdraw this redundant provision to lessen industry confusion and simplify compliance.
- *Distinguish overdraft protection programs from “free” account features.* ICBA urges the OTS to withdraw this unnecessary and difficult requirement. If the OTS chooses to include this provision, it must be written with more clarity so that financial institutions can effectively comply.
- *Clarify that fees will reduce the amount of overdraft protection provided.* The OTS should make clear that this provision does not apply to ad hoc overdraft coverage not tied to a particular program.
- *Demonstrate when multiple fees will be charged.* The OTS should clarify how and when this information should be disclosed to the consumer.
- *Explain the impact of transaction-clearing policies.* ICBA strongly opposes this requirement as it ignores that for ad hoc programs there is not a formal transaction-clearing policy that is always applied regarding the order that overdrafts should be paid due to manual staff review and intervention.
- *Promptly notify consumers of overdraft protection program usage each time used.* ICBA urges the OTS to provide greater specificity as to how this requirement should be complied with, since failure to comply with this requirement would be a violation of the FTC Act and the OTS Advertising Rule. ICBA also urges the OTS to clarify that “technologically feasible” refers to the feasibility of that particular financial institutions, and not the feasibility among the banking industry.
- *Inform consumers when access to overdraft services will be or has been reinstated after suspension.* ICBA urges the OTS to provide greater clarity regarding the type of notification required at the time of suspension, at the time of reinstatement and whether financial institutions could instead specify in the circumstances in account opening disclosures.
- *Provide consumer choice.* ICBA is strongly opposed to the extension of consumer choice to checks and ACH and urges the OTS to delete this provision from the Supplemental Guidance.

- *Reasonably limit aggregate overdraft fees.* ICBA urges the OTS to explicitly state that this practice only applies to financial institutions that actively promote their overdraft protection programs. ICBA vehemently opposes any agency efforts to price-fix overdraft fees.
- *Do not manipulate transaction-clearing rules.* This practice should be written to allow financial institutions to, on a customer- by customer basis, change whatever transaction clearing policy they use at the request of the customer or if it would benefit the customer.

ICBA comments regarding specific overdraft practices are addressed in greater detail below.

Fairly represent overdraft protection programs.

The proposed Supplemental Guidance states that for customers who have experienced financial difficulties, savings associations 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. The example provided is that 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. The failure to provide these consumers with fee information would violate the FTC Act prohibition against deceptive practices and the OTS Advertising Rule.

*ICBA Comments:*

While ICBA understands that some financial institutions, particularly larger national institutions, have engaged in deceptive marketing practices, we have concerns with the lack of specificity with this best practice, especially given that non-adherence would be deemed a violation of the FTC Act. What would be considered “significant overdraft fees,” for example? Even financial institutions that charge overdraft protection fees of around \$25 - \$35 are minimal compared to the merchant fees or late fees consumers would face for returned checks. Financial institutions must charge some fees to cover overdrafts as a means of managing the risk related to overdrafts and also as a deterrent so that consumers understand that overdrawing their account should be taken seriously and should be avoided.

Provide information about alternatives when they are offered.

The proposed Supplemental Guidance recommends that institutions provide information about other overdraft services such as overdraft protection through linked accounts or lines of credit, or small dollar loans.

*ICBA Comments:*

The Regulation E rule adopted by the Board in November 2009 requires financial institutions to provide consumers a separate disclosure and consent notice in writing, or if the consumer agrees, electronically, containing a description of all overdraft services offered by the institution, such as credit lines and transfers from another account. We, therefore, request the OTS withdraw this redundant provision to lessen confusion and simplify compliance.

Distinguish overdraft protection programs from “free” account features.

The proposed Supplemental Guidance states that it 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. The proposed Supplemental Guidance states this is particularly true when consumers have been automatically enrolled in programs that charge a significant fee for each overdrawn transaction and that these circumstances would violate the FTC Act and OTS Advertising Rule.

*ICBA Comments:*

ICBA urges the OTS to withdraw this unnecessary and difficult requirement. Regulation DD (Truth in Savings) provisions require the disclosure of all fees related to the account, including overdraft fees, and the Regulation DD amendments effective January 1, 2010, require periodic statements to disclose the aggregate total of all overdrafts and returned items fees for the statement period and year-to-date.

This practice should not be a violation of the FTC Act and the OTS Advertising Rule because it ignores the fact that the overdraft protection fee may very likely be less costly than a returned check which would generate a returned item fee as well as any merchant or other penalty fees.

Furthermore, for ad hoc programs, consumers are not automatically enrolled in a specific program; rather the financial institution may, on some occasions, pay a check or other debit transaction and charge the consumer a fee for this service as opposed to just returning the item. Often, this is done at the consumer’s request after he or she has been contacted by the financial institution. These transactions are not typical of the account, and institutions should not be required to disclose the fee for each overdraft of this type in their advertisements.

The proposed Supplemental Guidance states that marketing cannot “focus on account features that are ‘free’ or inexpensive” unless the cost of each overdraft transaction is also stated. This provision is written very broadly and it is unclear how a financial institution would comply with this requirement. For example, while the term “free” is clear and understandable, financial institutions would not know how to interpret “inexpensive.” Also, in the requirement that the marketing cannot

“focus on account features that are free or inexpensive,” the meaning of “focus” is unclear. These provisions must be written more clearly, especially since they are violations of the FTC Act and OTS Advertising Rule. As currently drafted, it is unclear how financial institutions would comply.

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

The proposed Supplemental Guidance states that associations must alert consumers that the fees charged for covering overdrafts will be subtracted from the overdraft protection limit disclosed. Failure to explain the treatment of such fees would violate the FTC Act and the OTS Advertising Rule.

*ICBA Comments:*

ICBA recommends the Supplemental Guidance make clear that this provision does not apply to ad hoc overdraft coverage services since these services do not generally have pre-determined overdraft limits.

Demonstrate when multiple fees will be charged.

The proposed Supplemental Guidance states that savings associations promoting overdraft protection programs must disclose that more than one overdraft fee may be charged against the account each day, depending on the number of items presented for withdrawal from the consumer’s account. The proposed Supplemental Guidance further states that omitting such information is deceptive, whether a savings association promotes overdraft protection, or not, and would violate the FTC Act and OTS Advertising Rule.

*ICBA Comments:*

If this provision is to be a requirement for institutions promoting overdraft services, it is unclear where and how this information should be disclosed to the consumer, as the provision is currently worded. For example, would this be a required disclosure at account opening? At the time of the transaction? Or, on the periodic statement? It is also unclear whether this disclosure would be a verbal, written or in-person requirement. ICBA recommends the OTS clarify how and when this information should be disclosed to consumers otherwise financial institutions will have no way of knowing if they are in compliance and could risk running afoul of the FTC Act and the OTS Advertising Rule.

Explain the impact of transaction-clearing policies.

The proposed Supplemental Guidance states that not explaining that transactions may not be processed in the order they occur, and that the order in which transactions are processed and cleared can affect the total amount of

overdraft fees incurred by a consumer, would be deceptive and in violation of the FTC Act and OTS Advertising Rules.

*ICBA Comments:*

ICBA strongly opposes this requirement. This provision definitely should not be a requirement for institutions that cover overdrafts on an ad hoc basis because in these instances there is no formal process of when and how overdrafts would be covered. In the instance of community bank ad hoc programs, the way in which they may cover an overdraft would depend on the typical monthly transaction activity of that specific customer.

A community bank that offers overdraft coverage on an ad hoc basis may typically pay transactions low to high in order to avoid the customer incurring more than one overdraft fee, but may make an exception to this policy by paying a higher mortgage payment first to protect the customer from the repercussions of a returned check for such a significant payment. Often, these decisions are made by the community banks after they have contacted the consumer and received direction from the consumer. Therefore, for these types of ad hoc programs there is not a formal policy that is always applied regarding the order that overdrafts should be paid.

In addition, for some financial institutions that offer an automated overdraft protection service, there usually is a formal policy of how items are to be paid, i.e., largest to smallest or smallest to largest. Community banks with automated overdraft protection services will oftentimes still review the overdrafts, and if there is a large or significant check returned unpaid, they will contact the customer to ask if he/she would rather have this check paid over other items. Again, this manual intervention is typical for community banks because they have closer relationships with their customers and have a better understanding of their banking habits than the larger, less-personal financial institutions. This provision does not address this type of manual intervention in the transaction clearing process, and should therefore not be included in the final Supplemental Guidance.

Furthermore, the provision states that this omission is material because it may affect a consumer's decision about when to engage in transactions to minimize or avoid overdraft fees. This statement assumes that consumers would have the ability to manipulate their depository transactions in a way that they could incur fewer overdraft fees depending on how and when their payments were made. In reality, consumers have little control over when their payments will be processed once the payments are authorized and executed. For example, it would be very difficult for a consumer to determine when a check written would be processed – it could be the same day or several days or weeks later. Even electronic transactions are not all processed on a real-time basis. Therefore, the OTS requirement for providing this explanation is flawed because such a disclosure may not achieve the desired result.

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

The proposed Supplemental Guidance states that the failure to promptly notify consumers each time the overdraft protection program is used, including failing to provide a consumer with the information necessary to return the account to a positive balance, is deceptive. Consequently, such omissions would violate the FTC Act and the OTS Advertising Rule. The proposed Supplemental Guidance also states that where technologically feasible, real-time notification should be provided.

*ICBA Comments:*

Community banks automatically provide written notification anytime there is an account overdraft regardless of the type of overdraft coverage program – ad hoc, automated, transfers or credit lines. Notices contain the amount of the overdraft, the date of the overdraft, any fees, and the negative account balance which includes the overdraft amount.

As with most of the other provisions included in this proposed Supplemental Guidance, we urge the OTS to provide greater specificity as to how this requirement should be complied with, since failure to adhere to with this requirement would be a violation of the FTC Act and the OTS Advertising Rule. Is notification required within hours, a day or several days? Is there a safe harbor?

And what is meant by the statement that institutions must provide a consumer with “the information necessary to return the account to a positive balance.” What information would be required to comply with this provision?

If real-time notification should be provided where technologically feasible, the OTS should clarify that “technologically feasible” refers to the feasibility to that particular financial institution and not the entire banking industry. What may be technologically feasible to a larger financial institution may not be to a community bank. Additionally, prompt notification will not ensure prompt receipt if the consumer is not available to receive the notification.

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

The proposed Supplemental Guidance states 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. This failure would be a violation of the FTC Act and the OTS Advertising Rule.

*ICBA Comments:*

Again, as with some of the other provisions in the proposed Supplemental Guidance, this provision must be written with greater specificity if failure to comply would be a violation of the FTC Act and the OTS Advertising Rule. For example, it is unclear as to the type of notification required, and whether it would be required at the time of suspension, at the time of reinstatement, or whether financial institutions could instead specify in their account opening disclosures what the circumstances would be in which overdraft protection may be reinstated after suspension.

The rationale for such a requirement is also unclear. The proposed Supplemental Guidance states that this helps consumers avoid overdraft fees in cases in which they “may attempt a point of sale transaction believing that [they] will be denied without charge if sufficient funds are not available.” ICBA urges the OTS to clarify in what instances consumers would typically attempt a point of sale transaction knowing that their transaction may be denied. As previously stated, consumer testing conducted by the OTS would provide greater insight into the benefit, if any, of proposed requirements.

Provide consumer choice.

The proposed Supplemental Guidance recommends, as a best practice, that financial institutions provide their customers with the opportunity to affirmatively choose or “opt in” to overdraft protection for transactions outside the scope of Regulation E’s opt-in requirement for ATM and one-time debit card transactions. This would include an affirmative opt-in requirement for check and ACH transactions.

*ICBA Comments:*

ICBA ardently opposes such a best practice and strongly urges the OTS to delete this provision. In particular, it is unclear how such a practice would be favored by consumers. If a check or ACH transaction is returned as unpaid, consumers would still incur a non-sufficient funds fee, but unlike with overdraft protection, would also incur merchant fees and possible late fees if their returned item causes a late payment. Community bank customers value overdraft protection for this very reason, and based on information provided by our member banks, there are very few, if any, circumstances in which a consumer would rather have a check returned unpaid than to have overdraft coverage. This is yet another example of how consumer testing and industry outreach would be helpful to the OTS in determining what provisions would be in the best interest of consumers.

Most importantly, this proposed provision runs counter to the recent revision of Regulation E wherein the opt-in requirement specifically does not apply to checks, ACH, and recurring debits. The Federal Reserve concluded that “payment



of overdrafts [related to check and ACH transactions] may enable consumers to avoid other adverse consequences that could result if such items are returned unpaid, such as returned item fees charged by the merchant.” The Federal Reserve also acknowledged that consumer testing indicated that “consumers are more likely to pay important bills using checks, ACH and recurring debits.”

Reasonably limit aggregate overdraft fees.

The proposed Supplemental Guidance states that in some circumstances, failure to impose a reasonable limit on aggregate overdraft fees is an unfair practice under the FTC Act. The Supplemental Guidance further states that the risk of engaging in an unfair practice is heightened when a financial institution fails to limit fees for consumers who frequently overdraw their accounts and, as a result, such consumers incur substantial injury in the form of unreasonable and excessive overdraft fees. The OTS states that based on their supervisory experience, most institutions do not provide overdraft protection in a manner that permits overdraft fees to reach excessive levels. The OTS further states that aside from imposing a reasonable limit on overdraft fees, financial institutions should also monitor customer usage of overdraft protection, and where use becomes excessive, limit its use or offer consumers a lower cost option.

*ICBA Comments:*

Again, ICBA acknowledges that there are financial institutions that have charged their customers excessive overdraft fees as this generates most of their fee income. We maintain however, that community banks’ business model would render the decision to overcharge customers for overdrawn accounts unwise. Moreover, because community banks reach out to customers who frequently overdraw their accounts they are able to offer alternative credit options so customers are not put in the position of relying on overdraft programs and incurring excessive fees for overdrafts. Moreover, community banks’ ongoing review of consumers chronically overdrawing affords the bank the last-resort option of closing the customer’s account.

ICBA strongly urges the OTS to acknowledge this distinction and to rewrite this best practice accordingly. One way would be to explicitly state that this best practice only applies to financial institutions that actively promote their overdraft protection programs, which would not include automated overdraft services that are not promoted or ad hoc overdraft services. The OTS should also remove the statement that, “in some circumstances, failure to impose a reasonable limit on aggregate overdraft fees is an unfair practice under the FTC Act.” This statement lacks specificity and it is unclear to financial institutions whether their overdraft operation would be a violation under the FTC Act. Clear legal language would help insure compliance by financial institutions and proper and consistent examination by the regulatory agencies.

Furthermore, ICBA is not in favor of including in this Supplemental Guidance standards for “reasonable and proportional” fees such as the recent amendments to Reg Z regarding credit card programs. Financial institutions must be allowed flexibility in controlling when and how to charge fees for certain services as long as these fees are disclosed up front to the consumer.

ICBA vehemently opposes any agency efforts to “price-fix” overdraft fees, which are priced to protect financial institutions, and as a deterrent to encourage consumers to engage in more financially responsible practices. “Price-fixing” will result in financial institutions not providing overdraft coverage and returning items unpaid. Fees imposed by both the financial institution and the merchant or biller will far exceed any overdraft fee imposed on the consumer.

Instead, the OTS should make it clear that fees should be properly disclosed to consumers, consistent with Reg DD requirements and best practices, so they are aware of the consequences of overdrawing on their accounts. Such disclosure provides consumers with the choice of how to operate their accounts and lets them be the decision-maker. If there is an instance where consumers believe bank fees are excessive, they can pursue business with another financial institution or look to other sources of credit. This is a far better alternative to imposing rigid pricing requirements that will prevent many financial institutions from providing the service to their customers altogether.

Do not manipulate transaction-clearing rules.

The proposed Supplemental Guidance states that savings associations should not manipulate transaction clearing rules to inflate fees, such as overdraft protection fees. The Supplemental Guidance states that 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 and that manipulating transaction clearing in this way would violate the FTC Act. The OTS states that instead, a savings association should establish consistent transaction clearing rules for similar accounts.

*ICBA Comments:*

ICBA believes that financial institutions should not be allowed to manipulate transaction clearing policies in order to generate more overdraft protection fees -- a practice that is not common among community banks. However, this best practice should be written to allow financial institutions to, on a customer-by-customer basis, change whatever transaction clearing policy they consistently use, at the request of the consumer or if it would benefit the consumer.

For example, many community banks will pay items in a certain order, whether it is high to low, or low to high, or as the transactions come in for processing. However, because of the close relationship community banks have with

their customers, community banks will often review overdrafts at the end of the day and examine whether there is a specific item given its importance that should be paid first, even if this is contrary to their normal transaction clearing policy. These exceptions are often done after the customer is contacted by the financial institution and has requested that a certain check or other debit transaction be paid, because it might be more beneficial to have their mortgage or child support payment processed before their other less significant payments.

One of the primary reasons why customers value community banks is because they are small enough that they have the flexibility to provide these types of services to their customers. Further unnecessary regulation by the agencies must not impede an institution's ability to continue to serve their customers. This best practice should expressly state that savings associations can have this flexibility in processing checks and other debit transactions, as long as there is not a policy of doing so as a means to generate greater customer fees.

### **Conclusion**

ICBA strongly urges the OTS to table this proposal. It is not prudent or fair to finalize the proposal and impose additional and costly regulatory burden on financial institutions given the new Regulation DD (Truth in Savings) and Regulation E (Electronic Fund Transfers) requirements governing overdraft services. Additionally, this proposed guidance unfairly targets savings associations only and creates an uneven playing field amongst financial institutions.

Moreover, the proposed Supplemental Guidance comes at a time of regulatory uncertainty as the impending enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 will establish a new regulatory framework for savings associations and consumer protection by merging the OTS and the OCC and forming the Consumer Financial Protection Bureau. Before imposing additional requirements, the banking agencies and the Consumer Financial Protection Bureau should have time to organize and perform an assessment of the industry's compliance with existing regulatory requirements.

Lastly, and most importantly, this is bad for consumers. Community banks provide overdraft services as an extension of their commitment to providing the highest level of customer service. If regulatory barriers and requirements become too burdensome, community banks will discontinue these services.

If, in light of the above concerns, the OTS chooses to continue with the Supplemental Guidance, ICBA urges the OTS to:

- exempt ad hoc or non-automated overdraft coverage services from the final Supplemental Guidance;

- understand and factor in the operational differences between community banks and larger financial institutions;
- solicit input on operational and technical issues from the banking industry;
- conduct consumer testing;
- structure the list of best practices as actual recommended best practices, and not requirements under the FTC Act or the OTS Advertising Rule, and, if this is not done, provide greater specificity for any stated practices; and
- incorporate ICBA recommendations and comments for the specific practices outlined in the proposed Supplemental Guidance.

Additionally, ICBA strongly opposes extending the opt-in to checks and ACH, efforts to set overdraft fees and mandating the explanation of transaction-clearing policies.

ICBA is happy to meet with the OTS to discuss the concerns presented in this letter, and we encourage the OTS to contact us at any time. Please do not hesitate to contact Cary Whaley or Elizabeth Eurgubian at (202) 659-8111 or by email at [cary.whaley@icba.org](mailto:cary.whaley@icba.org) and [elizabeth.eurgubian@icba.org](mailto:elizabeth.eurgubian@icba.org).

Again, thank you for the opportunity to comment.

Sincerely,  
/s/  
Viveca Y. Ware  
Senior Vice President  
Regulatory Policy

cc: Federal Reserve Board  
Federal Deposit Insurance Corporation  
Office of Comptroller of the Currency