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RE: Federal Financial Institutions Examination Council Data Collection on Overdraft Fees and Practices

Dear Gary A. Kuiper,

The Pew Charitable Trusts is dedicated to data driven research on deposit accounts and furthering public policy that is beneficial to positive growth and change in retail banking. We have published a number of reports that examine bank practices and policies with regard to overdraft programs and that demonstrate the detrimental nature of this product.

Introduction

The Federal Financial Institutions Examination Council (FFIEC) recently proposed to categorize fee income that banks and credit unions receive for various services, including overdrafts, ATMs, and monthly maintenance fees.[1] Pew is very encouraged by this extension of data collection and commends the FFIEC for requiring financial institutions to report their fee income more specifically. Among the many benefits to the comprehensive collection of banking data is the impact it can have on regulators' decisions regarding practices that might be harmful to consumers. Our research shows that overdraft fees are very detrimental to American families and these data should provide financial regulators with more information to understand the magnitude of this problem. The Consumer Financial Protection Bureau recently issued a report that detailed the negative effects of overdraft fees on consumers.[2] This report found that 6 percent of accounts in the study population were closed in 2011. It also found that the main reason accounts are closed is a negative balance, and the majority of negative balances are the result of overdrafts.

Pew's research has shown that financial institutions have a variety of procedures for how they administer overdraft services. Examples of areas that differ by institution include the minimum amount a customer must overdraft before a fee is charged, the maximum number of fees that can be applied in a day, and the order in which transactions are posted to the account. However, at the largest banks, there is near uniformity in the penalty fees that are charged to customers who overdraft using their debit cards or other payment instruments. Of the 36 large banks Pew examined in October 2012 for our most recent study, 31 (86 percent) charged a penalty between $30 and $40 for each overdraft transaction.[3] The full report is attached.

Over half of the financial institutions Pew studied in 2012 reordered at least some of their customers' transactions from highest dollar amount to lowest.[4] This practice, which was called a "neat trick[] generat[ing] colossal sums per year in additional overdraft fees" in a 2010 court case, can increase the number of overdraft fees that result from a single transaction, while providing no benefit to the accountholder.[5]

Pew's research has shown several problems with overdraft fees, which cost accountholders $32 billion in 2013 according to Moebs Financial Services.[6] Specifically, the practices of financial institutions with regard to point of sale and ATM transactions should be addressed by policymakers immediately. These fees represent an exorbitant penalty for transactions that could easily be declined by the bank at little to no cost. In a poll commissioned by Pew in 2012, the vast majority of consumers (75 percent) who had overdrawn in the past year at debit point-of-sale or an ATM said that they would prefer that their transactions be declined rather than pay a $35 overdraft fee.[7]

Proposed Extension of Data Collection

Collecting data on overdraft fees specifically will provide regulators with a clearer picture of the banking industry's reliance on profits that are derived from hidden fees based on consumers' mistakes. However, additional data collection on the posting order practices implemented by financial institutions that can increase their fee income would be beneficial. To gain a clear picture of these practices, the FFIEC should require that financial institutions report whether or not they reorder debit point-of-sale and ATM transactions from highest to lowest dollar amount.

The reordering of transactions, which is common among the nation's largest banks, could have serious systemic and reputational risks associated with it. Currently, there is a multidistrict class action litigation suit in the 11th Circuit in which the plaintiffs are arguing that reordering debit transactions from highest to lowest dollar amount is a violation of consumer protection laws.[8] The litigation has already resulted in 11 settlements by large banks totaling almost $1 billion dollars.[9] This case shows that there is a huge financial incentive for financial institutions to continue or adopt a highest to lowest dollar amount posting order for ATM and point-of-sale transactions. However, massive litigation that involves most of the largest banks in America is not healthy for consumer confidence in the banking system.

Financial institutions obviously need to be concerned about reputational risk. During the past several years, concern about the practices of the largest banks has led to the passage of major financial reforms, such as the Credit CARD Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act.[10] This fact makes it even more important for institutions to consider the implications of a practice on its customers. In fact, the Dodd-Frank Act specifically mandates in its Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) provision that institutions consider the effect of a product on consumers.[11]

The burden on financial institutions to report this singular data point would be very low. While there are many different ways that a financial institution might post transactions, this question only requires a "yes or no" answer to a single unambiguous question. Pew is concerned with the posting order for transactions of all types, but the reordering of debit and ATM transactions is particularly indefensible as there is no possible consumer benefit. It is the subject of scrutiny as outlined above, making this single additional data point both a useful extension of FFIEC data collection and a low burden on financial institutions of any size.

The extension of this data collection by the FFIEC is particularly important because of the inability to collect and examine the information by any other means. Most financial institutions do not make information about their processing policies available to the public, at least not in a way that is feasible for a third party to collect and analyze or for a consumer to understand. For institutions that do make their account agreements freely available, the processing order for transactions is often vaguely disclosed and subject to change at the bank's discretion at any time, without notice to accountholders.

Policymakers in Congress as well as financial regulators have shown interest in this subject, including a request for information from the Consumer Financial Protection Bureau as well as a bill introduced in the 113th Congress.[12] Yet little is known about its prevalence and the extent to which it increases the overdraft fees paid by consumers. This is especially true among smaller institutions, which number in the thousands and serve a significant portion of the market.[13]

Conclusion

Checking accounts are a vital product for Americans and it is important that they are safe and transparent. It is in the interest of all parties that they are free from hidden fees. The FFIEC's interest in overdraft fees is commendable, but more can be done to understand this aspect of banking practices. Pew would welcome the opportunity to speak with you further about our research on this topic or other aspects of checking accounts.

Sincerely,

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Attached: Checks and Balances: Measuring Checking Accounts' Safety and Transparency

[1] Proposed Agency Information Collection Activities, Comment Request, 78 Fed. Reg. 12141 (Feb. 21, 2013).
[2] Consumer Financial Protection Bureau, *CFPB Study of Overdraft Programs*, June 2013, http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.
[3] Pew Charitable Trusts, *Checks and Balances: Measuring Checking Accounts' Safety and Transparency*, May 2013, http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/ChecksBalances-new.pdf.
[4] Id.
[5] *Gutierrez v. Wells Fargo*, 730 F. Supp. 2d 1080, 1082 (N.D. Cal. 2010), *affirmed in part, reversed in part, and remanded*, 704 F.3d 712 (9th Cir. 2012).
[6] Press Release, Moebs Financial Services (Mar. 25, 2013), http://www.moebs.com/Portals/0/pdf/Press%20Releases/Moebs%20Press%20Release%20OD%2032513.pdf.
[7] Pew Charitable Trusts, *Overdraft America: Confusion and Concern About Bank Practices,* May 2012, http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/SC-IB-Overdraft%20America(1).pdf.
[8] *In Re: Checking Account Overdraft Litig., MDL*, 2013 U.S. Dist. LEXIS 8134 (S.D. Fla. 2013).
[9] The banks that have settled include Bank of America, Iberiabank, Fifth Third Bank, National City Bank, Commerce Bank, Chase Bank, TD Bank, RBS Citizens Banks, PNC Bank, BBVA Compass Bank, and U.S. Bank.
[10] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734; Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376.
[11] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5531 (2012).
[12] Notice and Request for Information, Impact of Overdraft Programs on Consumers, 77 Fed. Reg. 12031 (Feb. 28, 2012); Overdraft Protection Act of 2013, H.R. 1261, 113th Cong. (2013).
[13] According to FDIC data, as of May 2, 2013, the 6,917 banks with under $10 billion in domestic deposits make up 26% of total domestic deposit volume among FDIC insured banks.