

Client Alert

February 12, 2015

OCC Takes a Page from the CFPB's Playbook on Overdraft Programs

By Oliver I. Ireland and Ryan H. Rogers

On February 11, 2015, the Office of the Comptroller of the Currency ("OCC") issued an "updated" installment to the Comptroller's Handbook in a new booklet entitled "Deposit-Related Consumer Credit." In doing so, the OCC stole a page from the playbook used by the Consumer Financial Protection Bureau ("CFPB") in its notice of proposed rulemaking on prepaid products ("Prepaid Proposal"). (Our client alert on the CFPB's Prepaid Proposal is accessible [here](#).)

Similar to the CFPB's approach of treating overdraft services on prepaid cards as "credit" for purposes of Regulation Z—a move that, if adopted, could regulate prepaid overdraft services out of existence—it appears that the OCC now expects financial institutions it supervises to obtain customer opt in for overdraft services, perform ability-to-repay analysis for those services and establish overdraft fees that are "reasonably correlated to the actual cost" of the service. At least the CFPB's Prepaid Proposal was issued pursuant to the Administrative Procedure Act, with an opportunity for comment. The OCC's new booklet, which is accessible [here](#), simply showed up on its Web site.

FOCUS ON DEPOSIT ACCOUNT OVERDRAFT SERVICES

The OCC's new booklet focuses on three types of bank services—overdraft line-of-credit ("LOC") programs, discretionary overdraft protection ("ODP") programs for paying check or other deposit account transactions, and deposit advance products. The guidance uses the terms "customer" and "consumer" interchangeably throughout the booklet and, therefore, the guidance could be interpreted as covering overdraft-related services offered to businesses, as well as to consumers. For deposit advance products, the booklet essentially restates existing OCC guidance provided in OCC Bulletin 2013-40, which sets forth the agency's risk management expectations for such products. However, the OCC's new supervisory expectations for LOC and ODP programs now mean that banks must treat those programs as "credit" programs in accordance with several supervisory "principles."

SUPERVISORY PRINCIPLES FOR OVERDRAFT PROGRAMS

The OCC's bulletin outlines several supervisory expectations for banks that offer LOC and ODP programs, including principles relating to disclosures, customer eligibility requirements, program features, limitations on customer use (e.g., overuse) and program oversight by bank management. Some of these supervisory expectations are based on provisions in Regulation E or Regulation Z, including the following:

- *Customer Opt In.* The OCC expects that banks will offer overdraft services only on an opt-in basis. The OCC states that "[c]ustomers should not be automatically enrolled in programs" and that enrollment should occur "only after the customer has received appropriate disclosures, has made an affirmative request for the product, and has agreed to abide by product terms, including associated fees."

Client Alert

- *Ability-to-Repay Determination.* The OCC expects banks to implement policies and procedures to determine an applicant's creditworthiness and ability to repay the amount(s) of any funds that may be made available to the customer under the program. Specifically, the OCC states that underwriting practices should "include an analysis of income or assets and debt obligations" and an analysis of "whether the customer is able to manage and repay the credit obligations arising from the product while still meeting other financial obligations."
- *Reasonable Fees.* The OCC states that fees for LOC and ODP programs "should be reasonably correlated to the actual costs of offering, underwriting, and servicing the product as well as associated risks."

PRACTICAL IMPLICATIONS

As a result of the OCC's new guidance, banks that offer LOC and ODP programs should assess their ability (and willingness) to offer customers these services. For example, the guidance contemplates that banks will assess the volume of revenue generated from overdraft services and will "regularly" monitor customer use of such services to identify operational, compliance and reputational risks. Notably, the OCC expects that banks will report LOC and ODP products in regulatory reports as loans. Thus, banks will be expected to follow the instructions for the Consolidated Reports of Condition and Income (call report) and generally accepted accounting principles (GAAP) with respect to the reporting of income and loss recognition. In this regard, the OCC states that banks "should adopt rigorous loss estimation processes" so that fee income is "accurately measured."

WHAT'S AHEAD

If the history of deposit advance products is an indication, it is possible that some overdraft programs may go by the wayside. This is bad news for bank customers who look to LOC and ODP programs to meet their short-term liquidity needs. And, it is quite possible that the OCC's policy position is a harbinger of what's to come, in that the OCC cautions that the regulatory landscape may change: "Rules and regulations pertaining to overdraft protection services are subject to change, and bank management, directors, and examiners are encouraged to stay informed and up to date." This is prudent, albeit troubling, advice.

Contact:

Oliver I. Ireland
Washington, D.C.
(202) 778-1614
oireland@mofo.com

Ryan H. Rogers
Washington, D.C.
(202) 887-1507
rrogers@mofo.com

Client Alert

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 11 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.