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By Fax (202-898-3500) and First Class Mail

March 31, 2010

The Honorable Sheila C. Bair
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429-9990

Dear Ms. Bair:

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

FDIC Policies Needed on Soliciting Opt-Ins for Overdraft Programs

Specifically, we request that the FDIC work with state banking commissioners to:

- Require banks to submit their training manuals, scripts provided to bank employees, communications to customers, and advertising materials and promotions used to solicit opt-in for fee-based overdraft coverage, in order to monitor whether bank practices and messages are deceptive or inconsistent with the Federal Reserve's rule.
- Prohibit banks from using scare tactics or deceptive or misleading statements in materials and messages soliciting consumer opt-in.
- Closely examine overdraft opt-in programs for disparate impact and take action against any bank that targets vulnerable consumers who are heavy users of overdrafts.

- Consider sustained overdraft fees, i.e. multiple fees for a single violation, to be an unfair practice because the fee is not reasonable or proportional to the overdraft.
- Urge banks to deny overdrafts when funds are not sufficient to cover debit card purchases and ATM withdrawals. Bank of America has announced that it will deny unfunded debit card purchases while Citibank denies both debit purchases and ATM withdrawals on insufficient funds. Rather than solicit customers to pay \$35 for small overdrafts, responsible banks should simply deny these transactions.

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

Overdraft Opt-In Marketing Targeted at Vulnerable Consumers

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

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

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

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

Targeting the most vulnerable segment of bank customers – the small minority with repeated overdrafts per year -- raises safety and soundness concerns for the institution, since it encourages high levels of unsustainable debt among these accountholders. Research² has repeatedly found that overdraft fees have a disparate impact on lower income consumers and communities of color, raising fair lending concerns under the Equal Credit Opportunity Act (ECOA).³

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

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

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

Sincerely,

Jean Ann Fox
Director of Financial Services
Consumer Federation of America

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

Ed Mierzwinski
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U.S. Public Interest Research Group

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

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

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