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October 16, 2006

VIA EMAIL (comments@fdic.gov) AND FIRST CLASS MAIL

Mr. Steve Hanft
Legal Division
Federal Deposit Insurance Corporation
5550 17th Street, NW
Washington, D.C. 20429

Re: Study of Overdraft Protection Programs

Dear Mr. Hanff:

I write on behalf of the Empire Justice Center in response to your request for comment on overdraft protection programs. We commend the Federal Deposit Insurance Corporation (FDIC) for its proposed survey on overdraft protection programs of the institutions that it regulates. The collection of information regarding bounced check and overdraft protection programs - what has become an incredibly lucrative business for banking institutions - is necessary to determine the safety and soundness and compliance with consumer protection laws of basic checking accounts.

Empire Justice Center is a non-profit legal services organization with offices in Albany, Rochester and White Plains. Empire Justice provides support and training to legal services offices statewide, undertakes policy research and analysis, and leads legislative and administrative advocacy. We also represent low-income individuals, as well as classes of New Yorkers, in a range of poverty law areas including consumer and banking law. This letter includes clients' experiences with overdraft programs which highlight the need for increased scrutiny of these practices.

Bounce protection fee plans vary from bank to bank but generally include non sufficient funds (NSF) fees for bounced checks, overdraft fees and fees for depositing a check from a third-party that bounces. These plans are usually not affirmatively agreed to by the customer, but rather, are imposed by the bank as a "courtesy" or additional service on their account; the bank covers the check and then imposes a fee on the account. The National Consumer Law Center (NCLC), Consumer Federation of America (CFA) and the Center for Responsible Lending (CRL) have all researched bounce protection plans. Their research consistently reveals that these plans are no longer

implemented by banks solely as a means to recoup costs for processing “bad checks” or deterring customers from bouncing checks or overdrawing on their accounts. Rather, bounce protection plans are unabashedly instituted by banks as yet another profit-making mechanism.

According to a report issued by the Consumer Federation of America and the National Consumer Law Center, it costs a bank approximately \$.50 to \$1.50 to process a bounced check.¹ Yet, one bank in Albany, New York charges \$33.00 for each bounced check, and then another \$33.00 every four days until the account is brought current, regardless of the overdraft amount. It is estimated that banks generate more than \$5.6 billion in annual revenue and \$5.2 billion in annual profits from bounced check fees.²

Bounced check fees disproportionately affect lower income individuals who often carry account balances that are very close to a zero balance and are therefore more likely to incur fees for overdrafts. It is Empire Justice Center’s experience that banks are unforgiving, regardless of the circumstances and regardless of how small the overdraft amount may be. The fees far outweigh any risk assumed by the banks and are all too often devastating to families. Following are stories of clients who contacted us. Unfortunately, apart from contacting the banks and trying to urge them to forgive some of the fees, Empire Justice was unable to help these consumers due to the current lack of consumer protections.

- Mrs. S lives in Albany, New York. She incurred over \$165.00 in bounced check fees from her bank. Before going into the hospital for an operation, Mrs. S had pre-written checks for her bills to be sent while she was in the hospital. Her grandson mistakenly mailed the envelopes a week earlier than he was supposed to. Three checks, totaling about \$100.00, bounced; she incurred a \$33 charge for each check. Mrs. S’s only income is from social security and thus, she had to wait for her social security check to be deposited until her bank account could be brought current. She incurred \$66.00 more in fees – a \$33.00 fee every three days until the account was brought current. The bank took the fees directly out of her account and refused to forgive any fees.
- Mr. J was a 58-year-old disabled veteran at the time we met. Mr. J bounced a check for \$12.50; he only had \$3.78 in his account at the time. The bank charged an initial \$39 fee for the bounced check, and then \$33.00 every three days until the account was brought current. By the time his next SSI check was direct deposited, Mr. J had incurred a total of \$132.00 in fees. For lending their customer \$8.72 for 10 days, the bank charged him \$132.00, representing an APR of over 45,000%.

¹ Bounce Protection: How Banks Turn Rubber Into Gold by Enticing Consumer to Write Bad Checks. An Examination of Bounce Protection Plans, Consumer Federation of America and the National Consumer Law Center (June 2005) <<http://www.consumerfed.org/pdfs/bounceappendix012803.pdf>>.

² Id.

- Mrs. C's total monthly income is \$936 from SSI, public assistance and child support. Between June and September 2004, she incurred at least nine overdraft charges of \$33 each, totaling nearly \$300. The fees stemmed from two checks that bounced on the same day in June in the amount of \$211.28. Because the bank immediately withdrew their charges from her account as they were incurred, she continued to overdraw on the account and was not able to bring the account current for three months.
- Ms. M's bank erred by crediting her account twice for the same deposit. Ms. M did not realize the bank's error and withdrew some of the money. When the bank realized their error, they reversed the second deposit without prior notice to Ms. M, and the account showed as being overdrawn. Ms. M incurred a fee for the account being overdrawn, and then successive fees every four days until she was able to bring the account current. In total, Ms. M was charged \$396 in fees. Because of the incessant fees that were being debited from her account, it took Ms. M a few months to bring the account current.
- Another client got into a similar spiral of debt in fees because she relied on the balance amount printed on her ATM receipt and ended up overdrawing on her account because this was not actually the current balance in her account.

Empire Justice challenges the banking industry to rationally justify these outrageously excessive fees. They would be considered usurious under New York State's small lending laws and they are, simply stated, yet another form of predatory lending that banks have ingeniously come up with for no other purpose than to gouge low income consumers of their limited assets.

There are several other troubling aspects of overdraft protection fees. Account holders are typically contractually obligated to the terms, with no real opportunity for negotiation. The terms are confusing, sometimes drafted this way intentionally so as to trick the account holder, and there is no requirement for lenders to disclose key factors such as the effective APR of the fee. Perhaps one of the most egregious allowances is that banks are allowed to dip into the funds to collect these fees of account holders who receive social security, disability benefits or public assistance, despite the fact that these funds are federally exempt from seizure by creditors and debt collectors.

In addition to the detrimental effects on individuals' financial assets, overdraft protection programs are jeopardizing asset-building programs that have worked hard to bring consumers into the traditional banking system. Bank customers who incur excessive fees often end up leaving the banking system with far reaching effects on their economic well-being. The move of consumers from the traditional banking system to the fringe banking businesses has the detrimental result of fortifying this separate and unequal financial services system.

Empire Justice is not opposed to overdraft protection fees. Rather, we are opposed to *predatory* overdraft protection fees that represent yet another means for banks

to prevent consumers from building assets. The more fees that go into the coffers of banks, the fewer dollars consumers have to spend in their local communities. Bank fees are harmful to a family's ability to build assets, and to our state's ability to build its economy.

Recommendations

In light of the experiences we have had working with clients, and the impact we have seen these fees have on lower income families and the communities they live in, Empire Justice recommends that the following issues be researched in the FDIC survey:

- **The amount and frequency of the fees.** How much and how often do banks impose fees when an account is overdrawn? Do banks have caps on the total amount of fees that can be imposed on an account as the result of an overdraft? Do the fees vary depending on the amount of overdraft or is it the same fee if the account is overdrawn \$2.00 versus \$200.00?
- **The impact of overdraft fees on low-income account holders, including account holders who receive otherwise exempt income such as social security, disability benefits and public assistance.** The Center for Responsible Lending's recent survey³ (showing that 16% of overdraft loan users pay 71% of fees) substantiates our belief that lower-income folks are disproportionately affected by overdraft fees. These programs should be examined to see whether their marketing, implementation and disclosures have a disparate impact on lower-income account holders and whether banks are routinely overlooking the restrictions on seizing exempt funds.
- **Whether the fees charged are rationally related to the risk and costs incurred by the banking institutions in processing overdrafts or whether the banks are unjustly profiteering.**
- **Whether the fees charged act as a legitimate deterrent to account holders or whether overdraft programs are marketed and sold to consumers in a manner that allows for, if not promotes overdrafts.**
- **Whether there is appropriate upfront disclosure of overdraft program terms to account holders.** Are account holders meaningfully informed about the terms of these programs and meaningfully informed of alternative programs within their banks? Are consumers required to opt-out of these programs or, preferably, must they affirmatively sign-up for the "protection"?
- **Whether adequate notice is provided to account holders.** Are account holders notified in a timely manner that their account has been overdrawn, and

³ James, Lisa and Peter Smith. April 24, 2006. "Overdraft Loans: Survey Finds Growing Problems for Consumers." CRL Issue Paper No. 13. Center for Responsible Lending. <http://www.responsiblelending.org/pdfs/ip013-Overdraft_Survey-0406.pdf>.

- given a grace period to bring the account current? Are the notices clear and written in an understandable manner? How are consumers specifically notified?
- **Whether banks notify account holders at the time of a point of sale, or at a withdrawal from an automatic teller machine that their account contains insufficient funds.** This would include an investigation of the capability, as well as the practice of banks to update account information as transactions occur.
- **The marketing of these programs to banking institutions.** Are they marketed and sold to banks as a money-making endeavor?

Again, we applaud the FDIC's efforts to investigate this important banking issue. Thank you for allowing us this opportunity to provide input and recommendations for the process.

Sincerely,

Kirsten E. Keefe

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