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This is a response to a request for comments on proposed amendments to Regulation DD. I am employed as an independent trainer within the banking industry. During the last 20 years, I have worked for the FDIC, the OTS, and more than 25 state banking associations in that capacity. The opinions expressed are entirely my own and I not compensated for offering them; they differ in some material respects from those held by some of my clients.

The choice of regulation DD as the appropriate tool for regulating Overdraft Protection Programs (ODP) was the correct one. Properly implemented, it will leave no basis for the reconsideration of the more draconian method the proposal threatens. It is acknowledged that, without an amendment to the Truth-in-Savings Act making ODP terms the object of a required disclosure, the Federal Reserve Board of Governors (the Fed) has a difficult task in grafting a new concept onto an existing regulation.

The critical element missing from the proposal is the selection and definition of a single descriptive term capable of communicating a regulatory philosophy. To create a de novo regulatory framework rather than an adaptation of the marketing framework established by the ODP vendors, the Fed needs to adopt and emphasize a practical and legal fiction: Any item presented against insufficient funds is legally presumed to be the result of an error by the consumer who authorized the charge. It is adoption of that concept that best protects the consumer and yields a regulation that reflects a philosophy rather than a list of individual rules.

Clearly, consumers like ODPs. This alteration of Regulation DD and the interagency guidelines on the same issue will put banks who do not offer a formal program at a disadvantage. Consumers who have benefited from an ODP at another bank will probably ask about their new bank's ODP when they are opening an account. No bank will want to say, "We don't have one." The net effect of these regulatory initiatives will be that all banks will offer ODPs.

Identifying a Descriptive Term

In some areas, the proposal resembles a parfait with layers of divergent opinions. Occasionally, those varying opinions are visible strata within a single paragraph. If the Fed chooses and defines a descriptive term which does not reflect the vendor – created paradigm, the final regulation will reflect a “fresh look” at the principal issues: Consumers should not be encouraged to authorize payments against insufficient funds and if they do authorize such payments, the financial consequences should be fully disclosed to them.

The supplementary information accompanying the proposal is sprinkled with the terms:

- o bounce protection services,
- o bounced check protection services,
- o overdraft payment services,
- o overdraft protection program and
- o automated overdraft services.

Only the latter two phrases are included in the proposal. However, neither is defined and neither conveys a concept. “Overdraft protection program” is a phrase too readily comparable to those used by ODP vendors. In addition, the mechanism it supposedly describes certainly does not “protect” the consumer from overdrafts. The second term, “automated overdraft services,” clearly implies to consumers that the process of overdrawing their account is automatic, an idea the proposal actually suggests is deceptive. Neither phrase suggests that this is anything other than an alternative line of credit against which the consumer can make intentional draws. In summary, the terms are equally misleading and convey no intent to protect the consumer.

Please consider implementing and defining the term “inadvertent overdraft policy,” “accidental overdraft program,” “policy on items presented against insufficient funds” or any other phrase indicating a presumption that any authorization of a debit against insufficient funds by a consumer is accidental. Please, step outside the framework established by the ODP vendors and use a term that has connotations consistent with the overall philosophies found in this proposal.

230.2 Definition of Advertisement (Regulation)

I believe that use of the proper descriptive term will squelch any bank’s desire to “promote” an ODP to existing customers. A promotional piece describing “our bank’s inadvertent overdraft policy” hardly sounds like a solicitation to write an NSF check. However, the expansion of “advertisement” to cover communications with existing customers provides a necessary mechanism for oversight of any such communications. It should be retained.

230.2 Definition of Advertisement (Commentary)

No comment

230.4(b)(5) Increased Specificity In Fee Descriptions (Commentary)

My perspective is that this is a solution in search of a problem. I cannot conceive that any consumer believes that one type of debit for which there are not sufficient funds (for example, a

check) would generate an NSF fee while a different type of item (for example, an EFT), would not. Nor do I believe that any consumer believes a \$254 EFT will create more or less of an overdraft than a \$254 check if it is presented against insufficient funds. Finally, I do not believe that consumers should be able to knowingly overdraw their accounts at an ATM, but would make a summary observation that includes all of the above circumstances: Not even the most naïve consumer expects the bank will make funds available that do not belong to him without imposing a fee. This proposed change is apparently a reaction to a particular vendor's ODP, it is simply unnecessary and should be deleted.

If this is an issue cannot be abandoned in its entirety, the proposal's fourth example of what would constitute misleading advertising addresses it more than adequately. There is no need to mention it in the initial disclosure; it is language that would be imbedded in disclosures offered by all banks and, therefore, of absolutely no value to the consumer in choosing between accounts. Any change in Regulation DD that requires a discussion of the ODP, beyond NSF fees, in the initial disclosure is a mistake. ODP is not a feature of the account. If the bank exercises discretion in making the program available; i.e. it is not available to everyone opening an account.

Any revision of the commentary should reflect the fact that most banks have fees for items presented against insufficient funds and the fee is the same regardless of whether the item is paid or returned. (The commentary currently references "fees associated with checks returned unpaid.") The proposal repeatedly references "overdraft fees." If the fee is disclosed as an "overdraft" fee the consumer might very reasonably conclude that, if a check is returned unpaid, an "overdraft" fee will not be imposed because there will not be an overdraft. The commentary should refer to the fee as a "nonsufficient funds" or "NSF" fee in order to acknowledge current industry practices and make the terminology understandable. If a bank has a different fee structure; i.e. has different fees for items paid vs. items returned, it can use more accurate terminology.

In evaluating the need to require the explanation of fees to be more explicit, it is also worth noting that it will render current TISA disclosures on accounts subject to overdraft incomplete and in need of revision. It will affect all banks, not just those promoting ODPs. That is a substantial cost to impose on an industry based on an assumption that consumers simply have no sense whatsoever.

Since this would not be a change initiated by the banks, there would be no requirement for banks to give advance notice and send a notice of change in terms to existing account holders. If this change is implemented, regulatory guidance should clearly indicate that. Otherwise banks will be offered a monetary – based "interpretation" by forms vendors that it is necessary. As noted earlier, I believe these regulatory initiatives will encourage all banks to offer ODPs. A requirement that they update their TISA disclosures for other purposes would provide a logical opportunity to add their ODP related disclosures at the same time.

230.6 Periodic Statement Disclosures (Regulation)

Although it is also based on another practical and legal fiction (the assumption that most consumers actually review their bank statements) I think this is a good idea. For it to actually protect consumers, it should be applicable to all banks, not just those that offer formal ODPs. Nevertheless, its underpinnings do need some adjustment.

The supplementary information accurately indicates the purpose of such a disclosure is to “To highlight the overall cost to consumers of presenting items on an account with insufficient funds on a routine basis.” However later in the same paragraph it indicates the disclosure would “...better inform consumers about the cumulative effect of using an overdraft service on a routine basis.” The latter observation is simply wrongheaded and reflects a complete failure to recognize that the problem is that a consumer wrote an NSF check, not that the bank paid it.

Please assume two consumers look at their bank statements at year end and realize they each paid \$140 in NSF fees. However, one had five NSF checks that were paid and the other had five NSF checks that were returned. How many consumers learned a lesson about the direct costs of writing NSF checks? *Two*. How many consumers also learned a lesson about the indirect costs of writing NSF checks? *One*. How many consumers learned a lesson about the danger of relying on an ODP program? *None*.

All ODP programs do is create a predisposition on the bank’s part to pay an NSF item – their mere existence does not encourage consumers to issue NSF debits. The pivotal issue is how these programs are advertised. The consumer who suffers the greatest penalties for authorizing NSF debits is the one whose items are returned unpaid. He incurs exactly the same bank fees as the customers whose items were paid, but he also incurs additional merchant expenses, possible suspension of services and damage to reputation. The problem is not overdrafts. The problem is that people authorize payments when they do not have the money. A consumer protection law should treat the disease and any catalyst that promotes spread of the disease. An overdraft is the symptom, not the disease.

The fundamental error in the proposed addition of this disclosure to the periodic statement is that assumes banks impose two fees, one for items that created overdrafts and another for items that were returned unpaid. Most banks have a single fee, the one they assess for items presented against insufficient funds. This proposal would require that banks break out whether the fee was imposed to pay a check or to return it. The NSF fee was not imposed for either of those reasons. The required breakdown is misleading and is of absolutely no value. It will require some banks to go back on day two processing and recode fees for those checks that were paid versus those that were returned. Again, the aggregate amount of fees charged will advise the consumer of the direct costs of writing NSF checks.

There is also no need to aggregate the NSF fees for the statement period. The aggregate amount for the year to date will always be the larger figure and be more likely to make an impression on the consumer. A single disclosure of the aggregate amount of NSF fees incurred year to date may have value and may help consumers to realize the cost of poor bookkeeping.

The proposed disclosures on periodic statements would apply to all banks. First, there are many

consumers who authorize NSF debits every month, even though their bank does not have an ODP program. This information would be no less valuable to a consumer who banks at a non ODP bank than it is to a consumer whose bank operates an ODP program. Again, it is the consumer who authorizes the NSF item all the ODP does is pay it. Second, if the disclosure is a legal requirement data processing firms will provide the change as “maintenance.” If it is not required for all banks, they will be charge individual banks for custom programming so banks will be less likely to adopt the practice voluntarily. Finally, there is guidance in this proposal that would make it clear which banks have ODP programs and which do not.

230.6 Periodic Statement Disclosures (Commentary)

Again, banks very rarely have fees for overdrafts or for returning checks. They have fees for checks that are presented against insufficient funds.

230.8 Advertising (Regulation)

As noted, it would be more consumer-oriented to describe the activity as an “Inadvertent Overdraft Program” (or some parallel phrase) that triggers additional disclosures. As for the individual disclosures suggested:

The fee for the payment of each overdraft. The vast majority of banks do not have fees for overdrafts. They have fees for items presented against insufficient funds which are not varied based on whether the item is paid or returned. The fee for presenting an item against insufficient funds should be disclosed as well as any daily cap on the aggregate amount of fees or, if there is none, an indication to that effect. While I think such fees are an unfair and deceptive practice, any daily fee for the maintenance of an overdrawn account should also be disclosed.

The types of transaction for which a fee for overdrawing an account may be imposed. While I have express strong objections to a requirement that information on fees be made more particular on this point, I see no reason to exclude it from advertising or promotional information. While the supplementary information accompanying the proposal uses checks, ATM fees and other electronic transfers as examples it should be made clear that if a deposited check is returned and debiting it back to the account creates an overdraft there will be an NSF fee. (It is worth noting that any disclosure or advertising which notes the ODP’s multi-faceted abilities to pay items presented against insufficient funds encourages its use.)

The time period by which the consumer must repay or cover any overdraft. Generally, the phrasing involves “restoring the account to a positive balance,” not repaying an overdraft. If an NSF check is paid on each of five consecutive days, it might be a bit vague as to which how many overdrafts there are and which one starts the clock ticking for any stated time frame. It would also be appropriate to require a disclosure indicating what happens if the account is not restored to a positive balance within the stated time frame.

The circumstances under which the institution would not pay an overdraft. If the issuance of an NSF item is presumed to be inadvertent, how will the consumer’s decisions be affected by

knowing that it will or will not be paid? In the event of a dispute in connection with a returned check, a bank's description of the circumstances in which it would refuse to pay an overdraft or otherwise suspend the overdraft protection program will be argued to create a contractual commitment to pay an NSF debit in all other circumstances. No matter what else is involved, the primary reason it will not be paid is because there was not enough money in the bank to pay it.

I suggest an additional requirement be added that the institution disclose that it is not committing to pay an item presented against insufficient funds. Again, the proposal is accepting the paradigm established by the vendors and assuming that such a disclosure has already been made voluntarily. An indication that there is no guarantee that the item will be paid is fundamental and a necessary precursor to any discussion about why it might not be paid.

I also suggest that any advertisement in connection with ODPs should also include a descriptive statement indicating that issuing or authorizing debits against insufficient funds poses substantial risks such to the consumer. The regulation should provide model language. For example:

We encourage you to balance your account statement regularly and never knowingly write checks or authorize other payments unless the funds to pay them are in your account and available for withdrawal. You will incur substantial costs when you issue payments against insufficient funds and, if those items are not paid, there will be even more ramifications including additional expenses, suspension of services, damage to your credit rating and, in some cases, criminal liability.

230. 8 Advertising (Commentary)

The proposal posits five examples of "misleading practices" to be added to the commentary. Again, directly connecting these prohibitions to a phrase that is more descriptive and reflective of a regulatory purpose will yield a comprehensive concept.

I have no objections to any of the five prohibitions, but note:

- o The first prohibition indicates financial institutions may not mislead customers by representing an overdraft service as a line of credit. There should not be any concern that consumers might confuse an ODP with a traditional line of credit unless they are led to that conclusion by the financial institution. There is no basis for assuming that the average consumer knows what a line of credit is.
- o The fourth prohibition reflects a concern which, as noted previously, has no practical implications, but there is no reason to object to its inclusion here if the concept survives in the regulation.
- o The fifth prohibition answers the question it raises by indicating that an advertisement of a "free" account which mentions ODP is acceptable as long as it clearly and conspicuously indicates there is a cost associated with the service. There is no reason to object to its inclusion.
- o I suggest you include an additional prohibition, one that indicates it is misleading if an advertisement suggests that the consumer should intentionally issue or authorize a debit against insufficient funds. Such a step would be consistent with a descriptive term that

indicates any such program is based on inadvertent overdrafts and eliminate the need for any consideration of the other practices on which the request seeks additional comment. Such a message is appropriate and is, perhaps, of greater importance than the others.

Finally, the last three additions to the commentary regarding advertising disclosures:

- o As noted before, explaining that more than one type of item can be presented against insufficient funds is explaining the obvious, but there is no drawback to mentioning it in advertising.
- o As noted before, the “circumstances for nonpayment” will create the potential for a claim of wrongful dishonor against the bank. This should be deleted along with the parallel provision in the regulation. (It is worth noting that one of the suggested phrases, “not in good standing,” has no real meaning. After 29 years in banking and 25 years as an attorney I would tell you that phrase means whatever I want it to mean or nothing at all. There is no chance it would be consistently interpreted by consumers). Elsewhere in Regulation DD there are indications that a bank need not make meaningless disclosures. That observation should be applied here.
- o There is no need for a disclosure for an account described as “free” to be required to include the specific amount of an NSF fee in an advertisement that clearly indicates there is a cost for the service. A “free” account may be subject to a number of fees and there is no basis for a presumption that it is the NSF fee that is most important to the consumer. Burying the requirement to include the specific fee in the commentary makes it likely that it will be violated frequently. This paragraph should be deleted.

Conclusion

The primary shortcoming of the proposal is its failure to coin a descriptive phrase that reflects an attempt to protect the consumer. In addition, its focus on the symptom, overdrafts, rather than the problem, NSF items, will generate needless expense to the affected institutions as well as confusion among consumers.