August 6,2004

Jennifer J. Johnson
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
VIA EMAIL: regs.comments@federalreserve.gov

Re: Docket No. R-1197 and Docket No. OP-1198

Dear Board of Governors:

The Center for Responsible Lending (CRL) appreciates the opportunity to comment to the Federal Reserve Board and the other members of the Federal Financial Institutions Examination Council on two proposals related to overdraft loan programs (also known as courtesy overdraft protection programs):

- the Board's proposed amendments to Regulation DD, promulgated pursuant to the Truth in Savings Act; and
- the Proposed Interagency Guidance on overdraft loan programs issued by the Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration (the "Agencies").

CRL is an organization dedicated to protecting home ownership and family wealth by working to eliminate abusive financial practices. A nonprofit, non-partisan research and policy organization, CRL promotes responsible lending practices and access to fair terms of credit for low-wealth families.

CRL is an affiliate of the Center for Community Self-Help ("Self-Help"), which also includes a credit union and a loan fund. Self-Help has provided more than $3.5 billion in financing to help low-wealth borrowers in forty-seven states buy homes, build businesses, and strengthen community resources. Self-Help has assets of over $900 million and our loan loss rate has been less than one half of 1% per year. Self-Help also has experience as a provider of deposit accounts. Self-Help Credit Union has $174 million in assets and more than 12,800 accounts. In addition, Self-Help recently acquired Firestone Credit Union, a full service retail credit union located in Wilson, North Carolina. CRL's affiliation with Self-Help provides CRL with important insight into lenders' needs and responsibilities to communities.

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CRL opposes the Board's proposal to regulate overdraft loan programs' under the Truth in Savings Act (TISA), rather than the Truth in Lending Act (TILA). The comment submitted by the National Consumer Law Center, Consumer Federation of America, and other organizations provides a comprehensive critique of the Board's proposals. CRL endorses and supports those comments.

We write separately to underscore our concern, grounded in Self-Help's experience as a lender, that the proposals will have serious negative consequences for financial institutions and borrowers. While we believe that requiring TILA disclosures will promote competition and the informed use of credit, disclosures alone are not enough. Our main concerns with the Board's current approach are outlined in Sections I and 11. In addition, in Section III, we comment on the proposed amendments to Regulation DD related to advertising. In Section IV, we propose some changes to the "best practices" which would at least ameliorate some of the problems inherent in short-term high-cost loans made without regard to a borrowers ability to repay. Finally, in Section V, we propose that the Board should require institutions to report certain information about their overdraft loan programs.

I. INTRODUCTION AND OVERVIEW

Overdraft loan programs today bear little resemblance to the traditional practice of institutions' using their discretion to pay overdrafts for customers on an occasional ad hoc basis. Overdraft protection historically was offered as a truly incidental accommodation to customers. Checks typically were returned to a given branch, and branch personnel knew the customers and could assess when an accommodation would be appropriate.' In fact, when the Federal Consumer Credit Protection Act was first enacted in 1968, most business was conducted in this way. Thus, Regulation Z properly exempted the occasional, incidental overdraft accommodation.

Historically, if a customer were a repeat offender (that is, overdrew an account on more than a truly inadvertent and incidental basis), then the financial institution provided some alternative protection (a line of credit or a linked account), counseled the customer that future overdrafts could not be honored, and/or closed the customer's account.[3]

In recent years, the clearing of checks has changed dramatically. It has become a highly automated process with little or no involvement from the local branch. Automation has led to new practices, such as paying checks in a certain priority each day (largest first, in the order presented, etc.). It also has become far simpler to link a checking account with a line of credit or another asset account, and thus it is far easier today than it was in the 1960's to provide a true, contractual form of overdraft protection.

Unfortunately, rather than provide consumers with access to a contractual form of overdraft protection, consultants and others have built an entire industry based on converting

[1] "Overdraft loan programs" refers to programs in which the decision to cover the check is automated or the service is marketed to consumers. CRL does not, at this time, believe that it is appropriate to apply TILA to discretionary, ad hoc, and non-automated decisions to pay customers' overdrafts.
[2] *See* Interagency Guidance on Overdraft Protection Programs, 69 Fed. Reg. 31,858, 31,860 (June 7, 2004).
[3] Steve Cocheo, *Follow the Bouncing Check,* April A.B.A. BANKING J., 32 (2003).

overdrafts into major profit centers by exploiting loopholes in Regulation Z.[4] Overdraft loan programs are profitable because they lead customers to overdraw their accounts far more often than they would in the absence of such programs.[5]

The assertion by some overdraft loan proponents that these programs merely provide coverage for inadvertent overdrafts that occur anyway is a fallacy. The institutions that adopt the programs generate a dramatic increase in overdraft fee income.[6] Marketing materials specifically promote free checking and make statements implying that overdrafts will be covered.[7] Typically, the targeted customers are not advised of the far less costly alternatives, such as lines of credit or cash advances from credit cards, that provide guaranteed overdraft protection. Furthermore, targeted customers are not provided with meaningful information that would allow them to compare the costs of overdraft loans to the costs of these other alternative short-term credit products.

There are many similarities between overdraft loans and payday lending. As has been widely reported, overdraft loans can have annual percentage rates of 300%, 600%, 1,200% and more, which at times far exceed APR's on payday loans. There is, however, at least one important difference between payday lending and overdraft loan programs-- the Board requires payday lenders to comply with TILA, but exempts overdraft loans.

Overdraft loan programs target the same customer base targeted by payday lenders: low- and moderate-income consumers who have little or no savings.[8] One consultant encourages institutions to maximize overdraft fees by opening branches "in supermarkets, particularly supermarkets with a middle to down market and family target market."' As is the case with payday loans," overdraft loans trap low- and moderate-income customers in a cycle of debt. Another consultant estimated that 4% of overdraft loan customers are responsible for 50% of overdraft loan fees." According to a study conducted by the Washington State Department of

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[4] It is estimated that in 2002 Washington Mutual earned approximately $1 billion from its overdraft program. Alex Berenson, *Banks Encourage Overdrafts, Reaping Profit,* N.Y. TIMES, Jan. 22, 2003, at A1. Overdraft loan programs are highly profitable. One overdraft loan vendor estimated that income from overdraft loans accounts for as much as 50% of the total income for some financial institutions and that prohibiting overdraft loans would reduce institutions' fee income by $100 billion. Paul Gentile, *No Bounce*, CREDIT UNION TIMES, June 30, 2004, p. 1.

[5] "[Blanks participating in the program will, in essence, attempt to entice their customers to write NSF checks more frequently and on purpose in order to generate fee income." OCC Interpretative Letter 914, at p. 5, available at http://www.occ.treas.gov/interp/sep01/int914.pdf.

[6] J.M. Floyd & Associates states that institutions that adopt their overdraft loan program will increase overdraft income by 50% - 300%. *See* http://www.overdraftprivilene.coni/odp.html. Catawba Valley Bank doubled its overdraft income within two years of implementing an overdraft loan program. http://www.overdraftprivilege.com/casestudies/August2002_CatawbaValleyBank.pdf

[7] Seventy-eight percent of the advertisements reviewed for a recent study on overdraft loan programs implied that all overdrafts would be covered, *See* Consumer Federation of America, *Bounce Loan Advertisements and Disclosures on the Internet,* attached as Appendix A to the comment submitted by NCLC, et al. (August 5, 2004), at p. 3.

[8] Low- and moderate-income customers pay a disproportionate amount of the overdraft loan fees. Alex Berenson, *Federal Reserve Says Banks Can Continue Overdraft Plans,* N.Y. TIMES, June 8, 2004.

[9] Ralph Haberfied, *Breaking the* $200 *Barrier: With the Right Strategy That's How Much a Bunk Can Generate in Fee's Per Account,* Bankstocks.com, September 25, 2001, available at http://www.bankstocks.coni/article.asp'?id=425.

[10] Keith Ernst, et. al., *Quantifying the Economic Cost of Predatory Puyday Lending*, Center for Responsible Lending, at p. 3 (2003) available at http://www.responsiblelending.org/pdfs/CRLpaydaylendingstudy1203.pdf.

[11] Alex Berenson, *Some Bunks Encourage Overdrafts, Reuping Profit*, N.Y. TIMES, Jan. 22, 2003.

Financial Institutions, over 20% of borrowers who incur overdraft loan fees are charged such fees two or more times per month.[12]

Most institutions that offer overdraft loans through ATM and debit cards do not notify borrowers at the time that the transaction occurs that a purchase or withdrawal will result in an overdraft loan. Without notice, a consumer is given the mistaken impression that the account has a positive balance because the sale or withdrawal is completed. As a result, a consumer is likely to incur more overdraft loan charges through additional ATM and debit card transactions.[13] As we discuss below, the Board should prohibit institutions from dispensing overdraft loans through ATM and debit cards unless the consumer is first informed that the transaction will cause an overdraft, is shown the exact fee that will result, and is given the opportunity to cancel the transaction before a fee is assessed.

It also is important to recognize that to intentionally overdraw an account – that is, to write a check against a bank account when the customer knows he or she doesn’t have sufficient funds and hasn’t put into place a line of credit or linked account to cover the overdraft – is a crime in most states. That is one reason that more specific, contractual forms of overdraft protection have been put in place by almost all financial institutions in the United States. Overdrawing an account without some guaranteed form of overdraft protection is a behavior no one – and certainly not bankers or regulators – should ever encourage. It is absolutely contrary to sound advice concerning how to handle personal finances responsibly. It is an unsafe and unsound practice for consumers and financial institutions alike. To write checks without adequate funds and without a contractually guaranteed form of overdraft protection has historically been a blot on a consumer’s credit record and continues to be the basis for banks to close accounts and report offenders to third-party consumer credit reporting agencies.

Nor should there be an issue about qualifying for a contractually guaranteed form of protection. A consumer who could qualify for a bounce protection limit of $500 should be equally able to qualify for a $500 overdraft line of credit at the same financial institution. If not, there would be safety and soundness issues for the financial institution that provided the overdraft loan to a borrower that should not qualify for a loan. In addition, there would be potential discrimination issues with respect to the customer if, as is the case with subprime mortgage lending, members of protected classes receive high-cost overdraft loans more often than similarly situated white borrowers.

The ultimate irony, of course, is that throughout the text of the Proposed Interagency Guidance (hereinafter “Guidance”), the Agencies concede that overdraft loans are a form of credit and refer to them as credit (*see* Attachment A). The proposed Guidance is focused almost

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[12] The study found that 20% of customers who incur overdraft loan fees charged by a bank, and 27.3% of credit union customers who pay overdraft loan fees, are charged such fees 2 or more times per month. Washington Department of Financial Institutions, *Overdraft Protection Programs,* (September 19, 2003) at p. 4, available at http:/lwww.dfi.wa.gov/Legislative0/;,20r

[13] In addition, a borrower who receives an overdraft loan through ATM or debit card incurs fees that they would not have been charged in the absence of the overdraft loan program. For example, a customer who overdraws their account through a check may be charged an NSF fee regardless of whether or not an overdraft loan is provided, but a customer without an overdraft loan option who inadvertently attempts to overdraw their account with their ATM card will have their withdrawal rejected and will not pay any fees.

entirely on how financial institutions must protect themselves in offering this kind of credit, how the credit must be reported in call reports, how much capital will be required for the credit, and how charge offs must be handled. If the regulatory agencies believe financial institutions need this much protection from themselves, it is hard to understand why the same Agencies nevertheless are attempting to bend both logic and the law to conclude that consumers don't deserve comparable protections under the TILA, which requires disclosures of credit terms and encourages responsible comparative shopping, and the Equal Credit Opportunity Act (ECOA), which assures that when credit is denied, consumers are advised of the reasons for the denial and of possible alternatives.

Moreover, overdraft loans are exactly the kind of lending activity that Congress intended to address under TILA and ECOA. Low- and moderate-income customers are being targeted for products with finance charges that are among the highest, if not the highest, of any form of consumer credit being offered in the United States. Alternative forms of overdraft protection typically would be available to these consumers, if only the consumers had the information for comparative shopping (e.g., transfers from other accounts, personal lines of credit, and/or credit card cash advances), all of which are offered at a fraction of the charges imposed by overdraft loan programs. Some lenders appear to be steering low- and moderate-income consumers into these more costly programs (and/or denying them regular lines of credit). Furthermore, as a result of the Board's overdraft loan proposal, borrowers will not be entitled to receive notice of adverse actions and the reasons for the institution taking the action, as otherwise would be required by ECOA.

II. THE PROPOSALS ARE INCONSISTENT WITH TILA AND WILL RESULT IN NEGATIVE CONSEQUENCES FOR CONSUMERS AND FINANCIAL INSTITUTIONS

Individuals occasionally need access to short-term credit on an emergency basis. At other times, individuals may inadvertently overdraw their accounts. In each of these situations, borrowers would benefit from being able to access small amounts of credit on a contractual basis. Borrowers may also benefit from the convenience of the credit being attached to their checking accounts. The credit also should be provided at an appropriate price, with the loan serving as a vehicle for the borrowers to escape their financial emergency, not as the instrument that traps them in a cycle of debt.

Disclosure of the APR for overdraft loan programs **would benefit borrowers and is feasible.** As with other open-end credit programs, an effective APR can be disclosed on the borrower's periodic statement. It would not be burdensome or difficult for institutions to provide this type of disclosure.[14] In addition, meaningful disclosure could be made at the time an individual opens an account. *See* sample disclosures chart in Section IV(B)(5), *infra.* Since overdraft loan programs are almost always more expensive than other credit options offered by financial institutions, a sample chart could clearly convey that overdraft loans are the most

[14] Wells Fargo Bank's Direct Deposit Advance Service charges borrowers $2 for every $20 advanced and permits borrowers to access a line of credit of no more than $500. Wells Fargo does not require an application for a borrower to be eligible for the service, but the borrower must affirmative request a loan. Wells Fargo provides borrowers with the cost of the loan as an APR on their statements. *See* http://www.wellsfargo.com/per/checking/dda/terms.jhtml?_requestid=10355.

expensive option. For the disclosures to be truly meaningful, the Board must also require institutions to provide borrowers with the option of electing to participate in the overdraft loan program or applying for the lower cost alternative forms of credit.[15]

A decision by the Board that overdraft loan fees are regulated under TILA would allow borrowers to compare the cost of overdraft loans to alternative overdraft protection programs, such as lines of credit and cash advances from credit cards. TILA coverage also would promote price competition among institutions serving low- and moderate-income borrowers' short-term credit needs. The Board, however, proposes to exempt overdraft loan charges from TILA. This result would conflict with the main goal of TILA, to ensure that consumers receive information necessary for them to make informed decisions about their use of credit.

As we discuss below, the Board's proposal that overdraft loan fees are not finance charges is inconsistent with TILA's goal of enabling consumers to compare credit terms. The Board's proposal also harms consumers by encouraging irresponsible behavior by financial institutions and hindering competition among providers of small loans to low- and moderate-income consumers. Furthermore, the proposal conflicts with the Board's treatment of other loan products and creates uncertainly among consumers and financial institutions. Finally, the Board lacks the legal authority to exempt overdraft loans from TILA.

A. The Board's Proposal is Inconsistent with TILA's Goal of Enabling Consumers to Compare Credit Terms.

The Agencies characterize overdraft loan programs as extensions of credit, an analysis CRL fully supports. In the supplement to the Board's proposed amendments to Regulation DD, the Board concludes that overdraft loan fees "relate to the institution's provision of credit as opposed to fees related to the use of the consumer's own funds in the account."[16] As noted above, the interagency Guidance is replete with references to overdraft loans as credit, most notably the unequivocal statement that "[w]hen overdrafts are paid, credit is extended."[17] On the other hand, with respect to TILA coverage, the Board proposes to treat overdraft loans differently from other credit products. This differential treatment is at odds with the purposes of TILA.

The purpose of TILA is to promote the informed use of consumer credit by providing meaningful disclosures about its terms and costs. TILA mandates that creditors disclose the cost of credit as a dollar amount (a finance charge) and as an annual percentage rate (APR). According to TILA:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof

[15] *See* discussion at IV(B)(5), *infra*.
[16] Truth in Savings, 69 Fed. Reg. 31,760, 31,764 (June 7, 2004).
[17] 69 Fed. Reg. 31,858, 31,862 (June 7, 2004); *see also* Attachment A

> by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.’[8]

With TILA, Congress clearly intended to provide borrowers with uniform disclosures about the cost of credit and to promote competition in financial services. The Board’s proposal to allow overdraft loan programs to disclose their costs in a manner different than other credit programs makes it impossible for borrowers to compare the costs of credit.

B. Overdraft Loan Fees are Finance Charges Under TILA.

Despite concluding that overdraft loans are extensions of credit, the Board erroneously relies on two exceptions to the definition of what constitutes a finance charge to exempt overdraft loan fees from TILA. The Board proposes that overdraft loan fees are not finance charges if 1) they are “discretionary” programs or 2) if the institution charges the same fee when consumers overdraw their accounts, whether or not an overdraft loan is provided. The Board’s application of these exceptions to overdraft loans is not a reasonable interpretation of the Board’s own regulations or TILA.

1. <u>Overdraft Loan Programs Are Not Discretionary.</u>

First, the Board proposes that overdraft loan fees from institutions that operate “discretionary” overdraft loan programs are not finance charges, relying on section 226.4(c)(3), which provides that transactions are generally exempt from TILA if there is no written agreement between the consumer and the institution to pay an overdraft and impose a fee.’’ The purpose of the exemption was to permit institutions to use their discretion on an ad hoc basis to accommodate customers. Overdraft loan programs, however, are discretionary in name only. Most programs establish parameters for paying overdrafts without discretion (e.g. accounts must be open for 30 days and receive periodic direct deposit) and set limits for consumers (thus functioning as lines of credit). As the Board itself admits, institutions generally pay overdrafts up to their pre-set aggregate limits.[20]

The Board’s proposal allows institutions to hide behind the fiction that the programs are discretionary, when in fact they are operated in a non-discretionary manner. According to a survey conducted by the Consumer Federation of America, 78% of advertisements for overdraft loan programs state or imply that the program will provide guaranteed overdraft protection.[21] An advertisement, or any other written statement from an institution, that creates an expectation that overdrafts will be paid is a written agreement on behalf of the bank to pay the overdraft and therefore, should be sufficient to trigger Regulation Z coverage.

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[18] 15 U.S.C. § 1601(a).
[19] *See* 12 C.F.R. § 226.4(c)(3).
[20] 69 Fed. Reg. 31,760, 31,761 (June 7, 2004).
[21] *See* Consumer Federation of America, *Bounce Loun Advertisements and Disclosures on the Internet,* attached as Appendix A to the comment submitted by NCLC, et al. (August 5, 2004), at p. 3.

The Board itself acknowledges that the disconnect between the original purpose of the exception and the current program may lead to a change in its proposal. "Since this regulatory exception was created for the occasional ad-hoc payment of overdrafts, its application to these automated and marketed overdraft programs could be reevaluated in the future."[22] The Board should not wait until a later date to reevaluate — Regulation Z was never intended to provide an exception to mass-marketed automated loan programs; to apply it to overdraft loan programs undermines the purposes of TILA.

2. <u>Overdraft Loan Fees Are Not Comparable To NSF Fees.</u>

The Board also proposed to exempt overdraft loan programs from TILA as long as those programs' fees do not exceed the standard NSF fees charged by the relevant institution. The Guidance states that, even where an institution agrees in writing to pay an overdraft, the "fees assessed against a transaction account for overdraft protection services are finance charges only to the extent the fees exceed charges imposed for paying or returning overdrafts on a similar account that does not have overdraft protection."[23] Thus, the Guidance would have the perverse effect of denying TILA protections to consumers who repeatedly take out overdraft loans — while extending those protections to consumers who use lines of credit that cost much less.

By comparing the overdraft loan fee to the NSF fee, the Board is making a false analogy between the consumer who has an account and uses an overdraft loan product and the consumer who chose an account that does not include a credit feature, but does include a penalty for overdrawing the account.

In the context of determining whether a charge is a finance charge under TILA, however, this is not the correct comparison, because TILA addresses the cost of credit. The more appropriate comparison is between credit extended through an account with an overdraft loan program and, for example, credit extended through an account linked to a line of credit. An overdraft loan does not cost a consumer any less because the consumer would have paid a similar amount in the form of a penalty if he or she had chosen an account without a credit feature at an earlier point in time and then overdrew the account.

Congress intended for TILA to promote the informed use of credit by providing consumers with information necessary to evaluate the cost of credit from different sources.[24] TILA's goals also include providing consumers with information needed to decide whether to delay consumption, use cash, or use credit.[25]

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[22] 69 Fed. Reg. 31,858, 31,862 (June 7, 2004).
[23] *Id.*
[24] *See* 15 U.S.C. § 1601(a) ("The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.").
[25] In connection with proposed comprehensive revisions to Regulation Z eventually made in 1981, the Board prepared a "Regulatory Analysis of Proposed Revision of Regulation Z." See Proposed Rule, Credit; Truth in Lending; Revision of Regulation Z, 46 Fed. Reg. 80,648, 80,731 (Dec. 5, 1980). This analysis included a table entitled "Goals of Truth in Lending" listing 39 TILA goals, which included seven "Goals Associated with Improving Consumer Decisionmaking." These seven goals were: reduce credit search costs; simplify information processing; improving consumers' ability to make comparisons; enable consumers to match products and needs;

A consumer who decides whether to take out an overdraft loan in a non-discretionary program[26] is not deciding between paying an overdraft fee and paying an NSF fee. Because the consumer already has chosen an account with a credit feature, a consumer does not have the option of choosing to pay an NSF penalty in lieu of an overdraft loan if the consumer overdraws the account. The decision the consumer needs to make is whether to take advantage of an overdraft loan, use a credit card, utilize an overdraft line of credit, obtain a payday loan, borrow from friends or family, delay payment or consumption, or take some other course of action. What matters to the consumer at that point in time is the cost of an overdraft loan—and how that cost compares to the cost of other types of credit.

For this decision, the Board proposals provide the consumer with no assistance at all. This result conflicts with the critical TILA goal of assuring "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[27]

a. Overdraft Loan Fees and NSF Fees Are Not Charges Imposed in Comparable Transactions.

Credit for overdraft loan programs and NSF fees are not "comparable cash transactions." In 1980, Congress provided for the exclusion from the finance charge of costs that were the same in cash transactions as in credit transactions.[28] Congress adopted the "comparable cash transaction" language to exempt items from the finance charge when the same charge was imposed regardless of whether the consumer used cash or credit. The examples given of fees that satisfied this exemption were sales taxes, license fees, and registration fees.[29]

Overdraft loan programs that are relying on this exception are non-discretionary; credit is extended as a matter of course—and contractual agreement. Consumers who take advantage of an overdraft loan program are choosing a credit source. By contrast, consumers who incur NSF fees are overdrawing their accounts and paying penalties for doing so. The two transactions are not comparable for TILA purposes. When an overdraft loan occurs through use of a debit or ATM card, the inappropriateness of deeming the NSF fee to be a "comparable cash transaction" is even more apparent. Such transactions do not involve checks, so there can be no corollary NSF fees.

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enable consumers to decide between using credit and delaying consumption; and show consumers where search can be beneficial. See *id.* at 80,735. Requiring the disclosure of overdraft loan fees in the finance charge advances these goals. *See also id.* at 80,737 ("Probably of primary importance is TIL's requirement that rates be calculated in identical fashion regardless of credit source or type . . . Likewise, decisions about using cash or delaying consumption rather than using credit should be facilitated with standardized credit cost calculations available.")

[26] If the overdraft loan program truly were discretionary, the exemption provided in 12 C.F.R. § 226.4(c)(3) would apply.

[27] 15 U.S.C. § 1701(a).

[28] *See* Pub. L. No. 96-221, 94 Stat. 132, § 606 (1980), codified at 15 U.S.C. § 1605(a).

[29] *See* S. Rep. No. 96-73, at 12 (1979)("The bill will eliminate some current confusion by making clear that charges which would also be incurred in a similar transaction for cash, such as sales taxes, license and registration fees, are not to be included in the finance charge."); S. Rep. 96-368, at 26 (1979) (same).

b. The Finance Charge Includes the Entire Charge Imposed for Use of an Account's Credit Feature, Since This Charge Has No Equivalent in an Account That Lacks a Credit Feature.

In fact, in connection with an overdraft loan, the finance charge should always include the entire fee levied in connection with the extension of credit. Section § 226.4(b)(2) of Regulation Z states that the finance charge includes "[s]ervice, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account to the extent that the charge exceeds the charge for a similar account without a credit feature." **A** fee charged when credit is extended through a checking account has no equivalent in an account that has no credit feature.

Section § 226.4(b)(2) of Regulation Z forces us to consider the two aspects of the cost of credit on an account with a credit feature.[30] One component relates to charges imposed on an account when no credit has been extended (that is, the basic charges applicable to an account with a credit feature as opposed to an account without a credit feature).[31] The other component relates to charges imposed when a consumer utilizes an account's credit feature, for which there is no equivalent transaction or charge in an account that has no credit feature.

Therefore, the Board should revise its proposed Guidance to clarify that an overdraft loan fee has no corollary in an account that has no credit feature and that the entire overdraft loan fee must be included in the finance charge. Disclosure of the entire charge for the extension of credit is the only way to meet TILA's goal of ensuring that consumers receive a meaningful disclosure of credit terms so that they can compare the various credit terms available to them.

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[30] To ensure that the two distinct components of the cost of credit in connection with accounts that have credit features, the Board could revise 12 C.F.R. § 226.4(b)(2) to state as follows:

"Service, transaction, activity, or carrying charge, including any charge imposed in connection with a checking or similar transaction account

(i) whether or not there is an outstanding principal balance for an extension of credit through the account, to the extent that it exceeds the charge for the same line item on a similar account without a credit feature; and

(ii) when there is an outstanding principal balance for an extension of credit through the account, any charge imposed in connection with the extension of credit through the account."

[31] The relevant question with respect to NSF fees is whether an NSF fee on an account with a credit feature is higher than an NSF fee on an account without a credit feature. For example, consider the situation where an institution declines to pay an overdraft by a consumer who has an account with a credit feature (for example, because the consumer has reached the maximum overdraft loan amount or otherwise fails to meet the overdraft loan criteria) and imposes an NSF fee. The amount, if any, by which the NSF fee imposed exceeds the NSF fee that would have been imposed on an account without a credit feature represents a cost of credit and should be included in the finance charge.

C. The Board's Proposal Harms Borrowers.

1. <u>The Board's Proposal Allows Institutions to Lure Borrowers into a Risky, "Discretionary" Product.</u>

The Board's proposal to grant an exception for mass-marketed and automated overdraft loan programs that claim to be discretionary exacerbates, rather than addresses, the Board's concern that overdraft loan programs encourage "irresponsible" behavior by consumers. By giving preferential treatment to "discretionary" overdraft loan programs, the Board encourages a situation in which consumers write checks that exceed their account balances without any guarantee that the overdrafts will be covered.

The Board's proposal also encourages irresponsible behavior by financial institutions. As noted above, overdraft loan programs have become major profit centers for financial institutions that offer them. The Board's proposal provides every incentive for those financial institutions to encourage consumers to overdraw their accounts (through advertising and other means) and not to provide them information about lower cost alternatives. It is irresponsible for institutions to base their profitability on encouraging overdrafts, and the Board's proposal will only encourage more institutions to establish overdraft loan programs. The Board's decision also creates a significant incentive for institutions to create other "discretionary" programs that will be freed from TILA's disclosure requirements.

2. <u>The Board's Proposal Harms Competition Among Institutions and Conflicts with Its Treatment of Other Credit Products.</u>

The Board's proposal will hurt competition that could lower costs for consumers, especially in the short-term credit market for low- and moderate-income borrowers. The Board's proposal distorts the pricing of overdraft loan products by providing an incentive for those products to be priced at the same level as the NSF fee, and no lower. Institutions set the price of their NSF fees to deter borrowers from writing overdrafts.[32] The price has nothing to do with the cost of extending credit through overdraft loans or the risk of default. The preferential treatment afforded to overdraft loans by the Board distorts the market and hurts consumers by masking the difference between paying a penalty for a single overdraft and continually borrowing against an account through an overdraft loan. If the Board requires overdraft loans to comply with TILA, as other credit programs must, it will encourage price competition among institutions and between overdraft loans and lower priced products.

In addition, the Board's proposal conflicts with earlier decisions made by the Board and will undermine the integrity of the regulatory process. In March 2000, the Board concluded that payday loans should be covered by TILA. Commenters who opposed the proposal argued that TILA disclosures would be difficult to make and would not provide meaningful information to borrowers. In determining that payday loans should be covered by TILA, the Board stated:

> TILA, as implemented by Regulation Z, reflects the intent of the Congress to provide borrowers with uniform cost disclosures to promote the informed use of

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[32] Alex Berenson, *Banks Encourage Overdrafts, Reuping Profit,* N.Y. TIMES, Jan. *22,* 2003, at **Al.**

credit and assist borrowers in comparison shopping. **This purpose is furthered by applying the regulation to transactions, such as payday loans, that fall within the statutory definition of credit....**"[33]

TILA states that "[c]redit means the right granted by a creditor to a debtor to defer payment of debt or incur debt and defer its payment."[34] Overdraft loans clearly satisfy TILA's definition of credit. Thus according to the Board's own reasoning, the purposes of TILA would be furthered by applying Regulation Z to overdraft loans. The Board should force overdraft loan programs to compete with other credit options.

D. The Board Lacks the Legal Authority to Exempt Overdraft Loan Programs from TILA.

There is a significant legal question about whether the Board can exempt overdraft loan programs from the relevant consumer credit protection laws, especially when the Board readily admits that the programs constitute consumer credit. The relevant federal regulatory Agencies, including the Board, have explicitly stated that overdraft protection is credit, and have explicitly acknowledged that the relevant overdraft programs are promoted as a source of consumer credit. It is no longer reasonable, and would seem to be contrary to the statute, for the Board nevertheless to exempt overdraft protection from the consumer protections provided by TILA and the Equal Credit Opportunity Act.[35] Further, as noted in the comment submitted by the National Consumer Law Center, *et al*., the Board has not followed the appropriate procedures to exempt overdraft loans from TILA. Accordingly, if the Board enacts these proposals, its actions could be considered arbitrary and capricious and beyond the authority delegated to the Board.

III. COMMENT ON THE PROPOSED AMENDMENTS TO REGULATION DD RELATED TO ADVERTISING

As discussed above, CRL does not support the Board's decision to regulate overdraft loan products under TISA rather than TILA. However, since the Board specifically requested comment on the types of advertising that is misleading or inaccurate, we will briefly provide our views on this issue. Institutions should not be permitted to receive both the marketing benefits from a non-discretionary loan program and the favorable regulatory treatment provided by the Board to discretionary loan programs. Therefore, the Board should first state that any program that does not adhere to the Regulation DD advertising restrictions will be considered a non-discretionary overdraft loan program that must comply with TILA.

Accordingly, the proposed amendments to Regulation DD should also prohibit all advertising that states or implies to borrowers that the overdraft loan program provides guaranteed overdraft coverage. For example, any advertisement that states that an overdraft "will" be covered or that the program gives the borrower "peace of mind" should be prohibited. In addition, the proposed regulations should prohibit institutions from advertising that they will

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[33] Truth in Lending, 65 FR 17,129, 17,130 (March 31, 2000).
[34] 15 U.S.C. § 1602(e).
[35] In the Guidance, the Agencies state that overdraft loans are incidental credit since there is no finance charge for TILA purposes. As a result, overdraft loans are exempt from certain provisions of ECOA, 15 U.S.C. § 1691.

pay overdrafts up to a certain limit, as well as all advertising that in any way encourages borrowers to overdraw their accounts intentionally. All of these types of advertising are inconsistent with the Board's view that these programs should be regulated as discretionary and ad hoc extensions of credit.

We also believe that the advertising proposals are deficient in another area. The current commentary to Section 230.8 prohibits the use of terms such as "free," "no cost" and the like when an account has an activity-related fee. When this regulatory provision and the related commentary were originally adopted, overdraft loan programs of the type being addressed in the pending proposals largely did not exist. Thus, unlike the situation discussed in the existing regulation and commentary relating to traditional NSF fees, the overdraft loan fees covered in the pending proposals fall squarely within the concept of activity fees. By definition, these overdraft loan fees are imposed in direct correlation to the activity on an account, and thus "free," "no cost" and similar terms should be prohibited when used in connection with accounts having these types of activity-based fees.

To properly address this issue, we recommend that a new fifth subparagraph be added to the current commentary at 8(a)-3 to read as follows:

> "v. any fee associated with the payment of an overdraft (for example, an institution offering overdraft loans may advertise the account as "free" only if no overdraft or other fee is imposed when the institution pays an overdraft)."

It also would be useful to amend the current commentary at 8(a)-4 iv to read as follows:

> "iv. Stop-payment fees and fees imposed when checks are returned unpaid. However, if a fee is charged when an overdraft is paid, such a fee constitutes an activity fee of the type discussed in ***3*** v."

As we state above, CRL does not believe that disclosure of the fee on the periodic statement without an APR provides meaningful information to consumers. However, if the Board insists on enacting its proposals, we believe that the disclosure should be as comprehensive as possible. The Board's proposal requires institutions to disclose overdraft fees in periodic statements on an aggregate basis for each statement period, but gives institutions the option of voluntarily disclosing each fee separately.[36] We recommend requiring disclosure of both aggregate and individual fees. In addition, the proposal requires institutions' periodic statements to show the total amounts for overdraft fees and returned item fees for the calendar year-to-date. Disclosing fees on each basis—individually, in the aggregate, and year-to-date--would better inform customers about the cost of using an overdraft service on a regular basis. These disclosures might also serve as a source of information for internal monitoring of how frequently consumers overdraw their accounts. In addition, regulators could collect this information to determine how much borrowers pay in overdraft loan fees.

[36] 69 Fed. Reg. 31,760, 31,764 (June 7, 2004).

IV. COMMENTS RELATED TO THE INTERAGENCY GUIDANCE

A. The Interagency Guidance Should Explicitly State that the Board's Decision Does Not Affect Whether Institutions Must Comply with State Usury Laws.

The Guidance correctly states that institutions with overdraft loan programs must still comply with state usury laws.[37] We support the Agencies' conclusion and believe that, given the high interest rates that accompany overdraft loans, institutions should be warned explicitly that the Board's decision does not affect their duty to comply with state law. The Agencies should state that the Guidance and the Board's proposed amendments to Regulation DD have absolutely no effect on whether or not overdraft loan fees are interest for the purposes of state usury law.

B. Best Practices.

In addition to stating that overdraft loans are subject to TILA and Regulation Z, the Agencies should strengthen the "best practices" set forth in the proposed interagency Guidance. As proposed, the non-binding best practices provide little protection for borrowers and do not even address the concerns about overdraft loans that the Agencies set forth on page 8 of the Guidance. Among the concerns noted by the Agencies that the best practices would not address are that institutions lead borrowers to believe overdraft loan programs are lines of credit (by informing them that the account includes an overdraft protection limit of a certain dollar amount without disclosing how the service differs from a line of credit), encourage "irresponsible consumer behavior," and mislead consumers about the cost of the overdraft loans.

Revised best practices should address the problems inherent in high-cost, short-term loans made without regard to borrowers' ability to repay. Furthermore, if the Board insists on regulating overdraft loans under TISA: (1) the best practices should be changed to ensure that overdraft loan programs are marketed and operated in a manner that is consistent with the basis for the Board's decision to exempt them from TILA--that institutions pay overdrafts on an ad hoc discretionary basis; and (2) the best practices should be **mandatory** for any program that maintains it is a "discretionary" program entitled to TILA exception. Consistent with these goals, CRL recommends the following changes to the Best Practices recommendations:

1. <u>Limit overdraft loans to ensure that they are used on an ad hoc discretionary basis.</u>

The Agencies propose that institutions should "consider" daily limits on the number of overdrafts or fees that can be charged.[38] Daily use of overdraft loans, however, would certainly constitute "excessive consumer usage," against which the proposal also warns.[39] The Board relied on an exemption to TILA created to allow institutions to pay overdrafts on an ad hoc basis. In order to ensure that advertised or automated overdraft loan programs are truly intended to cover the occasional inadvertent overdraft, we recommend that the proposal be revised to

[37] 69 Fed. Reg. 31,858, 31,861 (June 7, 2004).
[38] 69 Fed. Reg. at 31,864.
[39] *Id*.

prohibit "excessive consumer usage,'' to be defined as receiving **4** or more overdraft loans per year or receiving more than 1 overdraft loan in any 60 day-period.[40]

In addition, within 15 days after the fourth overdraft loan, or second overdraft loan received within 60 days, the institution should be required to provide the borrower with the option to apply for an alternative loan program offered by the institution,[41] such as conversion of the overdraft loan to a line of credit, and counsel the borrower on their credit needs.[42]

Limiting overdraft loans as proposed is important for several reasons. First, if borrowers are receiving overdraft loans on a regular basis, they are using the product as a line of credit, not an ad hoc accommodation. **A** limitation ensures that there will be some consistency between how the program is operated and the Board's rationale for excluding overdraft loans from TILA. Second, the limitation will prevent borrowers from being trapped in a cycle of debt. **As** discussed above, a significant percentage of borrowers who receive overdraft loans are likely to receive multiple loans per month.[43] Finally, a limitation on the number of overdrafts will limit the credit risk to institutions from individuals who are overly reliant on overdraft loans to satisfy their short-term credit needs, as well as the risk to an institution that is overly reliant on fee income from overdrafts.

2. <u>Require institutions to obtain the affirmative consent of consumers before enrolling.them in an overdraft loan program.</u>

The Agencies propose that institutions should obtain the affirmative consent of customers, or in the alternative, provide the opportunity to opt-out of the overdraft loan program.[44] This best practice should be changed to require that consumers apply for the loan program or give their affirmative consent, in writing, to participate in this credit program-- just as they would any other credit program.

The requirement of affirmative written consent will prevent consumers from incurring overdraft loan charges when they never intended to participate in the program. For example, someone can incur multiple overdraft charges through their debit card without knowing that they have been enrolled in an overdraft loan program. Requiring disclosure buried within the other

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[40] As we discussed at the beginning of our comment, we believe that it is appropriate to regulate overdraft loan programs under TISA for institutions that truly provide overdraft accommodations in an ad-hoc discretionary manner, and that do not offer automated or advertised programs. The limitations on excessive use discussed in the text would only apply to overdraft loan programs that are either automated or advertised.

[41] If a borrower has used overdraft loans excessively but fails to qualify for an institution's alternative credit programs, the institution should not make any more overdraft loans to the borrower. To permit additional loans would be to allow the institution to profit from the very same problems that likely prevented the borrower from qualifying for the institution's lower-rate credit products.

[42] As an alternative to strict limits on the number of overdraft loans, the Board could set a limit based on the percentage of overdraft loan fees as compared to the average daily balance. If the overdraft loan fees in a year ever exceed a certain percentage, say *5%,* of the average monthly balance for that year, the institution would be required to provide the borrower with an opportunity to apply for an alternative overdraft protection program. In addition, the institution would be prohibited from providing any more overdraft loans to the borrower.

[43] ***See*** footnotes 11-12 and accompanying text.

[44] 69 Fed. Reg. at 31,863.

account opening disclosures is not sufficient. The burden should be on the institution to obtain the application and consent of the consumer, not on the consumer to opt-out.

3. Promptly notify consumers of each overdraft loan.

The Agencies propose that institutions should promptly notify borrowers when a fee is assessed.[45] The best practice should be modified to require institutions to send a letter on same day that the fee is assessed and, in a non-check transaction, require the borrower to click through a notice to accept the fee.

4. Alert consumers before a non-check transaction triggers fees.

The Agencies propose that, if "feasible," institutions should provide a notice to customers that an overdraft loan fee will be assessed if the transaction is completed.[46] This best practice should be changed to state that overdraft loans shall not be provided through non-check transactions unless consumers are notified that a fee will be assessed, are informed of the amount of the fee, and are given the opportunity to cancel the transaction. There are important differences between check transactions and ATM and debit card transactions--traditionally when a consumer inadvertently attempted to overdraw an account through an ATM or debit card transaction, the transaction was denied without a fee being charged. Since many ATM and debit transactions occur in real time and on-line, institutions have the information to deny these transactions **before** they occur. Accordingly, at the very least, customers should have the option of deciding whether to incur a loan fee at the point of sale.

5. Fairly represent overdraft protection programs and alternatives.

The Agencies propose that when customers are informed about an overdraft protection program, the institution should also inform them about the existence and costs of alternative credit products.[47] This best practice lacks the specificity necessary to ensure that institutions will comply and fails to ensure that the information provided to borrowers will allow them to compare the costs of overdraft to the costs of other short-term credit options.

We propose that at the time a customer is informed of the overdraft program the institution be required to disclose a chart showing the cost of overdraft, as expressed by an APR and a dollar amount, as compared to other credit products offered by the institution. The disclosure should be made for sample loans of $50 and $100 and with repayment periods of 7 days, 14 days, and the maximum number of days for repayment under the institution's overdraft loan program. The following chart is for a hypothetical institution that requires borrowers to repay overdraft loans within 30 days and charges $22[48] for an overdraft loan and 18%[49] for a line

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Board of Governors of the Federal Reserve System, *Annuul Report to the Congress on Retail Fees and Services of Repository Institutions*, June 2003, at p. 5 (finding that the average overdraft fee is 21.80).
[49] Washington Mutual rate for an unsecured line of credit that can be linked to a consumer's checking account to cover overdrafts. Personal communication with customer service representative, 8/6/04.

of credit. Additional columns should be added for other overdraft credit programs offered by the institution.

<u>Sample Disclosure for Cost of $50 Loan</u>

Days to Repay	Overdraft Loan APWDollar Amount	Line of Credit APWDollar Amount	[other overdraft credit program]
7	2,294% / $22	18% / $0.17	
	1,147% / $22	18% / $0.35	
30	535% / $22	18% / $0.74	

<u>Sample Disclosure for Cost of $100 Loan</u>

Days to Repay	Overdraft Loan APWDollar Amount	Line of Credit APWDollar Amount	[other overdraft credit program]
7	1.147% / $22	18% / $0.35	
14	573% / $22	18% / $0.69	
30	267% / $22	18% / $1.48	

Uniform information about the costs of loan programs will permit customers to comparison shop and receive accurate information about the costs of overdraft loan programs. The written disclosure for "discretionary" overdraft loan programs should state that those programs will not provide coverage for all overdrafts and should provide the name of those credit programs offered by the institution that provide guaranteed coverage. This best practice will address the Agencies' concerns that institutions are not giving accurate information to customers about the cost of overdraft loans and that overdraft loans are not differentiated from other credit products.

For disclosure to be truly meaningful, however, the borrower must also be given the opportunity at disclosure to not participate in an overdraft loan program **<u>and</u>** to choose to apply for one of the alternative credit programs. Disclosures without choice are not meaningful.

6. <u>Clearly explain discretionary nature of program.</u>

The Agencies propose that "information provided to consumers should not contain any representations that would lead a consumer to expect the payment of overdrafts is guaranteed or assured."[50] This best practice should include a statement that if financial institutions make any representations (written or oral) that state or imply that the program is nondiscretionary, the program will be considered a non-discretionary extension of credit covered by TILA, regardless of whether the institution also states that the program is discretionary. Such a requirement will prevent institutions from providing contradictory information to consumers and then arguing that consumers should not have expected that overdrafts would be paid. For example, one institution states that its **"discretionary"** overdraft privilege service "gives you the **peace of mind** of

[50] 69 Fed. Reg. at 31,863.

knowing your checks **will be paid rather than returned**."[51] These contradictory statements are intended to provide institutions with both the marketing benefits of a non-discretionary loan and the favorable treatment provided by the Board to discretionary loan programs.

In addition, institutions that operate "discretionary" overdraft loan programs should be required to make the following disclosure in writing:

> We reserve the right not to pay an overdraft at anytime. If we decide not to pay an overdraft, you may be subject to civil or criminal penalties for writing a check on an account with insufficient funds. If you would like guaranteed overdraft protection please inquire about [insert name of institution's other overdraft products].

This disclosure is an accurate characterization of programs that are operated in a manner that is consistent with the exemption on which the Board has relied. The disclosure also addresses the Agencies' concerns that overdraft loan programs are being portrayed as lines of credit.

7. Avoid promoting poor account management.

The Agencies propose that programs should not be marketed in a manner that encourages routine or intentional overdrafts.[52] The Guidance should be changed to prohibit the marketing of overdraft loan programs entirely. Advertising overdraft loans is inconsistent with the Board's reliance on the discretionary ad hoc nature of the program for its exemption from TILA and will encourage customers to overdraw their accounts. Promoting the use of an allegedly discretionary product is especially problematic given that customers have no guarantee that overdrafts will be paid. If the programs are truly only to be used to cover non-intentional overdrafts, it is inappropriate to advertise them to customers.

V. THE BOARD SHOULD REQUIRE INSTITUTIONS THAT PROVIDE OVERDRAFT LOANS TO REPORT CERTAIN DATA

Regardless of its decision on whether overdraft loans should be regulated under TILA, the Board should require institutions to report data on its overdraft loan programs. This would enable the Board and independent researchers to study overdraft loans' effect on borrowers, particularly low- and moderate-income borrowers. Institutions should be required to disclose how often account holders receive overdraft loans, the average length of time before an account is brought back to a positive balance, the overdraft loan fee, and the average amount of an overdraft. Institutions should also be required to report the ratio of the overdraft loan fees paid by each depositor over the course of a year to that person's average balance, which is data that almost all institutions already track. Institutions should provide additional information comparing overdraft loan users to non-users, including race and ethnicity, income, home zip code, average daily balance, and average amount of direct deposit.

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[51] Available at http://www.fidelitybank-pa.com/add_overdraft.asp (emphasis added).
[52] 69 Fed. Reg. at 31,863.

VI. CONCLUSION

We appreciate the opportunity to comment on the Board's proposals. We hope that the Board will reconsider its proposal and regulate overdraft loans under Truth in Lending Act. In the alternative, we urge the Agencies to take appropriate steps to lessen the potential harm to borrowers from this product while ensuring access to credit on appropriate terms. Please do not hesitate to contact CRL if you wish to discuss these issues in greater detail.

Sincerely,

Martin Eakes
CEO

Eric Halperin
Policy Counsel

Attachment A: Let the Language Speak for Itself

<u>Interagency Guidance on Overdraft Protection Programs, 69 Fed. Rep;. 31858,31862 (June 7,2004):</u>

"Institutions also are advised to monitor carefully their programs on an ongoing basis and adjust them as needed ***to account for credit risk."*** 69 Fed. Reg. 31858, 31859(emphasis added)

"Credit and reputational risks to the institution can also be minimized through the incorporation of these best practices." 69 Fed. Reg. 31858, 31860 (emphasis added)

"This credit service is sometimes offered to transaction account customers, including small businesses, as an alternative to traditional ways of covering overdrafts." 69 Fed. Reg. 31858, 31860 (emphasis added)

". . . these overdraft protection programs are marketed to consumers ***essentially as short-term credit facilities,*** and typically provide consumers with an express overdraft 'limit' that applies to their accounts." 69 Fed. Reg. 31858, 31860 (emphasis added)

"Aspects of the marketing, disclosure, and implementation of some overdraft protection programs, ***intended essentially as short-term credit facilities,*** are of concern to the Agencies." 69 Fed. Reg. 31858, 31860 (emphasis added)

"For example, some institutions have ***promoted this credit service*** in a manner that leads consumers to believe that it is a line of credit by informing consumer that their account includes an overdraft protection limit. . . ." 69 Fed. Reg. 31858, 31860 (emphasis added)

"Institutions ***should weigh carefully the credit, legal, reputation, and other risks*** presented by the programs." 69 Fed. Reg. 31858, 31860 (emphasis added)

"The overdraft protection programs discussed in this interagency guidance may expose an institution ***to more credit risk*** (e.g., higher delinquencies and losses) than overdraft lines of credit and other traditional overdraft programs because of a lack of individual account underwriting." 69 Fed. Reg. 31858, 31861 (emphasis added)

"Therefore, institutions providing overdraft protection programs should adopt written policies and procedures adequate to ***address the credit, operational, and other risks*** associated with these types of programs." 69 Fed. Reg. 31858, 31861 (emphasis added)

"Institutions also should monitor these accounts on an ongoing basis and be able to identify individual consumers who may be excessively reliant on the product or who may ***represent an undue credit risk*** to the institution." 69 Fed. Reg. 31858, 31861 (emphasis added)

"The programs should be administered and adjusted, as needed, to ***ensure that the credit risk*** remains in line with expectations." 69 Fed. Reg. 31858, 31861 (emphasis added)

"For example, there should be established procedures for the suspension of overdraft services when the account holder ***no longer meets the eligibility criteria*** (such as when the account holder has declared bankruptcy ***or defaulted on <u>another loan</u>)*** as well as for when there is a lack of repayment of an overdraft." 69 Fed. Reg. 31858, 31861 (emphasis and double emphasis added)

"In those instances, the charge off timeframes described in the FFIAC Uniform Retail ***Credit Classification*** and Account Management Policy would apply." 69 Fed. Reg. 31858, 31861 (emphasis added)

"***<u>Overdraft balances should he reported as loans</u>.***" 69 Fed. Reg. 31858, 31861 (double emphasis added)

"Accordingly, overdraft losses (other than the portion of the loss attributable to uncollected overdraft fees) ***should be charged off against the allowance for loan and lease losses*** and uncollected overdraft fees should be reversed against overdraft fee income or estimation processes to ensure that any allowances related to earned fees reflect all estimated losses and that earned but uncollected fees are accounted for accurately." 69 Fed. Reg. 31858, 31861 (emphasis added)

"The procedures for estimating an adequate allowance should be ***documented in accordance with the Policy Statement on the Allowance for Loan and Lease Losses*** Methodologies and Documentation for Banks and Savings Institutions." 69 Fed. Reg. 31858, 31861 (emphasis added)

"The Agencies also expect proper ***risk-based capital treatment*** of outstanding overdrawn balances and unused commitments." 69 Fed. Reg. 31858, 31861 (emphasis added)

"***State laws that may be applicable include usury*** and criminal laws, and laws regarding unfair or deceptive acts or practices." 69 Fed. Reg. 31858, 31861 (emphasis added)

"<u>When overdrafts are paid, credit is extended</u>." 69 Fed. Reg. 31858, 31862 (double emphasis added)

"Under the Equal Credit Opportunity Act (ECOA) and Regulation B, creditors are prohibited from discriminating against an applicant on a prohibited basis ***in any aspect of a credit transaction. This prohibition applies to overdraft protection programs."*** 69 Fed. Reg. 31858, 31862 (emphasis added)