

**Comments to the  
Consumer Financial Protection Bureau  
Docket No. CFPB-2012-0007  
77 Federal Register 12031 (February 28, 2012)**

***Impacts of Overdraft Programs on Consumers***

**by**

**Center for Responsible Lending  
Consumer Federation of America  
National Consumer Law Center, on behalf of its low income clients**

**June 29, 2012**  
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The Center for Responsible Lending (CRL) is a not-for-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, which consists of a state-chartered credit union (Self-Help Credit Union (SHCU)), a federally-chartered credit union (Self-Help Federal Credit Union (SHFCU)), and a non-profit loan fund.

SHCU has operated a North Carolina-chartered credit union since the early 1980s. Beginning in 2004, SHCU began merging with community credit unions that offer a full range of retail products. In 2008, Self-Help founded SHFCU to expand Self-Help's mission. CRL has consulted with Self-Help's credit unions in formulating these recommendations.

Consumer Federation of America (CFA) is a nonprofit association of some 300 national, state, and local pro-consumer organizations created in 1968 to represent the consumer interest through research, advocacy, and education.

The National Consumer Law Center (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit.

## Introduction

We would like to thank the Consumer Financial Protection Bureau (the Bureau) for making high-cost overdraft programs a priority. We are pleased that the Bureau has issued this Request for Information (RFI) as it seeks to learn more about consumers' experiences and the consequences of overdraft practices.<sup>1</sup>

We especially appreciate the Bureau's recognition of several aspects of overdraft programs that have long caused us deep concern, particularly their capacity to inflict serious economic harm, especially on financial institutions' most vulnerable customers.<sup>2</sup>

Fifteen years ago, overdraft programs were low-cost or free courtesy services, transfers from a consumers' other accounts, or low-cost lines of credit. Since then, they have evolved into a high-cost credit product that strips money from consumers' accounts, and drives consumers into debt. They make bank accounts unsafe for vulnerable consumers and lead to account closures, pushing families out of the banking system.

High-cost overdraft loan programs charge borrowers up to \$38 per overdraft transaction, regardless of the amount overdrawn, and regardless of whether the customer has the ability to avoid overdrafting. In fact, where debit and ATM transactions are involved, the typical customer would prefer to stop the transaction at no cost rather than incur an overdraft fee, but many banks instead encourage these unnecessary and unwanted overdrafts.

Banks have also purposefully caused consumers to overdraft by "reordering" the posting order of daily transactions in order to create negative balances that increase overdraft fees. Most recently, some banks have stopped employing this deceptive practice, in part in

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<sup>1</sup> 73 Fed. Reg. 12031 (Feb. 28, 2012). We are also pleased that the Bureau is launching a study using data from the largest banks. We have long urged the prudential regulators to monitor overdraft programs closely, including by rigorously collecting and analyzing data. *See, e.g.*, Comments to the Office of the Comptroller of the Currency (OCC) on its Proposed Guidance on Deposit-Related Consumer Credit Products, by the Center for Responsible Lending, Consumer Federation of America, and National Consumer Law Center, on behalf of its low-income clients, (Aug. 8, 2011) [hereinafter 2011 OCC Comments], *available at* [http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/OCC-Comments-Payday-and-Overdraft-Guidance-Aug-8-2011\\_Final.pdf](http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/OCC-Comments-Payday-and-Overdraft-Guidance-Aug-8-2011_Final.pdf). In particular, we have asked regulators to collect data showing the number of fees paid by customers with overdrafts; the demographics of overdrafters; information about whether customers with overdrafts would likely qualify for a lower cost product; the portion of overdraft fees triggered by debit card transactions; and the cost to the institution of covering overdrafts. *Id.* We were pleased that the FDIC collected much of this data several years ago for the illuminating study it published in 2008. Federal Deposit Insurance Corporation, *Study of Bank Overdraft Programs* (Nov. 2008) [hereinafter FDIC Overdraft Study, 2008]. It appears the Bureau is committed to learning the answers to these questions in today's marketplace.

<sup>2</sup> Richard Cordray, Director, Consumer Financial Protection Bureau, Prepared Remarks, CFPB Roundtable on Overdraft Practices, New York, New York (Feb. 22, 2012) [hereinafter Director Cordray Remarks, Feb. 2012], *available at* <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-at-the-cfpb-roundtable-on-overdraft-practices/>.

response to a series of court cases addressing transaction reordering, but other banks still engage in the practice.

When a customer does overdraft and incur a charge, the bank guarantees itself repayment by taking the overdraft amount plus its fees immediately from the customer's next deposit in one balloon repayment. This automatic immediate "setoff" against the deposit account severely limits the consumer's ability to make a measured decision about the order in which to cover his or her debts and other, often essential, expenses, such as food or prescription medicines. Thus, financial institutions harm other lenders and businesses by putting themselves first in line to pay off high-cost loans and leaving their customers financially worse off.

Effective reform of today's overdraft practices must address several key harmful features of the product. Reform cannot be limited to improving disclosures or attacking deceptive marketing. With overdraft fees as high as they are, banks have too great an incentive to ensure that customers continue to incur overdraft fees. This incentive will prove stronger than the best disclosures if not coupled with substantive protections.

Our key recommendations are as follows:

- Do not substitute "opting in" for substantive reforms.
- Prohibit overdraft fees on one-time debit card and ATM transactions, which can easily be declined at no cost. Ending fees triggered by debit and ATM transactions would limit a significant number of excessive fees. It is clearly feasible for banks to make this change. Citibank has never charged such fees, and HSBC has stopped charging them. Bank of America, the largest debit card issuer, stopped overdraft fees at the point-of-sale in 2010. The Bureau should level the playing field, or banks that have stopped charging abusive overdraft fees on these transactions will struggle to compete with banks that have not.
- Require that after six fee-based overdraft loans in a 12-month period, including "sustained" or "continuous" overdraft fees, that a customer be provided affordable installment loans of at least 90 days to pay off the remaining balance, and that no further fee-based overdraft loans be provided. Any bank payday loans should be included in the count of six loans. Such repeated overdrafts indicate the borrower's inability to repay, and continued fee-based overdraft would be acting as an exorbitantly priced credit product that is not appropriate for anyone.
- Stop manipulation of posting order to increase fees. Require that banks minimize fees through posting order whenever feasible and establish a specific posting order that serves as a safe harbor and protects consumers by minimizing fees. Prohibit posting transactions in order from highest to lowest, or in any manner that increases the number of overdrafts. The FDIC recently made clear that high-to-low posting is inappropriate; the Bureau should do the same.

In addition, the CFPB should:

- Require that overdraft fees be reasonable and proportional to the amount of the underlying transaction and to the cost to the bank of covering the overdraft, consistent with the FDIC's overdraft guidance and rules governing penalty fees on credit cards.
- Require that the cost of overdraft loans and fees be disclosed as an annual percentage rate.
- If overdraft loans continue to be permitted on debit cards, which we oppose, the cards should be treated as credit cards and protected by the credit card provisions of TILA, including the fee-harvester provisions.
- Require that overdraft loans and fees not be repaid through automatic setoff against the customer's deposits (and especially when those are exempt funds), consistent with the prohibition on wage assignments in the Credit Practices Rule; Treasury's interim final rule regarding delivery of Social Security benefits to prepaid debit cards; and the prohibition against setoff already applicable to credit cards under the Truth in Lending Act.
- Evaluate overdraft programs in light of the letter and the spirit of federal and state consumer protection laws, which aim to protect customers from many of the abusive features characteristic of high-cost overdraft loan programs.

## I. Background

### A. Regulatory inaction allowed overdraft programs to morph from an ad-hoc courtesy into routine, extremely high-cost credit.

Automated high-cost overdraft programs were not always widespread. What began as an ad-hoc occasional courtesy that banks and credit unions provided to their customers grew to a \$10.3 billion "service" in 2004 and more than doubled to \$23.7 billion by 2008.<sup>3</sup> This growth was spurred in the late 1990s and early 2000s by heavy marketing of automated overdraft programs by consultants promising dramatic fee increases to banks.<sup>4</sup> Some

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<sup>3</sup> Leslie Parrish, Center for Responsible Lending, *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years* 5 (Oct. 6, 2009) [hereinafter *Overdraft Explosion*], available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/crl-overdraft-explosion.pdf>.

<sup>4</sup> See, e.g., Impact Financial Services, <https://impactfinancial.com/portal/AboutIFS/FromPresidentsDesk/tabid/66/Default.aspx> (last visited July 7, 2008 and Mar. 23, 2012) ("Virtually all of our clients have increased the NSF fee income from 50-150% or more"); Moebs Services, Inc., <http://www.moebs.com/Default.aspx?tabid=102> (last visited July 9, 2008 and Mar. 23, 2012) ("overall fee income is increased by 200 percent"). Both examples on file with CRL. See

consultants offer the software at no upfront cost to the institution; they simply charge the financial institution a percentage of the increased fee revenue generated by the software.<sup>5</sup>

This growth was also spurred by federal banking regulators, whose inaction, or lack of meaningful action, allowed overdraft abuses to persist and to grow. The Office of the Comptroller of the Currency (OCC) first recognized several overdraft practices as problematic as early as 2001, when a bank that the OCC supervised asked it for a “comfort letter,” or explicit approval, for the high-cost overdraft program it wanted to implement. Rather than providing this approval, the OCC articulated a number of compliance concerns about the program, noting “the complete lack of consumer safeguards,” including the lack of limits on the numbers of fees charged per month; the similarities between overdraft fees and other “high interest rate credit”; and the lack of efforts by banks to identify customers with excessive overdrafts and meet those customers’ needs in a more economical way.<sup>6</sup>

Despite the articulation of these concerns, federal regulators failed to act on overdraft practices until 2005, when they issued a joint guidance.<sup>7</sup> Rather than explicitly prohibit or even effectively discourage the troubling practices that the OCC had identified in 2001, the regulators issued recommendations that financial institutions engage in “best practices.” These included limiting overdraft coverage to checks alone (i.e., excluding debit card and other transaction types); establishing daily limits on fees; monitoring excessive usage; and obtaining affirmative consent to overdraft coverage.<sup>8</sup>

The guidance also cautioned banks against potential violations under the Equal Credit Opportunity Act (ECOA), noting that “steering or targeting consumers . . . for [higher cost] overdraft protection programs while offering other consumers overdraft lines of credit or other more favorable credit products . . . will raise concerns under the ECOA.”<sup>9</sup>

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*also* Consumer Federation of America and National Consumer Law Center, *Bounce Protection: How Banks Turn Rubber Into Gold By Enticing Consumers to Write Bad Checks* (Jan. 27, 2003), available at [http://www.nclc.org/images/pdf/overdraft\\_loans/bounce-protection-appendix-2003.pdf](http://www.nclc.org/images/pdf/overdraft_loans/bounce-protection-appendix-2003.pdf).

<sup>5</sup> Impact Financial Services’ website states “Since we don’t charge up-front or implementation costs and our fee is a percentage of the increased NSF income you earn from the service, you have no financial risk!” Impact Financial Services, <https://impactfinancial.com/portal/WhatisIOP/HowTheProgramWorks/tabid/65/Default.aspx> (last visited July 7, 2008 and Mar. 22, 2012) (on file with CRL).

<sup>6</sup> Office of the Comptroller of the Currency, Interpretive Letter # 914 (Aug. 3, 2001), available at <http://www.occ.gov/static/interpretations-and-precedents/sep01/int914.pdf>. The OCC raised compliance issues with respect to the Truth in Lending Act, the Truth in Savings Act, the Electronic Fund Transfer Act, ECOA, and Regulation O (extensions of credit to bank insiders).

<sup>7</sup> OCC, FRB, FDIC, and National Credit Union Administration, Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9127 (Feb. 24, 2005) [hereinafter 2005 Joint Guidance], available at <http://www.occ.gov/news-issuances/federal-register/70fr9127.pdf>.

<sup>8</sup> *Id.* at 9132.

<sup>9</sup> *Id.* at 9131.

Regulators generally did not enforce the guidance and banks widely ignored it.<sup>10</sup> For example, before Regulation E required it in 2009, banks almost never sought affirmative consent to overdraft coverage (and rarely even made any right to opt out of coverage known to consumers), and most large banks adopted none of the best practices recommended in the joint guidance. Instead, overdraft abuses continued to flourish, with bank revenues from overdraft fees increasing steadily.<sup>11</sup>

Also in 2005, despite having taken the position that overdrafts are “credit,”<sup>12</sup> the Federal Reserve Board (the FRB) chose, over strong objections from consumer organizations,<sup>13</sup> to regulate high-cost overdraft programs under the Truth in Savings Act’s Regulation DD instead of the Truth in Lending Act’s Regulation Z.<sup>14</sup> This decision had several harmful implications, including that the cost of overdraft loans and fees were not required to be measured in annual percentage rate (APR) terms, as credit typically is. This made it difficult-to-impossible for consumers to compare the cost of overdraft loans to lower-cost credit options, like lines of credit or credit cards, and enabled financial institutions to more easily perpetuate the myth that overdrafts are a courtesy service.

In November 2009, the FRB required that institutions obtain customers’ “opt-in” before charging overdraft fees on one-time debit card purchases and ATM transactions.<sup>15</sup> But the rule failed to address the fundamental substantive problems with bank overdraft programs, including the disproportionately high fees, and the manipulation of processing order to increase the size and frequency of fees. These abuses continued even after the FRB’s rule. In addition, banks often pressured or misled consumers to sign opt-in forms.

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<sup>10</sup> The OCC’s Consumer Compliance Handbook used by its examiners in their evaluation of banks, per review in 2010 and 2011, made no mention of these best practices; in fact, it didn’t mention overdraft programs at all. *See* OCC Consumer Compliance Handbook, *available at* <http://www.occ.treas.gov/handbook/compliance.htm>. The OCC did issue one enforcement action against one small bank five years later. OCC Consent Order in the Matter of Woodforest National Bank, The Woodlands, TX, AA-EC-10-93, #2010-202, October 6, 2010, *available at* <http://www.occ.treas.gov/news-issuances/news-releases/2010/nr-occ-2010-122a.pdf>. OCC took action after the OTS cited the federal thrift section of that bank for egregious overdraft practices at WalMart stores.

<sup>11</sup> Eric Halperin and Peter Smith, Center for Responsible Lending, *Out of Balance* 9 (July 11, 2007).

<sup>12</sup> *See* 2005 Joint Guidance, *supra* note 7, at 9129 (“When overdrafts are paid, credit is extended.”).

<sup>13</sup> *See, e.g.*, Comments to the Board of Governors of the Federal Reserve System on Proposed Interagency Guidance on Overdraft Programs, Center for Responsible Lending, (Aug. 6, 2004) [hereinafter CRL’s 2004 FRB Comments].

<sup>14</sup> 70 Fed. Reg. 29582 (May 24, 2005).

<sup>15</sup> Reg. E., 12 C.F.R. § 205.17(b).

Although the opt-in rule did not provide sufficient protections to consumers, it did trigger a shift in the marketplace. The largest issuer of debit cards, Bank of America, stopped charging debit card point-of-sale overdraft fees altogether,<sup>16</sup> joining Citi, which never has. HSBC has now stopped charging overdraft fees on debit card point-of-sale and ATM transactions.<sup>17</sup> But banks that have taken the high road thus far are left vulnerable to pressure from investors to backslide as they attempt to compete with banks that have not.

Regulators have also contributed to the unequal playing field. Recognizing the need for more substantial action on overdraft abuses, the FDIC finalized guidance in November 2010, urging banks to curb excessive overdraft fees—identifying more than six fees in a 12-month period as “excessive”<sup>18</sup>—and telling banks to stop posting transactions in order from highest to lowest.<sup>19</sup>

In contrast to the FDIC, while the OCC also proposed guidance in June 2011, the guidance asserts general principles for responsible lending but does not set forth clear guidelines about what is appropriate. Thus, the OCC’s guidance may result in little change to the overdraft landscape at all.<sup>20</sup> As discussed further below, the guidance, if finalized, may also inadvertently legitimize high-to-low posting order. We have urged the OCC to withdraw its proposed guidance.

In this landscape, banks are currently engaged in differing practices, either voluntarily or because they are subject to differing guidelines. And all financial institutions continue to have strong incentives to engage in a race to the bottom—even as that “bottom” differs based on the financial institution’s prudential regulator.

## **B. Overdraft programs cause serious financial harm and drive customers out of the banking system. [RFI Questions 11, 12]**

High-cost overdraft loans are structured in a way likely to lead to repeat overdrafts by those least able to afford them. They are replete with predatory loan characteristics, including: short-term balloon repayment; high cost; lack of appropriate underwriting that

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<sup>16</sup> Andrew Martin, *Bank of America to End Debit Overdraft Fees*, New York Times, March 9, 2010, available at <http://www.nytimes.com/2010/03/10/your-money/credit-and-debit-cards/10overdraft.html>.

<sup>17</sup> Consumer Federation of America, Survey of OCC Bank Overdraft Loan Fees and Terms (July 2011) (attached as Appendix B to 2011 OCC Comments, *supra* note 1).

<sup>18</sup> Federal Deposit Insurance Corporation, Supervisory Guidance for Overdraft Protection Programs and Consumer Protection, FIL-81-2010 (Nov. 24, 2010) [hereinafter FDIC 2010 Guidance on Overdraft Programs].

<sup>19</sup> Federal Deposit Insurance Corporation, Overdraft Payment Program Supervisory Guidance, Frequently Asked Questions, <http://www.fdic.gov/news/conferences/overdraft/FAQ.pdf> (last visited June 29, 2012).

<sup>20</sup> Office of the Comptroller of the Currency, Proposed Guidance on Deposit-Related Consumer Credit Products, 76 Fed. Reg. 33409 (June 8, 2011) [hereinafter OCC Proposed Guidance], available at <http://www.gpo.gov/fdsys/pkg/FR-2011-06-08/pdf/2011-14093.pdf>.

assesses the customer's ability to repay the loan without taking out another loan shortly thereafter; and the bank's repaying itself before all other debts or expenses, directly from the customer's next deposit of wages or exempt federal benefits, such as Social Security or SSI payments, or military or veteran's pay or benefits.

As the real-life case study below demonstrates, customers struggling financially are unlikely to be able to both repay an overdraft loan and the associated high fees in one lump sum *and* continue to meet ongoing expenses; as a result, as with payday loans, consumers must borrow again before the end of the next pay cycle. Over time, the repeated fees strip away consumers' cash assets, leaving them financially worse off than when they first overdrafted. Further, in cases involving debit or ATM transactions, the customer could have avoided the costs of overdrafting simply by the bank stopping the transaction at no cost—clearly the preference of many account holders.

Overdraft and bounced check fees are the leading cause of involuntary bank account closures, and a significant cause of voluntary account closures. Thus, overdraft loan practices drive vulnerable consumers out of the banking system, leading to greater numbers of unbanked households.<sup>21</sup> Former FDIC Chair Sheila Bair has noted that “[r]epeat use of fee-based overdraft protection doesn't make sense for anyone.”<sup>22</sup>

The FDIC's recent overdraft guidance acknowledged that repeat overdraft fees can result in “[s]erious financial harm” for “customers with a low or fixed income.”<sup>23</sup> The Bureau's RFI notes that the FDIC's 2008 survey (based on 2006 data) found that 84 % of overdraft fees were borne by only 9 % of account holders, with some account holders paying over

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<sup>21</sup> The FDIC's 2009 survey found that one-third of previously banked households no longer had an account because they felt the cost was too high, including minimum balance requirements, overdraft fees, and other service charges. FDIC, *National Survey of Unbanked and Underbanked Households* 25 (Dec. 2009), available at [http://www.fdic.gov/householdsurvey/full\\_report.pdf](http://www.fdic.gov/householdsurvey/full_report.pdf). A survey in the Detroit area found that among those surveyed who formerly had a bank account, 70 percent chose to close the account themselves, citing moving, worrying about bouncing checks, and excessive fees as their reasons for closing the account. The remaining formerly banked, 30 percent, reported that their bank closed their account; the primary reason was bounced checks and overdrafts. See Michael S. Barr, *Financial Services, Savings and Borrowing Among Low- and Moderate-Income Households: Evidence from the Detroit Area Household Financial Services Survey* 12, (Mar. 30, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1121195##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121195##). See also Dennis Campbell, Asis Martinez Jerez, and Peter Tufano, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures* 6, (June 6, 2008), available at [http://www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell\\_jerez\\_tufano.pdf](http://www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf) (noting that virtually all involuntary bank account closures, when the financial institution closes a consumer's account, occur because the customer overdrew the account an excessive number of times).

<sup>22</sup> Sandra Block, *Bank overdraft fees: Now it's up to the customer to accept*, USA Today (June 25, 2010), available at [http://www.usatoday.com/money/industries/banking/2010-06-25-overdraft18\\_CV\\_N.htm](http://www.usatoday.com/money/industries/banking/2010-06-25-overdraft18_CV_N.htm).

<sup>23</sup> FDIC 2010 Guidance on Overdraft Programs, *supra* note 18, at 1.



\$1,600 per year.<sup>24</sup> The FDIC study also found that consumers living in lower-income areas bear the brunt of these fees.<sup>25</sup>

Two CRL surveys, in 2006 and 2008, found that 71 % of overdraft fees were shouldered by only 16 % of respondents who overdrafted, and those account holders were more likely to be lower income, non-white, single, and renters when compared to the general population. Respondents reporting the most overdraft incidents were those earning below \$50,000.<sup>26</sup>

Communities of color, seniors, young adults, and military families are also hit hard by overdraft fees:

- Communities of color. Multiple surveys have found that communities of color bear a disproportionate share of high-cost overdrafts,<sup>27</sup> and civil rights groups have expressed concern about the impact these fees have on communities they represent.<sup>28</sup>

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<sup>24</sup> 77 Fed. Reg. 12031 (citing FDIC Overdraft Study, 2008, *supra* note 1, at 76 and at iv). Note that this study included only FDIC-supervised banks, whose average overdraft fees at the time were \$27. *Id.* at v. Consumers overall paid an average \$34 fee at that time. See Eric Halperin, Lisa James, and Peter Smith, Center for Responsible Lending, *Debit Card Danger: Banks offer little warning and few choices as customers pay a high price for debit card overdrafts* 8 (Jan. 25, 2007) [hereinafter *Debit Card Danger*], available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/Debit-Card-Danger-report.pdf>. This \$34 average is influenced heavily by the fees charged at the largest banks, whose fees have averaged \$34-\$35 for several years. As a result, the FDIC's study may have understated the amount that many bank customers pay annually in overdraft fees.

<sup>25</sup> FDIC Overdraft Study, 2008, *supra* note 1, at v.

<sup>26</sup> Leslie Parrish, Center for Responsible Lending, *Consumers Want Informed Choice on Overdraft Fees and Banking Options* (Ap. 16, 2008) [hereinafter CRL Research Brief, 2008], available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/final-caravan-survey-4-16-08.pdf>.

<sup>27</sup> CFA's 2004 survey found that 45 percent of African Americans had experienced overdrafts, compared with only 28 percent of consumers overall. Consumer Federation of America, *Overdrawn: Consumers Face Hidden Overdraft Charges from Nation's Largest Banks* 18 (June 9, 2005), available at <http://www.consumerfed.org/pdfs/CFAOverdraftStudyJune2005.pdf>.

In 2006, a CRL survey found that only 16 percent of people who overdraft pay 71 percent of all overdraft fees, and those individuals are more likely than the general population to be lower income and non-white. Lisa James and Peter Smith, Center for Responsible Lending, *Overdraft Loans: Survey Finds Growing Problem for Consumers*, (Ap. 24, 2006), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/ip013-Overdraft-Survey-0406.pdf>; CFA conducted another survey in July 2009, finding that African Americans were twice as likely as consumers overall to have experienced overdrafts.

<sup>28</sup> See, e.g., Letters from the Leadership Conference on Civil and Human Rights and other civil rights groups to Wells Fargo and Chase, Nov. 29, 2010, available at <http://www.civilrights.org/fairhousing/banking/ltr-to-wells-fargo-re-overdrafts-11-29-10.pdf>; <http://www.civilrights.org/fairhousing/banking/ltr-to-chase-re-overdrafts-11-29-10.pdf>.

- Seniors. Older Americans aged 55 and over paid \$6.2 billion in overdraft fees in 2008<sup>29</sup>—\$2.5 billion for debit card/ATM transactions alone<sup>30</sup>—and those heavily dependent on Social Security paid \$1.4 billion.<sup>31</sup> Banks repay themselves and collect fees directly from Social Security income, which would be protected from creditors in other creditor/debtor contexts.<sup>32</sup>
- Young adults. Young adults, who tend to earn relatively little as students or new members of the workforce, paid \$1.3 billion in overdraft fees in 2008.<sup>33</sup> Because they are more likely to use a debit card for small transactions than older adults, they were paying \$3 in fees for every \$1 borrowed on a debit card when the national average was \$2 in fees for every \$1 borrowed.<sup>34</sup> As the Bureau notes, the FDIC Survey found that young adults were the most likely to overdraw their accounts, with 46 % of all young adults overdrawing their accounts in the previous year.<sup>35</sup>

The situation is exacerbated by deals banks make with universities to provide school ID cards that double as debit cards. Banks pay the partner school for exclusive access to the student population and sometimes split the fee revenue they collect on debit card transactions with the university.<sup>36</sup> An estimated 100 to 125 of

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<sup>29</sup> Leslie Parrish and Peter Smith, Center for Responsible Lending, *Shredded Security: Overdraft practices drain fees from older Americans* (June 18, 2008) [hereinafter *Shredded Security*], available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/shredded-security.pdf>. The figures in this report have been updated in the text above to reflect the increase in total overdraft fees paid by all Americans from \$17.5 billion in 2006 to \$23.7 billion in 2008 as reported in *Overdraft Explosion*, *supra* note 3.

<sup>30</sup> *Shredded Security*, *supra* note 29, at 7. The report found that debit card POS and ATM transactions account for 37.4 percent and 2.5 percent, respectively, which, when calculated as a percentage of \$6.2 billion, together equal \$2.5 billion.

<sup>31</sup> *Id.* at 6, Table 1. “Heavily dependent” was defined as recipients who depended on Social Security for at least 50 percent of their total income.

<sup>32</sup> See *infra* Part VIII.

<sup>33</sup> Leslie Parrish and Peter Smith, Center for Responsible Lending, *Billion Dollar Deal: Banks swipe fees as young adults swipe debit cards, colleges play along 1* (Sept. 24, 2007) at 1 [hereinafter *Billion Dollar Deal*], available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/billion-dollar-deal.pdf>. The figures in this report have been updated in the text above to reflect the increase in total overdraft fees paid by all Americans from \$17.5 billion in 2006 to \$23.7 billion in 2008 as reported in *Overdraft Explosion*, *supra* note 3.

<sup>34</sup> According to a 2006 survey, seven out of ten young adults would use a debit card for purchases costing less than \$2. *Billion Dollar Deal*, *supra* note 33, at 3.

<sup>35</sup> FDIC Overdraft Study, 2008, *supra* note 1, at v.

<sup>36</sup> *Billion Dollar Deal*, *supra* note 33, at 7 (citing *U.S. Bank Pays Campus for Access to Students*, Milwaukee Journal Sentinel, June 18, 2007 (noting the agreement between US Bank and the University of Wisconsin at

these bank/university partnerships already existed in 2006,<sup>37</sup> and commentators note that these programs have only grown as an alternative to campus credit card marketing after the Credit CARD Act of 2009 made the latter more difficult.<sup>38</sup>

Military families. Military families, whom Congress took action to protect from payday and other predatory lending practices in 2006,<sup>39</sup> remain vulnerable to abusive fee-based overdraft practices. The Military Lending Act banned loans based on unfunded checks or electronic debits from accounts, effectively banning payday loans made at stores or online, but rules adopted by the Department of Defense to implement the MLA exclude overdraft loans.

Financial institutions have taken advantage of their ability to charge overdraft fees to a captive audience on bases. An executive vice president of one turnkey overdraft system vendor has been quoted as saying, “If you happen to be a bank that’s on a military post, you’re probably doing twice as much activity as any other bank.”<sup>40</sup>

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Oshkosh prohibits all financial institutions other than US Bank and the college’s own credit union from locating ATMs on campus); Amy Milshstein, *In the Cards*, College Planning & Management, Dec. 2005, at 30-31 (noting the fee-sharing deal Higher One has with partner universities)).

<sup>37</sup> *Id.* at 7, note 9 (citing Nadia Oehlsen, *Banks Go Back to School with Campus Card Partners*, Cards & Payments, Oct. 1, 2006). In addition, CR80 News, which tracks university identification technology, estimates 115 partnerships between schools and banks. See *Banks Give College Try With Branded Cards*, ATM & Debit News, Aug. 31, 2006.

<sup>38</sup> Kelly Dilworth, *Student ID/debit card combos bring high fees, controversy to colleges*, [www.creditcards.com](http://www.creditcards.com) (March 2012), [http://www.creditcards.com/credit-card-news/student\\_id-debit\\_cards-college-campus-controversy-1279.php](http://www.creditcards.com/credit-card-news/student_id-debit_cards-college-campus-controversy-1279.php) (last viewed June 29, 2012).

<sup>39</sup> In 2006, Congress passed the Talent-Nelson Amendment to the John Warner National Defense Authorization Act of 2007, capping loans to military borrowers at 36 percent APR, among other protections. Pub. L. No. 109-364, 120 Stat. 2266-2269, *codified at* 10 U.S.C. § 987.

<sup>40</sup> Alex Berenson, *Banks Encourage Overdrafts, Reaping Profit*, N.Y. Times, Jan. 22, 2003, *available at* <http://www.nytimes.com/2003/01/22/business/banks-encourage-overdrafts-reaping-profit.html> (quoting Dick Gowdy, executive vice-president, Strunk & Associates). One credit union whose customers are predominantly military families found that after implementation of an automated “privilege pay” system, the percentage of overdraft users considered “chronic overdrafters” increased from 37 percent to 65 percent. Testimony, Mary Cunningham, USA Federal Credit Union, on behalf of the Credit Union National Association, Before the Financial Institutions Subcommittee of the House Financial Services Committee (July 11, 2007), *available at* <http://archives.financialservices.house.gov/hearing110/htcunningham071107.pdf>. Similarly, the President of the Navy-Marine Corps Relief Society testified to the Senate Banking Committee that overdraft penalty fees are the top problem at all but four of the fifty-one offices of the charity that counseled one out of every five Sailors and Marines in 2010. Testimony, Admiral Steve Abbot, President, Navy-Marine Corp Relief Society, Senate Banking, Housing and Urban Affairs Committee hearing on Protecting the Military in the Consumer Financial Marketplace (Nov. 3, 2011) *available at* [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=ca463f82-0902-4a6d-9a08-d8b7e6860fe0](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=ca463f82-0902-4a6d-9a08-d8b7e6860fe0).

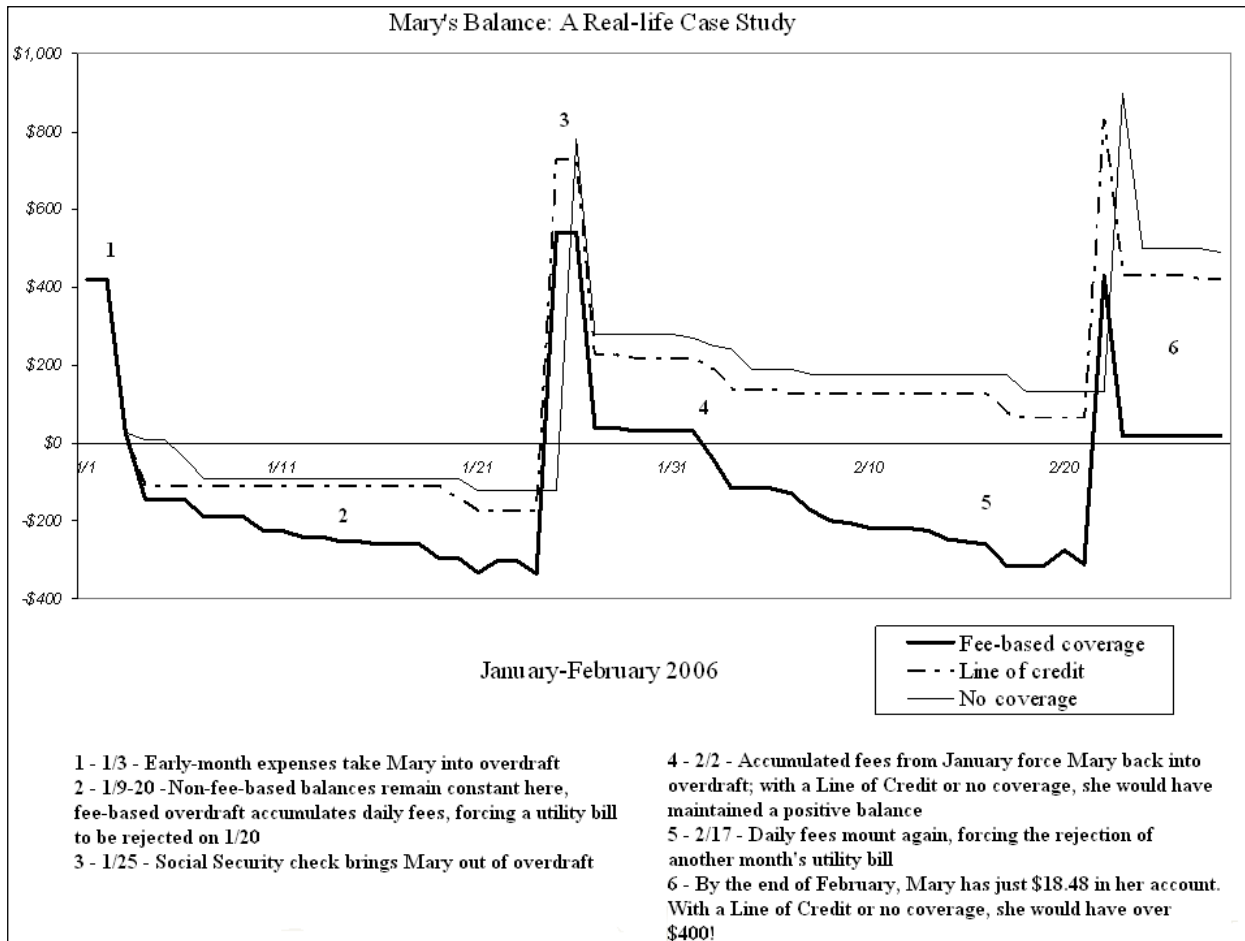
In mid-2012, a CFA survey found that the overdraft fees charged on base are almost always identical to the same bank's fee schedule off-base. *See* chart in Appendix C. The large majority of banks on military bases charge high overdraft fees on point-of-sale and ATM transactions. At least 90 % of banks with branches on military bases ask consumers to opt in to pay overdraft fees that range from \$18 to \$38.50 per overdraft for single debit card purchases and/or ATM withdrawals, allowing over \$125 in overdraft fees per day on small debits.

**C. Real life example demonstrating harm caused by high-cost overdraft programs.**

In CRL's report on the impact of overdraft fees on older Americans, we graphed two months of actual checking account activity of one panelist, whom we call Mary, from our database.<sup>41</sup> Mary is entirely dependent on Social Security for her income. We also graphed what her activity would have been with an overdraft line of credit. We later added a third scenario to the graph: no overdraft coverage at all.

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<sup>41</sup> CRL analyzed 18 months of bank account transactions, from January 2005 to June 2006, from participants in Lightspeed Research's Ultimate Consumer Panel. For further discussion of our database and methodology, *see Out of Balance, supra* note 11, at 13-14.



During January and February of 2006, Mary overdrew her account several times and was charged \$448 in overdraft fees. At the end of February, she had \$18.48 in her account. She was trapped in a destructive cycle, using the bulk of her monthly income to repay costly overdraft fees.

With an overdraft line of credit at 18 % over the same period, Mary would have paid about \$1 in total charges for her overdrafts instead of \$448 in overdraft fees. Even if Mary had had no overdraft coverage at all, she would have been better off than she was with fee-based overdraft. Five of her transactions, totaling \$242, would have been denied—two point-of-sale transactions and three electronic transactions. She would have been charged no fee for the two point-of-sale transactions. She may or may not have been charged an NSF fee for each of the three denied electronic transactions. She also may have been charged late fees if any of the electronic transactions were bills. Assuming, conservatively, that she was charged an NSF fee and a late fee for each of the three transactions, the chart illustrates that, *after* reflecting payment of the \$242 in denied transactions, her ending balance still would have been \$247—far higher than the \$18.48 left in her account with fee-based overdraft coverage.

Mary's situation illustrates a problem common among the repeat overdrafters who pay the vast majority of the fees: Overdraft fees beget more overdraft fees. Ultimately, fee-based overdraft coverage prevents account holders from being able to meet obligations they otherwise would have been able to meet—leaving them worse off than no overdraft coverage at all.

**II. The FRB's opt-in rule was an inadequate response to overdraft abuses; substantive protections are needed. [RFI Questions 3, 6, and 7]**

In November 2009, the FRB required that institutions obtain customers' "opt-in" before charging overdraft fees on one-time debit card purchases and ATM transactions.<sup>42</sup> But the rule failed to address the fundamental substantive problems with overdraft programs, including the disproportionately high and repeat fees, and the manipulation of transaction processing order to increase the size and frequency of fees. These abuses continued after the FRB's rule. To make matters worse, many consumers opted in as a result of misunderstanding their options or in response to misleading information proffered by the bank. As this experience shows, an opt-in rule without any substantive reforms is insufficient to protect consumers. Consumers should be protected from abusive products in the first instance, rather than having to successfully navigate an obstacle course of disclosures in order to avoid an abusive product.

**A. Opt-in rates after the FRB's rule do not indicate that consumers preferred or benefitted from overdraft programs. Financial institutions misled consumers into opting in.**

Opt-in rates after the FRB's rule should not be treated as evidence that consumers understood their options and were consciously choosing a product they preferred. Instead, banks conducted a targeted campaign to pressure and mislead consumers to opt in – especially those consumers most likely to generate overdraft fees.

Many financial institutions, large and small, aggressively marketed overdraft opt-in, targeting customers who generate the most fees, and steering them to the highest-cost credit the bank offers.<sup>43</sup> Bank consultants urged banks to aggressively target frequent overdrafters to "get them" to sign opt-in forms. They advised banks that "if they are in the top 29% of abusers, call them" and urged banks to "entice" these customers with gifts and cash, because "[a]fter all, this is your most profitable fee group." They assured banks that

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<sup>42</sup> Reg. E, 12 C.F.R. § 205.17(b).

<sup>43</sup> For further discussion and examples of this targeting strategy, see Leslie Parrish, *Banks Target, Mislead Consumers As Overdraft Deadline Nears*, Center for Responsible Lending (Aug. 5, 2010), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/Banks-Target-And-Mislead-Consumers-As-Overdraft-Deadline-Nears.pdf>. See also Center for Responsible Lending Research Brief, *Banks Collect Opt-Ins Through Misleading Marketing* (Ap. 2011) [hereinafter *Banks Collect Opt-Ins Through Misleading Marketing*], available at <http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/banks-misleading-marketing.html>

“Regulation E offers aggressive bank marketers opportunities to maintain or even increase revenues from their overdraft programs.”

Banks also used misleading marketing, which we documented in comments and letters to the OCC, the FRB and others.<sup>44</sup> This misleading marketing was directly reflected in common misconceptions reported by consumers who opted in.<sup>45</sup> An April 2011 CRL survey found that:

- For almost half of those who opted in, simply stopping the bank from bombarding them with opt-in messages by mail, phone, email, in person, and online banking was a factor in their decision.<sup>46</sup>
- Sixty percent (60%) of consumers who opted in stated that an important reason they did so was to avoid a fee if their debit card was declined. In fact, a declined debit card costs consumers nothing.
- Sixty-four percent (64%) of consumers who opted in stated that an important reason they did so was to avoid bouncing paper checks. In fact, the opt-in rules cover only debit card and ATM transactions.

Furthermore, opt-in disclosures would not have been effective tools for understanding the implications of opting in for the significant number of consumers who have limited educational or literacy skills—the very consumers most vulnerable to overdraft fees. About 1 in 20 adults in the U.S., totaling about 11 million people, is non-literate in English. Overall, 14% of adults have below basic prose literacy skills and 22% have below basic quantitative skills.

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<sup>44</sup> See, e.g., Center for Responsible Lending, et al., Comments to the Federal Reserve Board on Regulation E (Mar. 30, 2010), available at [http://www.consumerfed.org/elements/www.consumerfed.org/file/Overdraft\\_Comments\\_RegE\\_March2009-Final\\_As\\_Submitted\\_w\\_Appendix.pdf](http://www.consumerfed.org/elements/www.consumerfed.org/file/Overdraft_Comments_RegE_March2009-Final_As_Submitted_w_Appendix.pdf); Letter from Center for Responsible Lending, et al., to Comptroller John Walsh (Oct. 13, 2010), available at <http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/OD-OCC-Letter-10-13-10-Sign-On-doc.pdf>.

<sup>45</sup> These findings are consistent with what the Bureau reports it has heard from consumers: “Many of the consumers we heard from did not realize [incurring an overdraft fee on a point-of-sale transaction] could happen – despite the opt-in requirement that is supposed to provide them with the means of protecting their own interests. Maybe they did not understand the potential consequences of this term in their checking account agreement. They may have been misled by marketing materials that suggested opting in to overdraft protection was necessary if they wanted to continue to use their debit card. Or maybe they saw one-sided advertising that emphasized the benefits of overdraft while burying information about the costs.” Prepared Remarks by Richard Cordray, Director of the Consumer Financial Protection Bureau, CFPB Roundtable on Overdraft Practices, New York City, N.Y., February 22, 2012 at <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-at-the-cfpb-roundtable-on-overdraft-practices/>.

<sup>46</sup> See also *Banks Collect Opt-Ins Through Misleading Marketing*, *supra* note 43.

Clearly, the opt-in rule did not vindicate authentic consumer preferences. Instead, banks used deceptive marketing to pressure and mislead consumers into opting in, targeting some consumers over others.

### **B. Opt-in cannot substitute for meaningful reform.**

Even if consumers had not been misled or pressured into opting in, the FRB rule still failed to protect consumers because it did not address the fundamental problems with overdraft. Affirmative consent with adequate disclosure should be a baseline requirement for any credit product, but it is not an effective remedy against abusive practices. “Opting in” is not sufficient to protect consumers, and can provide cover for abuses—as evidenced by long-time abuses in the payday, credit card, and mortgage markets, where consent requirements have long been the norm. Consent requirements did not remove the need for significant substantive reform in the credit card and mortgage markets in recent years. Likewise, “opting in” to overdraft coverage is no solution. Even consent with perfect disclosure cannot fix a fundamentally abusive financial product.

Recommendation: *Do not let “opting in” replace substantive consumer protections.*

### **III. Prohibit high-cost overdraft fees on point-of-sale transactions and ATM withdrawals.** *[RFI Questions 5, 7, 10, and 11]*

Overdraft fees for debit card point-of-sale (POS) and ATM transactions remain the most egregious of all such fees. First, neither banks nor merchants charge fees for declined point-of-sale or ATM transactions,<sup>47</sup> so the whole premise behind why “courtesy” overdraft fees developed in the first place—to protect consumers from NSF and returned checks fees—does not apply in this context.

Second, overdrafts triggered by debit card POS transactions have long been very small—far smaller than the size of the overdraft fees themselves. Using 2006 data, the FDIC

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<sup>47</sup> In the notice accompanying its final opt-in rule in November 2009, the Federal Reserve indicated that such a practice would raise unfairness concerns: “A few commenters suggested the possibility that financial institutions may create new fees for declining ATM or one-time debit card transactions. While the final rule does not address declined transaction fees, the Board notes that such fees could raise significant fairness issues under the FTC Act, because the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction.” Final Rule, Federal Reserve Board, Electronic Funds Transfers, Regulation E, 74 Fed. Reg. 59033, 59041 (Nov. 17, 2009).



found that the average debit card transaction triggering an overdraft was \$20;<sup>48</sup> CRL found the average loan amount triggered by a debit card transaction was \$17.<sup>49</sup>

Third, ATM and debit card POS transactions are more numerous than checks or ACH transactions, making a per-transaction fee particularly harmful when several transactions occur in a single day. As discussed below in Part IV, frequent overdrafting, which is greatly enabled by ATM and debit card POS transactions, may also reflect an inability to repay the loan.

We discussed earlier the failure of the FRB's opt-in rule to address key problems with overdraft fees, given the incentives banks still have to maximize fees. A few of the larger banks, however, have made striking voluntary changes to their overdraft programs in the clear best interest of their customers. In the wake of the opt-in rule, the largest debit card issuer, Bank of America, stopped charging high-cost overdraft fees on point-of-sale transactions altogether. According to a Bank of America executive, "What our customers kept telling me is 'just don't let me spend money that I don't have.'"<sup>50</sup> The bank found that after eliminating these overdraft fees, customer complaints dropped sharply, and satisfaction levels rose.<sup>51</sup> HSBC also stopped charging high-cost overdraft fees at the point-of-sale, as well as at the ATM.<sup>52</sup> Citibank has never charged these fees.

With these three banks' policies, the proportion of the nation's largest twelve banks that do not charge high-cost overdraft fees at the point-of-sale is now 25%.<sup>53</sup> But 75% continue to do so, retaining access to a highly exploitative fee revenue stream that their competitors have agreed to forego. Further regulatory action is needed to level the playing field and ensure that those banks that have taken the high road do not backslide.

The Bureau's RFI notes its interest in programs and technologies that make consumers aware at the time they engage in a transaction that they may incur an overdraft fee. We note, again, that while such notification should be provided, consent—even at the moment a transaction occurs—has never been an adequate protection against an abusive product. Real-time warnings would not change the abusive structure of this product, which leads to

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<sup>48</sup> FDIC Overdraft Study, 2008, *supra* note 1, at v.

<sup>49</sup> *Debit Card Danger*, *supra* note 24, at 25. This report and the FDIC Overdraft Study, *supra* note 1, use five- to six-year-old data which pre-dates the changes initiated by the FRB's opt-in rule in 2009. The CFPB should request updated data as part of its overdraft inquiry data request to large banks.

<sup>50</sup> Andrew Martin, *Bank of America to End Debit Overdraft Fees*, N.Y. Times, March 9, 2010.

<sup>51</sup> Transcript, Brian Moynihan, CEO, *Bank of America Q3 2010 Earnings Call* (Oct. 19, 2010), available at <http://www.morningstar.com/earnings/18372176-bank-of-america-corporation-bac-q3-2010.aspx>.

<sup>52</sup> Consumer Federation of America, *Survey of OCC Bank Overdraft Loan Fees and Terms* (July 2011) (attached as Appendix B to 2011 OCC Comments, *supra* note 1).

<sup>53</sup> *Id.*

a cycle of debt for struggling consumers: the high cost; the extremely short loan term; the balloon repayment; and the setoff that forces repayment before all other debts and expenses are paid.

In light of the abuses associated with overdraft fees on ATM and POS transactions, the Bureau should use its UDAAP authority to ban the fees. Before the OTS merged with OCC, it suggested that the disproportionality and high daily aggregate amounts of overdraft fees in general could constitute unfairness under its UDAP authority.<sup>54</sup> The Bureau's UDAAP authority leads to the same conclusion in the specific context of ATM and POS transactions.

The longstanding public policy against penalty fees also supports a determination that ATM and POS overdraft fees are unfair. To be enforceable, damages set in advance by contract must be reasonably proportional to the anticipated loss.<sup>55</sup> Because ATM/POS overdraft fees are so often disproportionate to the amount of the overdraft, these fees violate the longstanding contract law principle against unenforceable penalties.

Recommendation:

- *Prohibit charging overdraft fees on point-of-sale and ATM transactions.*
- *Request current data from banks on the size of ATM/POS transactions triggering overdraft fees.*

**IV. Require assessment of ability to repay. More than six overdraft fees or other loans within twelve months indicates lack of ability to repay. [RFI Questions 1, 10, and 12]**

No credit product should be extended without a meaningful assessment of the borrower's ability to repay the loan without needing to take out another loan shortly thereafter. Ability to repay should be the touchstone for all lending. Indeed, Congress has expressed that very principle several times, including in the Credit CARD Act and the Dodd-Frank Act. The FDIC and OCC have also come out against lending without considering ability to repay that leads to multiple refinancing.<sup>56</sup> As discussed earlier, overdraft programs were

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<sup>54</sup> Office of Thrift Supervision, Proposed Supplemental Guidance on Overdraft Programs, 75 Fed. Reg. 22681, 22683, 22688 (Ap. 29, 2010) [hereinafter OTS 2010 Proposed Supplemental Guidance].

<sup>55</sup> Restatement (2d) of Contracts, §356.

<sup>56</sup> See, e.g., OCC AL 2000-7 on Abusive Lending Practices; OCC AL 2002-3 on Predatory and Abusive Lending Practices (advising against loans based on the ability to seize collateral rather the ability to make scheduled payments; frequent and multiple refinancings; loan flipping); FDIC Financial Institution Letters, Guidelines for Payday Lending, FIL 14-2005, (Feb. 2005) [hereinafter FDIC Guidelines for Payday Lending] available at <http://www.fdic.gov/news/news/financial/2005/fil1405a.html> (“For example, payday loans to individuals who do not have the ability to repay, or that may result in repeated renewals or extensions and fee payments over a relatively short span of weeks, do not help to meet credit needs in a responsive manner”).

never intended to be administered as routine credit products, but they currently operate as such. Yet no product as high-cost, as short-term, as today's overdrafts, should be routine.<sup>57</sup>

For example, while most of the largest national banks already have a daily limit on overdraft fees, the per day limit is in the hundreds of dollars.<sup>58</sup> This is particularly outrageous in the context of a debit card transaction, where the original transactions could easily be denied at no cost to the consumer.

Further, the unlimited, unrestricted use of high-cost overdraft programs by financial institutions drives out better products, removing incentive for banks to offer customers lower cost, manageable ways to deal with shortfalls. It also puts consumers in a much worse-off position than if they had had a more affordable product, like a line of credit or a credit card, from the start.

As noted earlier, overdraft fees are the leading cause of involuntary account closures.<sup>59</sup> A limit on the number of fees that may be charged would stop fees *before* they become excessive so that banks avoid the extreme, and extremely unfortunate, result of knocking customers out of the banking system because of banks' own abusive practices.

As we argue in Part VIII below, debit cards subject to overdrafts should be protected by TILA's credit card protections, including the CARD Act provision requiring an assessment of ability to repay credit. Accordingly, the Bureau should use its CARD Act and its UDAAP authority to establish a standard that requires banks to assess ability to repay overdrafts without the need to take out another loan shortly thereafter. After six fee-based overdraft loans in a 12-month period, including "sustained" or "continuous" overdraft fees, a customer should be provided affordable installment loans of at least 90 days to pay off the remaining balance, and no further fee-based overdraft loans should be provided. Any bank payday loans should be included in the count of six loans. Repeated overdrafts indicate the borrower's inability to repay, and continued fee-based overdraft would be acting as an exorbitantly priced credit product that is not appropriate for anyone.

Guidance from other regulators supports this course of action. The FDIC recognized recently in its supervisory guidance that routine assessment of overdraft fees—more than six during a twelve-month period—is excessive.<sup>60</sup> And OTS, as the Bureau notes in its

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<sup>57</sup> FDIC 2010 Guidance on Overdraft Programs, *supra* note 18 (noting more than six overdraft fees in one year is excessive); OCC Proposed Guidance, *supra* note 20 (cautioning against excessive overdrafts; noting account and marketing materials should not "promote routine use").

<sup>58</sup> *See* Appendix B.

<sup>59</sup> *See* Part I.

<sup>60</sup> FDIC 2010 Guidance on Overdraft Programs, *supra* note 18. The OCC notes that another prudent limitation may include a "grace period" of one or days to allow a customer to return the account to a positive balance before any fee is imposed. OCC Proposed Guidance, *supra* note 20, at 33411. We agree this

RFI, suggested that failing to “limit fees for consumers who frequently overdraw their accounts’ could be unfair as ‘these consumers may not be able to avoid the harm cause by overdraft fees.’”<sup>61</sup> The FDIC and OCC’s views suggest that failure to monitor overdraft usage harms consumers with no countervailing benefits.<sup>62</sup>

*Recommendation: Require that after six fee-based overdraft loans in a 12-month period, including “sustained” or “continuous” overdraft fees, that a customer be provided affordable installment loans of at least 90 days to pay off the remaining balance, and that no further fee-based overdraft loans be provided. Any bank payday loans should be included in the count of six loans. Repeated overdrafts indicate the borrower's inability to repay, and continued fee-based overdraft would be acting as an exorbitantly priced credit product that is not appropriate for anyone.*

#### **V. An emerging problem: overdraft fees on prepaid cards—they’re called *prepaid*, not *postpaid*.**

Overdraft fees should be eliminated from prepaid cards. Banning overdraft fees on prepaid cards would prevent deceptive practices and confusion. Prepaid cards should be exactly as advertised: prepaid. Overdraft fees turn them into something entirely different: postpaid.

Although Congress and the Treasury Department have taken measures to eliminate overdraft fees on prepaid cards, they have not ended the practice. Congress has directed some prepaid card issuers to eliminate overdraft fees by conditioning the interchange fee cap exemption on the absence of such fees. But that rule does not apply to banks under \$10 billion. The Treasury Department also took an important step forward to protect prepaid card users by banning attached lines of credit or loan agreements on cards that accept direct deposit of federal payments.<sup>63</sup> However, again, the rule does not apply to every card. In the absence of comprehensive regulation, some prepaid card issuers, such as CheckSmart in Ohio and Arizona, have begun to charge overdraft fees.

Advertising prepaid cards with overdraft fees creates confusing inconsistencies. The very name “prepaid card” should mean what it says. A “prepaid” card with overdraft fees is actually a postpaid card. Common marketing refrains for prepaid cards, such as “no credit

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limitation would be prudent but note that for customers paying the most in overdraft fees, who are struggling to make ends meet, a grace period of a day or two will not significantly soften the blow delivered by routine high fees.

<sup>61</sup> 77 Fed. Reg. 12032 (citing OTS 2010 Proposed Supplemental Guidance, *supra* note 51).

<sup>62</sup> FDIC 2010 Guidance on Overdraft, *supra* note 18; OCC Proposed Guidance, *supra* note 20.

<sup>63</sup> See 75 Fed. Reg. 80335 (Dec. 22, 2010). The interim rule has not yet been finalized. NCLC’s comments suggesting ways to tighten the rule to prevent evasions are available at [http://www.nclc.org/images/pdf/other\\_consumer\\_issues/exempt\\_public\\_benefits/prepaid-card-comments.pdf](http://www.nclc.org/images/pdf/other_consumer_issues/exempt_public_benefits/prepaid-card-comments.pdf).

check needed” and “you can’t spend more than you have,” are inconsistent if the card actually allows you to overdraw, making it a credit product with overdraft fees.

Overdraft fees and other abusive practices have driven many consumers out of bank accounts and created the opportunity for prepaid cards. The security of deposit accounts and funds in prepaid card accounts should not be undermined by allowing overdraft fees.

Advertising a card as “prepaid,” but including post-paid features like overdraft, is clearly deceptive. The Bureau should use its UDAAP authority to ban overdraft fees on prepaid cards.<sup>64</sup>

Recommendation: *Prohibit overdraft fees on prepaid cards.*

## **VI. Require minimizing fees through posting order when feasible. [RFI Question 9]**

Manipulation of transaction ordering has long been a concern for regulators.<sup>65</sup> The 2005 Joint Guidance raised the issue, but only recommended that banks inform customers that transaction ordering may increase fees.<sup>66</sup> In its own 2005 guidance, the OTS went further, explicitly stating that, as a best practice, transaction-clearing processes should not be manipulated to inflate fees.<sup>67</sup> In its 2009 final Regulation E rule establishing pre-CARD Act opt-in requirements, the FRB identified transaction posting order as an area that may need additional consumer protections and indicated it would continue to assess posting order.<sup>68</sup>

Courts and regulators have concluded that reordering may constitute an unfair trade practice. In 2010, a federal court ordered Wells Fargo to reimburse its account holders in California over \$200 million in overdraft fees triggered by reordering transactions to maximize fees.<sup>69</sup> After a thorough review of the bank’s internal communications, the court

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<sup>64</sup> 12 U.S.C. § 5531(a).

<sup>65</sup> It has also long been a concern for consumers. In June 2005, CFA, Consumer Union, CRL, NCLC, and USPIRG wrote to the four federal banking regulators, and among other things urged them to bring FTC Act cases against banks that “order debit processing to maximize fee revenue while routinely covering overdrafts for their account holders.” Letter from Consumers Federation of America, et. al., to Federal Banking Regulators (June 8, 2005).

<sup>66</sup> 2005 Joint Guidance, *supra* note 7, at 9132.

<sup>67</sup> Office of Thrift Supervision, *Guidance on Overdraft Programs*, 70 Fed. Reg. 8428, 8431 (Feb. 18, 2005).

<sup>68</sup> “The Board recognizes that additional consumer protections may be appropriate with respect to overdraft services, for example, rules to address transaction posting order. Therefore, the Board is continuing to assess whether additional regulatory action relating to overdraft services is needed.” Final Rule, Federal Reserve Board, Electronic Funds Transfers, Regulation E, 74 Fed. Reg. 59033, 59050 (Nov. 17, 2009).

<sup>69</sup> *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080 (N.D. Cal. 2010).

concluded that “the only motives behind the challenged practices were gouging and profiteering.”<sup>70</sup> The court found that the bank’s reordering constituted an unfair business practice under California’s Unfair Competition Law. A number of other banks have paid hefty sums to settle lawsuits brought on similar grounds.<sup>71</sup>

The FDIC recently implemented guidance instructing banks that they should “avoid[] maximizing customer overdrafts and related fees through the clearing order.”<sup>72</sup> It further explained that transactions should be processed “in a neutral order that avoids manipulating or structuring processing order to maximize customer overdraft and related fees,” adding “[r]eordering transactions to clear the highest item first is not considered neutral.”<sup>73</sup> The guidance noted that UDAP prohibitions apply to bank overdraft practices.<sup>74</sup>

Before it merged with OCC, OTS also recognized that reordering may constitute an unfair or deceptive trade practice.<sup>75</sup>

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<sup>70</sup> *Id.* at 1104.

<sup>71</sup> Settlements arising out of a multi-district litigation (MDL) in Florida, not all of which have received final court approval, include Bank of America (\$410 million), <http://www.bofaoverdraftsettlement.com/CourtDocuments.aspx>; Chase (\$110 million), <http://www.bloomberg.com/news/2012-02-06/jpmorgan-agrees-to-pay-110-million-to-settle-overdraft-fee-gouging-case.html>; Union Bank N.A. (\$35 million), [http://op.bna.com/bar.nsf/id/jtin-8ndk9v/\\$File/unionbnksett.pdf](http://op.bna.com/bar.nsf/id/jtin-8ndk9v/$File/unionbnksett.pdf); Bank of Oklahoma (\$19 million), [http://www.tulsaworld.com/business/article.aspx?subjectid=51&articleid=20111124\\_51\\_E1\\_BOKFin428673](http://www.tulsaworld.com/business/article.aspx?subjectid=51&articleid=20111124_51_E1_BOKFin428673); Commerce Bank (\$18.3 million), <http://www.bloomberg.com/news/2011-12-23/commerce-bancshares-unit-to-pay-18-3-million-to-settle-overdraft-lawsuits.html>; Associated Bank (\$13 million) <http://www.bloomberg.com/news/2011-11-28/associated-banc-corp-unit-to-pay-13-million-to-settle-overdraft-suits.html>; Harris Bank (\$9.4 million), <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=1325857>; Intrust Bank (\$2.7 million), <http://www.bizjournals.com/wichita/blog/2012/01/intrust-settles-lawsuit-related-to.html>; Iberia Bank (\$2.5 million), <http://news4lawyers.com/iberiabank-agrees-to-pay-2-5-million-to-settle-overdraft-fee-lawsuits-bloomberg/>; and Great Western Bank (\$2.2 million), <http://www.stollberne.com/ClassActionsBlog/2011/12/20/great-western-bank-settles-overdraft-fee-class-action/>.

Other settlements of cases related to transaction posting order that were not consolidated into the MDL include Bank of Hawaii (\$9 million), [http://www.bizjournals.com/pacific/blog/morning\\_call/2012/02/judge-approves-9m-bank-of-hawaii.html](http://www.bizjournals.com/pacific/blog/morning_call/2012/02/judge-approves-9m-bank-of-hawaii.html), and Fifth Third Bank (\$9.5 million), [http://seattletimes.nwsourc.com/html/businesstechnology/2013565988\\_apohfifththirdoverdraftfees.html](http://seattletimes.nwsourc.com/html/businesstechnology/2013565988_apohfifththirdoverdraftfees.html).

<sup>72</sup> FDIC 2010 Guidance on Overdraft Programs, *supra* note 18.

<sup>73</sup> Federal Deposit Insurance Company, Overdraft Payment Program Supervisory Guidance, Frequently Asked Questions, <http://www.fdic.gov/news/conferences/overdraft/FAQ.pdf>.

<sup>74</sup> FDIC 2010 Guidance on Overdraft Programs, *supra* note 18.

<sup>75</sup> OTS 2010 Proposed Supplemental Guidance, *supra* note 54, at 22688.

The OCC also has a proposed guidance pending on transaction posting order, reminding regulated institutions that UDAP prohibitions apply, but we are concerned that the guidance would leave far less clear what constitutes an appropriate posting order.<sup>76</sup> The OCC’s proposal advises that transaction processing not be “solely designed or generally operated to maximize overdraft fee income”<sup>77</sup> and provides the following examples of methods it deems acceptable: “in the order received, by check or serial number sequence, or in random order.”<sup>78</sup> While we were encouraged that the OCC raised the issue and did not name “highest to lowest” among appropriate posting orders, we are concerned that by failing to give more explicit guidance about what is not appropriate, the OCC’s guidance would allow banks to continue to increase fees through posting order. Indeed, Bank of America, in its August comment letter to the OCC—where the bank advocates for more explicit standards addressing posting order—notes that “the Proposal does not appear likely to have the effect of changing any bank’s posting order methods.”<sup>79</sup>

Banks could assert, for example, that they post transactions in order from highest-to-lowest to benefit consumers who want their large transactions paid first, based on the premise that larger transactions are the more important ones.

We are pleased that the Bureau’s RFI asks about this assertion, and we hope the Bureau will collect data from the largest banks sufficient to evaluate its credibility. But to date, all the information available to us suggests that the assertion is at worst disingenuous, and at best severely overblown. For debit card transactions, this assertion has been completely discredited.<sup>80</sup> Even for checks and ACH transactions, it is not compelling.

First, the institution will typically pay all items until the customer reaches the negative limit on the account, so unless that limit is reached, the only impact of high-to-low posting is that it maximizes fees. For example, one consumer was recently charged four overdraft fees instead of one because four “online transactions, payments made thru Paypal and otherwise” were posted in order from highest to lowest (it wasn’t clear whether these were processed as recurring debit card transactions or as ACH transactions, but they were not

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<sup>76</sup> CRL 2011 OCC Comments, *supra* note 1.

<sup>77</sup> OCC Proposed Guidance, *supra* note 20.

<sup>78</sup> *Id.*

<sup>79</sup> Bank of America, Comments to the Office of the Comptroller of the Currency on its Proposed Overdraft Guidance (Aug. 8, 2011).

<sup>80</sup> Any argument defending posting debit card purchases in order from highest to lowest is easily rebuttable by the reality that, once debit card transactions are authorized, they are “must pay” items – i.e., the bank must pay them to the merchant whether or not there are sufficient funds at the time of settlement. Thus, all debit card transactions authorized are paid whether or not they settle against available funds and regardless of the order in which they are posted. *See Gutierrez v. Wells Fargo*, 730 F. Supp. 2d at 1124.

one-time debit card purchases).<sup>81</sup> Had they been posted chronologically, they still would have all been paid.

Second, although banks do not disclose the the extent to which they will allow the account to be overdrawn, our understanding is that it is often in the \$500 range. If a transaction is large enough, it will often be declined regardless of the order in which the transactions are posted; again, the only impact of high-to-low posting is that it maximizes fees.

In addition, large important payments, such as rent or mortgage, may be made when the consumer's pay or benefits have been deposited at the start of the pay cycle. We suspect that the "important" transactions that put an account into overdrawn status near the end of the pay cycle are for less important purchases, not the ones touted by banks in their opt-in marketing.

In sum, the frequency with which high-to-low posting harms customers clearly far exceeds any rare occasion on which it may result in an important item being paid.

Further, for consumers paying the majority of overdrafts, as described in Mary's story earlier, repeat overdraft fees actually make it less likely that *any* transaction, regardless of its size, will ultimately be paid, and routine high-to-low posting is a significant generator of those repeat overdraft fees. Banks that really want to ensure important transactions get paid would charge a reasonable price for covering overdrafts and would not inflate overdraft fees by reordering customers' transactions.

With respect to any testing or surveys that financial institutions may use to support the notion that consumers want checks and ACH transactions posted from highest to lowest, those we have seen typically ask consumers whether they would like their most important items to be paid first. Such a question, of course, is misleading. Those surveys fail to note the rarity with which high-to-low posting would make the difference in whether or not an important item is paid. Furthermore, they also do not ask whether having an important item paid on a rare occasion would be worth being charged a severely inflated number of overdraft fees on many other occasions.

It is also noteworthy that a significant portion of institutions post transactions in chronological order or in order from lowest to highest, including, per the FDIC's 2008 survey, a much larger percentage of banks without automated overdraft programs.<sup>82</sup> A wealth of marketing materials establishes that consultants selling automated overdraft

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<sup>81</sup> Consumer's email on file with CRL.

<sup>82</sup> FDIC Overdraft Study, 2008, *supra* note 1, at 11, Table III-9: 59 percent of banks without an automated fee-based overdraft program posted transactions from *smallest to largest*, compared to only 30 percent of banks with an automated program; 35 percent of banks with automated fee-based overdraft programs posted transactions in order from *largest to smallest*, compared to only 18 percent of banks without these programs.



programs promised massive increases in fee revenues.<sup>83</sup> We have seen no marketing promising that the programs help to ensure consumers' most important items get paid.

Finally, if banks really posted largest transactions first to ensure that important items get paid, why have they not touted this in their disclosures, instead of long disclosing, cagily, that they post transactions "at their discretion" or that they "reserve the right to" post high-to-low?

High-to-low posting is particularly harmful given how long banks often hold consumers' deposits before crediting them. Check 21, passed in 2004, and the rise of debit card and electronic transactions, enables banks to debit accounts more quickly, while the rules for how long banks can hold deposits before crediting accounts have not been updated in over 20 years. A spokesperson for a large national bank told the Atlanta Journal Constitution that the bank holds some deposits for as long as the law allows, unless the account holder calls and asks for a quicker credit.<sup>84</sup> Accordingly, banks have the discretion and ability to increase or decrease the number of overdrafts by holding deposits for longer lengths of time. If an overdraft would otherwise have been covered by the release of held deposits, then the bank should refund any overdraft fees if the deposit clears into good funds.

Overdraft fees are so high, so punitive, that banks should be expected to *minimize* the number of fees charged. Last year, Citibank began posting checks and ACH transactions in order from lowest to highest, noting, "We think this is the right thing to do."<sup>85</sup> An opaque, complicated practice like transaction posting is not one that banks use to compete for customers; thus, it should be standardized. Further, minimizing costs for consumers finds precedent in the Credit CARD Act's amendment to TILA, which requires that any payments above the minimum payment be applied to the balance carrying the highest interest rate first.<sup>86</sup>

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<sup>83</sup> See, e.g., Impact Financial Services, <https://impactfinancial.com/portal/AboutIFS/FromPresidentsDesk/tabid/66/Default.aspx> (visited July 7, 2008, Aug. 3, 2011, and June 14, 2012) ("Virtually all of our clients have increased the NSF fee income from 50-150% or more"); Moebs Services, Inc., <http://www.moebs.com/Default.aspx?tabid=102> (visited July 9, 2008, Aug. 3, 2011, and June 14, 2012) ("overall fee income is increased by 200 percent").

<sup>84</sup> Peralte C. Paul, *Whose Money is it? Checks Clear Faster than ever, but deposits tend to creep into accounts slowly*, Atlanta Journal Constitution, May 10, 2007.

<sup>85</sup> Ann Carrns, *Citi's New Policy May Mean Fewer Bounced Checks*, N.Y. Times, April 7, 2011, available at <http://bucks.blogs.nytimes.com/2011/04/07/citis-new-policy-may-mean-fewer-bounced-checks/> (citing company memo written by Cece Stewart, Citibank's president of consumer and commercial banking).

<sup>86</sup> "Upon receipt of a payment from a cardholder, the card issuer shall apply amounts in excess of the minimum payment amount first to the card balance bearing the highest rate of interest, and then to each successive balance bearing the next highest rate of interest, until the payment is exhausted." 15 USCA § 1666c(b)(1).

As other regulators and courts have observed, reordering constitutes an unfair trade practice under their UDAAP powers. Likewise, the practice should be deemed unfair under the CFPB's UDAAP authority.

Recommendations:

- *Explicitly prohibit posting transactions in order from highest to lowest or in any other order that in whole or in part increases the number of overdrafts or amount of fees;*
- *Require that banks minimize fees through posting order when feasible. If an overdraft would have been avoided but for a held deposit that later cleared, any overdraft fees should be reversed.*
- *Determine, and direct banks to use, a specific posting order that serves as a safe harbor for banks and protects consumers. The safe harbor posting order should explicitly provide that point-of-sale, ATM, and recurring debit transactions be posted in the chronological order as presented to the institution. For checks and ACH transactions, credits should be posted before debits, and debits should be posted in the order presented to the institution.*

**VII. Require that overdraft fees be reasonable and proportional.**

The 14 largest banks typically charge an overdraft fee per transaction of \$35.<sup>87</sup> This does not include “sustained” overdraft fees that almost two-thirds of the largest banks also charge if the account is not brought positive within a few days.<sup>88</sup> For any transaction type, the average fee is grossly out of proportion to the overdraft amount and the loss to the bank, particularly as the loan is typically repaid shortly thereafter from the customer's next deposit.<sup>89</sup>

When banks are permitted to impose unfettered fees on multiple transactions, they have the incentive to manipulate consumers into incurring those fees. The Bureau's RFI mentions a number of ways in which banks manipulate consumers to increase overdraft fees: transaction order, disclosures, marketing. We support addressing these tactics but are concerned that, so long as the size or frequency of the fee itself is not reasonable, banks will continue to have the incentive to maximize these fees.

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<sup>87</sup> See Appendix B.

<sup>88</sup> See Appendix B.

<sup>89</sup> *Debit Card Danger*, *supra* note 24, at 25. Based on CRL's 2008 data analysis, the loan was repaid an average of 3-5 days later.

Manipulations like those in the overdraft context led Congress to enact a number of reforms to curb the size of over-the-limit and late fees on credit cards. Even before Congress acted, the FRB issued rules under its authority to address unfair or deceptive practices, determining that fees above a reasonable threshold cause substantial consumer injury.<sup>90</sup>

Other regulators have supported requiring the fees to be reasonable and proportional. The OTS's proposed 2010 overdraft guidance asked whether its final guidance should include a "reasonable and proportional" standard like that required for credit card penalty fees under the Credit CARD Act.<sup>91</sup> That guidance also noted UDAP concerns raised by unreasonable fees.<sup>92</sup> The FDIC's overdraft guidance advises that fees be "reasonable and proportional," recommending that banks consider eliminating overdraft fees for transactions that overdraw an account by a *de minimus* amount and that, if a fee is charged, it should be reasonable and proportional to the amount of the original transaction.<sup>93</sup>

As we argue in Part VIII below, debit cards subject to overdrafts should be protected by TILA's credit card protections, including the CARD Act provision requiring that penalty fees be reasonable and proportional.<sup>94</sup>

The longstanding public policy against penalty fees also supports a determination that overdraft fees must be reasonable and proportional. To be enforceable, damages set in advance by contract must be reasonably proportional to the anticipated loss.<sup>95</sup> Because overdraft fees are so often disproportionate to the amount of the overdraft, these fees violate the longstanding contract law principle against unenforceable penalties.

The Bureau should use its authority under the CARD Act and its UDAAP powers to require that that fees be reasonable and proportional to the underlying transaction and to the cost to the institution of covering the overdraft.

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<sup>90</sup> The FRB took this approach in addressing fee harvester card abuses, concluding that upfront security deposit and fees exceeding 50 percent of the initial credit limit caused substantial consumer injury. Final Rule, Board of Governors of the Federal Reserve System, Truth in Lending, Fee 74 Fed. Reg. 5538 (Jan. 29, 2009). It further determined that such costs exceeding 25 percent of the initial credit limit must be charged to the account over six months. *Id.* The FRB's approach addressed, in part, the problem caused when fees are required to be repaid unreasonably quickly in order to avoid further interest or fees. The same dynamic is at play in the overdraft context.

<sup>91</sup> OTS Proposed Supplemental Guidance, *supra* note 54, at 22683.

<sup>92</sup> *Id.* at 22687-88.

<sup>93</sup> FDIC 2010 Guidance on Overdraft Programs, *supra* note 18, at 3 note 5.

<sup>94</sup> 15 U.S.C. § 1665d.

<sup>95</sup> Restatement (2d) of Contracts, §356.

Recommendation: *The CFPB should require that overdraft fees be reasonable and proportional to the amount of the underlying transaction and to the cost to the institution of covering the overdraft.*

**VIII. Require that overdrafts be subject to all protections under TILA, including a meaningful APR disclosure and protections against automatic setoff.**

**A. Exclusion of overdraft loans is inconsistent with purpose of TILA.**

As discussed earlier, and as the Bureau’s RFI points out, overdraft programs today bear little resemblance to the traditional practice whereby institutions use their discretion to pay overdrafts for customers on an occasional ad hoc basis.<sup>96</sup> Yet in 2004, the FRB chose to exclude the typical high-cost overdraft fee from the definition of “finance charge” in Regulation Z under the Truth in Lending Act (TILA) based on the false premise that these loans were administered on a discretionary, ad hoc basis and that the fees were akin to NSF fees for a “comparable cash transaction.” Our organizations objected to the FRB’s decision then for reasons that have only become more compelling with the continued evolution of overdraft programs.<sup>97</sup>

A central purpose of TILA is to promote the informed use of consumer credit by providing meaningful disclosures about its terms and costs.<sup>98</sup> TILA mandates that creditors disclose the cost of credit using a single standard—the annual percentage rate (APR)—so that consumers can make an “apples to apples” comparison of different forms of credit.

The FRB’s decision to allow overdraft loan programs to disclose their costs in a manner different than other credit programs was inconsistent with TILA’s goal of enabling consumers to compare credit terms. The decision made it impossible for consumers to readily compare the cost of overdrafts to alternative small dollar credit options, such as lines of credit or cash advances from credit cards. It also encouraged growth of this extremely high-cost form of credit, and it discouraged competition among institutions that

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<sup>96</sup> 77 Fed. Reg. 12031.

<sup>97</sup> For a more complete discussion of objections to the FRB’s decision, please *see* CRL’s 2004 Comments. *See also* National Consumer Law Center, Consumer Federation of America, et al., Comments to the Federal Reserve Board on Proposed Amendments to Regulation DD (Aug. 6, 2004).

<sup>98</sup> “The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.” 15 U.S.C. § 1601(a).

provide responsible small dollar credit, particularly to consumers most likely to be exploited by high-cost credit products.

These incentives have been particularly clear in the context of the opt-in rule, where banks urge consumers to affirmatively choose one credit product over others, without comparable pricing terms. One reason that banks may have been successful in getting consumers to sign opt-in forms is that the model form does not provide consumers with a means to make the “apples to apples” comparison between fee-based overdrafts and other less costly alternatives, such as traditional overdraft lines of credit, a cash advance on a credit card, or a non-credit transfer from savings.

TILA’s goals include providing consumers with information needed to decide whether to use one form of credit or another, or to delay consumption or use savings or cash.<sup>99</sup> The failure of the FRB to require APR disclosures for fee-based overdrafts stands directly in opposition to that goal, especially the failure to require APR information at the moment when consumers are deciding whether to opt in or not to this extremely high cost form of credit.

**B. The FRB relied upon decades-old exemptions that were not appropriate or suitable for modern, automated overdraft programs.**

The FRB supported its decision to exclude high-cost overdraft loan fees from TILA by relying on two pre-existing exceptions in Regulation Z to the definition of what constitutes a finance charge. It concluded that overdraft fees are not finance charges if 1) they are “discretionary” programs or 2) if the institution charges the same fee when it declines to pay a check or transaction. Yet these exceptions were not suitable for the 21<sup>st</sup> century version of automated overdraft programs that banks use today.

**1. Overdraft loan programs are not typically administered on a “discretionary” basis.**

First, in its application of the “discretionary” exception, the FRB relied on Section 226.4(c)(3) of Regulation Z, 12 C.F.R. § 226.4(c)(3)(now renumbered to 12 C.F.R. §

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<sup>99</sup> In connection with proposed comprehensive revisions to Regulation Z eventually made in 1981, the FRB prepared a “Regulatory Analysis of Proposed Revision of Regulation Z.” *See* Proposed Rule, Credit; Truth in Lending; Revision of Regulation Z, 46 Fed. Reg. 80648, 80731 (Dec. 5, 1980). This analysis included a table entitled “Goals of Truth in Lending” listing 39 TILA goals, which included seven “Goals Associated with Improving Consumer Decisionmaking.” These seven goals were: reduce credit search costs; simplify information processing; improving consumers’ ability to make comparisons; enable consumers to match products and needs; enable consumers to decide between using credit and delaying consumption; and show consumers where search can be beneficial. *See id.* at 80735. Requiring the disclosure of overdraft fees in the finance charge advances these goals. *See also id.* at 80737 (“Probably of primary importance is TIL’s requirement that rates be calculated in identical fashion regardless of credit source or type . . . Likewise, decisions about using cash or delaying consumption rather than using credit should be facilitated with standardized credit cost calculations available.”)

1026.4(c)(3)), which provides that transactions are generally exempt from TILA if there is no written agreement between the consumer and the institution to pay an overdraft and impose a fee.<sup>100</sup> The purpose of the exemption was to permit institutions to use their discretion on an ad hoc basis to accommodate customers. But overdraft programs are discretionary in name only; most programs establish parameters for paying overdrafts without discretion and set limits for how much credit they will extend (thus functioning as lines of credit).<sup>101</sup>

The FRB itself acknowledged that the disconnect between the original purpose of the exception and the modern overdraft program may lead to an eventual change, noting that “[s]ince this regulatory exception was created for the occasional ad-hoc payment of overdrafts, its application to these automated and marketed overdraft programs could be reevaluated in the future.”<sup>102</sup>

The FRB’s “opt-in” rule only makes application of the “discretionary” exception to modern-day overdraft programs less reasonable. Fee-based overdrafts are more clearly credit now than ever: To encourage account holders to opt in, banks have promoted these programs as an emergency source of funds, and in many cases account holders are choosing to opt in with an expectation that they will be “covered.”<sup>103</sup> TD Bank even markets its overdraft opt-in program as “TD Debit Card Advance,” described as a “discretionary overdraft service.”<sup>104</sup> Not only are overdraft programs credit in substance, but they are clearly being marketed as short-term loans as well.

## **2. Overdraft loan fees are not comparable to NSF fees.**

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<sup>100</sup> See 12 C.F.R. § 226.4(c)(3).

<sup>101</sup> The Bureau notes this in its RFI: “Over the past decade or more, many institutions introduced automated overdraft systems under which overdraft items are paid, subject to tolerances or limits that are established at the account level . . . .” 77 Fed. Reg. 12031.

<sup>102</sup> “The Board’s adoption of final rules under Regulation DD does not preclude a future determination that TILA disclosures would also benefit consumers. The Board expressly stated in its proposal that further consideration of the need for coverage under Regulation Z may be appropriate in the future.” Proposed Rule, Truth in Savings, Regulation DD Amendments, Board of Governors of the Federal Reserve System, 69 Fed. Reg. 31858, 31862 (June 7, 2004) and reiterated upon publication of the final rule at 70 Fed. Reg. 29582, 29585 (May 24, 2005).

<sup>103</sup> For example, one calls its overdraft coverage the “[Name of Bank] Debit Card Advance.” Claims for its \$35 overdraft program read just like the solicitations for a credit product. “This safety net enables you to make a debit card purchase or ATM withdrawal, even when you do not have enough money available in your checking account.” The bank’s website presents examples of “coverage when you need it most,” including Molly who needs to buy asthma medicine, Mike and Karen who get in trouble with a joint account, Lisa who needs to buy groceries, and Mike who wants cash to go on a date. On file with CRL.

<sup>104</sup> TD Bank, *Overdraft Services Comparison Chart*, [www.tdbank.com/personal/overdraft\\_comparison.html](http://www.tdbank.com/personal/overdraft_comparison.html), (last visited June 29, 2012).

The FRB also exempted overdraft fees from TILA’s definition of finance charge so long as those programs’ fees do not exceed the standard NSF fees charged by the relevant institution.<sup>105</sup>

In 1980, Congress excluded costs that were the same in cash transactions as in credit transactions from the definition of finance charges.<sup>106</sup> Congress adopted the “comparable cash transaction” language with the intent of exempting items from the finance charge when the same charge was imposed regardless of whether the consumer used cash or credit. The examples given included sales taxes, license fees, and registration fees.<sup>107</sup>

In the context of determining whether a charge is a finance charge under TILA, however, this is not the correct comparison. Fees for overdraft programs and NSF fees are not “comparable cash transactions.” When an overdraft loan occurs through use of a debit or ATM card, the inappropriateness of deeming the NSF fee to be a “comparable cash transaction” to an overdraft fee is even more apparent: there are no NSF fees on declined ATM or debit transactions.

This exception also distorts the pricing of overdraft products by providing an incentive for overdraft fees to be priced at the same level as the NSF fee, and no lower. Institutions set the price of their NSF fees to deter borrowers from writing checks that would be returned from merchants for insufficient funds.<sup>108</sup> That price has nothing to do with the cost of extending credit through overdraft loans, or the risk of default.

**C. The FRB’s treatment of overdraft fees was inconsistent with its treatment of similar products, subjecting borrowers to harm.**

As the Bureau has noted, there are similarities between overdrafts and payday loans.<sup>109</sup> However, the FRB requires payday lenders to comply with TILA but exempts overdrafts.

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<sup>105</sup> Under Regulation Z, even where an institution agrees in writing to pay an overdraft, the “fees assessed against a transaction account for overdraft protection services are finance charges only to the extent the fees exceed the charges imposed for paying or returning overdrafts on a similar transaction account that does not have overdraft protection.” 2005 Joint Guidance at 9130-31 (citing 12 C.F.R. § 226.4(c)(3)).

<sup>106</sup> 15 U.S.C. § 1605(a).

<sup>107</sup> See S. Rep. No. 96-73, at 12 (1979) (“The bill will eliminate some current confusion by making clear that charges which would also be incurred in a similar transaction for cash, such as sales taxes, license and registration fees, are not to be included in the finance charge.”); S. Rep. 96-368, at 26 (1979) (same).

<sup>108</sup> Alex Berenson, *Banks Encourage Overdrafts, Reaping Profit*, N.Y. Times, Jan. 22, 2003.

<sup>109</sup> “There are similarities between overdrafts and payday loans, which we discussed at the Bureau’s first field hearing last month in Alabama. Both products serve consumers who are strapped for cash and who feel they need short-term help. Both disproportionately affect a vulnerable demographic of consumers.” Director Cordray Remarks, Feb. 2010, *supra* note 2.

This distinction is inappropriate and both products should come with a price tag that borrowers can understand and use—this is the very point of a consistent APR.

In 2000, the FRB confirmed that payday loans are covered by TILA. Commenters who opposed the proposal argued that TILA disclosures would be difficult to make and would not provide meaningful information to borrowers. In determining that payday loans should be covered by TILA, the FRB stated:

TILA, as implemented by Regulation Z, reflects the intent of the Congress to provide borrowers with uniform cost disclosures to promote the informed use of credit and assist borrowers in comparison shopping. This purpose is furthered by applying the regulation to transactions, such as payday loans, that fall within the statutory definition of credit....<sup>110</sup>

TILA states that “[c]redit means the right granted by a creditor to a debtor to defer payment of debt or incur debt and defer its payment,”<sup>111</sup> a definition that overdraft programs clearly meet.

Today, given recent FRB amendments to Regulation Z for open-end credit, it is not clear that even including overdraft loan fees in the definition of finance charge would result in an APR disclosure for these fees, if they are deemed open-end loans. Overdraft fees, like the payday loan products being offered by a few banks (banks call them some variation of “deposit advances”), operate like short-term, closed-end credit. Our groups have urged the Bureau to deem both of these products closed-end, which, if overdraft fees were included in the definition of “finance charge,” would result in a meaningful APR disclosure. At a minimum, the CFPB should require a sample APR disclosure for overdrafts, and it should be based on the average duration of an overdraft loan.

We note here that although the CFPB’s Penalty Box Disclosure would represent an improvement over existing required disclosures, it is limited in its ability to disclose the cost of credit in a meaningful way because it lacks an APR disclosure. *See* Appendix A for our comments on the Penalty Box.

Treating overdrafts as closed-end credit, and requiring an APR disclosure as such for overdraft fees would also appropriately bring overdrafts under the protections of the 36 % interest rate cap in the Military Lending Act. There is no logical reason that Congress’s efforts to protect military service members from payday loans should not extend to high-cost overdrafts as well.

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<sup>110</sup> Final Rule, Board of Governors of the Federal Reserve System, Revisions to Staff Commentary to Regulation Z (Truth in Lending), 65 Fed. Reg. 17129, 17130 (Mar. 31, 2000).

<sup>111</sup> 15 U.S.C. § 1602(e).



**D. If overdrafts are permitted on debit cards, then they should be protected by TILA’s credit card protections.**

As discussed above, overdraft fees should not be permitted on debit or ATM transactions. If they are permitted, however, the card should be viewed as a credit card subject to TILA, including the rules limiting the fees on fee harvester cards.

TILA has long recognized that if a card or other access device is used to access credit, then it is a credit card. The statutory definition of “credit card” is “any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.”<sup>112</sup> The Regulation Z commentary makes clear that if a debit card accesses a line of credit or other credit feature, it converts the card into a credit card protected by the general TILA credit card rules, whether the credit line is accessed to purchase goods and services or at an ATM to get a cash advance.<sup>113</sup>

More recently, Regulation Z was amended to create a separate, narrower definition of “credit card”<sup>114</sup> for purposes of the provisions added to TILA by the Credit CARD Act of 2009, including the fee harvester provision. That definition excludes “an overdraft line of credit accessed by a debit card.”<sup>115</sup> The exclusion is not in the statute and was added using the FRB’s exception authority.<sup>116</sup> Regulation Z does not define the term “overdraft line of credit.”

The FRB’s discussion of the exception for debit cards that access overdraft lines of credit makes clear that it was referring to traditional, amortizing lines of credit, not credit that triggers overdraft fees and is exempted from TILA coverage. The FRB noted that lines of credit are not in wide use,<sup>117</sup> whereas overdraft fee programs clearly are. It appears that the Board was attempting to avoid impediments to credit unions and others that would prevent those institutions from continuing low cost overdraft protection options. The FRB noted that several Regulation Z provisions apply to such credit, just not some credit card specific rules, such as the credit card application and solicitation rules.

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<sup>112</sup> 15 U.S.C. § 1602(l).

<sup>113</sup> See Official Staff Commentary on Regulation Z, 12 C.F.R. pt. 226, Supp. I, § 226.2(a)(15)-2.1.A through -2.i.B.

<sup>114</sup> Regulation Z uses the term “credit card account under an open-end (not home-secured) consumer credit plan.” 12 C.F.R. § 226.2(a)(15)(ii).

<sup>115</sup> 12 C.F.R. § 226.2(a)(15)(ii)(B).

<sup>116</sup> See Proposed Rule, Board of Governors of the Federal Reserve System, CARD Act Revisions to Regulation Z (Truth in Lending) 74 Fed. Reg. 54124, 54129 (Oct. 21, 2009).

<sup>117</sup> *Id.* at 54130 and note 7 (citing 2007 Survey of Consumer Finances data indicating that few families (1.7 percent) had a balance on lines of credit other than a home-equity line or credit card).

On the other hand, the credit extended through overdraft fee programs is currently completely unregulated as credit, which is what has led to such widespread abuses. It defeats the purpose of TILA and the Credit CARD Act to permit credit that is extended via a card or other access device to be exempted from the consumer protection rules that govern credit. As discussed more fully above, credit should be regulated and treated like credit.

### Recommendations

- *Amend Regulation Z to include overdraft fees in the definition of “finance charge”, and require a meaningful APR disclosure based on the average duration of an overdraft.*
- *Treat debit cards accessing overdraft fee programs as credit cards.*

### **IX. Evaluate overdraft programs in light of the letter and the spirit of federal and state consumer protection laws.**

A range of state and federal laws are meant to protect consumers from the kind of harm financial institutions cause through overdraft programs, but banks have been able to circumvent these laws, aided by federal regulations that permit abuses.

#### **A. The Military Lending Act prohibits payday loans to military service members and their families.**

See previous discussion in Part I.B above.

#### **B. State and federal laws protect wages and exempt benefits from garnishment by debt collectors.**

State and federal law protect wages and exempt benefits from garnishment by debt collectors.<sup>118</sup> The FTC explained in promulgating the Credit Practices Rule that exempt benefits must be protected “to afford minimal protection to debtors and their families by allowing them to retain the prime necessities of life, with a view to preserving the family unit and furnishing the insolvent with a nucleus to begin life anew.”<sup>119</sup>

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<sup>118</sup> Even for ordinary wages, under federal law the maximum amount a debt collector can garnish is 25 percent of the borrower’s disposable earnings for that week or the amount by which those earnings exceed 30 times the federal minimum hourly wage, whichever is less. National Consumer Law Center, *Collection Actions* §§ 12.4.1.1, 12.4.1.4.1 (2008 & Supp.). Many states have laws that protect a greater amount. *Id.* Appx. F.

<sup>119</sup> Final Rule, Credit Practices, Federal Trade Commission, 49 Fed. Reg. 7740, 7768 (Mar. 1, 1984).

The Credit Practices Rule explicitly identifies as unfair, and prohibits banks from engaging in, several practices that are functionally equivalent to abusive characteristics of today's overdraft programs:<sup>120</sup>

- *Confessions of judgment.* As with a confession of judgment, the lender (in this case, the bank) is able to seize the borrower's income without judicial process.
- *Waivers of exemption from attachment.* The ability to seize income without judicial process also operates like an exemption waiver, permitting lenders to reach Social Security and other exempt income.
- *Assignments of wages.* A loan based on the ability to take some, or all, of an incoming wage or benefit check is effectively an assignment of wages.
- *Security interest in household goods.* Automatic repayment from the customer's checking account serves the same terrorizing function as a nonpossessory security interest in household goods.

Repaying loans by set-off of the next deposit that enters the account constitutes a modern day wage assignment.

The Treasury Department recently announced new rules to protect Social Security and other federal benefits from being frozen when debt collectors attempt to garnish bank accounts.<sup>121</sup> But financial institutions—debt collectors in the context of overdrafts—avoid these laws and rules, and they siphon billions of dollars directly from consumers' checking accounts every year.

The Treasury Department recently authorized direct deposit of Social Security and other federal payments to prepaid cards. But Treasury was concerned that high-cost credit products would siphon off exempt benefits, so the rule bans deposits to prepaid cards that have a line of credit or loan agreement that triggers automatic repayment upon the next deposit.<sup>122</sup>

Unfortunately, this Treasury rule only applies to prepaid cards and not traditional checking accounts. Thus, Social Security, federal disability income, veterans' benefits and other federal benefits are at risk of being seized to pay debt through overdraft programs when direct deposited into a bank account. Federal benefits recipients are now required to use electronic payment methods, as paper checks are being eliminated, exposing more vulnerable seniors and others to these dangerous loans. It is fundamentally unfair for the federal government to require benefit recipients to use deposit accounts or prepaid cards without also protecting those vulnerable citizens from unsafe and unsound features.

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<sup>120</sup> 16 C.F.R. § 444.

<sup>121</sup> 31 C.F.R. § 212.1.

<sup>122</sup> Interim Final Rule, Department of the Treasury, Federal Government Participation in the Automated Clearing House, 75 Fed. Reg. 80335, 80338 (Dec. 22, 2010).

Recommendation: *Prohibit financial institutions from automatically repaying themselves first from the customer’s next deposit, as it amounts to modern day wage assignment.*

### **C. TILA prohibits banks from “setting off” credit card debt against deposits.**

TILA protects the sanctity of deposit accounts against credit card debt: Banks may not repay themselves a customer’s credit card debt by offsetting it against the customer’s deposits with the bank.<sup>123</sup> There is no logical reason that overdraft debt should be treated any differently.

Indeed, the definition of “credit card” under TILA -- “any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit” -- is broad enough to encompass overdrafts accessed by a debit card. It is only the FRB’s interpretation of this definition in Regulation Z and the accompanying Staff Interpretations that inappropriately narrow the definition.

But the policy reasons behind protecting deposit accounts from setoff from credit card debt continue to apply broadly – they protect the ability of consumers to decide which debts and expenses to pay first, especially preserving the ability to pay for necessities such as food and shelter. Regulation Z’s credit card definitions could be revisited to apply the set-off prohibition to overdrafts if the consumer has opted into debit card overdrafts.<sup>124</sup>

Prohibiting automatic setoff would be consistent with the prohibition on wage assignments in the Credit Practices Rule; Treasury’s interim final rule regarding delivery of Social Security benefits to prepaid debit cards; and the prohibition against setoff already applicable to credit cards under the Truth in Lending Act.

Recommendation: *Prohibit financial institutions from setting overdraft debt off against deposit accounts.*

### **D. EFTA prohibits creditors from conditioning credit on the consumer’s repayment through “preauthorized electronic fund transfer.”**

The Electronic Fund Transfer Act (EFTA) prohibits creditors from conditioning an extension of credit on the consumer’s repayment of that debt by “preauthorized electronic fund transfer.”<sup>125</sup> This prohibition is not applicable to overdrafts for a variety of reasons.

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<sup>123</sup> 15 U.S.C § 1666h.

<sup>124</sup> Prohibiting payment of overdrafts by set-off is also necessary to provide coverage under the Department of Defense rules that define “consumer credit” products covered by the Military Lending Act protections. 32 C.F.R. part 232.

<sup>125</sup> 15 U.S.C. § 1693k; Reg. E, 12 C.F.R. § 205.10(e)(1). That ban applies to transfers from one account to another account at the same institution, even though such transfers are otherwise outside of the scope of the EFTA.

Yet the ban implements an important policy protecting the sanctity of deposit accounts and funds needed for necessities, and that policy helps to avoid unfair and deceptive practices, regardless of whether the EFTA specifically applies to overdrafts or not.

The ban not only to protect consumers' deposits, but also ensures that credit is made based on ability to repay. If a bank does not have sufficient confidence in a consumer's ability to repay to justify credit without automatic repayment, then that is an indication that the consumer cannot afford further debt. Conversely, an automatic electronic repayment feature leads banks to engage in sloppy—or nonexistent—underwriting, relying on the ability to collect and not the ability of the consumer to repay a loan without entering a cycle of debt—a form of asset-based lending.

**Recommendation:** *Prohibit banks from conditioning extension of overdraft coverage on preauthorized electronic fund transfer, regardless of whether the credit is repaid with single or recurring payments.*

#### **E. Laws prohibit steering and discrimination in lending and require that banks serve their communities.**

Customers should not be steered into higher-cost credit than that for which they qualify. The Dodd-Frank regulatory reform bill prohibits mortgage lenders from offering financial incentives for originators to steer borrowers into more expensive mortgage loans than they qualify for.<sup>126</sup> The FRB's recently finalized mortgage rules do the same.<sup>127</sup> Steering in the context of other forms of credit is no more appropriate than it is in the mortgage context.

Banks offer a variety of forms of reasonable overdraft protection to customers who apply for it and qualify for it. Checking accounts can be linked to overdraft lines of credit at 16% to 22% APR, to credit cards, and to savings accounts. One national bank has an overdraft line of credit at 21.9% APR and a fee of \$2 per transfer.<sup>128</sup>

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<sup>126</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1403, Pub. L. 111-203, 124 Stat. 1376, 2139 (2010), *codified at* 15 U.S.C. § 1639b(c). Section 1403 prohibits a mortgage originator from receiving, “directly or indirectly, compensation that varies based on the terms of the loan, other than the amount of the principal.” It also prohibits originators from steering borrowers from a qualified mortgage (one with generally less risky terms) to a non-qualified mortgage (one with generally riskier terms); to a loan that the consumer lacks a reasonable ability to repay; and to a loan that has “predatory characteristics (such as equity stripping, excessive fees or abusive terms).”

<sup>127</sup> “In connection with a consumer credit transaction secured by a dwelling, a loan originator shall not direct or ‘steer’ a consumer to consummate a transaction based on the fact that the originator will receive greater compensation from the creditor in that transaction than in other transactions the originator offered or could have offered to the consumer, unless the consummated transaction is in the consumer’s interest.” 12 C.F.R. § 226.36(e)(1) .

<sup>128</sup> For a comparison of different forms of short term loans, *see* Lauren Saunders, National Consumer Law Center, *Stopping the Payday Loan Trap: Alternatives that Work, Ones that Don't* (June 2010), *available at* [http://www.nclc.org/images/pdf/high\\_cost\\_small\\_loans/payday\\_loans/report-stopping-payday-trap.pdf](http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf).

Instead, banks steer customers into the highest cost form of overdraft coverage they offer.<sup>129</sup> Other customers may apply for reasonably priced overdraft lines of credit but not meet strict underwriting criteria. Banks do not deny those customers credit; instead, they extend them high-cost overdraft credit at triple- or quadruple-digit APRs with no meaningful underwriting.

This disparate treatment is not risk-based pricing. There is little risk to the institution that any single overdraft or payday loan will not be repaid, since the bank repays itself before any of the customer's other debts or expenses. Indeed, there is likely *less* risk than with the overdraft line of credit, which can be for much more than the biweekly income and is not repaid automatically.

As described above, a prime consumer with an overdraft line of credit would pay only \$1 for the same amount of credit that cost "Mary" \$448 in overdraft fees. There are serious fair lending implications to charging such astronomical price differences to two set of customers who are likely to have different demographic characteristics. The consumers who are steered into high-cost coverage or who do not qualify for traditional overdraft protection are more vulnerable: lower income, more cash strapped, more heavily minority, more dependent on public benefits.<sup>130</sup> Charging astronomically higher rates to vulnerable consumers is the essence of predatory lending.

Further, the Community Reinvestment Act calls on banks to serve the communities where they take deposits with appropriate products. By making high-cost overdrafts, banks harm communities of color rather than fulfill these obligations.<sup>131</sup>

#### Recommendations:

- *Require banks to ensure that tests used to determine who receives lower cost products are not discriminatory and that fair products are available to all consumers;*
- *Collect data to identify fair lending violations or discriminatory impact in overdraft and take appropriate enforcement action.*

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<sup>129</sup> See Leslie Parrish, *Banks Target, Mislead Consumers As Overdraft Deadline Nears*, Center for Responsible Lending (Aug. 5, 2010), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/Banks-Target-And-Mislead-Consumers-As-Overdraft-Dateline-Nears.pdf>. The OCC's Proposed Guidance notes specific concerns about customers on public benefits being steered into payday loans. OCC Proposed Guidance, *supra* note 20, at 33412,

<sup>130</sup> See Part I above.

<sup>131</sup> *Id.*

## Conclusion

We thank the Bureau for its attention to high-cost fee-based overdraft programs. Indeed, substantive reforms in this area are long overdue. The abuses in this market have spiraled out of control, much like the credit card market had several years ago. In that context, the appropriate regulatory response blended improved disclosures with substantive reforms addressing abusive features of the product.

Likewise, in the overdraft context, we encourage the Bureau to go beyond improving disclosures or addressing deceptive marketing to address the *substantive* problems with the product that result in its creating a cycle of high-cost debt by those incurring the majority of these fees: charging overdraft fees on debit card and ATM transactions that could be declined at no cost; extending this high-cost credit without an ability to repay, resulting in more than six such loans per year; and reordering transactions to maximize overdraft fees.

Thank you for your consideration of our comments. We would be happy to discuss them further.

## **APPENDIX A: FEEDBACK ON PENALTY BOX DISCLOSURE**

### **I. General Comments: The Limitations of Disclosure, And Particularly Without an Annual Percentage Rate (APR)**

As noted in the Introduction and Part II of our comments, the effectiveness of any disclosure will be limited, particularly when, as in this context, the financial institution has a strong incentive to maximize fees.

The effectiveness of disclosures related to fee-based overdraft is further limited to the extent the cost is not expressed in APR terms. Not only does the lack of an APR inhibit the consumer's ability to compare this product to lower cost options, but it also greatly diminishes the impact generated when the customer evaluates the price of the product on a stand-alone basis. Indeed, key data points on the proposed form—like the amount by which the account was overdrawn and the number of days the customer was overdrawn—seem to be efforts to emphasize how expensive the credit is, but they are unlikely to have the same impact on the consumer that a quadruple- or 5-digit APR would have.

Thus, as discussed in Part VIII of our comments, we recommend that CFPB take steps toward requiring a meaningful APR disclosure for all forms of credit, including open-end and closed-end, and including overdraft. Such a requirement is clearly consistent with the purpose of the Truth in Lending Act and would be fully consistent with—indeed, imperative to—the Bureau's commitment to transparency and comparability across products.

We recommended that the CFPB require a summary table similar to the credit card "Schumer box" showing the costs of each overdraft alternative and its APR. The disclosure should also show that the cost of declining to opt in is "\$0." A proposed disclosure follows:



<b>SAMPLE MODEL FORM COST COMPARISON TABLE</b>			
<b>Type of Overdraft Coverage for ATM and Everyday Debit Card Transactions</b>	<b>Charges</b>	<b>Total Cost per Transaction</b>	<b>Sample Effective Annual Percentage Rate Cost (assuming \$100 overdraft for two weeks)<sup>132</sup></b>
1. None	\$0	\$0.00	N/A
2. Opt-in to fee-based overdraft coverage	\$34 per transaction	\$34.00	886%
3. Overdraft line of credit	\$5 transfer fee plus 18% interest	\$5.69	148%
4. Transfer from credit card	\$5 transfer fee plus 24% interest	\$5.92	154%
5. Transfer from linked savings account	\$5 transfer fee	\$5.00	N/A

## **II. Specific Comments on the Proposed Form**

Despite these significant concerns, the proposed penalty box does mark an improvement over current disclosures, as it helps to highlight how expensive these fees are relative to the amount of credit extended. If finalized, we hope it will be revised to more directly encourage consumers to opt-out of high-cost fee-based coverage.

### **D. Specific 30-day Statement Summary**

We suggest adding a cross-reference to the box on overdraft fees at right.

### **E. Overdraft-Related Fees**

We suggest considering adding fee-per-incident to this box.

### **F. Fees charged this period**

We suggest (1) presenting the fees in a tabular format and (2) distinguishing between overdraft fees on one-time debit card and ATM transactions from overdraft fees on checks/ACH:

Overdraft fees on one-time debit card and ATM transactions:	\$x
Overdraft fees on checks and electronic payments:	y
Non-sufficient funds fees (NSF)	<u>z</u>
	<b>\$ TOTAL</b>

<sup>132</sup> Among these alternatives, only overdraft lines of credit and transfers from a credit card currently require Truth in Lending Act disclosures. The APR calculation given for a \$34 overdraft fee is thus for illustrative purposes only. The example uses very conservative parameters, since banks require that overdrafts be repaid in just days and many banks pile on additional fees if the overdraft is not repaid in a week or less.

**G. Total amount you overdrew this period**

This line item could be confusing in several respects. First, it says it may include items returned for insufficient funds, which would not be an amount “overdrawn,” since those funds would never had been withdrawn from the account. Second, if the purpose of this information is to give consumers a sense of the cost (fees) compared to the benefit (amount borrowed or overdrawn), then the overdrawn amount should not include overdraft fees that have been charged to the account during that period, since these fees represent additional cost, not benefit.

**H. Number of times you overdrew your account this period**

We suggest clarifying whether this item is referring to the number of instances the account dipped below zero (which could have lasted a few days and included several overdraft items) or the number of items that overdrew the account.

**I. Number of days you were overdrawn**

While we agree it makes sense to include this metric, we note this is a good example of a dynamic of overdraft that an APR would make much more meaningful, since the very short repayment term is a key component of how expensive overdraft fees are in APR terms.

**J. Year-to-date fees incurred**

We suggest considering moving cumulative fees to Page 1, Overdraft-Related Fees, particularly for customers who do not review statements in detail on a monthly basis. Further, fees incurred on a rolling 12-months basis are more meaningful than calendar year-to-date.

**K. Ways to Lower These Fees**

Consistent with our suggestion that the disclosure box more directly urge customers to opt out of this high-cost credit product, we suggest changing the order as we have numbered below, adding an option addressing an overdraft line of credit, and making some revisions to the wording. Further, while we understand that the types of alternatives and alerts institutions offer will vary, the Bureau should require that its model disclosure be mirrored by each institution as closely as possible to minimize banks’ ability to frame the disclosures in a manner that effectively discourage seeking lower cost alternatives.

1. *Opt-out*. This option should be listed first. With respect to the language itself:
  - a. The language suggesting “considering” opting out is very soft. We suggest strengthening it along the following lines: “Opt out of high cost overdraft

coverage on all types of transactions and seek lower cost alternatives. These could include overdraft alternatives, like an overdraft line of credit or a link to your savings account, and other cheaper forms of credit, like a credit card, to help avoid a negative balance in your checking account at all.”

- b. So long as there is not a consent requirement for overdraft fees on checks and ACH transactions, it should be made clearer that the “opt-in” applies only for debit card and ATM transactions, while consumers may be automatically enrolled in the coverage for other transactions. Confusion may be caused by the text that says “You can also request to opt-out of all overdraft coverage” combined with the text on the right that says “OPTED-IN, allowing overdraft coverage and related fees for all transactions.”
  - c. The institution should be required to allow consumers to opt out by any manner by which they allow customers to opt-in (e.g., on-line, email, mail, ATM). The manner of opting out should be disclosed.
2. *New option*: “Ask us if you qualify for a typically lower cost overdraft line of credit.”
  3. *Link to savings account*.
  4. *Track your balances/text alerts*. We suggest adding email as an option because there is no per email charge, as there is for texts for many customers.

## **APPENDIX B: JUNE 2012 CONSUMER FEDERATION OF AMERICA SURVEY OF 14 LARGEST BANKS' OVERDRAFT PRACTICES**

In May, 2012 CFA surveyed the websites of the fourteen largest banks and collected information on their overdraft fees and practices, processing order for payments from accounts, and fee information for overdraft protection products offered by the bank. When information was not available online, CFA visited bank branches and made calls to customer service numbers to fill in the missing data.

Table One shows the fees charged by banks when a transaction is paid despite an insufficient balance, the fee charged when an overdraft is not repaid in days, and any limits banks set on the size of overdraft to trigger fees and any daily limit on the number of fees charged. CFA computed the maximum overdraft fees a consumer could be charged in one day, using the bank's highest fee and the maximum fee limit per day. CFA also computed an Annual Percentage Rate (APR) for a single \$100 overdraft repaid in two weeks, using the top fee charged by the bank and any sustained overdraft fees applied for that time period, computed as if this were a closed-end payday loan.

Table Two indicates the bank's regulator and notes the types of transactions for which banks permit or deny overdraft coverage. Information from account agreements, online disclosures, or customer service representatives on the order in which banks process payments from accounts is summarized. Finally, the table notes whether traditional forms of overdraft coverage are available and any pricing information posted. These include transfers from savings accounts or credit cards to cover overdrafts and overdraft lines of credit available from the bank.

Overdraft fees and terms change at any time, so consumers should check their bank for current information.

### **Key Findings:**

- The median overdraft fee is \$35 and initial fees range from \$33 to \$37. The \$35 median fee and range of top fees remain unchanged from CFA's 2010 and 2011 surveys. The highest overdraft fee in the survey is \$37 and is charged by Fifth Third Bank and RBS Citizens.
- Big banks that do not permit consumers to trigger overdraft fees when using debit cards at the point of sale include Bank of America, Citibank, and HSBC. Citibank and HSBC also deny overdrafts for no fee at the ATM. The other eleven banks in the survey solicit consumers to opt in to pay overdraft fees on debit card POS and ATM transactions.
- Five banks (Fifth Third, PNC, RBS Citizens, SunTrust, and U.S. Bank) charge tiered fees based on the number of overdrafts in a twelve month period or the size of the overdraft. Two banks (U.S. Bank and Fifth Third Bank) are increasing overdraft fees to take effect in late June. Fifth Third is eliminating the \$33 fee step

in its tiered structure. As a result, the first overdraft in a year still costs \$25 but all subsequent overdrafts cost \$37 at Fifth Third. U.S. Bank is raising its fees at the end of June and will charge \$15 for a \$15 or less overdraft and \$35 for any overdraft over \$15.

- Almost two-thirds of banks charge a second or “sustained” overdraft fee, structured either as a flat fee or a per-day fee. For example, SunTrust charges \$36 on the 7<sup>th</sup> day an overdraft remains unpaid, Bank of America adds a second \$35 fee if unpaid in five days, and JP Morgan Chase adds \$15 after a five-day period an overdraft remains unpaid. RBS Citizens charges \$6.99 per day on the fourth through thirteenth day an overdraft is owed. Fifth Third Bank is eliminating its \$8 per day sustained overdraft fee, effective June 27, 2012.
- Over 85 percent of banks set a threshold to trigger overdraft fees, such as \$5 total overdrawn in a day before fees are charged. U.S. Bank sets the highest threshold at \$10 while four banks (Bank of America, Citibank, HSBC, and RBS Citizens) charge fees when the account is overdrawn by less than a dollar. SunTrust uses a \$5 per item threshold for overdraft fees and Chase has announced a \$5 per item limit effective July 22.
- All of the surveyed banks except HSBC set a limit on the number of overdraft fees that can be charged in a single day, ranging from three at JP Morgan Chase to ten per day at Fifth Third Bank. Regions and SunTrust will charge up to six overdraft fees and six insufficient funds fees in one day. (Note that HSBC does not permit overdrafts at POS or ATM, however.)
- Applying the highest overdraft fee to each bank’s daily limit on the number of fees, consumers can be charged in one day overdraft fees totally \$99 at U.S. Bank to \$370 at Fifth Third Bank. After announced changes in June 2012, the range of maximum overdraft fees in one day will be \$102 at JPMorgan Chase to \$370 at Fifth Third Bank. (HSBC has no limit.)
- The cost of a \$100 overdraft repaid in two weeks, adding up initial and sustained overdraft fees that would accrue in that time period, was computed as if this were a closed-end payday loan. The highest equivalent APRs are charged by Fifth Third Bank (3,250%), RBS Citizens (2,779%), PNC Bank (2,574%), and U.S. Bank (2,158%). After announced changes at Fifth Third and U.S. Bank, the APRs will be 962% at Fifth Third and 2210% at U.S. Bank. The lowest-cost two-week overdraft loans are made by Citibank at 884% (checks), HSBC (checks) and Wells Fargo at 910%, and by Regions at 936%.
- The order in which banks pay transactions has a big impact on the number of overdraft fees customers can be charged, with paying the largest transactions first resulting in more overdraft fees for low balance customers. Banks that continue to pay the largest transactions first for at least one category of transaction include

Bank of America, Capital One, Fifth Third Bank, HSBC, JPMorgan Chase, PNC, RBS Citizens, Regions, SunTrust, and Wells Fargo. This year's survey found more variation in bank processing order, based on the type of transaction. For example, some banks process time-stamped transactions in the order received, then other transactions largest to smallest. See survey chart below for details.

- All fourteen of the largest banks provide lower cost traditional forms of overdraft protection, such as transfers from savings or credit cards and overdraft lines of credit. Fees to transfer funds from savings to cover checking account overdrafts range from \$10 to \$20 per transfer. RBS Citizens charges an annual \$30 fee to cover overdraft protection from savings or line of credit.

**Table 1: Overdraft Fees and Limits, Cost of \$100 Overdraft Compared to Payday Loans**

Name	Initial OD and tiered OD's	Sustained OD fee	OD amount to trigger OD fee	Daily Max OD fees	Total Max Daily OD fees	APR for \$100 2-week OD
<b>Bank of America</b>	\$35	\$35 after 5 days	\$0.01	4 per day	\$140	1820% <sup>133</sup>
<b>BB&amp;T</b>	\$35	\$33 after 7 day overdraft	\$5	8 per day	\$280	1768% <sup>134</sup>
<b>Capital One</b>	\$35	None	\$5.01	4 per day	\$140	910% <sup>135</sup>
<b>Citibank</b>	\$34	None	\$0.01	4 per day	\$136	884% <sup>136</sup>
<b>Fifth Third Bank</b>	1 <sup>st</sup> is \$25 2 <sup>nd</sup> -4 <sup>th</sup> is \$33, 5 <sup>th</sup> or more is \$37 (\$25 1 <sup>st</sup> , \$37 2 <sup>nd</sup> 6/27/12)	\$8/day after 3 days (No sustained OD fee 6/27/12)	\$5.01	10 per day	\$370	3250% <sup>137</sup>  (962% 6/27/12)
<b>HSBC</b>	\$35	None	\$0.01	Unlimited	Unlimited	910% <sup>138</sup>
<b>JP Morgan Chase</b>	\$34	\$15 once after overdrawn 5 days	\$5.01 total \$5.01 per item 7/22/12	3 per day	\$102	1,274% <sup>139</sup>
<b>PNC bank</b>	1 <sup>st</sup> is \$25 \$36	\$7/day after 5 days; Max of \$98	\$5.01	4 per day	\$144	2574% <sup>140</sup>
<b>RBS Citizens</b>	1 <sup>st</sup> is \$22 \$37	\$6.99/day for 4th-13th days	\$1	7 per day	\$259	2779% <sup>141</sup>
<b>Regions</b>	\$36	None	\$5.01	6 OD and 6 NSF	\$216	936% <sup>142</sup>
<b>SunTrust Bank</b>	1 <sup>st</sup> is \$25 2 <sup>nd</sup> on is \$36 <sup>143</sup>	\$36 on 7 <sup>th</sup> day	\$5 item	6 OD and 6 NSF	\$216	1872% <sup>144</sup>
<b>TD Bank</b>	\$35	\$20 on 10 <sup>th</sup> day	\$5.01	5 per day	\$175	1430% <sup>145</sup>

<sup>133</sup> Bank of America: \$35 OD fee + \$35 extended overdraft fee after 5 days = \$70

<sup>134</sup> BB&T: \$35 OD fee + \$33 negative balance fee after 7 days = \$68

<sup>135</sup> Capital One: \$35 OD fee

<sup>136</sup> Citibank: \$34 OD fee

<sup>137</sup> Fifth Third Bank: \$37 OD fee + \$8 per day after 3 days (4-14<sup>th</sup> day or \$88) = \$125 (\$37 OD fee 6/27/12)

<sup>138</sup> HSBC: \$35 OD fee

<sup>139</sup> JPMorgan Chase: \$34 OD fee + \$15 after 5<sup>th</sup> day = \$49

<sup>140</sup> PNC: \$36 OD fee + \$63 sustained OD fee (\$7 per day 6<sup>th</sup> through 14<sup>th</sup> day) = \$99

<sup>141</sup> RBS Citizens: \$37 OD fee + \$69.90 (\$6.99 4<sup>th</sup> through 13<sup>th</sup> day) = \$106.90

<sup>142</sup> Regions: \$36 OD fee

<sup>143</sup> Balanced Banking account fee is \$20

<sup>144</sup> SunTrust: \$36 OD fee + \$36 sustained OD fee on 7<sup>th</sup> day = \$72

<sup>145</sup> TD Bank: \$35 OD fee + \$20 sustained OD fee on 10<sup>th</sup> day = \$55

<b>U.S. Bank</b>	\$10 per item if OD is \$20 or less, \$33 per item if OD is \$20.01 or more (\$15 per item if OD \$15 or less, \$35 per item if OD is \$15.01 or more, 6/29/12)	\$25/week on 8 <sup>th</sup> day and each wk w/OD	\$10	3 OD and 3 NSF	\$99 OD if each over \$20  (\$105 if each OD over \$15)	2158% <sup>146</sup>  (2210%)
<b>Wells Fargo</b>	\$35	None	\$5.01	4 per day	\$140	910% <sup>147</sup>

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<sup>146</sup> U.S. Bank: \$33 OD fee + \$50 sustained OD fee (\$25 following 1<sup>st</sup> and 2<sup>nd</sup> week) = \$83 (\$35 OD fee + \$50 sustained)

<sup>147</sup> Wells Fargo: \$35 OD fee



**Table 2: Overdraft Transactions Covered, Payment Processing, and Overdraft Alternatives**

Name	Regulator	Types of transactions covered by OD	Order in which payments are processed	OD protection programs
<b>Bank of America</b>	OCC	Check, online and automatic bill payments, ACH and recurring debit card transactions. ATM transactions if you opt in per use. Does NOT charge OD fee on debit card POS transactions.	At bank's discretion, but ordinarily largest to smallest dollar amount within each category <sup>148</sup>	\$10 each for transfer from second checking account, savings account, or line of credit. Acct. can be linked to a Bank of America credit card, transfers in \$100 increments.
<b>BB&amp;T</b>	OTS	Checks, automatic bill payments, recurring debit card transactions. ATM withdrawals and non-recurring debit card transactions if you opt in.	In general, posts in chronological order, then in low to high dollar amount. <sup>149</sup>	Offered with savings, credit card, or line of credit. \$12 transfer fee.
<b>Capital One</b>	OCC	Checks and other transactions made using checking account number, and automatic bill payments. Non-recurring debit card transactions and ATM withdrawals if you opt in.	By category, then largest to smallest dollar amount <sup>150</sup>	Offered with savings account or line of credit. \$10 transfer fee. \$25 annual fee on ODP line of credit at 19.8% APR.
<b>Citibank</b>	OCC	Check, in person withdrawal, transfer, draft, ACH transaction or electronic transactions. Does NOT charge OD on POS debit or ATM transactions.	At bank's discretion, but generally pay checks and ACH smallest to largest dollar amount <sup>151</sup>	\$10 per day for transfers from savings account or line of credit
<b>Fifth Third Bank</b>	FRB	Checks and automatic bill payments using your checking account number. Non-recurring debit card transactions and ATM withdrawals if you opt in.	First post ATM and debit POS in order took place, then post checks, electronic bill pay and fees in order largest to smallest amount <sup>152</sup>	OD protection from saving account, credit card, or line of credit. Charge based on # of OD protection transfers in last 12 months. 1-10 is \$10, 11-20 is \$15, 21 or more is \$20 each. (\$12 transfer fee 6/27/12)
<b>HSBC</b>	OCC	Checks, may cover preauthorized automatic bill payment. Does NOT authorize and pay overdrafts for ATM transactions and POS debit card transactions.	Generally largest to smallest dollar amount <sup>153</sup>	Overdraft transfer fee \$10 max per day.
<b>JP Morgan Chase</b>	OCC	Check, bill pay, in-person withdrawal, and ACH. ATM and non-recurring debit transactions if you opt in.	Order received for most transactions (i.e., debit card POS and ATM, cashed checks and online transactions), all others	\$10 per transfer to credit card, savings account or home equity line of credit. No fee if OD is \$5 or less.

<sup>148</sup> Bank of America Deposit Agreement and Disclosures, March 1, 2012, Processing and Posting Orders, viewed May 9, 2012.

<sup>149</sup> BB&T Bank Services Agreement, Payment of items, April 1, 2012, p. 4

<sup>150</sup> Capital One Bank, Rules Governing Deposit Accounts, May 21, 2012.

<sup>151</sup> Citibank Client Manual Consumer Accounts, U.S. Markets, Effective February 24, 2012, p. 24-25.

<sup>152</sup> Fifth Third Bank Customer Service, May 30, 2012.

<sup>153</sup> HSBC, Rules for Deposit Accounts, accessed May 30, 2012, P. 4.

Name	Regulator	Types of transactions covered by OD	Order in which payments are processed	OD protection programs
			highest to lowest dollar amount <sup>154</sup>	
<b>PNC bank</b>	OCC	Checks, ACH transactions and preauthorized automatic debits, any use of checking account number. ATM and non-recurring debit transactions if you opt in.	Largest to smallest <sup>155</sup>	\$10 per transfer from other deposit account or credit card. Line of credit also available.
<b>RBS Citizens</b>	OCC	Checks, transactions made with checking account number, automatic bill payments. ATM and debit card transactions if you opt-in.	Largest to smallest dollar amount <sup>156</sup>	\$30 annual fee for OD protection with savings link or line of credit. Plus \$10 daily transfer fee for line of credit
<b>Regions</b>	FRB	Checks, other transactions made using checking account number, and automatic bill payments. ATM withdrawals and debit card transactions if you opt in.	At bank's discretion; generally largest to smallest dollar amount <sup>157</sup>	Savings, checking, money market, credit card or line of credit offered for \$15 per transaction
<b>SunTrust Bank</b>	FRB	Checks, in person withdrawals, or other electronic means. ATM withdrawals and non-recurring debit card transactions if you opt in.	At bank's discretion; may post largest to smallest <sup>158</sup>	Savings, money market, credit card or line of credit offered for \$12.50 per transfer.
<b>TD Bank</b>	OCC	Check, in person withdrawal, or other electronic means. "TD Debit Card Advance" for ATM withdrawals and debit card transactions if you opt in.	First, pending debit card, ATM, or electronic transactions, the rest ordered by category; Generally largest to smallest dollar amount within each category <sup>159</sup>	\$10 per daily transfer. Line of credit at 18% APR.
<b>U.S. Bank</b>	OCC	Check, automatic bill payment, recurring debit card transactions. ATM transactions and non-recurring debit card transactions if you opt in.	Date/time order for non-checks, then smallest to largest for non-time stamped. Checks in check number order. <sup>160</sup>	\$10 per transfer from other deposit account, credit card, or line of credit. Fee waived if negative account balance is less than \$10.

<sup>154</sup> Chase Deposit Account Agreement, accessed April 30, 2012, Page 7. Transfer fee effective 5/31/12

<sup>155</sup> PNC Bank Account Agreement for Personal Checking, Savings and Money Market Accounts, Effective December 5, 2011, page 4.

<sup>156</sup> Citizens Bank, "What You Should Know About Overdraft Fees," viewed May 30, 2012.

<sup>157</sup> Regions, Deposit Agreement, 2011, Page 10.

<sup>158</sup> SunTrust Customer Service, May 30, 2012

<sup>159</sup> TD Bank Simple Checking Account Guide (03/12), p. 2

<sup>160</sup> U.S. Bank "Your Deposit Account Agreement," February 12, 2012, p. 3,4.

Name	Regulator	Types of transactions covered by OD	Order in which payments are processed	OD protection programs
<b>Wells Fargo</b>	OCC	Check, bill pay, and ACH. ATM transactions and non-recurring debit card transactions if you opt in.	At bank's discretion; generally largest to smallest dollar amount for checks and ACH. Generally in time order for ATM, debit, others; if time stamp not available, lowest to highest. <sup>161</sup>	\$12.50 daily for savings transfer, \$2.50 for advance from line of credit. Advance from credit card also available for \$12.50-\$20 per day.

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<sup>161</sup> Wells Fargo, "Consumer Account Agreement," October 15, 2011, p.26-27.

## APPENDIX C: SURVEY OF OVERDRAFT PRACTICES ON MILITARY BASES CONSUMER FEDERATION OF AMERICA

CFA reviewed the fees and terms for overdrafts at all banks with branches on military bases<sup>162</sup> to see if overdraft fees are charged and if customers are given the means to opt-in to pay overdraft fees on debit card point of sale purchases and ATM withdrawals. The survey also noted when banks offer lower-cost ways to cover overdrafts, such as transfer from savings, a credit card, or a line of credit at the bank. CFA found that the overdraft fees charged on base are almost always identical to the same bank's fee schedule off-base. CFA surveyed the banks' websites and called branches to collect information not available on websites. See chart below.

Our findings indicate that almost 90 percent of banks with branches on military bases permit consumers to opt in to pay overdraft fees that range from \$18 to \$38.50 per overdraft for single debit card purchases and/or ATM withdrawals. For example, Armed Forces Bank,<sup>163</sup> with branches on many bases, charges \$25 per overdraft item for any overdraft of \$5 or more or \$10 total overdrawn in one day. The daily limit on overdraft fees at this bank is \$125. A \$25 fee to borrow \$100 for two-weeks, if computed as a payday loan, comes to 650 percent APR. Fort Sill National Bank<sup>164</sup> charges an \$18 per overdraft fee and permits up to seven fees in one day for a total of \$126.

The largest banks charge the steepest overdraft fees. Regions Bank, with a branch at Redstone Arsenal in Alabama, charges \$36 per overdraft item up to six per day on any overdraft over \$5.<sup>165</sup> Bank of America charges \$35 to permit a customer to overdraw at the ATM and adds another \$35 sustained overdraft fee if the overdraft and fee are not repaid in five days.<sup>166</sup> Wells Fargo, which has branches at ten bases, charges \$35 per overdraft up to four per day.<sup>167</sup> SunTrust Bank, at four bases in Georgia and Virginia, permits up to six overdrafts per day at \$36 each and a second \$36 sustained overdraft fee if not repaid in seven days.<sup>168</sup>

Of the banks offering opt-in to pay overdraft fees on debit card purchases and ATM transactions, some limit the total number of overdraft fees charged in one day or the threshold of overdrafts that trigger fees. For example, Bank of Hawaii with a branch at Hickam Air Force Base, charges a \$26 overdraft fee and another \$10 fee if an overdraft has

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<sup>162</sup> AMBA "Bank Institutions Located on Military Installations," June 2011.

<sup>163</sup> [www.afbank.com/optin](http://www.afbank.com/optin), visited 5/10/2012

<sup>164</sup> [www.fsnb.com/pages/overdraft.html](http://www.fsnb.com/pages/overdraft.html), visited 5/10/2012

<sup>165</sup> [www.regions.com/faq/coverage.rf](http://www.regions.com/faq/coverage.rf), visited May 10, 2012.

<sup>166</sup> [https://www.bankofamerica.com/deposits/index.action?body=check\\_compare](https://www.bankofamerica.com/deposits/index.action?body=check_compare)

<sup>167</sup> [www.wellsfargo.com/checking/overdraftservices/index](http://www.wellsfargo.com/checking/overdraftservices/index), visited May 10, 2012.

<sup>168</sup> SunTrust Personal Deposit Accounts Fee Schedule, effective March 1, 2012.

not been repaid in seven days.<sup>169</sup> The bank permits up to three overdraft fees in one day and does not charge a fee if the overdraft is less than \$5. Fort Hood National Bank, with a branch on base at Fort Hood in Texas, has tiered overdraft fees ranging from \$19 to \$35 with six per day permitted.<sup>170</sup> There is no overdraft fee at Fort Hood if the overdraft is less than a dollar or if the account is negative less than \$3.

The chart below, updated on May 14, 2012, lists the bank, the website for the bank, the bases where branches were located as of June 2011, fees and limits for all types of overdraft transactions, lower cost overdraft protection, and whether the bank charges overdraft fees on debit card point of sale and/or ATM transactions if the customer opts in to this form of overdraft coverage. If a customer does not opt in, or if the bank does not permit debit card transactions to overdraw the account, the transaction is rejected and no fee is charged.

Bank Name	URL	Branch Locations	Standard OD	OD Protection	Opt In?
<b>Armed Forces Bank, N.A. (OCC)</b>	<a href="http://www.afbank.com">www.afbank.com</a>	Fort Rucker, AL, Fort Huachuca, AZ(x2), Luke AFB, AZ(x2), MCAS Yuma, AZ, Edwards AFB, CA, Fort Irwin, CA(x2), NAS Lemoore, CA, NB Coronado, CA, NB Point Loma, CA(x2), Port Hueneme, CA, NB San Diego, CA(x4), Travis AFB, CA(x2), Vandenberg AFB, CA, Fort Carson, CO(x2), USAFA, CO(x2), MacDill AFB, FL, Tyndall AFB, FL, Moody AFB, GA, NS Great Lakes, IL(x3), Fort Leavenworth, KS(x3), Fort Riley, KS(x3), Fort Knox, KY(x3), Fort Leonard Wood, MO(x2), Nellis AFB, NV(x2), McGuire AFB, NJ, Grand Forks AFB, ND, Fort Bliss, TX(x3), Myer-Henderson Hall, VA(x2), NS Norfolk, VA, Fairchild AFB, WA, Fort Lewis-McChord, WA(x5), NB Bremerton, WA, NSB Bangor (2), WA, FE Warren AFB, WY	\$25 fee per item, max of \$125 per day. No fee for OD less than \$10 or on transactions less than \$5	\$7 per daily OD protection transfer from savings, 15.9 % APR for OD line of credit	Yes

<sup>169</sup> <https://www.boh.com/personal/banking-products/checking/understanding-overdrafts.asp>, visited May 11, 2012

<sup>170</sup> [https://www.fhnb.com/en/forms/frmodelection\\_step1.php?func=print](https://www.fhnb.com/en/forms/frmodelection_step1.php?func=print), visited May 12, 2012.

Bank Name	URL	Branch Locations	Standard OD	OD Protection	Opt In?
<b>Bank of America Military Bank (OCC)</b>	<a href="http://www.bankofamerica.com/military/">www.bankofamerica.com/military/</a>	Davis Monthan AFB, AZ, Bolling AFB, DC, Pentagon, VA, U.S. State Dept., DC, Washington Navy Yard, DC, NS Mayport, FL, Patrick AFB, FL, Fort Campbell, KY, Aberdeen Proving Ground, MD, Fort Meade, MD, Cannon AFB, NM, Grand Forks, ND, Charleston AFB, SC, Dyess AFB, TX, Joint Base San Antonio, San Antonio, TX, Amphibious Base, VA, Fort Eustis, VA, MCB Quantico, VA(x3), NS Norfolk, VA, NAS Oceana, VA, Pentagon Reservation, Arlington, VA	\$35 per item, max of 4 per day  \$35 sustained overdraft after each 5 days of negative balance	\$10 per OD protection transfer from another checking or savings account, or line of credit.  Can link checking account to a Bank of America credit card for overdraft protection.	No for debit card purchase Yes for ATM overdraft
<b>Regions Bank (FRB)</b>	<a href="http://www.regions.com">www.regions.com</a>	Redstone Arsenal, AL	\$36 per item, max 6 per day, no fee for OD of \$5 or less	OD protection is offered with transfer from deposit account, credit card or line of credit	Yes
<b>Fort Sill National Bank (OCC)</b>	<a href="http://www.fsnb.com">www.fsnb.com</a>	MC Recruiting Depot San Diego, CA, Dover AFB, DE, MCAS New River, NC, Fort Sill, OK, MC Recruit Depot Parris Island, SC, Sheppard AFB, TX	\$18 per item, max 7 per day	Transfer from savings to checking, \$2 fee per transfer	Yes "Recruit" acct. up to \$200 in OD limit
<b>5 Star Bank (FDIC)</b>	<a href="http://www.5starbankus.com">www.5starbankus.com</a>	Peterson AFB, CO (x2)	\$30 fee for overdrafts plus \$3 per day until the account shows a positive balance for checks, ACH	Overdraft line of credit available, \$10 per year plus interest. Transfer from savings no fee, limit six per month.	No
<b>Coastal Bank and Trust (FDIC)</b>	<a href="http://www.coastalbankandtrust.com">www.coastalbankandtrust.com</a>	Eglin AFB, FL	\$29 fee for military, OD collection fee of \$35 if negative 7 days	\$10 fee for transfer from savings; a transfer from credit card charged as cash advance, line of credit	Yes
<b>First National Bank Alaska (OCC)</b>	<a href="http://www.fnbalaska.com">www.fnbalaska.com</a>	Elmendorf AFB, AK	\$20 OD/NSF	Transfer from savings or to credit card, \$5	No
<b>First Arkansas Bank and Trust (FDIC)</b>	<a href="http://www.firstarkansasbank.com">www.firstarkansasbank.com</a>	Little Rock AFB, AR	\$28 fee. Limit \$500 overdrawn. No fee if \$5 or less overdrawn	Transfer from savings cost \$5 per transfer	Yes

Bank Name	URL	Branch Locations	Standard OD	OD Protection	Opt In?
<b>First National Bank and Trust (OCC)</b>	<a href="http://www.fnbt.com">www.fnbt.com</a>	Hurlburt Field AFB, FL	\$35.50 fee	Link to savings or money market acct. or LOC, \$8 transfer fee	Yes
<b>First Navy Bank (FRB)</b>	<a href="http://www.firstnavybank.com">www.firstnavybank.com</a>	Naval Air Station Pensacola, FL	\$18 per item, no limits, up to \$200 in OD	Not offered	Yes
<b>Columbus Bank &amp; Trust Co. (FDIC)</b>	<a href="http://www.columbusbankandtrust.com">www.columbusbankandtrust.com</a>	Fort Benning, GA(x2)	\$29 fee for military. \$35 OD collection fee after 7 days. No fee if \$5 or less total OD. 6 fee per day limit.	\$10 fee for transfer from savings, transfer for credit card billed as cash advance	Yes
<b>Wells Fargo Bank (OCC)</b>	<a href="http://www.wellsfargo.com/military/">www.wellsfargo.com/military/</a>	Fort Benning, GA, Fort Gordon, GA, Fort Dix, NJ, Holloman AFB, NM Kirtland AFB, NM, Minot AFB, ND, Jackson, SC, Shaw AFB, SC, Fort Bliss, TX, Hill AFB, UT	\$35 fee, max 4 fees per day	\$12.50 transfer from savings, \$12.50 fee for transfer from LOC, \$12.50 to \$20 credit card	Yes
<b>The Heritage Bank (FDIC)</b>	<a href="http://www.the-heritage-bank.com">www.the-heritage-bank.com</a>	Fort Stewart, GA	\$34 fee, max 4 per day	Overdraft protection from savings or credit available	Yes
<b>SunTrust Bank (FRB)</b>	<a href="http://www.suntrust.com">www.suntrust.com</a>	Robins AFB, GA, Fort Belvoir, VA, Fort Lee, VA, Langley-Eustis, VA	\$36 per item, max 6 ODs per day  \$36 sustained overdraft fee on 7 <sup>th</sup> day  No fee < \$5 item	Transfer from credit card, credit line, or deposit account. Fee of \$12.50 for OD protection transfers.	Yes
<b>Bank of Guam (FDIC)</b>	<a href="http://www.bankofguam.com">www.bankofguam.com</a>	Andersen AFB, Guam, NS Guam, Guam	Not given	OD protection from savings account available	Not given
<b>Bank of Hawaii (FRB)</b>	<a href="http://www.boh.com">www.boh.com</a>	NB Pearl Harbor- Hickam AFB, HI, MCB Hawaii, HI	\$26 fee, \$10 continuous OD fee after each 7 days unpaid, max 3 OD fees per day, no fee for OD less than \$5	\$10 fee for transfer from savings, \$25 annual fee for overdraft line of credit	Yes

Bank Name	URL	Branch Locations	Standard OD	OD Protection	Opt In?
<b>First Hawaiian Bank (FDIC)</b>	<a href="http://www.fhb.com">www.fhb.com</a>	Pearl Harbor- Hickam-AB, HI, Schofield Barracks, HI	\$26.50 fee, no fee for OD less than \$5, \$10 if overdrawn 7 days, limit 5 OD fees per day	Line of credit available for OD protection, link to savings	Yes
<b>Chase Bank (OCC)</b>	<a href="http://www.chase.com">www.chase.com</a>	Barksdale AFB, LA, Wright-Patterson AFB, OH	\$34 OD fee  \$15 sustained OD fee after 5 days  No fee if total OD \$5 or less; no fee if OD item is \$5 or less 7/22/12  Limit 3 OD fees per day	\$12 fee for transfer from credit card, savings account, or home equity line of credit	Yes
<b>Sabine State Bank (FDIC)</b>	<a href="http://www.sabinestatebank.com">www.sabinestatebank.com</a>	Fort Polk, LA(x2)	\$27 OD fee	Not offered	Yes
<b>PNC Bank (OCC)</b>	<a href="http://www.pnc.com">www.pnc.com</a>	Fort Meade, MD	\$25 fee for the first overdraft in 12 mon. \$36 fee for subsequent overdrafts, max 4 per day. No fee if overdrawn \$5 or less \$7/day sustained OD after 5 days, max \$98  Limit 4 OD/day	OD protection available from checking, savings, money market account, line of credit, or credit card for \$10 per transfer	Yes
<b>BancorpSouth Bank (FDIC)</b>	<a href="http://www.bancorpsouthonline.com">www.bancorpsouthonline.com</a>	Keesler AFB, MS	\$35 fee. After 10 days unpaid, \$35 continuous overdraft fee	Overdraft protection available using credit card or line of credit	Yes
<b>UMB Bank (OCC)</b>	<a href="http://www.umb.com">www.umb.com</a>	Whiteman AFB, MO	\$36 fee. If overdrawn more than 5 days, \$8 per day up to 20 days	OD protection with line of credit, credit card, or another account available	Yes



Bank Name	URL	Branch Locations	Standard OD	OD Protection	Opt In?
<b>U.S. Bank (OCC)</b>	<a href="http://www.usbank.com">www.usbank.com</a>	Malmstrom AFB, MT	\$15 fee if OD \$15 or less, \$35 fee for OD \$15.01 or more, 6/29/12, max 3 OD and 3 NSF per day  \$25 per week sustained OD fee on 8 <sup>th</sup> day	\$10 fee for OD protection transfer from account, line of credit, or credit card	Yes
<b>Great Western Bank (FDIC)</b>	<a href="http://www.greatwesternbank.com">www.greatwesternbank.com</a>	Offutt AFB, Nebraska	\$33 OD fee, daily max of \$165. If overdrawn 2 days, \$4 per day.	Offers OD protection with transfer from another account or a line of credit	Yes
<b>KeyBank, N.A. (OCC)</b>	<a href="http://www.key.com">www.key.com</a>	Fort Drum, NY	\$34 fee first 2 times, \$38.50 after that. \$28.50 after account negative 5 days. No limit on # of OD fees.	Overdraft protection line of credit offered up to \$10,000, \$10 fee for each advance and \$25 annual fee	Yes
<b>First Citizens Bank (FDIC)</b>	<a href="http://www.firstcitizens.com">www.firstcitizens.com</a>	Fort Bragg-Pope Field, NC, Camp LeJeune, NC, MCAS Cherry Point, NC	\$35 fee, limit 4 per day. No fee if OD \$5 or less.	\$10 fee for transfer from savings or line of credit	Yes
<b>NBC, Altus AFB Branch (FDIC)</b>	<a href="http://www.nbcokonline.com">www.nbcokonline.com</a>	Altus AFB, OK	\$29 fee of check or ACH is paid on insufficient funds	Overdraft protection available with another checking or savings account, \$5 transfer fee	No
<b>First National Bank of Midwest City (OCC)</b>	<a href="http://www.fnbmwc.com">www.fnbmwc.com</a>	Tinker AFB, OK(x2)	\$32 fee	OD protection is available with transfer from savings, line of credit	Yes
<b>Broadway National Bank (OCC)</b>	<a href="http://www.broadwaybank.com">www.broadwaybank.com</a>	AMEDD Center, TX, Brooke Army Medical Center, TX, Joint Base San Antonio, TX(X3),	\$28 fee	OD protection from checking or savings, are \$8 per transfer. Line of credit.	Yes

Bank Name	URL	Branch Locations	Standard OD	OD Protection	Opt In?
<b>Fort Hood National Bank (OCC)</b>	<a href="http://www.fhnb.com">www.fhnb.com</a>	Fort Hood, TX	Tiered fee of \$19, \$29, or \$35. Limit 6 per day. No fee if OD less than \$1 or if negative less than \$3	Account transfer offered	Yes
<b>Old Point National Bank (OCC)</b>	<a href="http://www.oldpoint.com">www.oldpoint.com</a>	Fort Monroe, VA	Up to \$30 fee, max \$150 per day	Line of credit or account transfers available	Yes
<b>USAA (OCC)</b>	<a href="https://www.usaa.com">https://www.usaa.com</a>	Bank Branch located in San Antonio, TX. Financial centers are located in: Annapolis, MD; Arlington, VA; Colorado Springs, CO; Fayetteville, NC; Highland Falls (West Point), NY; Killeen, TX; Oceanside, CA; San Antonio, TX; and San Diego, CA.	\$25 fee, limit 2 per day, checks and ACH payments only. Debit cards cannot overdraw account.	OD protection is available through a linked credit card, savings, or checking account. No additional fees are charged for overdraft protection except for cash advance fees associated with credit card.	No

Updated May 14, 2012. U.S. Bank and Chase fee changes updated 6/25/12.

