

COMMENTS

of the

**CENTER FOR RESPONSIBLE LENDING
CONSUMER FEDERATION OF AMERICA
NATIONAL CONSUMER LAW CENTER (on behalf of its low-income clients)**

and

**CONSUMER ACTION
CONSUMERS UNION
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
U.S. PIRG**

on

**FDIC's Proposed Overdraft Payment Supervisory Guidance
FIL-47-2010**

September 27, 2010

VIA ELECTRONIC SUBMISSION

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429-9990

The Center for Responsible Lending, Consumer Federation of America,¹ and the National Consumer Law Center (on behalf of its low-income clients),² along with Consumer Action,³ Consumers Union,⁴ the National Association of Consumer Advocates,⁵ and U.S. PIRG,⁶ provide the following comments regarding the FDIC's proposed guidance addressing overdraft payment programs and consumer protection.

¹ The Consumer Federation of America is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

² The National Consumer Law Center, Inc. (NCLC) is a non-profit corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes and regularly updates a series of sixteen practice treatises and annual supplements on consumer credit laws, including Truth In Lending, Cost of Credit, Consumer Banking and Payments Law, Foreclosures, and Consumer Bankruptcy Law and Practice, as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide comprehensive comments to the federal agencies on the regulations under these laws.

³ Consumer Action (www.consumer-action.org) is a national non-profit education and advocacy organization that has served consumers since 1971. Consumer Action (CA) serves consumers nationwide by advancing consumer rights in the fields of credit, banking, housing, privacy, insurance and utilities. CA offers many free services to consumers and communities. Consumer Action develops free consumer education modules and multi-lingual materials, for its network of more than 11,000 community based organizations. The modules include publications in Chinese, English, Korean, Spanish and Vietnamese.

⁴ Consumers Union of U.S., Inc., publisher of Consumer Reports®, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications and services have a combined paid circulation of approximately 8.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect Consumer welfare. Consumers Union's income is solely derived from the sale of Consumer Reports®, its other publications and services, fees, noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

⁵ The National Association of Consumer Advocates, Inc. (NACA) is a nonprofit 501(c)(3) organization founded in 1994. NACA's mission is to provide legal assistance and education to victims of consumer abuse. NACA, through educational programs and outreach initiatives, protects consumers, particularly low income consumers, from fraudulent, abusive and predatory business practices. NACA also trains and mentors a national network of over 1400 attorneys in representing consumers' rights.

⁶ The U.S. Public Interest Research Group serves as the federation of and federal advocacy office for the state PIRGs, which are non-profit, non-partisan public interest advocacy groups that take on powerful interests on behalf of their members.

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. SHCU and SHFCU comply with the National Credit Union Administration's (NCUA) regulations on overdraft practices, and they must do so as relatively small providers of retail services. CRL has consulted with Self-Help's credit unions in formulating these recommendations.

I. INTRODUCTION

We thank the FDIC for its leadership in addressing abusive overdraft programs. The FDIC's 2008 *Study of Bank Overdraft Programs* provided very useful data on high-cost overdraft programs and their impact on lower income consumers,⁷ and its current proposed guidance is a significant step forward. The FDIC's concerns about overdraft fees are consistent with its efforts to bring unbanked and underbanked individuals into the banking mainstream. Ultimately, high cost overdraft fees drive many vulnerable consumers from the banking system, leading to greater numbers of unbanked households.⁸

We especially support the FDIC's explicit recognition, both in its proposed guidance and in other settings, that frequent overdraft fees harm consumers. Its current proposal urges management to be "especially vigilant with respect to product over-use that may harm consumers," noting that automated overdraft programs were in fact intended to address

⁷ FDIC Study of Bank Overdraft Programs (Nov. 2008).

⁸ Overdraft fees are a significant reason that individuals who had bank accounts at one time are no longer banked. The FDIC's National Survey of Unbanked and Underbanked Households, FDIC (December 2009) 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. 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. Michael S. Barr, University of Michigan Law School, *Financial Services, Savings and Borrowing Among Low- and Moderate-Income Households: Evidence from the Detroit Area Household Financial Services Survey* (March 30, 2008). See also Dennis Campbell, Asis Martinez Jerez, and Peter Tufano, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures*, Harvard Business School (June 6, 2008) (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).

occasional errors or funds shortfalls.⁹ The proposal further acknowledges that repeat overdraft fees can result in “[s]erious financial harm” for “customers with a low or fixed income.”¹⁰ In a recent article, FDIC Chair Sheila Bair noted that “[r]epeat use of fee-based overdraft protection doesn’t make sense for anyone.”¹¹

We enthusiastically support several aspects of the FDIC’s proposed guidance, most notably 1) the agency’s recognition that more than six overdraft fees within a 12-month period constitutes excessive or chronic use; 2) its instruction that banks stop manipulating the order in which they post transactions to maximize fees; and 3) its instruction that banks not steer frequent overdrafters into high-cost programs while “obscuring” lower-cost alternatives. We also strongly support the FDIC’s caution that such steering raises fair lending concerns and will be “closely scrutinized.”¹²

At the same time, we believe the FDIC’s guidance could and should do more to address excessive overdraft fees. We devote the first section of this comment to a discussion of how excessive overdraft fees cause serious financial harm to consumers in much the same way repeated payday loans do. Yet the FDIC’s 2005 payday loan guidelines address payday loans much more firmly than its proposed overdraft guidance addresses overdraft fees. We urge the FDIC to address overdraft fees through its guidance as firmly and effectively as it has addressed payday loans.¹³

Summary of key recommendations:

- **End excessive overdraft fees at FDIC-supervised banks:**
 - **Require that any account holder who chooses overdraft coverage receive the lowest-cost credit for which the account holder qualifies.** Steering borrowers into higher-cost credit than they qualify for will no longer be tolerated in the mortgage context. It should not be tolerated in the overdraft context, either.

⁹ FDIC Proposed Guidance, Overdraft Payment Programs and Consumer Protection, FIL-47-2010 (Aug. 11, 2010) [hereinafter FDIC Proposed Guidance].

¹⁰ *Id.*

¹¹ Sandra Block, “Banks changing how they handle overdrafts; New rule requires them to get permission from customers before they charge a fee,” *USA Today* (June 25, 2010).

¹² FDIC Proposed Guidance.

¹³ We understand that the FDIC cannot use its unfair and deceptive acts and practices (UDAP) rulewriting authority without other federal banking regulators. We will continue to urge the federal banking regulators to use this authority to address both the frequency and size of today’s overdraft fees, including by requiring that fees be reasonable and proportional to the institutions’ cost in covering those transactions.

- **Instruct banks not to charge more than six overdraft fees within a 12-month period, consistent with the FDIC’s 2005 payday lending guidelines.**
- **Establish a limit of one overdraft fee per month (coupled with the limit of six per year), rather than suggesting a “daily limit.”** This requirement would be analogous to the provision of the FDIC’s payday loan guidance recommending no more than one loan outstanding at a time.
- **Prohibit all methods of transaction processing that increase overdraft fees.**
- **Take swift action to stop aggressive or deceptive practices aimed at convincing customers to opt in:**
 - **Review opt-in solicitation materials and practices at each examination and intermittently.**
 - **Provide examples of what constitutes “deceptive” opt-in solicitations.**
 - **Prohibit banks from asking account holders more than once if they want to opt-in.**
 - **Assess disparate impact on communities of color.**
 - **Require a “Schumer-box”-like disclosure of the comparative costs of opting in to fee-based overdraft, other overdraft alternatives, and declining to opt-in.**
- **Require periodic reporting of data on overdraft program activity, particularly on those account holders incurring multiple fees.**
- **Require institutions to obtain account holders’ affirmative consent to overdraft coverage for paper checks and ACH transfers.** This recommendation should be viewed in connection with our recommendation that account holders be enrolled in the least expensive form of overdraft coverage for which they qualify. As evident in the Regulation E “opt-in” context, requiring affirmative consent is not meaningful unless lower-cost options are fairly presented.

Public support for the overdraft reforms we recommend is very strong. Earlier this year, a national survey conducted for the Consumer Federation of America found that approximately two-thirds of Americans support limiting overdraft fees to six per year, and

86 percent support requiring banks to process transactions in the order in which they are received.¹⁴

II. Excessive overdraft fees, like payday loans, cause serious financial harm.

In the aggregate, fee-based overdraft programs cost consumers at least \$23.7 billion each year—more than the loans extended in exchange for those fees, which amount to \$21.3 billion.¹⁵ Debit card transactions, the most common triggers of overdraft fees, cause an average overdraft of under \$17,¹⁶ yet trigger an average fee of \$34.¹⁷ And this fee—twice the size of the loan itself—provides the account holder no benefit of avoiding a denied transaction because the cost of a denied debit card transaction is zero.¹⁸ The size of overdraft fees is particularly striking given the short repayment period of the typical overdraft loan: three to five days, when the bank repays itself from the account holder's next deposit.¹⁹

¹⁴ Consumer Federation of America, “Consumers Overwhelmingly Support Bank Overdraft Reforms,” Feb. 4, 2010, available at <http://www.consumerfed.org/elements/www.consumerfed.org/file/CFA%20OD%20Poll%20and%20Survey%202%204%2010%281%29.pdf>. The survey also found that 72 percent support limiting overdraft fees to one per overdraft; two-thirds support requiring that overdraft fees be related to the bank’s cost of providing the service; and two-thirds support requiring banks to get consumers’ permission before routinely charging overdraft fees on checks, debit cards and ATM withdrawals. The survey was conducted for CFA Jan. 18-21, 2010 by Opinion Research Corporation using telephone interviews. The margin of error is plus or minus three percentage points.

¹⁵ Leslie Parrish, *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years*, Center for Responsible Lending (Oct. 6, 2009), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/crl-overdraft-explosion.pdf>.

¹⁶ The average overdraft amount for debit card transactions is \$16.46. Eric Halperin, Lisa James, and Peter Smith, *Debit Card Danger: Banks offer little warning and few choices as customers pay a high price for debit card overdrafts*, Center for Responsible Lending, at 25 (Jan. 25, 2007), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/Debit-Card-Danger-report.pdf> [hereinafter *Debit Card Danger*].

¹⁷ *Id.*

¹⁸ Charging NSF fees for denied debit or ATM transactions is not a common practice, to our knowledge, and in its final Regulation E 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.” Federal Reserve Board, Final Rule, Electronic Funds Transfers, Regulation E, Docket No. R-1343, 74 Fed. Reg. 59041 (Nov. 17, 2009) [hereinafter FRB 2009 Regulation E Final Rule].

¹⁹ *Debit Card Danger* at 25.

This combination of high cost and short repayment period causes a debt trap for account holders who incur the majority of overdraft fees, analogous to the debt trap caused by payday loans. Ultimately, as our real-life case study below demonstrates, fee-based overdraft coverage leaves these account holders worse off than cheaper alternatives or even no overdraft coverage at all.

A. The majority of overdraft fees are paid by a small group of account holders least able to recover from them.

As the FDIC knows well, the large majority of fees are paid by chronic overdrafters who are also those least able to recover from them. The FDIC recognizes that “permitting product over-use” can result in “[s]erious financial harm” for customers with a low or fixed income.²⁰ Its recent study of overdraft programs, consistent with CRL’s previous research, found that account holders who overdrew their accounts five or more times per year paid 93 percent of all overdraft fees.²¹ It also found that consumers living in lower-income areas bear the brunt of these fees.²² Seniors, young adults, military families, and the unemployed are also hit particularly hard.²³ Older Americans aged 55 and over pay \$6.2 billion in total overdraft fees annually²⁴—\$2.5 billion for debit card/ATM transactions alone²⁵—and those heavily dependent on Social Security pay \$1.4 billion annually.²⁶

²⁰ FDIC Proposed Guidance.

²¹ FDIC Study of Bank Overdraft Programs at iv.

²² *Id.* at v. Two CRL surveys, conducted in 2006 and 2008, found that 71 percent of overdraft fees were shouldered by only 16 percent of respondents who overdrafted, and those account holders were more likely than the general population to be lower income, non-white, single, and renters. Respondents reporting the most overdraft incidents were those earning below \$50,000. Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options*, CRL Research Brief (Apr. 16, 2008), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/final-caravan-survey-4-16-08.pdf> [hereinafter CRL Research Brief].

²³ For further discussion, see Comments of the Center for Responsible Lending to Board of Governors of the Federal Reserve System on Proposed Rule to Amend Regulation E—Overdraft Practices (Mar. 30, 2009), Part II.B.1(b), pp.10-12, available at http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/comments-regulation-e_overdraft-practices.pdf.

²⁴ Leslie Parrish and Peter Smith, *Shredded Security: Overdraft practices drain fees from older Americans*, Center for Responsible Lending (June 18, 2008), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/shredded-security.pdf> [hereinafter *Shredded Security*]. 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.

²⁵ *Id.* The report found that debit card POS and ATM transactions account for 37.4 percent and 2.5 percent, respectively (p.7), which, when calculated as a percentage of \$6.2 billion, together equal \$2.5 billion.

²⁶ *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.

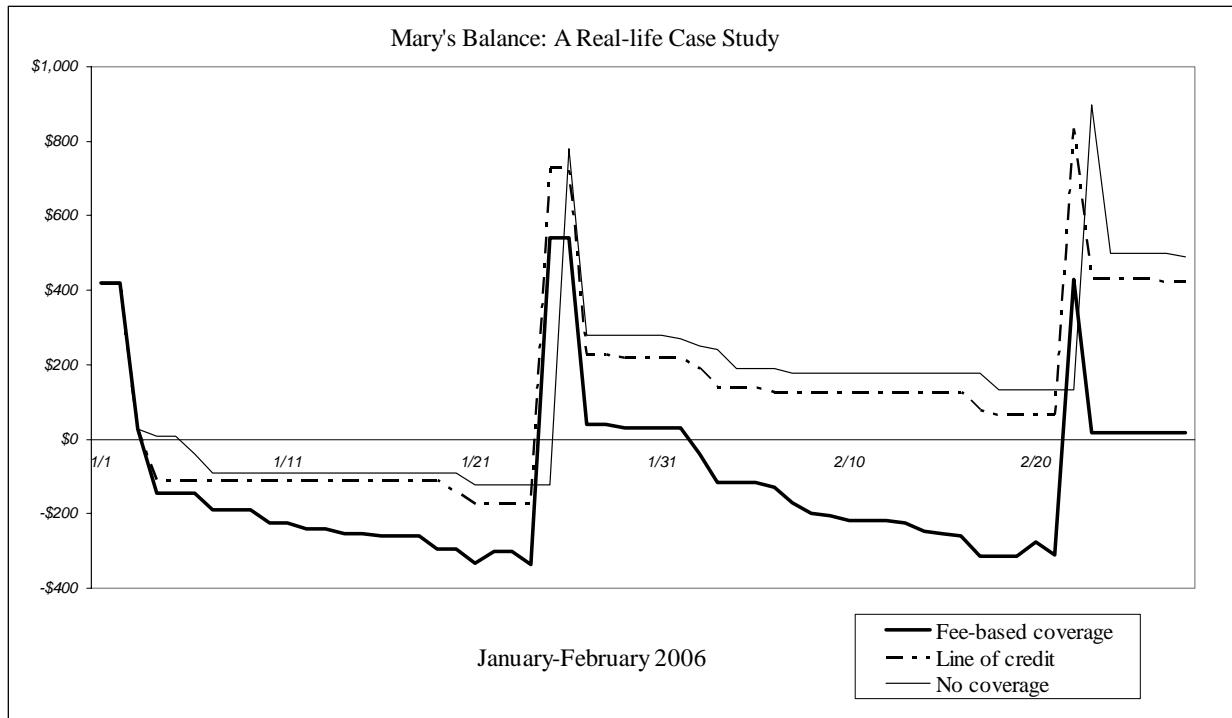
While the new opt-in requirement under Regulation E may impact these figures, it will not reduce the harm caused to the account holders banks are able to enroll in the program for debit card and ATM transactions through aggressive, often deceptive, marketing campaigns, and it does not address paper checks and ACH overdrafts at all. This consent-based rule fails to address a key substantive problem with the overdraft product—the fact that it operates as an extraordinarily high-cost credit product. It also fails to address the disparate impact these fees have on lower-income consumers. For further discussion of the inadequacy of the opt-in rule, particularly given steering, targeting, and deceptive solicitation concerns, see Part V, below.

B. Multiple overdraft fees leave account holders worse off than lower-cost coverage or even no coverage at all.

Multiple overdraft fees, particularly those charged within a short period of time, leave account holders worse off than cheaper overdraft alternatives *or no overdraft coverage at all.*

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.²⁷ 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 fee-based coverage at all, reflected below:

²⁷ 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, Eric Halperin & Peter Smith, *Out of Balance: Consumers pay \$17.5 billion per year in fees for abusive overdraft loans*, Center for Responsible Lending at 13-14, (July 11, 2007), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/out-of-balance-report-7-10-final.pdf> [hereinafter *Out of Balance*].



During January and February of 2006, Mary overdrawn 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 percent over the same period, Mary would have paid about \$1 in total fees for her overdrafts and would have had \$420 in the bank.

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 her ending balance still would have been \$489—plenty enough to cover the value of the denied transactions.

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—clearly causing substantial financial harm.*

C. Excessive overdraft fees are analogous to payday loan flipping.

Overdraft loans have been characterized as a bank’s equivalent of a payday loan, and with good reason. Both are very short-term, extremely high-cost loans that are repaid from the borrower’s next deposit, before essential expenses. Both are also made without regard to the customer’s ability to repay—a concern the FDIC raised about payday lending in its 2005 payday guidelines.²⁸

Existing research on repeat payday lending provides insight into the cycle of debt created by products like payday and overdraft loans. CRL’s research finds that over three-fourths of payday loan volume is generated within two weeks of a customer’s previous payday loan.²⁹ While technically a borrower typically closes an old payday loan and opens a new one, effectively the borrower is being flipped from one loan into another—unable to repay one loan and meet essential expenses without taking out another loan. The typical payday borrower has nine payday loans per year. Since these loans are generally taken on a back-to-back basis, a borrower would typically incur \$45 in fees every two weeks to borrow \$300 (for a typical payday loan priced at \$15 per \$100 borrowed), with effectively no reduction in principal—i.e., no benefit—ultimately paying \$405 in *interest* for that \$300 in credit.³⁰ Payday loans beget payday loans, then, much like overdraft loans beget overdraft loans.

In the context of small-dollar loan products like payday and overdraft, the FDIC has warned that “excessive renewals . . . are signs that the product is not meeting the borrower’s credit needs.”³¹ The agency encourages institutions to use a “reasonable time frame for the repayment of closed-end credit, e.g., at least 90 days.”³² Recognizing the need to address excessive renewals of payday loans, the agency issued guidelines in 2005 limiting excessive refinancings by prohibiting banks from making payday loans to anyone who has had payday loans outstanding for three months in any 12-month period.³³ It also

²⁸ FDIC Financial Institution Letters, Guidelines for Payday Lending, FIL 14-2005, February 2005 [hereinafter FDIC Payday Lending Guidelines].

²⁹ Leslie Parrish and Uriah King, *Phantom Demand: Short-term due date generates need for repeat payday loans, accounting for 76% of total volume*, Center for Responsible Lending (July 9, 2009), available at <http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf>.

³⁰ \$45 in fees * 9 payday loan transactions = \$405 in fees for \$300 in credit extended at a rate of \$15 per \$100 borrowed.

³¹ FDIC Financial Institution Letters, Affordable Small-Dollar Loan Products, Final Guidelines, FIL-50-2007, June 19, 2007.

³² *Id.*

³³ FDIC Payday Lending Guidelines.

said banks should have no more than one loan outstanding to a borrower at a time and should establish cooling off periods between loans.³⁴

The problems other regulators have identified with payday lending also apply to charging excessive overdraft fees. The OCC, in its payday guidance, noted that its guidance addressing abusive lending practices more generally should also be applied in the context of payday lending. That guidance identifies the following indicators of abusive lending: pricing and terms that far exceed the cost of making the loan; loan terms designed to make it difficult for borrowers to reduce indebtedness; and frequent and multiple refinancings.³⁵ These indicators are all true of excessive overdraft fees. Overdraft loan flipping is also analogous to mortgage loan flipping³⁶ and pyramiding late fees,³⁷ which the FDIC and other regulators have long recognized as harmful.

III. Curb excessive overdraft fees

We support the FDIC’s goal of addressing excessive fees and agree that banks should take affirmative action once an account holder has incurred six overdraft fees. However, the FDIC should, as a threshold matter, inform its institutions that it expects them to provide account holders who want overdraft coverage the lowest-cost coverage for which they qualify. Then, it should more firmly address excessive fees by clearly stating that extending account holders high-cost credit more than six times per year is not appropriate, similar to its approach to payday loans. Finally, rather than suggesting a “daily limit,” it

³⁴ *Id.*

³⁵ OCC Advisory Letter on Abusive Lending Practices, AL 2000-7, July 25, 2000.

³⁶ In the mortgage context, an originator sells the borrower an unaffordable loan only to later refinance the borrower into another unsustainable loan, extracting fees and stripping home equity from the borrower in the process. In the overdraft context, cash is stripped from the deposits of borrowers who are flipped. The bank extends a series of back-to-back overdraft loans to the customer that the customer cannot afford to repay. Unlike in the unaffordable mortgage scenario, the overdraft loan is in fact repaid, but only because the bank puts itself first in line for repayment before any other debt and essential expenses. The FDIC has identified mortgage loan flipping as a characteristic of predatory lending. FDIC’s Supervisory Policy on Predatory Lending, FIL-6-2007, available at <http://www.fdic.gov/news/news/financial/2007/fil07006a.html> (noting that “[i]nducing a borrower to refinance a loan repeatedly in order to charge high points and fees each time the loan is refinanced is a characteristic of predatory lending). It could appropriately characterize overdraft loan flipping in much the same way.

³⁷ Pyramiding late fees occur when lenders apply future payments to the late fee first, making it appear future payments are delinquent even though they are, in fact, paid in full within the required time period. As a result, lenders charge additional late fees. These fees provide no benefit to the consumer while driving them further into debt. 16 CFR 444. The FDIC has long prohibited pyramiding late fees as an unfair practice through the Credit Practices Rule. 12 CFR 227.15 (Regulation AA). Multiple overdraft fees drive consumers deeper into debt in much the same way. For customers who incur the majority of overdraft fees, they often would have had sufficient funds in their account to meet future expenses but for the excessive overdraft fees they have incurred in previous periods.

should establish a limit of one overdraft fee per month, coupled with the limit of six per year.

A. Require that any account holder who chooses overdraft coverage receive the lowest-cost credit the account holder qualifies for.

The FDIC and other federal banking regulators have long acknowledged that “[w]hen overdrafts are paid, credit is extended,”³⁸ even as the Federal Reserve continues to fail to regulate overdrafts under the Truth in Lending Act. Fee-based overdrafts are clearly credit now more than ever: To encourage account holders to opt in, banks are promoting 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.”³⁹ Overdraft programs, then, are clearly being marketed as short-term loans—i.e., credit.

Customers should not be steered into higher-cost credit than that for which they qualify. The Dodd-Frank regulatory reform bill prohibits creditors from offering financial incentives for originators to steer borrowers into more expensive mortgage loans than they qualify for.⁴⁰ The Federal Reserve’s recently finalized mortgage rules do the same.⁴¹ Steering in the context of other forms of credit is no more appropriate than it is in the mortgage context.

Banks typically carry a far lower-cost option—an overdraft line of credit—and many also offer transfers from credit cards, which are also typically less expensive. The FDIC clearly

³⁸ Department of the Treasury-Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9127, 9129 (Feb. 24, 2005) [hereinafter 2005 Joint Guidance].

³⁹ For example, TD Bank calls its overdraft coverage the “TD 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. www.tdbank.com/TDadvance/index.html, (last visited Sept. 26, 2010).

⁴⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203. 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).”

⁴¹ 75 Fed. Reg. 58509, Federal Reserve Board Final Rule, Regulation Z (Sept. 24, 2010), 12 CFR 226.36(e)(1): “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.”

recognizes that lower-cost small-dollar credit alternatives should be made available to account holders—its proposed overdraft guidance specifically references its small-dollar guidance. But the FDIC does not explicitly tell its banks that it expects them to offer their account holders the lowest-cost small-dollar credit option for which they qualify. It should.

The FDIC should require the following: Any account holder who indicates a desire for overdraft coverage must be evaluated by the bank using whatever requirements the bank uses to determine who qualifies for an overdraft line of credit, a link to a credit card, or any other lower-cost overdraft option the bank offers. Only account holders who do not qualify for a lower-cost option should be enrolled in fee-based overdraft.

B. Instruct banks not to charge more than six overdraft fees within a 12-month period, consistent with the FDIC's 2005 payday lending guidelines.

We support the FDIC's recognition that incurring six or more overdraft fees within a 12-month period constitutes excessive or chronic use. We agree with the FDIC's assessment of the problem. But its response could and should be far stronger: The FDIC should tell its institutions that it expects them to stop charging an account holder overdraft fees after the sixth within a 12-month period, and that whether or not the institution is able to provide an account holder alternative credit products, an extension of a high-cost overdraft loan at that point is not appropriate under such circumstances.

As noted above, overdraft fees create a cycle of debt for frequent overdrafters much like that caused by payday lending. But the FDIC's 2005 response to payday lending was far stronger than its proposed overdraft guidance. The payday guidance instructs institutions to establish “cooling off” periods between loans; establish annual limits on the number of loans allowed per customer; allow no more than one loan outstanding per customer at a time; and limit payday loan indebtedness to 90 days within a 12-month period. Further, it states that institutions should offer the customer, or refer the customer, to a more suitable product—but that “[w]hether or not an institution is able to provide a customer alternative credit products, an extension of a payday loan is not appropriate under such circumstances.”⁴²

Assuming a 14-day loan term, the FDIC's standard limits the number of payday loans any borrower can have to six per year, alleviating the debt trap while continuing to allow loans to the occasional users.

The FDIC specifically seeks comment on whether instructing institutions to contact a customer after six overdraft fees to discuss available alternatives, and providing the customer a reasonable opportunity to decide whether to continue with fee-based overdraft, is an effective way to monitor for excessive use. We enthusiastically support the FDIC's intent and certainly endorse requiring some affirmative action on the bank's part once six

⁴² FDIC Payday Lending Guidelines.

fees have been incurred. But a firm standard to stop charging fees after six is far more likely to prevent “[s]erious financial harm.”

First, stricter standards would be less susceptible to perverse incentives on the bank’s part and misunderstanding on the account holder’s part. Even if instructed to contact account holders after six overdraft fees, banks have little incentive to stop charging them fees. Indeed, these are the account holders who generate the majority of many banks’ fee revenue; their efforts to convince these account holders to opt in to coverage have made these incentives overwhelmingly clear (see Part V, below). It is likely that banks’ efforts to 1) successfully reach account holders; and 2) enroll account holders in lower-cost options would be severely undermined by their interest in maximizing fee revenue. As banks have little incentive to ensure that account holders understand their options and decide in their own best interest, banks are likely to provide information in a way that discourages understanding the costs of fee-based overdraft or deceptively pressure account holders to continue to use overdraft or other high-cost products.

Secondly, stricter standards would set clear expectations for the bank and be easily enforceable, as supervisors should be able to determine compliance easily. Determining whether banks have made appropriate efforts to contact account holders by phone or in person and inform them of lower-cost options will be more time consuming and difficult to ascertain.

Finally, and critically, a stricter standard to stop charging overdraft fees after six would appropriately recognize, like the FDIC’s payday guidance, that once a high-cost credit product is used more than occasionally, *it is simply not suitable, even if no alternative credit product is available*—a position clearly supported by the preceding discussion of the harm overdraft fees cause repeat users and by the FDIC’s own research, and a position the FDIC seems to support in its own proposal.

Such protections, appropriate in the payday context, are surely appropriate in the overdraft loan context where, in many cases, as the FDIC’s proposal acknowledges, participation is still based on “automatic enrollment, and customers may not have fully understood the risks and potential costs involved.”⁴³

The limit of six fees per year should include “sustained” or daily overdraft fees. Our review of the overdraft fees charged by the largest FDIC-supervised banks revealed that most of these banks charge sustained overdraft fees. These fees only make it more likely that overdraft programs will drive already vulnerable account holders into a debt trap.

⁴³ FDIC Proposed Guidance.

C. Rather than suggesting a “daily limit,” establish a limit of one overdraft fee per month (coupled with the limit of six per year).

The FDIC’s proposal suggests that institutions “institute appropriate daily limits on customer costs by, for example, limiting the number of transactions that will be subject to a fee or providing a dollar limit on the total fees that will be imposed in a day.” While we support limits on the number of fees that may be charged, we are concerned that recommending a daily limit might suggest that far more than six overdraft fees in one year is appropriate. And even if banks set a daily limit of one, they could still charge an account holder one high fee six days in a row, driving an account holder deep into high-cost debt. Instead, we recommend a limit of one fee per month, coupled with the limit of six per year.

In its payday loan guidelines, the FDIC clearly recognized the harm that too much high-cost debt within a short period could cause. In response, it said banks should require a cooling off period and limit loans outstanding to one at a time. Our case study discussed earlier demonstrates the harm that too many overdraft fees within a short time causes. A fee of one per month would protect account holders from a barrage of overdraft fees and would also be consistent with the limit on credit card penalty fees established by the Credit CARD Act.⁴⁴

IV. Prohibit all methods of transaction processing that increase overdraft fees.

We enthusiastically commend the FDIC for stating that it expects banks to avoid maximizing overdrafts through clearing order, and we agree with the two examples of appropriate procedures the FDIC provided: clearing items in the order received or by check number. However, we urge the FDIC to make clear that *all methods* of transaction processing that increase fees are inappropriate.

We have long urged regulators to prohibit clearing transactions in order from high to low, which the FDIC recognizes “likely increases the number of items triggering an overdraft.”⁴⁵ Banks often claim they do account holders a favor by paying the largest, and presumably most important, items first to ensure those items get paid. But this argument is disingenuous in an age of automated overdraft programs because banks typically cover all overdrafts, regardless of the order in which they are posted. So no matter what order the transactions are cleared in, all items generally get paid. The only difference is how much the account holder pays in overdraft fees.⁴⁶

⁴⁴ 15 USC 1637(k)(7) (restricting over-the-limit fees to one per billing cycle).

⁴⁵ FDIC Proposed Guidance.

⁴⁶ In its report, *Out of Balance*, CRL provided a hypothetical example demonstrating the dramatic difference in overdraft fees that can result when an account holder’s transactions are cleared high-to-low versus in the order in which they were presented to the institution by the processor. In our example, an account holder had \$750 in her checking account. Before she realized she did not have sufficient funds, she paid some bills and

Beyond clearing transactions in order from high to low, banks can further maximize fees through the order in which they clear different transaction types (debit card, ACH, checks, etc.). A federal court recently found that Wells Fargo had changed its procedure to process all withdrawals together, rather than paying all (typically smaller) debit card transactions before all (typically larger) checks, to maximize fees.⁴⁷

The new Regulation E rule further complicates how fee generation incentives affect transaction processing: For account holders who have not opted in, processing all debit card and ATM transactions before all checks and ACH transactions would generate more overdraft fees; for account holders who are enrolled in fee-based debit card and ATM overdraft, processing all transactions together, in order from high to low, would generate more fees.

The FDIC should make clear, therefore, that banks should not—

- process transactions in order from high to low, within a single transaction type or across all transaction types; or
- process debit card and ATM transactions before other transactions in order to maximize overdraft fees for account holders who are not enrolled in fee-based overdraft for debit card and ATM transactions; or
- otherwise post transactions in an order that maximizes fees.

Manipulation of transaction ordering has long been a concern for regulators. The 2005 Joint Guidance raises the issue but only recommends that banks inform customers that transaction ordering may increase fees.⁴⁸ 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.⁴⁹ In its 2009 final Regulation E rule, the Federal Reserve identified transaction posting order as an area that may need additional consumer

made several small dollar purchases, leaving her \$143 in the negative. If the ten transactions were cleared in the order in which they were presented to the institution, the account holder would have overdrafted once, when the \$600 rent check was posted, paid one \$34 overdraft fee, and had a total negative balance of \$177. If, instead, the institution manipulated the transactions to post them high-to-low, the account holder would have been charged eight \$34 overdraft fees, totaling \$272, and ended up with a negative balance of \$415. *Out of Balance* at 5-7.

⁴⁷ *Gutierrez v. Wells Fargo Bank, N.A.*, IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, No. C 07-05923 (August 10, 2010), WL 3155934 (N.D.Cal.), [hereinafter *Gutierrez v. Wells Fargo Bank, N.A.*].

⁴⁸ 2005 Joint Guidance, 70 Fed. Reg. 9132; OTS Guidance, 70 Fed. Reg. 8428, 8431 (2005) [hereinafter 2005 OTS Guidance].

⁴⁹ 2005 OTS Guidance, 70 Fed. Reg. 8341.

protections and indicted it would continue to assess it.⁵⁰ But no regulator has managed to stop banks from doing it.

In August, 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.⁵¹ After a thorough review of the bank’s internal communications, the court concluded that “the only motives behind the challenged practices were gouging and profiteering.”⁵²

We encourage the FDIC to use strong, specific language and to be the first federal banking regulator to put an end to manipulating posting order to increase fees.

V. Actively address deceptive approaches to Regulation E implementation.

Recent reports on opt-in rates have indicated that significant percentages of account holders are opting in to fee-based overdraft for debit card and ATM transactions.⁵³ This should not be surprising given the aggressive and deceptive tactics banks are employing to steer account holders to the highest cost overdraft coverage banks offer.

We support the FDIC’s caution to banks not to “steer frequent users” of fee-based overdraft products to opt in or “target[] customers who may be least able to afford such debt.” We further support its warning that such activity raises fair lending, UDAP, and other concerns and will be “closely scrutinized.”⁵⁴

There is no question that steering and targeting is occurring in the marketplace. Several industry consultants have urged banks to prioritize the marketing of debit card overdraft coverage to account holders who overdraft frequently. One consultant even suggests offering a gift or cash offer for opting in to account holders with four or more overdrafts

⁵⁰ 74 Fed. Reg. 59050: “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.”

⁵¹ *Gutierrez v. Wells Fargo Bank, N.A.*

⁵² *Id.*

⁵³ See, e.g., American Bankers Association, Press Release, *Half of Bank Customers Choose Overdraft Protection: ABA survey shows customers value overdraft service* (Aug. 31, 2010) (noting recent survey showing 46 of customers did or will opt in to debit card overdraft coverage), available at <http://www.aba.com/Press+Room/083110OverdraftProtection.htm>; Moebs Services, Press Release, *Overdraft Fee Revenue Drops to 2008 Levels for Banks and Credit Unions* (Sept. 15, 2010) (noting recent Moebs study found that between 60 and 80 percent of customers have opted into coverage, with a median of about 75 percent, and that of customers with 10 or more overdrafts in one year, “almost all” opted in), available at <http://www.moebs.com/Pressreleases/tabid/58/ctl/Details/mid/380/ItemID/193/Default.aspx>.

⁵⁴ FDIC Proposed Guidance.

annually, noting that this and other strategies will result in “[s]natching bank revenues from the jaws of Regulation E.”⁵⁵ The figure below includes the statements of four consulting companies offering opt-in marketing strategies to financial institutions:

SAMPLES OF OPT-IN MARKETING STRATEGIES TO FINANCIAL INSTITUTIONS
<p>“...20 to 29% of your members give you 90% of your NSF income. Target those top 29% and get them to opt in ...”</p>
<p>“If they are in the top 29% of abusers, call them.”</p>
<p>SOURCE: Rowland Consulting⁵⁶</p>
<p>“Target frequent fliers...focus attention on these customers first.”</p> <p>(Frequent fliers identified by i7Strategies as customers who don’t pay attention to account balances, live paycheck to paycheck, or intentionally overdraw their accounts.)</p>
<p>SOURCE: i7Strategies⁵⁷</p>
<p>“Segment and prioritize based on customers overdraft usage history.”</p>
<p>SOURCE: Soundbite Communications⁵⁸</p>
<p>“Regulation E offers aggressive bank marketers opportunities to maintain or even increase revenues from their overdraft programs.”</p>
<p>“...the customer is offered an incentive that...best entices the customer to respond...a gift or cash offer if they respond...[a]fter all, this is your most profitable fee group.”</p>
<p>SOURCE: ACTON Marketing Intelligence⁵⁹</p>

Some financial institutions have adopted this targeted marketing approach. News reports have discussed that one credit union is offering incentive-based pay to employees who can identify account holders who have overdrawn their accounts when they walk into a branch and then convince them to opt in to debit card overdraft coverage.⁶⁰

⁵⁵ See Press Release, *Consumer Overdraft Opt-in Intentions Surveyed in ACTON Study*, ACTON Marketing LLC (Feb. 23, 2010), available at <http://eworldwire.com/pressreleases/211495> and <http://www.actonfs.com/Optin.aspx>.

⁵⁶ See Webinar, *What Are the Best Ways for CUs to Replace Lost Overdraft Fee Income?* Rory Rowland, Rowland Consulting (Jan. 29, 2010), presentation on file with CRL, and Ray Birch, “How to get members to want to opt-in to overdraft programs,” *Credit Union Journal* (May 17, 2010).

⁵⁷ See David Peterson, *The Art of the Opt-In: Helping Your Consumers Make A Good NSF Choice*, i7strategies (Mar. 4, 2010), presentation on file with CRL.

⁵⁸ See advertisement of Soundbite Communications’ Debit Card Overdraft Enrollment Solution, available at http://www.soundbite.com/gate_form/795/893.

⁵⁹ See Press Release, *Consumer Overdraft Opt-in Intentions Surveyed in ACTON Study*, ACTON Marketing LLC (Feb. 23, 2010), available at <http://eworldwire.com/pressreleases/211495> and <http://www.actonfs.com/Optin.aspx>.

⁶⁰ See Ray Birch, “Iowa CU’s Face-to-Face Pitch Boosts Opt-in Fee,” *Credit Union Journal* (May 31, 2010).

We have several suggestions for how the FDIC can implement meaningful supervision of its banks' opt-in practices.

A. Review opt-in solicitation materials and practices at each examination and intermittently.

We support the FDIC's notification to its banks that overdraft payment programs will be reviewed at each examination. We urge the FDIC to closely monitor banks' efforts to entice account holders to opt in, both at examinations and intermittently. *Such monitoring should include requiring banks to submit to bank supervisors all materials aimed at soliciting consumers' opt-in—including but not limited to mail advertisements, emails, text messages, telephone and in-person scripts; employee training manuals; and employee incentive policies.* The FDIC should also make clear that deception includes not only written but oral statements. Upon identifying deceptive materials or practices, the FDIC should take appropriate swift and clear action to bring an end to such activity.

B. Provide examples of what constitutes “deceptive” opt-in solicitations.

We have observed the following deceptive materials or tactics, which the FDIC should explicitly identify as such and prohibit. We would welcome the opportunity to meet with the FDIC in the coming weeks to discuss our concerns further.

1. Stating or strongly implying that a cost will be incurred when a debit card overdraft is denied.

In its Final Regulation E rule issued in November 2009, the Federal Reserve stated that charging insufficient funds fees on denied debit card transactions would raise “significant fairness issues” under the FTC Act.⁶¹ In its recent guidance addressing opt-in requirements and related marketing issues, the OCC instructed institutions not to suggest that declined debit card transactions would result in fees.⁶² Yet some opt-in solicitations state or suggest that a denied debit card transaction will incur a fee. Some also improperly describe an overdraft fee as an NSF fee, which may confuse borrowers and lead them to believe that a denied debit card transaction will trigger a fee.

Moreover, most solicitations we have reviewed make no mention of the fact that denied debit card transactions carry no cost.

The FDIC should require that banks make clear that there is no cost to having a debit card denied.

⁶¹ 74 Fed. Reg. 59041.

⁶² OCC Bulletin OCC 2010-15, “Overdraft Protection: Opt-In Requirements and Related Marketing Issues,” April 12, 2010.

2. Stating that not opting-in will result in denial without mentioning alternative overdraft options.

Solicitations have often stated that the alternative to “opting-in” is having a debit card overdraft transaction declined. Such presentation completely disregards less-expensive overdraft protection options offered by most banks. Solicitations should not allow banks to give the erroneous impression that no other alternatives exist to avoid debit card denials. A proposal for additional disclosure to make the full array of options known to account holders is addressed in Section E, below.

3. Suggesting that a debit card or an account will not function correctly if the account holder does not opt in.

Some solicitations suggest that a debit card or an account will not function correctly if the account holder does not opt in, noting that new regulations may change the way account holders use their debit card; may prevent the account holder from completing everyday transactions, while obscuring the relevant details; or may keep the account holder’s account from operating smoothly.

The OCC’s recent marketing guidance specifically instructs institutions not to provide “misleading representations or omissions about . . . the consequences of opting in or failing to opt in for transactions that are affected.”⁶³ The FDIC should provide similarly specific guidance and explicitly state that banks should not indicate that not opting in will change the way a debit card or an account generally functions.

4. Overpromising overdraft coverage.

Regulation E provides that banks maintain discretion with respect to each decision to cover a transaction that overdraws an account. While the bank opt-in forms typically emphasize that covering overdrafts is discretionary for banks, some marketing materials present this product using terms and promises one would expect to see for a credit card, a line of credit, or even for a payday loan. Some banks promote fee-based debit card coverage as providing the account holder “peace of mind” or similarly promising that consumers can avoid embarrassment or dangerous emergencies by opting into debit card overdraft coverage. In reality, there is no assurance that opting in will result in overdraft coverage. The FDIC should explicitly provide that such overpromising is deceptive.

5. Suggesting that fee-based overdraft coverage is free.

Some solicitations present fee-based overdraft coverage as complimentary or costing nothing, until it is used. They may also present a comparison chart showing fee-based

⁶³ OCC Bulletin OCC 2010-15, “Overdraft Protection: Opt-In Requirements and Related Marketing Issues,” April 12, 2010.

overdraft coverage versus other options, listing annual fees for an overdraft line of credit and/or a savings account. As a result, the fee-based overdraft coverage, at first glance, appears to be the cheapest, when in reality, incurring only one overdraft fee per year would make the fee-based overdraft coverage the most expensive option. Statements that fee-based overdraft coverage is “free” and cost comparisons such as these are very misleading, and the FDIC should expressly prohibit them.

6. Suggesting that fee-based overdraft coverage provides advantages over formal overdraft protection.

In addition to a deceptive cost comparison like that just mentioned, institutions may attempt other ways to suggest that fee-based overdraft provides advantages over formal overdraft protection. For example, in their promotion of fee-based overdraft, some banks tout availability of “float,” whereby debits will be allowed to clear against insufficient funds before deposits have been credited, without incurring a fee. But when they describe formal overdraft protection, “float” is not mentioned. It seems unlikely that any float allowed through a fee-based program would not also be allowed through formal overdraft.

To our knowledge, fee-based overdraft offers no advantages over formal overdraft, and the FDIC should explicitly prohibit solicitations that deceptively suggest otherwise.

C. Prohibit banks from asking account holders more than once if they want to opt-in.

The FDIC should prohibit banks from repeatedly asking consumers to opt in. The bank should be permitted to only ask the consumer one time. If the consumer declines to opt in, or to provide an answer, the institution should be required to assume that the consumer does not wish to opt in and not solicit the consumer again.

There is ample precedent for a rule that permits an institution to seek a consent only once. For example, the IRS regulations governing the privacy of tax returns provide that a tax preparer may seek the consent of a customer to use tax information for marketing purposes only one time. If the customer declines the request, the tax preparer cannot solicit the customer again for the same type of request.⁶⁴

Furthermore, this repeated badgering and pressuring of consumers to opt in appears to be designed to counter the “default effect” the Federal Reserve clearly intended to establish when crafting its final rule.⁶⁵ By undermining the default effect, institutions undermine the intent and effectiveness of the rule, and such efforts should be expressly prohibited.

⁶⁴ 26 C.F.R. § 301.7216-3(b)(3).

⁶⁵ 74 Fed. Reg. 59038.

D. Assess disparate impact on communities of color.

We support the FDIC’s reinforcement that steering customers to fee-based overdraft and targeting frequent overdrafters, as well as inconsistent application of fee waivers, raise fair lending concerns.⁶⁶ Indeed, research has repeatedly found that overdraft fees have a disparate impact on communities of color.⁶⁷ We urge the FDIC to act vigilantly, including soliciting data that indicates the impact of overdraft practices and fees on communities of color, to identify disparate impact and take appropriate enforcement action, including, as appropriate, referral of such instances to the Department of Justice.

E. Require a “Schumer-box”-like disclosure of the comparative costs of opting in to fee-based overdrafts, other overdraft alternatives, and declining to opt-in.

One reason that banks’ opt-in solicitations may be successful is due to a fundamental deficiency of the opt-in model form—it does not provide consumers with a means of comparing the cost of fee-based overdraft loans to other alternatives, such as traditional overdraft lines of credit or transfer from savings. Most importantly, there is no comparison with the cost of not opting in, i.e., there is no disclosure indicating that declining to opt in means the consumer will never incur any overdraft fees for ATM and debit card transactions.

We urge the FDIC to work with the Board and other federal banking regulators to require a more meaningful disclosure, such as a summary table similar to the credit card “Schumer box” showing the costs of each overdraft alternative. Most importantly, such a table must show that the cost of declining to opt in is “\$0.” Such a disclosure would also be beneficial because it will allow consumers to compare the cost of overdraft loans to other forms of short-term credit. A proposed disclosure follows:

⁶⁶ FDIC Proposed Guidance. “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. 15 U.S.C. Sec. 1691. See, e.g., *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000), on reconsideration 147 F. Supp. 2d 1 (D.D.C. 2001); *McGlawn v. Pennsylvania Human Relations Comm’n*, 891 A.2d 757 (Pa. Commw. Ct. 2006). For a discussion of the auto lending cases, see generally National Consumer Law Center, *Credit Discrimination* 8.5 (5th Ed. 2009).

⁶⁷ Consumer Federation of America’s 2004 survey found that 45% of African Americans had experienced overdrafts, compared to only 28% of consumers overall. In 2006 and 2008, CRL 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. CRL Research Brief. CFA conducted another survey in July of this year, finding that African Americans were twice as likely to have experienced overdrafts than consumers overall.

SAMPLE MODEL FORM COST COMPARISON TABLE			
Type of Overdraft Coverage for ATM and Everyday Debit Card Transactions	Charges	Total Cost per Transaction	Sample Effective Annual Percentage Rate Cost (assuming \$100 overdraft for two weeks)⁶⁸
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

VI. Require periodic reporting of data on overdraft program activity, particularly on those account holders incurring multiple fees.

We support the FDIC's expectation that banks conduct an annual review of their overdraft programs. In order to effectively do so, banks will likely need to program their systems to compile meaningful data, particularly on account holders incurring frequent overdraft fees. The FDIC should require that this data be reported to the agency, and the agency should review it to assess compliance with its guidance and to address fair lending concerns.

VII. Require banks to obtain account holders' affirmative consent to overdraft coverage for paper checks and ACH transfers.

We appreciate the FDIC's statement that it believes customers should be able to "opt-out" of overdraft coverage for paper checks and ACH transactions. However, we urge the FDIC to go further and require that banks obtain account holders' affirmative consent before charging fees for such coverage. This recommendation should be viewed in connection with our recommendation that account holders who desire coverage be enrolled in the least expensive form of overdraft coverage for which they qualify. As evident in the Regulation E "opt-in" context, requiring affirmative consent is not meaningful unless lower-cost options are fairly presented.

⁶⁸ Some financial institutions offer cheaper forms of overdraft lines of credit and linked savings accounts, where no transfer fee is charged. Among these alternatives, only overdraft lines of credit and transfers from a credit card are covered under the Truth in Lending Act, and therefore subject to an APR calculation. The APR calculation given for a \$34 overdraft fee is thus for illustrative purposes only. Because a transfer from an account holder's saving account—unlike the other options—is not an extension of credit made by the bank, we do not include an APR in this case.

We have long advocated that account holders should not be extended credit to which they have not explicitly agreed. We continue to urge regulators to require that any credit only be extended on fair terms the account holder has reviewed and explicitly agreed to.

Indeed, the FDIC recognizes that with automatic enrollment “customers may not . . . fully underst[and] the risks and potential costs involved” in fee-based overdraft.⁶⁹ Therefore, the FDIC should advise its institutions to review all credit options with the account holder and, if the account holder chooses to have overdraft coverage, to enroll the account holder in the lowest-cost option he or she qualifies for.

VIII. Other Elements of Proposed Guidance

We urge the FDIC, to the extent its guidance addresses bank staff training, to expect bank staff to be particularly trained in enrolling account holders who choose overdraft coverage in the lowest-cost credit for which they qualify.

With respect to account balance disclosure, we support prominently distinguishing account balances from any available overdraft coverage amounts, but we urge that only overdraft amounts available under formal, lower-cost overdraft protection be included in *any* account balance.

With respect to examinations, we continue to support positive CRA consideration for providing affordable alternatives to overdraft coverage. *But we believe that CRA evaluations should be penalized for those institutions that charge account holders more than six overdraft fees in a 12-month period.*

CONCLUSION

We thank the FDIC for addressing excessive overdraft fees by proposing the strongest guidance yet proposed. However, we urge the agency, in its final guidance, to provide more explicit standards to its banks, consistent with its 2005 payday lending guidance. More explicit standards will set clearer expectations for FDIC-supervised banks and for the account holders who bank with them; will be more easily enforceable; and will be far more likely to address the serious financial harm excessive overdraft fees cause lower and fixed-income consumers.

If the FDIC wishes to discuss these comments, please do not hesitate to contact us.

⁶⁹ FDIC Proposed Guidance.