Consumers Union

June 27, 2008

Ms, Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave, NW
Washington DC 20551

Re: Regulation AA- Unfair or Deceptive Acts or Practices and Regulation DD- Truth in Savings

Office of Thrift Supervision: Docket ID OTS-2008-0004
National Credit Union Administration: RIN 3133-AD47
Federal Reserve Board: Regulation AA: R-1314 & Regulation DD: R-1315

Dear Chairman Bernanke, Members of the Board, and Board Secretary Johnson:

Consumers Union of U.S., Inc, the nonprofit publisher of *Consumer Reports,* writes to comment on proposed Regulation AA - Unfair or Deceptive Acts or Practices [R-1314], the recent proposal to curb unfair and deceptive credit card and overdraft practices and companion proposal Regulation DD [R-1315] regarding the form and content of disclosures under the Truth in Savings Act. We appreciate the fact that the Federal Reserve Board (Board), Office of Thrift Supervision (OTS), and National Credit Union Administration (NCUA) (collectively "Agencies") recognize that the current practices in the application of overdraft loan programs, which the proposals refer to as "overdraft services," are unfair. However, there are changes that should be made to the proposed rules to ensure that they adequately address the abuses and unfair practices in overdraft loans.

Our comment will address the positive changes proposed in Regulation AA [R-1314], and Regulation DD [R-1315], and will highlight those issues we believe could better protect consumers from unfair practices. This comment addresses overdraft loan and deposit services issues. A separate comment letter addresses the credit card issues in docket R-1314.

Our comments will discuss the following issues:

- The rule should provide consumers the right to affirmatively opt in to overdraft loan programs rather than opt out.

- Financial institutions should decline debit transactions if there are insufficient funds, rather than applying an overdraft loan program.

- If the Agencies retain the opt-out approach, it should be limited to check and ACH payments with affirmative opt-in required for debit card transactions. Also, financial institutions should not be permitted to asses any overdraft fee until after the first overdraft instance when explicit opt-out notice is given.

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- Fee-based overdraft loans are extensions of credit and should therefore be subject to the Truth in Lending Act requirement to disclose the cost in terms of the annual percentage rate.

- Financial institutions should provide consumers with fee-triggered opt-out notification, or at the very least, notify consumers of the opt-out right once within the month during which an overdraft fee has been assessed, even if the account has quarterly statements.

- The rule should address unfair transaction clearing practices in deposit accounts.

- The rule should prohibit financial institutions from assessing bounced check (NSF) fees when a check bounces solely due to a debit hold.

- The rule should ban overdraft fees and NSF fees when the overdraft would not have occurred but for a funds availability hold on deposited funds.

- The format and content requirements detailed in Section 230.10(b) need to be slightly modified.

- Financial institutions should not display as available those balances that reflect funds not yet available for use due to a check hold.

I. Section 227.32: Automatic enrollment in overdraft services is an unfair practice, even when the consumer is provided the opportunity to opt out.

Section 227.32(a)(1) requires financial institutions to give consumers notice and an opportunity to opt out before making an overdraft loan. We applaud the Agencies' efforts to address the systemic unfair practice of enrolling consumers by default in overdraft loan programs. These programs cost consumers $17.5 billion in fees annually, for $15.8 billion in loans.[1] The fee-based overdraft system is biased against lower balance households and can significantly inflate the true monthly cost of holding an account. This is especially unfair considering these services are often attached to accounts that are advertised as free but which in reality make the accounts uneconomical.[2] This gives bank accounts a bad name with some segments of the public and creates a barrier to consumers entering into the banking market. For these reasons we respectfully suggest that the rule be further tightened.

The proposed rule allows financial institutions to continue enrolling consumers in expensive overdraft loan programs without their affirmative consent. We urge the Agencies to change the proposed rule and require financial institutions to obtain the affirmative consent of consumers in writing to receive overdraft services before the first time that any overdraft fee is charged to the consumer's account.

A. The purported benefits of overdraft loan programs are grossly overstated.

Overdraft loan programs do not benefit consumers to the extent that financial institutions claim. The Agencies' analysis discusses the rare occasion when a consumer, who was never asked if

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[1] Eric Halperin & Peter Smith, *Out of Balance,* Center for Responsible Lending, July 11, 2007, at 11, *at* http://www.responsiblelending.org/pdfs/out-of-balance-report-7-10-final.pdf.

[2] Rhea L. Serna, "*Free Checking" is not Free. A Closer Look at Overdraft Fees: How California's Largest Banks Profit from Low-Balance Account Holders,* California Reinvestment Coalition, November 19, 2007, *at http://www.calreinvest.org/banking-insurance/overdraft-fees.*

he or she wanted high-fee overdraft credit, might benefit from the coverage of an important check, such as a mortgage, auto, or insurance payment. But these programs provide no assurance that such important payments will be covered, because for any individual check, the overdraft program is discretionary on the part of the bank.

Financial institutions assert that these high cost programs are valuable because they *may* cover special purpose mortgage or insurance checks, which are generally larger checks. This is inconsistent with the fact that the average transaction paid through an overdraft loan is significantly smaller than an average mortgage, auto, or insurance payment. Studies show that fee-based overdraft loans are very small, averaging $27, whereas the fees charged by the bank average $34.[3] These overdraft programs are not being used to cover large important payments, instead the loan amount is often even smaller than the fee assessed. Any assumption that overdraft programs benefit consumers by covering important checks is further invalidated because 46 percent of all overdrafts are triggered by debit card point of sale transactions, while only 27 percent are triggered by paper checks.[4] Therefore, the claim that there is a benefit for overdraft services stemming from special nature payments, such as mortgage payments, is weak at best and in any case not applicable to debit payments.

We suggest the following modification to §227.32: Because almost half of all overdraft loans are triggered by debit card purchases and most of these are significantly less than the overdraft fees assessed, it should be an unfair practice to charge an overdraft loan fee for a debit transaction. The institution can simply decline debit transactions if there are insufficient funds. A recent survey shows that consumers overwhelmingly want debit transactions to be declined if the account will become overdrawn, rather than be subject to overdraft fees.[5]

B. The Agencies should replace the opt-out requirement in §227.32(a)(1) with an affirmative opt-in requirement.

We question the assertions made by financial institutions about the value to consumers of overdraft programs. If overdraft programs in fact have substantial benefit to consumers, then financial institutions should be able to persuade customers to sign up for them. We therefore recommend requiring an opt-in system that puts the market incentives in the right place. The entity that wants to sell the product and collect the fees must educate its customers sufficiently about the product to get customers to affirmatively sign up. Opt-out lacks the same market incentives as opt-in. Because the financial institution does not have to go through the process of selling its overdraft program to customers under an opt-out system, it has less incentive to create a product that is a good value for the consumer.

The proposed rule is insufficient because it leaves enrollment in overdraft programs (and the potential to incur high fees) as the status quo. There is a tremendous difference between an affirmative opt-in versus a negative option opt-out. Behavioral economists have shown that consumers are much more likely to contribute to retirement plans if the plans automatically enroll them but permit an opt-out, than if consumers are required to affirmatively opt-in.[6]

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[3] Halperin & Smith, *supra* note 1, at 4.

[4] Eric Halperin & Lisa James & Peter Smith, *Debit Card Danger,* Center for Responsible Lending, January 25, 2007, at 3, *at* http://www.responsiblelending.org/pdfs/Debit-Card-Danger-report.pdf.

[5] Leslie Parrish *Consumers Want Informed Choice on Overdraft Fees and Banking Options,* Center for Responsible Lending, April, 16. 2008, at 4, *at* *http://www.responsiblelending.org/pdfs/final-caravan-survey-4-16-08.pdf.*

[6] Richard H. Thaler and Shlomo Benartzi, *Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving*, August 2001, available at http://faculty.chicagogsb.edu/richard.thaler/research/SMarT14.pdf.

Similarly, the percentage of consumers who will end up sticking with an expensive overdraft loan program will be much higher with the opt-out because the consumer is automatically "enrolled". Setting the default option is crucial, because inertia is a powerful force.

An opt-out system creates the added challenge of ensuring that consumers have adequate information and notice to make an educated decision. If not, the opt-out is meaningless. In order for a consumer to assess whether an overdraft program is in his or her financial interest, the notice must be clear and adequately explain the program. The consumer must be able to read and understand the materials, have sufficient financial literacy, and have time to make the evaluation. A small group of vulnerable consumers pay the majority of fees associated with discretionary overdraft loan programs.[7] Repeat users of overdraft loan programs are more often low-income, single and non-white and do not own their homes. Just 16 percent of overdraft loan users account for 71 percent of overdraft loan fees, while a core group of 6 percent account for almost half of the fees generated by these programs.[8] This data shows that certain groups are disproportionately affected by overdraft loan programs and an opt-out system does not go far enough to protect them.

C. If the Agencies retain opt-out, there are modifications that can make it fairer.

We suggest the following modification to §227.32(a)(2): Section 227.32(a)(2) requires banks to provide consumers with the option to opt out only for the payment of overdrafts triggered by ATM or debit transactions. By including this provision in the proposed rule, the Agencies recognize that these overdraft loans are more costly to the consumer relative to the loan amount than overdraft loans triggered by check and ACH payments. As discussed above, because an opt-out system will not protect consumers as well as opt-in, this provision does not go far enough to prevent the disproportionate impact these overdraft programs have on debit card users.[9]

If the Agencies retain the opt-out approach, it should be limited to check and ACH payments, with affirmative opt-in required for overdraft loans triggered by debit card transactions. This modification will protect consumers in a real way and should be no less of a technical challenge than what is currently being proposed in §227.32(a)(2). In both cases, payments would need to be tagged to determine which program they fall under.

We do not support a regulatory limitation that would grant consumers the right to opt out only from ATM and debit card transactions. At the very least, consumers should have the rights currently delineated in proposed §227.32(a)(2) to choose between a partial opt-out and an opt-out for all transactions.

We suggest the following additional modification to §227.32: The Agencies should prohibit an overdraft fee from being assessed until after the first overdraft instance when explicit opt-out notice is given. This change would ensure that financial institutions that use the opt-out are restricted from applying an overdraft charge before the consumer has been told what is at stake in the context of an actual overdraft. This could be used in conjunction with the above suggestion to apply opt-in to debit card transactions even if the Agencies retain opt-out for other payments.

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[7] Lisa James & Peter Smith, *Overdraft Loans: Survey Finds Growing Problem for Consumers*, Center for Responsible Lending, April 24, 2006, at 3, *at* http://www.responsiblelending.org/pdfs/ip013-Overdraft_Survey-0406.pdf.
[8] *Id.*
[9] Halperin & James & Smith, *supra* note 4, at 3

With this suggested modification, the rule would work as follows. A consumer overdraws the account for the first time. The bank then sends an initial notice explaining to the customer that he or she overdrew the account by $X and the bank covered it for free this first time through the overdraft loan program. The notice would then explain that unless the customer opts out of the program, the next overdraft will trigger a fee of $XX. All other disclosures required by proposed §230.10 would also be contained in this notice. Financial institutions that wish to charge customers for the very first overdraft loan could obtain the customers written affirmative consent to opt in to the loan program prior to making the first overdraft charge.

II. Overdraft loans are extensions of credit and should not be treated as if exempt from TILA.

There is an outdated distinction being made between overdraft programs that are subject to the Truth in Lending Act (TILA) and Regulation Z, such as checking accounts that link to a savings account, line of credit or a credit card, and those discretionary fee-based programs being addressed in this proposal, which the Agencies have treated as if they are exempt from the TILA/Regulation Z requirements. Though the distinction might have had some merit in a time when financial institutions covered the occasional overdraft on a case-by-case basis as a courtesy to account holders, this is no longer the case.

The Agencies noted in the 2005 Interagency Guidance on this subject,[10] that some financial institutions promote overdraft services in a way that leads consumers to believe that it is a line of credit. In addition to the one-time overdraft fee that is assessed when a transaction overdraws an account, financial institutions often charge an additional fee each day that the account remains overdrawn. Essentially the banks are charging the customer ongoing fees to borrow money, which is more like a credit transaction than a fee for service.

In the Board's Regulation DD proposal, financial institutions will be required to disclose alternatives for the payment of overdrafts, including any lines of credit that are regulated by Regulation Z. Because those lines of credit are subject to TILA disclosures it is deceptive to have no TILA disclosures for the overdraft loan programs because it makes the line of credit look more expensive and may deceive consumers into not choosing it for that reason.

The Agencies acknowledged in 2005 that the application of TILA and Regulation Z regulatory exceptions to these fee-based programs may need to be reevaluated sometime in the future.[11] The time is here. We urge the Agencies to acknowledge that fee-based overdraft loans are extensions of credit and should therefore be subject to TILA and Regulation Z requirements to disclose their cost in terms of annual percentage rate.

III. The rule should provide increased periodic opt-out opportunities triggered by overdraft fee assessment.

A. The periodic opt-out notice is essential, and once per statement period may be too seldom to receive the opt-out notice for some consumers.

We suggest the following modification to §227.32 (a)(1): Section 227.32(a)(1) requires financial institutions to offer consumers the opportunity to opt out of the overdraft loan program once during any statement period in which an overdraft fee is charged. This requirement is essential and should be retained, as well as strengthened. Once per statement period or even once per month (see our suggestion in Section III.B) may not sufficiently notify some consumers of their

[10] *Joint Guidance on Overdraft Protection Programs*, 70 FR 9127, at 9129 (February 24, 2005).
[11] *Id* at 9128.

opt-out right. A consumer is likely to be most aware of the household cost and any personal trade-offs involved in the receipt of this expensive form of credit immediately after the fee has been charged.

We recommend that the rule require opt-out notification once per incident or series of consecutive incidents that trigger one or more fees. If a consumer receives the opt-out notice each time this high fee is triggered he or she could become educated about the risks and expense of overdrafts, which could lead to beneficial behavioral changes. If overdraft programs are a genuine service (as financial institutions contend,) rather than a form of credit which encourages the overdrafting of accounts, then financial institutions as well as customers will be served by the educational function of the fee-triggered opt-out notice.

> *B. Persons receiving quarterly statements should still receive the opt-out notice in any month in which they incur an overdraft fee.*

If our suggestion in Section III.A is not adopted, we suggest the following modification to Section §227.32(a)(1): If the Agencies do not require an fee-triggered opt-out notice for each incident, then they should at least require that the opt-out notice be sent each month, as opposed to each statement period following an overdraft. This would protect student accounts and other special, often low-balance accounts that receive quarterly, rather than monthly statements. Since low-balance consumers may be at higher risk of encountering overdraft fees, they may be the most in need of prompt notification of overdraft charges. If the rule stays in its current form, these consumers will have to wait up to three months for a quarterly statement informing them that a fee was assessed and giving them the option to opt out. At the very least, the rule should be amended to require the notice and opportunity to be provided at least once per periodic statement period or once per month, whichever is more frequent.

IV. Unfair transaction clearing practices should be addressed in the rule.

The proposed rule should prohibit financial institutions from assessing overdraft or NSF fees in amounts greater than would occur under low-to-high clearing of batch processed transactions. As noted in Congressional testimony from the Consumer Federation of America:

> Banks decide the order in which withdrawals will be processed from accounts which has a large impact on the frequency of overdrafts and the cost to consumers with low balances. A bank that pays the largest check first can cause more checks to bounce for low-balance customers and can charge a penalty fee for each one. Consumers do not know the order in which items drawn on their account will be presented to their bank and are not likely to know the order in which their bank pays items. As a result, the Federal Reserve noted in adopting Truth in Savings regulations[12] that consumers who are aware that their account may be overdrawn are not likely to know the number of items that will bounce or the total fees they will be charged.[13]
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> …The justification banks give for clearing checks high to low is to make sure important big ticket items are paid, but that rationale can not justify this practice for banks that routinely cover overdrafts because all debits will get covered. If

[12] Truth in Savings, 12 CFR Part 230, at http://www.federalreserve.gov/BoardDocs/Press/bcreg/2005/20050519/attachment.pdf.

[13] Jean Ann Fox, Testimony before the Subcommittee on Financial Institutions and Consumer Credit, U. S. House Committee on Financial Services, (July 11, 2007), available at http://www.consumerfed.org/pdfs/OD_Maloney_Overdraft_Loan_Testimony071107.pdf.

> banks choose to pay transactions that overdraw accounts for the vast majority of customers, this is a moot argument. The only purpose for clearing the largest transactions first is to maximize the imposition of multiple overdraft fees for low balance customers. [14]

We urge the Agencies to address this issue in one of two ways. One approach is to prohibit financial institutions from engaging in the unfair practice of delaying the posting of any deposit or manipulating the order in which withdrawals are posted if such practice results in one or more overdrafts or NSFs that trigger a fee which would not have occurred with a different order of posting. This is in line with the recommended guidance put forth by the OTS, that transaction clearing rules should not be administered unfairly or manipulated to inflate fees.[15]

Alternatively, we recommend that the Agencies require financial institutions to pay lower dollar items before higher ones when batch processing, or to impose no fees greater in number than would have been imposed if they had done so. We have no objection to the concept of a fully informed opt-in, if in a rare case the consumer affirmatively requests an alternate clearing order.

V. The rule should cap the daily and monthly totals for allowable overdraft fees.

We strongly recommend that the Agencies place a cap on the daily and monthly totals for allowable overdraft fees. It is bad for the account holder's long term fiscal health and bad for the payments system to allow overdraft fees to accumulate unrestrained. It creates an incentive for financial institutions to facilitate payments where there are not enough funds. One study has shown that when banks implement bounce protection policies, they experience a 50 percent increase in overdraft checks.[16] The Agencies should look into how much these programs cost high volume users (accounts with more than three overdrafts per six month period,) not just at the average cost for all consumers. A recent study showed that 10 percent of consumers surveyed paid 53 percent of the overdraft fees charged.[17] If the Agencies do not act now to cap the total fee accrual, the docket should be kept open so that the record in this proceeding can be used to support placing a cap in the future.

VI. Section 227.32(b): The Agencies should include NSF fees in the proposed rule's debit hold provision and should prohibit financial institutions from assessing any fee if the overdraft is caused by a deposit hold.

Section 227.32(b) prohibits financial institutions from assessing an overdraft fee when the overdraft would not have occurred but for a debit hold placed on funds in the account that exceeds the actual purchase amount. This provision is a positive step towards curbing an unfair practice, but does not go far enough. Many consumers do not know that holds are often placed by retailers when they use their debit card to make a purchase. In a recent Consumers Union online questionnaire,[18] consumers were asked how they found out that money had been frozen after they filled up at the gas station. Over 10 percent of respondents said that the only reason they realized a debit hold had been placed was because they received an overdraft fee.

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[14] *Id.*
[15] *Guidance on Overdraft Protection Programs*, 70 FR 8428, at 8431 (February 14, 2005).
[16] Jean Ann Fox, *Overdrawn: Consumers Face Hidden Overdraft Charges From Nation's Largest Banks*, Consumers Federation of America, June 9, 2005, at 13, *at* http://www.consumerfed.org/pdfs/CFAOverdraftStudyJune2005.pdf.
[17] Parrish, *supra* note 5, at 3.
[18] Information on file with Consumers Union.

Section 227.32(b) will ensure that consumers are not penalized for a problem caused by the bank's decision to place a debit hold on the consumer's checking account.

This provision does not go far enough because: 1) it allows financial institutions to continue charging bounced check fees (NSF) when a check bounces due to a debit hold; and 2) the rule ignores the issue of overdraft fees and NSF fees caused by a deposit hold rather than by a debit hold.

A. It is also an unfair practice for a financial institution to charge an NSF fee when a check bounces due to a debit hold.

Under the proposed rule financial institutions will be able to continue charging consumers NSF fees when a debit hold triggers a bounced check. This practice is unfair for all the same reasons that make the overdraft fee unfair when caused solely by the debit hold. Banks will have no incentive to improve the debit hold system if they simply swap the overdraft and loan fee for an NSF fee. The justification that financial institutions often give for charging NSF fees is to change consumer behavior, or deter consumers from writing bad checks. This asserted justification is particularly lacking if the bank's and merchant's debit hold processing methods, not true lack of funds, cause the check to bounce. The Agencies' legal analysis regarding the unfairness of overdraft fees due solely to debit holds should be equally applied to NSF fees caused by debit holds.

B. It is unfair to assess overdraft or NSF fees caused by a deposit hold.

Consumers whose banks choose to impose long check hold times may still get stuck with overdraft fees or NSF check fees due to this practice. The principle behind the debit hold rule is that it is unfair for a financial institution to charge fees for events caused by its own practices. The Agencies' legal analysis, that overdraft fees triggered by debit holds are an unfair practice, also applies to overdrafts and NSFs caused by deposit holds.

Consumers are harmed when they incur NSF or overdraft fees solely due to a financial institution's check hold policies. It is difficult for consumers to know how long to wait before they have full access to their funds. Hold notices can be sent by snail mail, with checks clearing against the held deposit even before notice is mailed. These practices make it very difficult for consumers to know when a transaction will exceed the available funds and therefore should not be assessed a fee if they do happen to overdraft. We recommend that financial institutions be prohibited from assessing an NSF or overdraft loan fee if the fee would not have been incurred but for the delay in funds availability due to a check hold. It seems particularly wrong to allow an overdraft loan fee in the time between the actual clearing of the deposited check that covers that transaction and the end of a longer funds availability hold on that same deposit.

Example: A financial institution quickly withdraws funds from Consumer A's account when Consumer A writes a check to Consumer B. But the bank does not apply the same speed when crediting Consumer B's account with the deposited funds. We suggest that no fee be assessed to Consumer B for a transaction that would have cleared had the deposit not been delayed by the bank's funds availability policy. An exception to the rule would apply if Consumer B's transaction would have triggered an overdraft despite the hold. In this case, the overdraft was not caused by the bank's practice and the fee can be fairly assessed.

VII. Section 230.10(b): Consumer testing, opt-out disclosures and delivery of opt-out notices.

The Regulation DD analysis states the Board's intention to engage in consumer testing about the form and manner of the opt-out. We agree that this will be essential, but it should be done promptly so that it does not delay implementation of the Regulation AA requirements. In order for a consumer to assess whether an overdraft program is in his or her financial interest, the notice must be clear and adequately explain the program. However, a well-written notice is not enough for many consumers. The consumer must be able to read and understand the notice, have sufficient financial literacy and have time to make an evaluation. People who are unable to do this assessment will be disproportionately affected and the opt-out will be meaningless for them. We therefore urge the Board to perform testing that will determine the basic level of understanding communicated by any overdraft opt-out notice, however well crafted. If the testing shows—as we believe it will—that opt-out is hard to communicate, difficult to understand, or unlikely to be used, this is another strong reason for the Agencies to change to an opt-in rule.

In §230.10(b) the Board delineates the format and content requirements of the opt-out notice. With respect to the model form, we urge the Board to consider not only the words of the form, but also the timing and manner of presentation for maximum effectiveness. We respectfully submit our comments on each sub section of this provision of the proposed rule:

- Overdraft Policy, §230.10(b)(1): We support the requirement that the opt-out notice state the categories of transactions that can trigger overdraft fees. This lets the consumer know that because the account is covered by the bank's overdraft loan program there will be no notice at the time of payment if the consumer's account does not have funds to cover the transaction.

- Fees Imposed, §230.10(b)(2): Though we support the requirement that the opt-out notice state the fees that will be charged when an overdraft is covered, as we discussed in Section II above, we urge the Board to reevaluate the validity of treating fee-based overdraft loan programs as exempt from TILA.[19] Consumers should be notified of the fees and costs associated with every overdraft product offered by the bank in terms of the annual percentage rate. This will help to ensure that consumers receive adequate information to support more informed decisions.

- Fee in Relation to Overdraft, §230.10(b)(3): We support the requirement that the opt-out notice give the lowest dollar amount that can trigger an overdraft fee. This could serve to educate consumers and may influence the market in a helpful way by encouraging financial institutions to compete in structuring their overdraft programs. The market might reward financial institutions who select a *de minimus* amount below which the fee won't be charged. For example, a financial institution could choose to set the threshold for charging an overdraft fee at $10, or $25, or a loan amount equal to the overdraft fee.

- Maximum Cost, §230.10(b)(4): Though we support requiring banks to disclose the maximum amount of overdraft fees they will charge per day and per statement period, as we discussed in Section V, we strongly recommend that the Agencies place a cap on the daily and monthly totals for allowable overdraft fees under Regulation AA.

[19] 12 CFR § 226.4(c)(3) (1996).

- Disclosure of Opt-Out, §230(b)(5): We support requiring a notice explaining the right to opt out along with how a consumer may exercise that right. We recommend the notification be in an easy to understand form that allows the consumer to check a box or sign the form to turn it in. The form should be printed with the address to which it can be sent.

    - For web-based account opening or web-based statements, the testing should evaluate the ways in which the form can be presented for effectiveness. The regulation should prohibit a web presentation that minimizes the likelihood that the form will be seen, read, or considered. In addition, all opt-out forms, particularly web forms should ask for only necessary information in order to alleviate any consumer fears about identity theft that may deter use of the form. Further, the rule should prohibit a financial institution from requiring a consumer to consent to solely electronic disclosures as the condition for using an electronic opt-out form.

    - All of the following opt-out methods should be available to consumers each time they are given the opportunity to opt out: paper form with a check-off box and printed address for return; toll free phone number without long or complex menu barriers; and a web request page.

    - All opt-out notices that are triggered by an overdraft fee assessment should be sent to consumers independently from other bank communications (except the §230.11 disclosures) to best ensure that the notice comes to the consumer's attention.

    - The content of the opt-out notice that is triggered by assessment of an overdraft fee should state the amount of the transaction that caused the consumer to overdraw the account as well as the amount of the fee. Seeing these two numbers together should help educate the consumer about the actual cost of overdrawing the account and hopefully shape behavior. The amount of the fee should always be included in the opt-out notice, even if the account statement also reflects the fee. The opt-out notice should stand alone and be usable without reference to other materials.

- Alternative Overdraft Options, §230(b)(6): We strongly support the requirement that the opt-out notice include information about other overdraft services offered by the financial institution. Lower cost options should not be kept only for those who can discover them on their own, or offered to some customers and not others. However, as we discussed in Section II, we also urge the Board to require financial institutions to disclose the cost of all programs in terms of the annual percentage rate. Otherwise, the lower-cost line of credit may look deceptively more expensive than the overdraft loan program, since APR disclosures are required for lines of credit.

VIII. Section 230.10(c): Initial opt-out notice must be given to all account holders.

We support the Board's chosen language in §230.10(c)(1) that requires opt-out notification before a financial institution may assess any fee for covering an overdraft. However, we ask the Board to change the analysis that this requirement only applies to accounts opened after the effective date of the final rule. The rule's language makes this requirement applicable to all account holders, and that is essential. The opt-out notice is an attempt to protect consumers from an unfair practice, and part of the protection is that a consumer will receive a notice before

the bank assesses a fee. This is a warning and chance for those consumers who understand the notice to make a decision about whether they want to participate in the program. Current account holders should not receive less protection than new account holders. Therefore we urge the Board to make clear in the analysis that this provision will be applied to current as well as new account holders.

We suggest adding another provision under §230.10(c): The rule could be improved by specifying that opt-out notification be given at the time of account opening in an easy to understand form that allows the consumer to check a box or sign the form and submit it along with other account opening papers. If the consumer does not turn in the form at the time of account opening, the opt-out notice should be provided in a paper form which the consumer can retain, and without further information, fill out and send in at a later time. See Section III for more recommendations on the timing of opt-out notices.

IX. Section 230.11(a): Aggregate fee and balance disclosure requirements should apply to all financial institutions.

Section 230.11(a) governs the disclosure of aggregate fee disclosures. We strongly support the Board's decision to apply this subsection to all financial institutions, whether or not they promote the payment of overdrafts. Whether or not the financial institution advertises the program does not change the benefit to consumers of clear notification of their aggregate fees. It is essential that all consumers who are subject to overdraft fees are protected by the same disclosure rules and we support the Board's decision to apply this requirement to all institutions.

X. Section 230.11(c): Balances should not reflect funds that are subject to a check hold.

Section 230.11(c) prohibits institutions from disclosing a balance, on all automated systems, that reflects funds the institution may provide to cover an overdraft. We strongly support this provision because this practice is fundamentally deceptive. Misstating the balance makes it much harder for a consumer to avoid overdrawing the account.

We suggest the following modification to §230.11(c): Balance inquiries can still be deceptive if the balance shows as available those deposited funds that are subject to a funds availability hold at the time the balance is requested. This practice has the same adverse consequences as misstating the balance by including overdraft coverage. It is misleading for a consumer to receive a balance that shows as available those funds that will trigger a fee if spent. We urge the Board to add a provision that would prohibit balances shown to the consumer from reflecting deposited funds as if they were fully available, when the funds are not yet available to the consumer. If the Board is hesitant to require this now, then the Board should define this as a recommended practice for one year, and then reconsider formally requiring this further level of accuracy for balance disclosures.

XI. There should be an early effective date.

The Agencies seek comment on the effective date. That date should be as early as possible. Overdraft loan fees take significant funds from families who have never consented to those programs. In the current economy, these funds are needed at the grocer, the gas pump, and many other places.

XII. Conclusion.

We applaud the Agencies for recognizing, through this proposed rule, that overdraft loan programs are inherently unfair if consumers are not clearly notified that they are enrolled in the service. The opt-out solution is a partial step forward, but it does not go far enough to protect the disproportionate number of consumers who are affected by these unfair practices. We respectfully ask that you strengthen this rule to provide consumers the right to affirmatively opt in to overdraft loan programs rather than opt out. If the Agencies decide to keep the opt-out, we suggest limiting it to check and ACH payments, with affirmative opt-in required for overdraft loans triggered by debit card initiated overdraft payments. In addition, we ask that the Agencies prohibit an overdraft fee from being assessed until after the first overdraft instance when explicit opt-out notice is given. This will help protect consumers from the opt-out system which allows them to be enrolled by default in expensive loan programs.

We look forward to the continuing work of the Board, the OTS, and the NCUA on these important issues.

Sincerely,

Lauren Zeichner
Staff Attorney
Financial Services Campaign
Consumers Union

cc: JoAnn Johnson, Chairman, NCUA Board
Mary F. Rupp, Secretary, NCUA Board
John M. Reich, Director, OTS