September 27, 2010

Chairman Sheila Bair
Federal Deposit Insurance Corporation (FDIC)
550 17th Street, NW
Washington, DC 20429
Email: OverdraftComments@fdic.gov

Re: **Overdraft Payment Supervisory Guidance (FIL-47-2010)**

Dear Chairman Bair:

On behalf of the Cities for Financial Empowerment Coalition, we commend the FDIC's continued efforts to ensure that financial institutions offer the types of safe, affordable financial products and services that meet the needs of those with low incomes.

The Cities for Financial Empowerment (CFE) Coalition is a network of cities committed to advancing innovative financial empowerment initiatives locally and nationally. Expanding the vision of how municipal government can serve its citizens and create pathways for financial stability, CFE cities leverage power and politics in the service of at-risk communities. By focusing on connecting families with low and moderate incomes to banking, opportunities for asset building and financial education, these municipal efforts are reaching millions. However, too often, our work on behalf of consumers is undermined by unanticipated and high-cost overdraft fees.

The CFE Coalition strongly supports the FDIC's proposed Overdraft Payment Supervisory Guidance (the guidance).

The guidance is a strong statement of the FDIC's supervisory expectations and enforcement approach. It clearly articulates the FDIC's expectations for its supervised institutions regarding the marketing, disclosure and implementation of overdraft programs and requires financial institutions to maintain appropriate management systems to keep overdraft programs in compliance with the rules. According to the guidance, supervised institutions will be expected to conduct annual reviews of overdraft program features, ensure staff is trained regarding program features as well as alternative choices, and review marketing and disclosures for overdraft programs to reduce the risk of consumer confusion. Moreover, the supervisory guidance makes clear the safety and soundness risks, compliance risks, and the potentially illegal discrimination associated with targeting overdraft protection at particular consumers and with failing to ensure responsible use of overdraft.

A Comprehensive Supervisory Approach. In addition to setting an expectation of appropriate management oversight of overdraft programs, the guidance builds upon the improvements in the regulatory landscape achieved under the Federal Reserve's Regulation E rules, finalized last November. The guidance addresses three issues particularly important to creating a fairer, more transparent consumer banking marketplace.

1. **Effectuating systems to minimize repeated overdraft usage.** Placing daily limits on the number of fees would help to put an end to the disproportionate burden on

consumers with low incomes. We support requiring financial institutions to contact consumers who have incurred more than six overdraft charges in a 12-month period and provide clear information about less-costly options. The FDIC should set clear standards and carefully review these communications to ensure that less expensive options are presented clearly and conspicuously so that consumers are not misled or pressured to maintain costly fee-based overdraft protection.

2. **Preventing manipulative transaction clearing practices.** CFE strongly supports the proposal to require financial institutions to ensure their transaction clearing practices avoid maximizing customer overdrafts and related fees. Clearing transactions from highest value to lowest value is detrimental to consumers, is often used simply to maximize fees, and should be prohibited. This is illustrated, for example, by a recent decision by the Second Circuit Court of California against Wells Fargo, which shed light on a policy intended to "squeeze as much as possible" from consumers.[1] Clearing transactions from highest value to lowest value is a pervasive practice which District Judge William Alsup recognized as "gouging and profiteering."[2] The FDIC should maintain the ban on manipulative transaction clearing practices as proposed and strongly enforce this prohibition on practices such as those Wells Fargo employed that resulted in the "bone-crushing multiplication of additional overdraft penalties"[3] without benefiting consumers.

3. **Providing consumers with choice regarding overdraft for ACH transfers and checks.** CFE agrees that consumers should be able to opt out of overdraft coverage for paper checks and ACH transactions. Given the significant expenses to consumers ($12 million in overdraft fees in 2009 for check and online bill pay),[4] it is essential that overdraft coverage is clearly disclosed and that consumers are able to make an informed choice about whether to have the fee-based coverage on their accounts for checks and ACH transactions. Thus, we strongly support the FDIC's position requiring financial institutions to allow consumers to opt out of this coverage. Institutions also should inform consumers of more affordable ways to cover overdrafts for all transactions, not just for ATM withdrawals and one-time debits.

Rigorous Enforcement. The most important component of the guidance is strong enforcement, to ensure institutions are meeting the comprehensive expectations smartly designed to address the full range of consumer protection abuses prevalent in the marketplace regarding overdraft protection. CFE commends the FDIC for stating that its supervised institutions will be reviewed at each examination for compliance with the supervisory expectations. Notably, performance in this area will be factored into ratings and any necessary corrective actions. The guidance rightly lays out the potential impact of abusive overdraft practices on safety and soundness and compliance with consumer protection laws, calling particular attention to potential violations of Section 5 of the FTC Act (UDAP) and the Equal Credit Opportunity Act. We urge you to vigorously enforce these standards, as set forth.

Strong Precedent. We applaud the FDIC for setting forth a rigorous enforcement approach with far-reaching, firm expectations, rather than "best practices." The guidance establishes a strong precedent that other regulatory agencies should follow.

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[1] Gutierrez v. Wells Fargo, 07-05923, U.S. District Court, Northern District of California (San Francisco).
[2] Ibid., Gutierrez v. Wells Fargo
[3] Ibid., Gutierrez v. Wells Fargo
[4] See Martin, Andrew and Ron Lieber, "Banks Apply Pressure to Keep Fees Rolling In," The New York Times, February 22, 2010. Data on overdraft fee income by transaction type available at http://www.nytimes.com/2010/02/23/your-money/credit-and-debit-cards/23fee.html.

The CFE Coalition urges the other federal bank regulators to adopt a similarly concrete and comprehensive approach for their regulated institutions. In addition, we reiterate our support for legislation that would codify critical elements of the guidance and ensure such standards are universally applied across the financial services marketplace, regardless of an institution's regulator. We continue to support S. 1799 and H.R. 3904, bills which are critical to our cities' efforts to connect residents to mainstream banking and affordable financial services, and urge your support for legislation codifying the protections set forth in the guidance.

We commend you for your continued leadership regarding access to safe, affordable financial services. We urge you to finalize and vigorously enforce the guidance so that the federal government and CFE cities will enjoy maximum support in our ongoing efforts to improve the financial health of families with low and moderate incomes.

Respectfully,

Jonathan Mintz
Commissioner
NYC Department of Consumer Affairs
Co-Chair, CFE Coalition

Jose Cisneros
Treasurer
City and County of San Francisco
Co-Chair, CFE Coalition

Cc: Board of Governors of the Federal Reserve System
Department of the Treasury
Comptroller of the Currency
Office of Thrift Supervision