By Fax (202-898-0230) and First Class Mail

April 1st, 2010

The Honorable John E. Bowman
Acting Director
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Dear Mr. Bowman:

The federally-chartered thrifts under your supervision will soon implement changes to their overdraft programs to comply with the new Federal Reserve Regulation E rules that require affirmative consent from consumers before banks charge an overdraft fee for debit card purchases and ATM withdrawals. We write to urge the Office of Thrift Supervision to closely supervise bank implementation of overdraft opt-in rules.

OTS Policies Needed on Soliciting Opt-Ins for Overdraft Programs

Specifically, we request that the OTS:

- Require federally-chartered thrifts to submit their training manuals, scripts provided to bank employees, communications to customers, and advertising materials and promotions used to solicit opt-in for fee-based overdraft coverage, in order to monitor whether thrift practices and messages are deceptive or inconsistent with the Federal Reserve's rule.
- Prohibit thrifts from using scare tactics or deceptive or misleading statements in materials and messages soliciting consumer opt-in.

- Closely examine overdraft opt-in programs for disparate impact and take action against any thrift that targets vulnerable consumers who are heavy users of overdrafts.
- Consider sustained overdraft fees, i.e. multiple fees for a single violation, to be an unfair practice because the fee is not reasonable or proportional to the overdraft.
- Urge thrifts to deny overdrafts when funds are not sufficient to cover debit card purchases and ATM withdrawals. Bank of America has announced that it will deny unfunded debit card purchases while Citibank denies both debit purchases and ATM withdrawals on insufficient funds. Rather than solicit customers to pay $35 for small overdrafts, responsible thrifts should simply deny these transactions.

Given that consumers spent almost $24 billion on overdraft fees in 2008 and knowing that overdrafts triggered by debit cards are the leading form of payments that cause overdrafts, thrifts have a strong incentive to persuade consumers to opt-in to fee-based overdraft coverage for one-time debit card purchases and ATM withdrawals. We are already seeing aggressive marketing campaigns promoted by the consultants who design and sell overdraft programs to financial institutions.

Overdraft Opt-In Marketing Targeted at Vulnerable Consumers

We are especially concerned that financial institutions are targeting the most frequent overdrafters and steering them to opt into fee-based overdraft, the most expensive overdraft option. A New York Times columnist quotes the head of Chase's consumer banking as describing the sort of person who would best benefit from overdraft coverage as a person who runs low on funds the weekend before payday and needs money to pay for groceries or a prescription or to take a pet to the vet.[1] In other words, consumers who use overdrafts are cash-strapped families, struggling to make ends meet who can least afford to pay $34 for a $20 "cash advance" on a debit card.

Indeed, third party consultants who market overdraft programs have already begun urging banks to target their opt-in solicitations to frequent overdrafters. For example:

- A consultant urged his clients to "target abusers for opt-in." (Rory Rowland, Rowland Consulting, January 29, 2010)
- "Identify 'frequent fliers,'" – citing the FDIC survey's finding that the most frequent overdrafters spend over $1600 annually in fees – and to "focus attention on those customers first." (Webinar, i7Stategies, March 4, 2010)
- ACTON's "5 Step Mail Program" that targets customers with four or more overdrafts in a year. "This group gets a gift or cash offer if they respond…After all, this is your most profitable fee group." Step 5 is to again contact any customers in the 4+ group who have not responded. (www.actonfs.com/Optin.aspx)
- "With the SoundBite Debit Card Enrollment solution, your business can…Segment and prioritize outreach based on customers/ overdraft usage history…" (www.soundbit.com/solutions/sales-marketing/debit-card-overdraft-opt-in)
- One consultant asks "What can you do to protect or even increase your overdraft fees?" While not explicitly stating they target heavy overdrafters, one of their selling points is "Privilege Manager CRM Software that automates and segments account holder communications for greater efficiency and effectiveness." (www.jmfa.com/pageContent.aspx?id=126)

[1] Ron Lieber, "Overdraft Protection: Why Bother?" New York Times, March 12, 2010.

Targeting the most vulnerable segment of bank customers – the small minority with repeated overdrafts per year -- raises safety and soundness concerns for the institution, since it encourages high levels of unsustainable debt among these accountholders. Research[2] has repeatedly found that overdraft fees have a disparate impact on lower income consumers and communities of color, raising fair lending concerns under the Equal Credit Opportunity Act (ECOA).[3]

We urge you to work with the other bank regulators such as the OCC and the Federal Reserve Board, to closely monitor institutions' efforts to entice customers to opt in. The OTS should take appropriate swift and clear action to ensure that any opt-in efforts are in compliance with Regulations E and DD and the Equal Credit Opportunity Act and are not otherwise deceptive.

This week our organizations filed comments in a Regulation E docket at the Federal Reserve which we are attaching for your information. Our comments in this docket describe overdraft opt-in marketing by a national bank which illustrates our concerns about misleading promotion of opt-in overdraft programs.

Please let us know if you have any questions or if we can provide further information.

Sincerely,

Jean Ann Fox
Director of Financial Services
Consumer Federation of America

Chi Chi Wu
Staff Attorney
National Consumer Law Center
(On behalf of its low income clients)

Ed Mierzwinski
Consumer Program Director
U.S. Public Interest Research Group

Ira Rheingold
Executive Director
National Association of Consumer Advocates

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[2] Consumer Federation of America's 2004 survey found that 45% of African Americans had experienced overdrafts, compared to only 28% of consumers overall. CFA conducted another ORCI poll in July 2009, finding that African Americans were twice as likely to have experienced overdrafts as consumers overall. In 2006 and 2008, the Center for Responsible Lending found that only 16% of people who overdraft pay 71% of all overdraft fees, and those individuals are more likely than the general population to be lower income and non-white. See Leslie Parrish, *Consumers Want Informed Choice on overdraft Fees and Banking Options*, CRL Research Brief (Apr. 16, 2008) at www.responsiblelending.org/overdraft-loans/research-analysis/consumers-want-informed-choice-on-overdraft-fees-and-banking-options.html

[3] "Reverse redlining" – targeting unfair, predatory, or abusive products with a disparate impact on protected classes – has been recognized as a fair lending violation in both the housing and auto lending contexts. Overdrafts were recognized by banking regulators as extensions of credit in the 2005 Interagency Guidelines on Overdrafts, even though the associated fee has been excluded from Truth in Lending Act's definition of a "finance charge" by Board rule.

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The comments submitted to the Federal Reserve can also be found at http://www.consumerfed.org/elements/www.consumerfed.org/File/FRB_Overdraft_Comment_3_30_10.pdf.