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The Office of the
Comptroller of the Currency
250 E Street, SW, Mail Stop 2-3
Washington, DC 20219

RE: Docket ID OCC-2011-0012

In response to the notice of proposed rulemaking published in the June 8, 2011 Federal Register, the New York Bankers Association is submitting these comments on the Comptroller's Proposed Guidance on Deposit-Related Consumer Credit Products. Our Association believes that the proposal unnecessarily exceeds current regulatory requirements, conflicts with current New York State law, specifically hampers the ability of national banks and federal thrift institutions to provide services that their customers have come to expect, and ironically may create safety and soundness issues as to the profitability of banks. For these reasons, we urge that the Comptroller withdraw and reconsider the proposed guidance. Our Association is comprised of the community, regional and money center commercial banks and thrift institutions doing business in New York State. Our members hold aggregate assets in excess of \$10 trillion.

Current Regulatory Requirements

This proposed guidance would create still a further compliance burden, not required in any current regulation by a number of federal agencies and prospectively the new CFPB. It would require actions and prohibit activities that are currently specifically regulated in detailed regulations issued by the Federal Reserve Board under current law. We therefore strongly oppose this proposal, which is going to be enforced by bank examiners as if it were based in statute or regulation, which proscribes conduct specifically permitted in regulations issued by the agency charged by Congress with their issuance. We also oppose provisions of the guidance which mandate conduct which is not otherwise required by these regulations.

Regulation E, governing, among other things, overdraft protection programs, and Regulation DD, which governs elements of deposit advance programs, were issued by and are constantly being updated by the Board of Governors of the Federal Reserve System, the agency specifically charged by Congress with responsibility for their oversight. The consumer protection provisions of these regulations have now been transferred, again under statutory mandate, to the CFPB. The OCC's guidance should be in all cases consistent with the requirements of these regulations, providing clarity where clarity is necessary, but not imposing additional constraints with no basis in statutory law.

Merely by way of example, Regulation E requires that customers opt in only for ATM transactions and one-time overdraft coverage. This guidance, by contrast, would require opt-in for all check, ACH, and recurring debit card transactions as well. Ignoring the extensively researched and market-tested regulations of the Federal Reserve without a carefully constructed cost-benefit analysis is unjustified. It would also be highly burdensome to banks and thrifts subject to the guidance whose customers would receive separate and conflicting disclosures and choices than customers of other financial institutions. Similarly, national banks and federal savings institution customers will be subject to new "prudent eligibility standards" not applicable to other depository institution customers, additional disclosure requirements, differential requirements for check clearing and additional requirements for closing overdraft accounts.

Customer Expectations

Survey after survey, including those conducted by the Federal Reserve Board in preparation for the amendments to Regulation E covering overdraft protection programs, show that customers have come to expect that the overdrafts that they may incur as part of some of their routine retail transactions will be covered. In addition, many surveys have shown that, in the event that an overdraft occurs, customers want larger payments, such as for mortgages or taxes, covered first, in order to avoid very substantial late payment or bounced check fees that may be incurred for large dollar payments that are returned. The regulations of the New York State Banking Department, for example, require that New York State-chartered banks and thrifts provide disclosure to their customers of the order in which checks are paid, but do not mandate the order. Part 32.4 state, among other provisions, that "such disclosure may inform the depositor that the banking institution pays the largest items first, the smallest items first, or by the number of the item or in the order received."

Our Association believes that customers should receive appropriate disclosure, but that mandates limiting flexibility in meeting customer expectations should be avoided. This guidance would ignore this State regulation and these surveys, preventing banks and thrifts from providing customers the service they expect and often demand. And, because this is guidance and not a regulation, it may be expected that some financial institutions will be subject to the risk of additional

liability because the effect of a non-completed, large dollar payment transaction will cause a customer to incur substantial additional and foreseeable costs.

Safety and Soundness

The asserted basis for the issuance of this proposal is to protect the safety and soundness of banks engaging in deposit-related consumer credit activities. However, the proposal itself contains no fully developed cost-benefit analysis showing how bank safety and soundness would be adversely affected by any of the transactions prohibited in the guidance. Safety and soundness is a long-established but never fully defined concept at the heart of the regulation of banking. It is the responsibility of bank management to ensure that a bank's activities are safe and sound and comport with standards that will ensure the bank's continued health, growth and profitability. The system of bank regulation and examination is generally designed to enforce safety and soundness standards widely accepted within the industry and intended to keep both the banking system and individual institutions fiscally upright.

This proposed guidance, however, while issued in the name of safety and soundness, appears directed solely at consumer protection. It contains little, if any, rationale for connecting the conduct regulated in the guidance to bank safety and soundness. While for some consumers, reducing the number of overdrafts may contribute to the safety and soundness of their household finances, for many others, being able to incur the occasional overdraft may add to their convenience, avoid embarrassment and reduce the expenses and possible adverse credit score impact of significant overdrafts.

For these reasons, we respectfully urge the OCC to withdraw the proposed guidance.

We appreciate the opportunity to comment on this proposed guidance.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. Smith". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping tail.

Michael P. Smith