August 8, 2011

BY EMAIL: regs.comments@occ.treas.gov

Attention: Docket ID OCC-2011-0012
Office of the Comptroller of the Currency
250 E Street, SW., Mail Stop 2-3
Washington, D.C. 20219

Re: Guidance on Deposit-Related Consumer Credit Products
Docket ID OCC-2011-0012

Dear Sirs and Madams:

The Clearing House Association L.L.C.[1] ("The Clearing House") respectfully submits this comment letter in response to an invitation to comment on the proposed supervisory guidance entitled "Guidance on Deposit-Related Consumer Credit Products," issued by the Office of the Comptroller of the Currency ("OCC") on June 8, 2011 ("Guidance").[2]

The Guidance supplements 2009 Federal Reserve Board ("Board") amendments to Regulation E regarding automated overdraft programs for ATM and one-time debit card transactions (the "2009 Regulation E Amendments"),[3] as well as related 2009 Board amendments to Regulation DD. The Guidance updates and expands upon joint agency guidance on overdraft protection programs issued in 2005, the OCC's advisory letter 2002-3 regarding unfair and deceptive acts and practices, as well as OCC Bulletin 2010-15 issued to national banks regarding the Board's overdraft rules.

Generally, the Guidance sets forth the OCC's expectations for national banks with regard to all deposit-related credit products. In particular, in Appendices A and B the Guidance applies the OCC's expectations to automated overdraft protection and direct deposit advance programs. The Clearing House appreciates the OCC's efforts to clarify its supervisory expectations

[1] Established in 1853, The Clearing House is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing through regulatory comment letters, amicus briefs and white papers the interests of its owner banks on a variety of systemically important banking issues. The Clearing House Payments Company provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the U.S. See The Clearing House's web page at www.theclearinghouse.org.

[2] 76 Fed. Reg. 33409.

[3] 74 Fed. Reg. 59033 (November 17, 2009).

regarding deposit-related credit products as well as the opportunity to comment on the Guidance. The Clearing House welcomes future dialogue on the Guidance.

I. Executive Summary

The Clearing House agrees that the Guidance should provide banks "with a high degree of flexibility . . . to structure and operate their programs in a prudent and safe and sound manner" while also ensuring "fair treatment of customers without dictating specific product terms."[4] In support of these goals we provide the following recommendations.

A. Notice and comment rulemaking is necessary because the Guidance creates new substantive requirements for national banks and addresses deposit advance programs for the first time. These requirements need to be more fully developed in light of existing law as well as consumer, industry, and regulatory input.

B. Further consumer study is needed before opt-in requirements are expanded beyond the 2009 Reg E Amendments.

C. New disclosures may cause customer confusion and need to be related to existing Regulation E and Regulation DD disclosure requirements.

D. The Guidance should emphasize disclosure of the order of transaction processing over methods of processing.

E. Less prescriptive, principles-based standards would better ensure that banks effectively monitor accounts for credit risk, customers are treated fairly, and consumer choice is honored.

F. Customer risk assessments should be more fully considered because they may have unintended consequences under Regulation B and other laws.

We provide further detail on each of these points below.

II. Comments to Guidance as a Whole

A. The Guidance creates new substantive disclosure, opt-in, monitoring, and notification requirements for overdraft and deposit advance programs that are not currently required by law or regulation. As explained in the subsequent parts of this letter, The Clearing House does not believe that these requirements are necessary. If, however, the OCC proceeds with these new requirements, The Clearing House believes that the requirements should be addressed through a formal rulemaking process.

[4] 76 Fed. Reg. at 33410.

While some areas of the Guidance are consistent with the function of interpretive agency guidance, which is to clarify existing legal requirements,[5] other areas go beyond that function. The new substantive requirements noted above will have examination and enforcement consequences for national banks. These new requirements have not been appropriately developed through the regulatory procedural requirements set forth in the Administrative Procedures Act and do not take into consideration stakeholder interest.[6] While the OCC has requested comment on the Guidance, The Clearing House thinks a formal rulemaking will provide a more expansive opportunity for evaluation of the new requirements in light of industry and consumer input.

B. The Guidance articulates requirements that vary from the guidance issued by the FDIC regarding overdraft protection programs.[7] Further, the Guidance appears to have been issued for comment without any consultation with the Consumer Financial Protection Bureau (CFPB). The Clearing House respectfully suggests that consultation with the CFPB would better inform the process with regard to consumer protections and avoid the risk that another regulator may establish other, potentially conflicting standards. Hence, we recommend that the OCC seek to ensure that the Guidance is appropriately aligned with the FDIC guidance and the views of the CFPB to mitigate consumer confusion.

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[5] The function of interpretative guidance is to clarify or explain existing law. Guidelines, general statements of policy, memoranda and pamphlets published by an agency are characterized as interpretive and do not have the effect of binding law. *See* 5 U.S.C. §553(b)(A)-(B) (2010) (providing a statutory exemption from the notice-and-comment requirements set forth in the Administrative Procedures Act ("APA") for agencies with respect to "interpretative rules, general statements of policy"); *see Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (noting that "if a rule is 'substantive' the [APA] exemption is inapplicable, and the full panoply of notice-and-comment-requirements must be adhered to scrupulously"); *see also Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (noting that "courts have struggled with indentifying the difference between legislative rules and interpretive rules," but have generally arrived to the conclusion that "interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule") (*citing to Yesler Yerrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). The Court also noted that "[l]egislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Id.*

[6] Unlike interpretive guidance, a rule promulgated by an agency modifies or effects current law. When an agency is engaged in rulemaking it must follow the notice-and-comment requirements set forth in the APA. *See* 5 U.S.C. §553(b) (requiring an agency to publish a general notice of proposed rulemaking in the Federal Register which must include (1) the nature of the rulemaking, time and place; (2) reference to the legal authority pursuant to which the proposed rulemaking is promulgated; and (3) a description of the proposed rulemaking's substance). An agency can only issue a rulemaking without providing advance notice to the public if "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *See also Prof'ls & Patients for Customized Care* 56 F.3d 592, 595 (acknowledging that the APA does not define "substantive rules," "interpretive rules," or statements of policy," but noting that "courts over the years have developed a body of jurisprudence" that provides a helpful framework in distinguishing among the three types of rules"); *Sekula v FDIC,* 39 F.3d 448, 457 (3d Cir. 1994) (recognizing that "[i]nterpretive rules are not intended to alter legal rights, but to state the agency's view of what existing law requires").

[7] FDIC Financial Institution Letter FIL-81-2010, November 24, 2010.

C. The Guidance seems to conflate the protections afforded consumers under Regulation E for overdrafts with the protections afforded with regard to consumer credit products under Regulation Z. The Guidance also raises potential issues with regard to a bank's compliance with Regulation B. With regard to Appendix A, the OCC indicates in footnote 6 of the Guidance that it is not intended to affect whether or when the laws implemented by Regulations Z and B are applicable. However, without additional clarifying guidance, the consumer protections afforded by these regulations may be affected in unintended ways as further described below. In addition, Appendix B (Deposit Advance Programs) is, in effect, creating new rules with regard to a consumer credit program outside of the rulemaking authority of the Board (and now the CFPB) under the Truth in Lending Act.

With those generally applicable observations, below are The Clearing House's comments on the specific measures outlined in the Guidance.

III. Without further study it does not appear that opt-in for check and ACH overdraft is necessary or helpful to consumers and risks unintended consequences.

The Guidance requires consumer opt-in for overdraft protection for a larger group of payments than the 2009 Regulation E Amendments require. In particular, the Guidance requires consumer opt-in for overdraft protection with regard to all new accounts for any debit to an account based on any type of payment. The Guidance provides that for overdraft programs that are not already covered by the Regulation E requirements, such as check-based overdrafts, consumer opt-in need only be obtained from "new account holders." This expansion of opt-in requirements to additional payment types beyond ATM and one-time debit card transactions is problematic for the following reasons.

The Board, having considered industry and consumer input through its formal rulemaking process, expressly declined to extend the consumer overdraft opt-in requirements to check and ACH-based payments. As described in the preamble to the 2009 Regulation E Amendments, the Board initially considered using authority under the Federal Trade Commission Act to address overdrafts for all methods of debit transactions (including checks, ACH transactions, ATM withdrawals, recurring payments, and POS debit card transactions), but then declined to do go so far. For the reasons described below, the Board did not cover transaction types beyond ATM and one-time debit card transactions in the final version of its 2009 Regulation E Amendments.

According to the Board's analysis, consumers want the ability to overdraft on check and ACH transactions. Recognizing these consumer interests, the Board limited its opt-in requirements to ATM and one-time debit card transactions only. The Board noted that "participants in consumer testing indicated that they would prefer to have their checks paid into overdraft, because those transactions represented important bills. . . . [A] consumer will generally be charged the same fee by the financial institution whether or not a check is paid; yet, if the institution covers an overdrawn check, the consumer may avoid other adverse consequences,

such as the imposition of additional merchant returned item fees."[8] The Board discussed ACH transactions as analogous to consumer checks for important bills (and for which the consumer may incur merchant returned item fees), and declined to include ACH transactions under the opt-in requirements as well. Further, the 2009 Regulation E Amendments reinforce the consumer's access to overdraft coverage for check and ACH items by making clear that banks may not condition the payment of overdrafts for check, ACH, or other transactions on the consumer's opt-in consent to the bank's overdraft service for ATM and one-time debit card transactions.[9]

In contrast, the Guidance requires overdraft opt-in for check and ACH transactions for "new account holders." Such required opt-in means that check and ACH transactions will not be eligible for automatic overdraft protection, which in turn will result in unpaid transactions and return fees. This appears to contravene the consumer preferences determined by the Board after a notice and comment rulemaking. Hence, The Clearing House respectfully requests that the OCC explain its rationale for extending opt-in requirements to check and ACH transactions in light of the Board's findings in its rulemaking process for the 2009 Regulation E Amendments.

With respect to check overdrafts in particular, there are benefits for both banks and customers when banks are permitted to provide automated courtesy overdrafts for customers. For customers, as noted in the 2009 Regulation E Amendments, a fee will be assessed whether an overdrawn check is paid or not. However, when an overdrawn check is paid the customer avoids fees that may be charged by payees as well as the possible inconvenience and embarrassment of having to resubmit payment to a payee. For banks, automated programs reduce costs by saving administrative staff time. With automated programs, the decision to accommodate an overdraft, which is based on such factors as the customer's time with the bank and account maintenance quality, can be made without "ad hoc" manual review and approval. Under the Guidance as proposed, banks that wish to continue non-marketed courtesy or accommodation overdrafts without obtaining opt-in will need to revert to manual processes. The increased cost to the bank of such manual processes will likely result in increased overdraft fees.

With regard to the note that the additional overdraft opt-in is only required for "new account holders," The Clearing House requests that the OCC clarify what this term means. Specifically, does this refer to new accounts added by a consumer who already holds an account with an institution? Or does this mean, for example, only new customers entering into initial account relationships with an institution?

IV. New disclosures regarding overdraft programs risk consumer confusion.

The Guidance requires new disclosures regarding opt-in rights, transaction processing order, availability of alternative products, overdraft termination or reinstatement, limitations on

[8] 74 Fed. Reg. at 59034-59035.
[9] 12 CFR 205.17(b)(2).

overdraft availability, and deposit advance programs. To the extent such disclosures are related to new substantive responsibilities, such as opt-in requirements and account monitoring that elsewhere in this letter The Clearing House has requested not be made part of the final Guidance, The Clearing House requests that disclosures related to those requirements not be included in the final Guidance. More generally with respect to disclosures, The Clearing House offers the following comments.

The Clearing House strongly supports providing customers with adequate disclosures and other protections regarding overdraft programs, as well as all other relevant products and services. Under Regulation E: (1) consumers receive detailed disclosures regarding overdraft features; (2) consumers receive a reasonable opportunity to consent to the overdraft program; (3) in order to ensure the consumer has made an informed choice, the consumer must affirmatively opt-in to the overdraft program; and (4) consumers receive a written confirmation of their consent. Further, under Regulation DD banks provide disclosures that are both consistent with the requirements of Regulation E and that go beyond such requirements to provide even further consumer protection regarding covered bank products, such as by requiring certain disclosures in the advertising of overdraft programs.[10] In addition to these regulatory protections, banks have made many voluntary efforts[11] to educate customers about managing their account balances and overdraft fees.

Regulations E and DD have clear requirements regarding the content, format, and segregation of information for opt-in disclosures for ATM and one-time debit card transactions.[12] In particular, while Regulation E permits opt-in for other transaction types[13] as well as disclosure of alternative programs[14] to be included on the same opt-in disclosure for ATM and one-time debit card transactions, it does not permit inclusion of the other information that must be disclosed under the Guidance. Specifically, disclosure of (i) the order of transaction processing and (ii) overdraft termination and reinstatement are not permitted to be included with ATM and one-time debit opt-in disclosures according to Regulation E. Regulation DD further requires that advertising regarding overdraft programs include certain disclosures, but these disclosures are expressly not required for other information provided by a bank regarding an overdraft program, such as opt-in notices.[15] If the final Guidance requires disclosures beyond what is currently required or permitted in Regulations E and DD, The Clearing House requests that the final Guidance clarify how such disclosures can be made both to comply with the content

[10] 12 CFR 230.11.

[11] For example, many banks provide educational materials on websites and in brochures made available to customers in narrative, plain-English format, to explain why overdrafts can occur and what tools might be available to help consumers avoid them. Many banks today also have online or mobile banking platforms that provide account alerts (for example via text message or email) to notify consumers about potential upcoming payments and overdrafts and help them manage their account. In addition, after overdrafts occur, many banks provide information in plain English to customers to help them understand what has happened and why.

[12] 12 CFR 205.17(d) (Regulation E), and 12 CFR 230.11 (Regulation DD).

[13] 12 CFR 205.17(d)(6).

[14] 12 CFR 205.17(d)(5).

[15] 12 CFR 230.11(b)(2).

requirements of Regulations E and DD and to prevent conflicting or confusing information to consumers more generally.

The Clearing House also submits that new disclosures should be assessed formally to determine whether such disclosures are necessary in light of voluntary industry efforts and existing regulatory disclosures, particularly as the 2009 Regulation E Amendments were enacted a short time ago. We note that the Board, in its formal rulemaking process for the 2009 Regulation E Amendments, engaged in extensive consumer testing efforts to ensure that model notice forms were effective, and these model forms were then also subject to comment in the rulemaking process.[16] The Guidance skips this process, creating risk of unnecessary and confusing overlays to the current disclosure regime. Further, as noted above, the Guidance risks further exacerbating consumer confusion because it is not consistent with other banking regulators such as the FDIC or Board, and does not reflect the input of the CFPB. This is also true if non-marketed courtesy or accommodation automated overdraft programs are not exempted from the Guidance.

Also, the Guidance indicates that banks should provide notice to customers "when overdraft protection is suspended or terminated, and when it is reinstated, as applicable." The Clearing House requests that the OCC clarify what this phrase means. Specifically, does this mean that a bank should provide notice with regard to suspension/termination/reinstatement of overdraft coverage for particular transactions, or for all overdraft program application for a customer or their account? In other words, if a bank allows particular transactions to be paid without overdraft program fees, but does not suspend application of the overall overdraft protection capabilities, then are notices required?

V. Disclosure of processing order is more important than method.

The Guidance instructs institutions to review transaction processing procedures to ensure they operate in a manner that avoids maximizing customer overdrafts and related fees through the clearing order. The Guidance identifies examples of appropriate procedures, specifically clearing items in the order received or by check number.

The Clearing House agrees that the order of transaction clearing should not be designed to maximize overdraft fee income. However, we note that due to the nature of automated transaction processing, banks are unable to tailor transaction processing to minimize overdraft fees for particular customers. The Clearing House suggests that disclosing the order of transaction processing is more effective in minimizing overdraft fees than any particular method of processing since customers can anticipate which payments will clear in which order. Hence, the final Guidance should emphasize disclosure over method.

[16] 74 Fed. Reg. at 59036.

VI. Less prescriptive, principles-based standards would better ensure that banks effectively monitor accounts for credit risk, customers are treated fairly, and appropriately informed customer elections to opt-in to (or not opt-out of) overdraft programs are honored.

The Guidance states that accounts should be monitored and segmented by customer usage to detect indications of excessive overdrafts and/or potential changes to repayment capacity. The Guidance then outlines circumstances exhibiting excessive overdrafts, and indicates that banks should perform a more in-depth analysis of the "borrower's ability to manage and repay overdraft protection." The Guidance further indicates that customers should be notified of alternative products and that ultimately if there continue to be excessive overdrafts, overdraft privileges should be terminated or the account closed.

While The Clearing House supports ensuring that customers are informed and treated fairly, and further supports banks monitoring accounts for credit-risk management purposes, these purposes may be better served by a less prescriptive approach than is stated in the Guidance. Overdraft protection is an important product that certain customers prefer to utilize to cover temporary shortfalls in available funds. This fact is reflected both in the consumer testing undertaken by the Board as part of the 2009 Regulation E Amendments and by an individual customer's *election to participate in an overdraft program*. Hence, once a customer has received clear and conspicuous disclosures and has made an informed choice to opt-in to (or not opt-out of) overdraft protections, banks should not second-guess that choice. To require banks to monitor a customer's use of overdraft protections seems to ignore the disclosure and affirmative consent that has already taken place.

With respect to the requirement that banks inform customers that make excessive use of overdraft protection about alternatives to overdraft products, the Clearing House notes that customers who regularly rely on overdraft protection may not be eligible for other low-cost alternative products and such products may not be suitable for them. Further, aside from offering a linked savings account, institutions that have less diverse product offerings may not have low-cost alternatives to offer customers.

For the reasons discussed above, The Clearing House respectfully requests that the OCC modify the monitoring and customer notification requirements in the final version of the Guidance to provide for a less prescriptive and more principles-based approach. This will allow banks to adopt appropriate policies and procedures, subject to examiner review, that are both based on the Guidance's principles and suitable for each bank. The Clearing House further recommends that such principles-based standards take into account the customer's voluntary election to participate in the overdraft program and the potential lack of suitable alternatives available to a customer in lieu of overdraft protections.

VII. Establishing programmatic limits on customer overdrafts may unduly interfere with customer choice and appropriate pricing of risks.

The Guidance directs institutions to institute various programmatic limits on customer overdrafts including "the amount of credit that may be extended under an overdraft protection program, the number of overdrafts and the total amount of fees that may be imposed per day and per month, and any transaction amount below which an overdraft fee will not be imposed." Further, the Guidance expects banks to close accounts where there are "excessive" overdrafts.

The establishment of such limits may restrict consumer choice by limiting the number of overdrafts banks are willing to pay, especially where the cost and risk of loss may increase without off-setting revenue. The Clearing House supports efforts to protect consumers from abuse but does not believe that this necessarily warrants prescriptive and programmatic limits on overdraft fees.

Further, banks are not currently required by statute or regulation to set daily limits for overdraft fees, or to close accounts for excessive overdrafts. We believe that banks should be able to make credit risk monitoring and account closure decisions considering a range of factors including but not limited to excessive overdrafts. The Clearing House finds that the imposition of the limits set forth in the Guidance appears to conflict with a national bank's ability to set fees for deposit services under applicable law. Specifically, OCC regulations provide that

> "[t]he establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if the bank employs a decision-making process through which it considers the following factors, among others:
>
> (i) The cost incurred by the bank in providing the service;
> (ii) The deterrence of misuse by customers of banking services;
> (iii) The enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and
> (iv) The maintenance of the safety and soundness of the institution."[17]

Many banks do in fact set prudent limitations on overdrafts under this law in consideration of these factors. If, however, the OCC elects to proceed with the prescriptive expectations set forth in the Guidance, The Clearing House believes doing so would warrant a formal rulemaking to allow for consideration of this and other applicable law.

[17] 12 CFR 7.4002(b)(2).

VIII. The Guidance appears to require suitability tests for customers which may trigger unintended consequences given banks' Regulation B responsibilities.

If not already conducted as part of an initial account opening, the Guidance expects national banks to assess the customer's risk with respect to overdraft privileges, including an assessment of the credit and deposit profile of the consumer to determine whether the customer poses "undue risks." These are, in effect, overdraft suitability tests expected of national banks, and these tests exceed the usual credit assessments for account opening. These expectations may place banks in the position of having to provide adverse action notices under Regulation B. The Clearing House requests that the OCC consider further all these implications, in particular through a formal notice and comment rulemaking process.

IX. Without a formal notice and comment rulemaking, national banks should not be required to provide prescribed consumer disclosures, including opt-in requirements, opt-out or revocation rights, suitability assessments, and prescribed repayment terms with regard to deposit advance programs.

Appendix B to the Guidance provides expectations for national banks with regard to deposit advance programs, including prescribed consumer disclosures, opt-in requirements, opt-out or revocation rights, suitability assessments, and prescribed repayment terms. As noted above, given the nature of these programs, which are akin to extensions of credit, and the OCC's expectations, we believe that this product and the implications of the OCC's various requirements should be considered in the context of the industry dialogue and consumer testing. Such input is typically provided for new substantive requirements regarding products not addressed in other law. Therefore, we strongly urge the OCC to propose these expectations as part of a formal notice and comment rulemaking process.

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Thank you for the opportunity to comment on the Guidance. If you have any questions or wish to discuss The Clearing House's comment letter, please do not hesitate to contact me.

Very truly yours,

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