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Office of Thrift Supervision
Department of the Treasury

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MEMORANDUM FOR: CHIEF EXECUTIVE OFFICERS

FROM: Montrice G. Yakimov, Managing Director
Compliance and Consumer Protection

SUBJECT: Proposed Supplemental Overdraft Guidance

Background

Many institutions offer consumers a variety of options to avoid overdrawing their deposit accounts. These include providing consumers with lines of credit and permitting consumers to link one account to another. Fee based overdraft programs, in which a flat fee is charged each time that an overdraft is paid, have become common. Overdraft protection has typically been extended for checking, debit card, automated teller machine (ATM), and other deposit account transactions.

Through previous Guidance on Overdraft Protection Programs¹ (Overdraft Guidance), the OTS explained concerns about how overdraft protection programs had been implemented and suggested “Best Practices” intended to improve these programs. While overdraft protection programs continue to be widely used,² new concerns about their implementation have emerged. In addition, in recent months, both new rules and well-established laws have been applied to these programs. OTS is therefore proposing the Supplemental Guidance to clarify its supervisory expectations and the application of relevant laws and regulations. However, the Overdraft Guidance remains in effect with respect to matters not addressed in the Supplemental Guidance. Comment on the Supplemental Guidance will be due 60 days after it is published in the Federal Register.

Key Issues Discussed in the Supplemental Guidance

¹ Guidance on Overdraft Protection Programs, 70 Fed. Reg. 8428 (Feb. 18, 2005), issued as CEO Memorandum #211, available at <http://files.ots.treas.gov/25211.pdf>.

² For example, close to 90% of the institutions recently studied by the Federal Deposit Insurance Corporation (FDIC) had some form of overdraft protection program. See FDIC Study of Bank Overdraft Programs at page 5 (Nov. 2008), available at http://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_FinalTOC.pdf.

Since the Overdraft Guidance was issued in 2005, the legal landscape has changed considerably. These changes are particularly evident with respect to Regulation DD,³ which implements the Truth in Savings Act,⁴ and Regulation E,⁵ which implements the Electronic Fund Transfer Act.⁶ The Board has significantly amended Regulation DD twice since 2005 and Regulation E once since 2005 to address overdraft services.⁷ Most recently, the Board proposed further amendments to Regulations E and DD to clarify certain overdraft issues.⁸ Further, since 2005, OTS has articulated the standards that it applies to determine whether an act or practice is unfair or deceptive⁹ under section 5 of the Federal Trade Commission Act.¹⁰ As the Supplemental Guidance explains, many of the Best Practices discussed in the Overdraft Guidance are now required by law.

However, even where Best Practices have not become legally mandated, the Supplemental Guidance encourages institutions to implement them as a means of addressing reputation risk. Such risk has intensified due to public concern about the lack of choice, cost, and ways in which some overdraft protection programs have been provided. Fundamentally, the Supplemental Guidance encourages savings associations to review their overdraft programs to confirm that they are being operated in a manner that is effective, compliant with the law, and fair to consumers.

For additional information, please contact April Breslaw, Director, Consumer Regulation, (202) 906-6989 or Richard Bennett, Senior Compliance Counsel, Regulations and Legislation Division, (202) 906-7409.

The proposed Supplemental Guidance is available on the internet at:
http://www.ots.treas.gov/_files/482132.pdf.

³ 12 CFR part 230.

⁴ 12 U.S.C. § 4301 et seq.

⁵ 12 CFR part 205.

⁶ 15 U.S.C. § 1693 et seq.

⁷ See Truth in Savings; Final rule, 70 Fed. Reg. 29582 (May 24, 2005); Truth in Savings; Final rule, official staff commentary, 74 Fed. Reg. 5584 (Jan. 29, 2009); and Electronic Fund Transfers; Final rule, official staff commentary, 74 Fed. Reg. 59033 (Nov. 17, 2009).

⁸ See Electronic Fund Transfers; Proposed rule, 75 Fed. Reg. 9210 (March 1, 2010) and Truth in Savings; Proposed rule, 75 Fed. Reg. 9126 (March 1, 2010).

⁹ See Unfair or Deceptive Acts or Practices; Final rule, 74 Fed. Reg. 5498, 5502-5504 (Jan. 29, 2009).

¹⁰ 15 U.S.C. § 45.