

JOSEPH I. LIEBERMAN, CONNECTICUT, CHAIRMAN

CARL LEVIN, MICHIGAN
DANIEL K. AKAKA, HAWAII
THOMAS R. CARPER, DELAWARE
MARK L. PRYOR, ARKANSAS
MARY L. LANDRIEU, LOUISIANA
CLAIRE McCASKILL, MISSOURI
JON TESTER, MONTANA
ROLAND W. BURRIS, ILLINOIS
EDWARD E. KAUFMAN, DELAWARE

SUSAN M. COLLINS, MAINE
TOM COBURN, OKLAHOMA
SCOTT P. BROWN, MASSACHUSETTS
JOHN MCCAIN, ARIZONA
GEORGE V. VOINOVICH, OHIO
JOHN ENSIGN, NEVADA
LINDSEY GRAHAM, SOUTH CAROLINA

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

September 27, 2010

VIA EMAIL (OverdraftComments@fdic.gov)

The Honorable Sheila C. Bair
Chairman
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

RE: FDIC Proposed Overdraft Payment Supervisory Guidance, No. FIL-47-2010

Dear Madame Chairman:

The purpose of this letter is to express my support for the Federal Deposit Insurance Corporation's proposed overdraft payment supervisory guidance set forth in FIL-47-2010, dated August 11, 2010.

In 2005, the Permanent Subcommittee on Investigations, which I chair, initiated an in-depth investigation into abusive and unfair practices in the credit card industry, including excessive fees imposed on consumers for exceeding credit limits. In one hearing, the Subcommittee presented a consumer who had exceeded his card limit by just \$200, but was subjected to 47 over-the-limit fees over a six-year period that totaled \$1,500. The Subcommittee's investigation and hearings helped build support for legislative reforms culminating in President Obama's signing the Credit Card Accountability Responsibility and Disclosure Act of 2009, known as the Credit CARD Act. The Credit CARD Act includes provisions that prohibit card issuers from charging over-the-limit fees unless a consumer expressly agrees to permit completion of transactions that may result in exceeding the card's credit limit. In addition, for those consumers who choose to engage in over-the-limit transactions, the Credit CARD Act prohibits card issuers from charging more than one over-the-limit fee per month and more than three over-the-limit fees for the same set of transactions.

While the Credit CARD Act did not address other types of transactions, the abusive over-the-limit practices engaged in by credit card issuers are in many ways similar to the overdraft abuses engaged in by financial institutions with respect to consumer bank accounts, ATM withdrawals, wire transfers, and other transactions. These abusive practices injure consumers by imposing excessive, inappropriate, and duplicative fees that can deplete savings, trigger other penalties, and make it exceedingly burdensome to pay off debt. That's why, in 2009, I cosponsored the Fairness and Accountability in Receiving (FAIR) Overdraft Coverage Act of 2009, a bill aimed at stopping abusive practices related to overdraft fees imposed on financial accounts, debit card transactions, ATM withdrawals, and other transactions.

The FDIC's proposed guidance would begin to curb abusive overdraft practices. Under its proposed guidance, the banking institutions supervised by the FDIC would be required to closely monitor overdraft payment programs offered to consumers. Banks would be expected to provide meaningful disclosures to consumers about the overdraft program features and other, less costly options. Banks would also be required to ensure that they mitigate the risks associated with offering automated overdraft payment programs and demonstrate compliance with all consumer protection laws and regulations, including new regulations mandating notice and reasonable opportunity for customers to affirmatively choose (opt-in) to engage in fee-based overdraft coverage of ATM withdrawals and one-time point of sale debit card transactions. The FDIC would also expect banks to monitor their overdraft programs for excessive or chronic use by giving customers who overdraw their accounts on more than six occasions where a fee is charged in a rolling twelve month period an opportunity to choose a less costly alternative (such as linking a savings account or credit card to the customer's checking account or offering an overdraft line of credit) and decide whether to continue with the fee-based overdraft coverage.

The FDIC's proposed guidance offers needed consumer safeguards to prevent abuses. The FDIC's November 2008 *Study of Bank Overdraft Programs* found that financial institutions continue to expand the types of overdraft programs provided to consumers. The range of banking services and number of transactions that could potentially incur an overdraft have broadened significantly, to include not only paper checks, but also ATM machines, point-of-sale debit card use, preauthorized debits, telephone fund transfers, wire transfers, and online banking transactions. In addition, overdraft programs have sometimes been provided on an automatic enrollment basis, potentially leaving customers not fully aware of the risks and potential costs involved. In some situations, overdraft fees can exceed the amount of the underlying overdraft to a substantial degree and occur multiple times in a single banking day. The high costs associated with these overdraft fees may outweigh any overdraft benefit, resulting not only in customer dissatisfaction, but serious financial harm to some consumers.

The FDIC's proposed guidance, as it relates to the "opt-in" provision of Regulation E, is particularly important. The proposed guidance states: "In complying with these requirements, institutions should not attempt to steer frequent users of fee-based overdraft products to opt in to these programs while obscuring the availability of alternatives." An "opt in" provision, properly executed, is an effective way to cure problems associated with automatic overdraft payment programs, because it is based on the concept that consumers will have to be educated about a service before making the decision to use it. The proposed guidance correctly warns banks against using steering practices that would bypass or minimize this educational function. This cautionary guidance, in conjunction with the requirement that banks monitor excessive use of automated overdraft programs, would encourage banks to identify and offer at-risk customers lower cost overdraft alternatives, rather than charge them unlimited, high-cost overdraft fees. As with the credit card over-the-limit opt in, these provisions offer practical tools to ensure consumers understand their financial exposure and avoid imposition of excessive fees.

The FDIC's proposed guidance does not take the same approach, however, with respect to other kinds of transactions that could generate an overdraft fee, such as paper checks and certain transfers. The FDIC suggests that banks offer customers the ability to opt out of overdraft protection for those types of transactions, instead of mandating that they receive a customer's consent before imposing fee-based overdraft protection. The proposed guidance should require banks to institute opt-in procedures for all types of overdraft protection programs to ensure consumers consent to the fees that will be charged to them.

The proposed guidance could also be strengthened in its approach to preventing abusive fee amounts. My Subcommittee has heard from too many consumers who have unwittingly paid \$38 for a cup of coffee: \$3 for the coffee plus \$35 for the overdraft fee. Some financial institutions have imposed hundreds of dollars in overdraft fees on consumers who exceeded their account balances by a few dollars. To stop these unreasonable and excessive fees, the proposed guidance instructs banks to create a daily dollar limit on the amount of overdraft fees that can be charged to a client. The guidance should be further strengthened by prohibiting banks from imposing any overdraft fee that exceeds the amount of the underlying overdraft. This limitation would match the approach taken in regulations implementing Section 149 of the Credit CARD Act requiring banks to impose credit card penalty fee amounts that are "reasonable and proportional." This additional limitation would help put an end to excessive overdraft fees.

The FDIC's proposal also requested comment on issues related to the processing of transactions. Section 106 of the Dodd-Levin credit card reform bill, S. 414, would have required credit card issuers to process credit card transactions in the order that would minimize imposition of finance charges to the cardholder. The FDIC's guidance could adopt a similar pro-consumer approach by requiring banks to process transactions in the order that would minimize imposition of overdraft charges. This approach would help ensure that overdraft fees are used as a mutually agreed upon financial penalty on consumers to deter unplanned debt, rather than as a hidden opportunity to manipulate consumer transactions to increase bank profits.

The FDIC's proposed guidance provides welcome new consumer protections aimed at ending abusive practices related to overdrafts. The guidance would also prevent less scrupulous banks from gaining an unfair competitive advantage over banks that treat consumers fairly. As a cosponsor of legislation targeted at stopping overdraft abuses, I support the proposed guidance, urge consideration of the above proposals to further strengthen it, and encourage the FDIC to refrain from taking any steps to weaken its important consumer protections in the final rule.

Thank you for the opportunity to comment.

Sincerely,


Carl Levin
Chairman
Permanent Subcommittee on Investigations