



March 12, 2009

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

Re: Regulation E- Limitations on fee-based automatic overdraft loan programs.

Federal Reserve Board: Regulation E: R-1343

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 E – Electronic Fund Transfers [R-1343], the recent proposal to limit the ability of financial institutions to assess fees for paying ATM and one-time debit transactions that overdraw a consumer's account. Consumers Union asks the Board to adopt Alternative 2- Opt-In Approach, which will allow overdraft loan fees only if the consumer has affirmatively consented to being enrolled in a program offered by their financial institution. *Consumer Reports* National Research Center conducted a nationally representative telephone poll about common bank policies involving overdraft fees,¹ which found that many people don't expect to be charged a fee when they overdraw their account. This suggests that if Alternative 1- Opt-Out Approach is adopted, consumers will be unlikely to opt out of a program of which they are unaware. We have attached this poll as Appendix B and it provides strong evidence of consumer preferences regarding these programs.

We are glad that the Board has enhanced the proposal, by including for consideration the opt-in approach, although we feel the proposal is limited because it does not regulate overdraft coverage of checks, ACH and recurring debit payments. In our comment to the May 2008 FTC Act Proposal (incorporated as Appendix A,) we emphasized that only an affirmative opt-in requirement would provide the necessary consumer protections and we repeat this emphatically here. An opt-in approach to overdraft loan programs is the only way to ensure that consumers do not incur fees for services that detract from their personal economic stability. While we also offer suggestions to somewhat strengthen the opt-out approach, that alternative will not adequately protect consumers even with improvements. In the following sections we will highlight points discussed in our comment to the May 2008 FTC Act Proposal as well as points specific to this new proposal.

Our comments will discuss the following issues:

- The rule should provide consumers protection by prohibiting banks from assessing overdraft loan fees unless the consumer has affirmatively opted into a program. This is superior to an opt-out approach.

¹ See FINAL REGULATION POLL FINAL REPORT, *CONSUMER REPORTS* NATIONAL RESEARCH CENTER, February 13, 2009. This document is attached as- Appendix B.

West Coast Office
1535 Mission Street ■ San Francisco, CA 94103
415.431.6747 Tel ■ 415.431.0906 Fax

- The Board should reconsider using its authority under the FTC Act to regulate automatic fee-based overdraft loan coverage of checks, ACH payments and recurring debits.
- 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.
- The rule should address unfair transaction clearing practices in deposit accounts, as these practices increase the number of overdrafts and result in significantly more fee income for banks.
- The Board should require implementation no later than 90 days from the date of the final rule.
- The Board should provide specific requirements in the regulatory language to ensure that consumers are given adequate time and means to invoke their opt-in or out rights.
- Payment of checks should not be conditioned upon the consumer's decision regarding overdraft loan coverage of ATM and debit transactions.
- The terms and conditions of a consumer's bank account should be identical regardless of their decision regarding overdraft coverage of ATM and debit transactions.
- If the opt-in approach is adopted, existing customers should not be assessed overdraft loan fees unless they have received notice and made an affirmative choice to sign up. Existing customers should receive the same rights as new customers.
- The rule should ban overdraft loan fees when the overdraft would not have occurred but for a funds availability hold on deposited funds.
- The Board should be aware of a potential loophole in the debit hold provision.

I. Automatic enrollment in overdraft services is unfair to consumers, even with a right to opt out. It is essential that the Board adopt the opt-in approach.

The proposal seeks comment on two alternatives for regulating automatic overdraft coverage of ATM and debit transactions; opt-in and opt-out. We applaud the Board for recognizing, in the explanatory material of the May 2008 FTC Act Proposal, that this systemic practice of enrolling consumers by default in overdraft loan programs is statutorily unfair. But as we discussed in our comment to that proposal, the purported benefits of overdraft loan programs are grossly overstated. If such programs in fact have substantial benefit to consumers, then financial institutions should have to persuade customers to sign up. Because financial institutions do not have to go through the process of selling overdraft programs to customers under an opt-out system, there is less incentive to create a product that is a good value for the consumer. The opt-out approach is insufficient because it leaves enrollment in overdraft programs (and the potential to incur high fees) as the status quo. It puts an unfair burden on the consumer to reject this service when evidence suggests that most account holders will not alter the initial

default status of their account.² Therefore we ask the Board to adopt the opt-in approach which is the only way to ensure that consumers are truly protected from fee-based programs that detract from their economic stability.

A. Consumers are generally uninformed about how banks treat debit and ATM transactions when they overdraw their accounts.

The *Consumer Reports* National Research Center poll indicates that many consumers do not understand what will happen if they attempt to use their debit or ATM card without sufficient funds in their account.³ Thirty-nine percent of people thought that their bank would either deny a debit transaction or allow it to proceed without charging a fee.⁴ This percentage increased when asked what would happen at the ATM. Forty-eight percent of those polled thought the ATM card would not work at all if the account balance were too low and another 10% thought they would not be assessed a fee if the bank allowed the withdrawal.⁵

These impressions are not in line with the FDIC's confirmation in a study released in November 2008, that "a significant share of customer transaction accounts operat[e] under automated overdraft programs,"⁶ that charge a median fee of \$27 for the service.⁷ In the FDIC's study, the large institutions that use automated programs to cover overdraft obligations accounted for almost 73% of deposit dollars held in study population banks.⁸ Yet 39% of the people polled by *Consumer Reports* National Research Center did not think they were enrolled in an automated fee-based overdraft program with regards to debit transactions and 58% had this same misconception with regard to withdrawals at the ATM.

This evidence makes clear that consumers are not aware of the fees associated with overdraft loans made on their accounts and therefore will be unlikely to opt-out of a program that assesses these fees. Automatic fee-based overdraft programs are the most expensive option, and banks do not have any incentive to sell consumers lower cost services, such as linked accounts or lines of credit. The FDIC confirmed that the fees assessed for these types of overdraft programs were significantly lower than for automatic programs.⁹

B. Consumers want to choose whether to enroll in an overdraft loan program and would rather transactions be denied than incur overdraft fees.

Consumers overwhelmingly want choice when it comes to their bank accounts. The *Consumer Reports* National Research Center poll found that two-thirds of consumers said they prefer to expressly authorize overdraft coverage, so that there would be no overdraft loan—or fee—unless and until they opted into the service.¹⁰ Similarly, two thirds of consumers polled said that banks should deny a debit card or ATM transaction if the checking account balance is too low.¹¹ Other studies have made similar findings. The Center for Responsible Lending found that 91% of respondents who were enrolled in a fee-based overdraft loan program want a

² Richard H. Thaler and Shlomo Benartzi, *Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. 1 (2001), available at <http://faculty.chicagogsb.edu/richard.thaler/research/SMarT14.pdf>.

³ FINANCIAL REGULATION POLL, *supra* note 1. This poll was a nationally representative sample of 679 people.

⁴ *Id.* at 3.

⁵ *Id.*

⁶ FEDERAL DEPOSIT INSURANCE CORPORATION, EXECUTIVE SUMMARY, FDIC STUDY OF BANK OVERDRAFT PROGRAMS II (2008), available at http://www.fdic.gov/bank/analytical/overdraft/FDIC138_ExecutiveSummary_v508.pdf.

⁷ FEDERAL DEPOSIT INSURANCE CORPORATION, FDIC STUDY OF BANK OVERDRAFT PROGRAMS 15 (2008), available at http://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf.

⁸ *Id.* at 6.

⁹ FDIC, *supra* note 6, at III n.7.

¹⁰ FINANCIAL REGULATION POLL, *supra* note 1, at 8.

¹¹ *Id.* at 9.

choice about whether the program is included with their account. These same respondents overwhelmingly wanted their debit card transactions denied if the account was overdrawn.¹²

This past February, Justin from New York shared with Consumers Union his hardship with overdraft fees and expressed a desire for transactions to be denied rather than incur a fee. Here is what Justin told Consumers Union:

Since the beginning of 2008, Justin has incurred excessive overdrafts because of an arbitrary change in his bank's policy. Justin keeps two accounts separately – one for general spending, and the other for bills. He explains, "Previously, the bank would process credits prior to debits so if I went over in my spending account I could transfer money from my bills account and be covered with no overdraft charges. This has changed; now if I go over in my spending account, which I have, even if I transfer money the same day (which is immediately available), I receive an overdraft fee." Now, in addition to not being able to replenish his account immediately in order to avoid overdrafts, he is also being charged additional overdrafts as his bank chooses to debit the larger overdrafts before the smaller ones.

Justin reported that he was charged \$350 in overdrafts over a ten day period. Some of these transactions were for less than \$10, and all of them were for less than \$25. Eventually, after multiple telephone calls to the bank, Justin was refunded \$100 of his \$350 total overdraft fees. Justin told Consumers Union that he would rather have his debit card denied on transactions that would cause overdrafts. He wishes that he could choose whether the bank should cover transactions which overdraw his accounts, and he feels that "to tack on fees and change policies to increase fee income is completely intolerable."

C. For the consumers who need occasional emergency overdraft loans, there are better options.

In its discussion of the opt-in approach, the Board raises the concern that consumers who generally do not overdraw their accounts, may benefit from the occasional coverage of overdrafts and that opt-in might result in more declined transactions than these consumers would prefer.¹³ As an example, the Board introduces a hypothetical consumer who has not opted into the program, rarely overdraws the account, needs emergency funds and would like to withdraw such funds out of the ATM or make an essential purchase. Even if there are a small number of consumers who would wish to use their checking account as a credit arrangement after fully understanding the costs, these consumers are the precise population that might decide to make a choice to opt into an overdraft program.

Consumers that generally do not overdraw their account but want the option of accessing emergency funds will probably be eligible to sign up for less expensive options for covering overdrafts, such as a linked savings account, credit card or a line of credit. The FDIC found that fees for these types of accounts are significantly lower than for automatic overdraft programs.¹⁴ An opt-in rule will put overdraft loans on par with other forms of loans- which the consumer can evaluate for price before the credit is extended or any fees triggered.

¹² LESLIE PARRISH, CTR. FOR RESPONSIBLE LENDING, CONSUMERS WANT INFORMED CHOICE ON OVERDRAFT FEES AND BANKING OPTIONS 3-4 (2008), *available at* <http://www.responsiblelending.org/issues/overdraft/reports/consumers-want-informed-choice-on-overdraft-fees-and-banking-options.html>.

¹³ Electronic Fund Transfers, 74 Fed. Reg. 5212, 5225 (proposed Jan. 29, 2009) (to be codified at 12 C.F.R.).

¹⁴ FDIC, *supra* note 6, at III n.7.

By restricting banks from making the most expensive overdraft program the default, the Board will be protecting the group of vulnerable consumers who pay the majority of overdraft loan fees.¹⁵ The Center for Responsible Lending published a survey that found that repeat users of overdraft loan programs are more often low-income, single and non-white and do not own their homes. Just 16% of overdraft loan users account for 71% of overdraft loan fees, while a core group of 6% account for almost half of the fees generated by these programs.¹⁶ 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. It also shows that the typical consumer who pays overdraft loan fees is not the hypothetical occasional user.

In general, checking accounts are not designed for, expected to be or suitable as a source of occasional or emergency credit. Automatically enrolling all consumers in the most expensive overdraft service to protect those consumers who rarely use the program will disproportionately affect the segment of the population who actually do find themselves regularly paying overdraft loan fees. This is the group least able to afford it.

II. The following issues are discussed in comments submitted to the Board by Consumers Union to the May 2008 FTC Act Proposal and should be considered in this rulemaking.

Consumers Union's comments to the May 2008 FTC Act Proposal are submitted in Appendix A and contain thorough discussions on various points related to the regulation of fee-based overdraft loan programs. We ask the Board to consider these comments in the current rulemaking. In this section we will provide shorter summaries of these points and highlight consumer's stories that provide real life examples. The longer sections can be found in Appendix A.

- A. 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.*

We urge the Board 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. (See Appendix A, Section II for specific recommendations.)

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

The FDIC found it to be common practice for banks to process transaction from largest to smallest, which increases the number of overdrafts.¹⁷ Naturally these banks reported higher fee income than those that did not have these features.¹⁸

In January 2009, Stephanie from California shared with us her frustration about her bank's transaction clearing practices. Here is what Stephanie told Consumers Union:

Stephanie is very displeased by the way her bank handles overdrafts. Ten years ago, her bank began processing debits from the largest to the smallest charge by

¹⁵ LISA JAMES & PETER SMITH, CTR. FOR RESPONSIBLE LENDING, OVERDRAFT LOANS: SURVEY FINDS GROWING PROBLEM FOR CONSUMERS 3 (2006), *available at* http://www.responsiblelending.org/pdfs/ip013-Overdraft_Survey-0406.pdf.

¹⁶ *Id.*

¹⁷ FDIC, *supra* note 6, at III n.9.

¹⁸ *Id.* at IV n.12.

promoting it as a program that would pay mortgage and rent payments first, and then debit smaller amounts thereafter. She explains, “That’s bogus because it’s possible for all [debits] to be paid anyway, but this way they charge the highest one first and then they get to charge you for all the little \$17 overdrafts that follow.” This new ordering policy is not optional – it was automatically applied to her account and could not be changed. As a consequence, Stephanie has incurred many overdrafts over the past years that would not have occurred otherwise.

Also, Stephanie’s bank uses a variable fee which increases with each overdraft. The first overdrafts incur a \$24 fee, the third and fourth overdrafts incur a \$30 fee, and any overdrafts thereafter are \$35 each. As the bank debits her account from the largest charge to the smallest, the program causes excessive overdrafts which trigger the \$35 fees quickly. Stephanie supports the idea of an overdraft program, but wants the bank to offer a policy which is more reasonable: “The overdraft policy should be changed to allow the accountholder to decide if and how they want their overdrafts paid. It should be the consumer’s option, not the bank’s.”

Because this practice is so widespread and contributes so significantly to consumers overdrawing their accounts, we ask that the Board consider including a provision restricting this practice in the final rule. (See Appendix A, Section IV for specific recommendations.)

C. The proposed debit hold protections should prohibit financial institutions from assessing a fee for overdrafts caused by a deposit hold.

It is unfair for a financial institution to charge fees for events caused by its own practices. Consumers whose banks choose to impose long check hold times may still get stuck with overdraft fees due to this practice. The Board’s legal analysis in the explanatory material of the May 2008 FTC Act Proposal, that overdraft fees triggered by debit holds are an unfair practice, also applies to overdrafts caused by deposit holds.

Mary from Connecticut told the Board in its May 2008 rulemaking about her problems with long deposit hold times as well as with debit holds. More recently, she shared the details with Consumers Union. Here is what Mary told Consumers Union:

Mary has suffered greatly from excessive overdraft fees. As a freelance administrative assistant, she has many responsibilities that don’t leave her much time to watch her bank account. On countless occasions, Mary has deposited checks thinking that the amounts would be available immediately – as the bank tellers assured the deposits would “go in right away”. Unfortunately, Mary has overdrafted her account on numerous occasions because her bank sometimes put a hold on her deposits, triggering a \$25 fee each time.

In one instance, Mary was charged \$400 in overdraft fees resulting from a delayed deposit. These fees were later reversed after her bank acknowledged that she had not been at fault. Mary has also had trouble with restaurants and gas stations putting holds for “double or triple” the amounts of her purchases, leading to more overdrafts even though she had enough in her account to cover the actual transaction amount.

Mary estimates that she has incurred overdraft fees at least 50 times in situations over the past year where unfair banking policies have led her to overdraft – 80%

of these overdrafts were for purchase amounts much less than \$25. If she could, Mary would prefer to be declined by retailers in the event that her debit transactions would cause an overdraft. After more than \$1250 in overdraft fees, Mary is tired of haggling with her bank.

Consumers Union recommends that financial institutions be prohibited from assessing an overdraft loan fee if the fee would not have been incurred but for the delay in funds availability due to a deposit hold. (See Appendix A, Section VI.B for more information.)

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

We strongly recommend that the Board 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. Uncapped overdraft loan fees create an incentive for financial institutions to facilitate payments where there are not enough funds. The Board 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% of consumers surveyed paid 53% of the overdraft fees charged.¹⁹

Don from Ohio shared with us his story this past January. He describes overdraft fees as, "a snowball effect, I couldn't get away from it –the more you put in the more they take out." Here is what Don told Consumers Union:

Don and his wife rely on a limited income – the paycheck from his part time job, and the social security payment she receives for disability. Don checks his account balances regularly, but has recently been hit with a flurry of overdraft fees because of his bank's overdraft policy.

In October 2008, Don used his debit card and overdrafted his checking account by 85 cents. Before the bank opened the next day, Don deposited \$30 at the ATM thinking that this would cover the 85 cent overdraft – only to discover a day later that he had incurred two overdraft fees, one for the 85 cents and the other because the \$30 he had deposited did not cover the deficit caused by the first fee. The second overdraft triggered another overdraft fee and a \$5 per day fee for each was also added. Altogether Don got hit with \$120 in overdraft fees for an 85 cent overdraft. After haggling with this bank, Don reached a compromise where he only had to pay one of the \$35 overdraft fees.

A few months later, in February 2009, Don decided to make a car payment through his bank's online services, for the first time. When he placed this payment for \$399, the website stated that it would take 5 business days for the transfer to process. To his surprise, in a few days, Don checked his account and found \$468 in overdraft fees. Over two days, Don had used his debit card to make a number of small purchases, mostly under \$10, with the understanding that his car payment would be pending for 5 days. To the contrary – the bank had deducted the \$399 immediately even though the transaction was still processing, and left his account \$64 overdrawn. Each of the small purchases incurred the \$35 overdraft fee and he was also paying a \$5 per day fee for each overdraft. Don was very frustrated. He said, "the amount of \$468 represents our groceries for one month!" Luckily, Don was able to negotiate his \$468 overdraft

¹⁹ PARRISH, *supra* note 12, at 3.

fee down to \$66, which he thought was unfair. In retrospect, Don explains: “[sixty six dollars] was a hell of a lot more than a 42 cent stamp,” which is what it would have cost him to make his car payment by mailing a paper check.

Throughout this time, Don would have preferred that the bank decline all of the transactions which caused overdrafts. Don has resolved never to make an online payment through his bank again and is exasperated with all of the trouble he has gone through because of the bank’s overdraft policy.

III. Consumers should be provided a choice about whether their checks, ACH payments and recurring debits are covered by the most expensive overdraft program offered by the bank.

We ask that the Board expand the rule, under its FTC Act authority, to include transactions other than ATM and one-time debits. At the very least the Board should adopt opt-out for check, ACH and recurring debits, while adopting opt-in for ATM and one-time debit transactions.

A. Not all consumers want their checks paid if it will lead to high overdraft fees.

Even if overdraft loan programs could provide benefit to some consumers who want their check transactions covered, this is not true of all consumers. As we discussed in Section I.C. above, allowing banks to default consumers into the most expensive overdraft program for checks, may benefit a few consumers while harming the group of consumers that pay the majority of fees associated with these programs.²⁰ Giving consumers the true choice provided by opt-in is the only way to ensure that each consumer has account features that they can afford and which help them to maintain economic stability.

Though the majority of participants in the study performed for the Board by Macro International (Macro study),²¹ indicated that they would not opt-out if the decision applied to checks, the study population was only 18 people and therefore it is hard to extrapolate general consumer opinion on this point. Furthermore, people might pick a less expensive bank service to cover their overdrafts if it was made available to them.

B. Automatic overdraft programs diminish the income of vulnerable households because the bank retains a contractual right to set-off the overdraft amount, plus the fee.

The Board makes the point that automatic coverage of returned checks helps consumers avoid adverse consequences beyond the NSF fee, such as merchant fees, negative reporting to credit agencies and violations of bad check laws. We’d like to make the Board aware of the other side of that argument.

As noted by the Consumer Federation of America in comments to the Board’s Regulation DD-Truth in Savings: R-1315 proposal in 2008:

By defaulting consumers into these overdraft loan programs, lenders are allowed to collect payment by preemptive claim on the borrower’s next paycheck, pension, benefit or exempt funds deposit. Banks use their right of set-off to

²⁰ JAMES & SMITH, *supra* note 14, at 3.

²¹ MACRO INT’L, REVIEW AND TESTING OF OVERDRAFT NOTICES III (2008), *available at* <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20081218a6.pdf>.

deduct loan principal and finance charges before the accountholder has access to the next paycheck or Social Security direct deposit. Banks deduct the full overdraft amount plus fees before consumers have access to their funds in the account.²²

The detrimental affect that this right to set-off has on the most vulnerable consumers is clear evidence that automatic overdraft coverage of checks and recurring debits is not a benefit to everyone. Therefore, erring on the side of consumer choice will allow consumers to consider their personal situations and decide what bank services provide them real “protection.”

This past January, Vickie from West Virginia told Consumers Union about how she has overdraft fees automatically deducted from her next periodic direct deposit. Here is what Vickie told Consumers Union:

Vickie relies on Social Security checks as her only source of income and is having trouble with her bank’s overdraft policy. Over the past eight years, Vickie has paid her bank over \$1,000 in overdraft fees alone. On one of these occasions, her account was overdrawn by only 2 pennies, and for this she incurred an overdraft fee of \$34. When she first opened her account in 2001, the fee for overdrafts was \$30 – and over the years it has increased to \$32 and now is \$34.

Vickie has also experienced overdrafts fees triggering other overdrafts because her bank does not notify her when she has a negative balance. Often times, these overdraft fees are deducted from her social security check deposits which she finds particularly upsetting. She describes, “If you miss one little thing in [your account], it can set you way back.”

In her frustration Vickie explains, “If [the overdraft] was just two dollars, they didn’t care – if two dollars knocked you out of balance then [the effect] is like dominos, they just don’t care.” For now, Vickie nervously watches her account balances in fear of overdrafting again.

IV. Operational Considerations

We offer comment on various operational considerations that would improve the Board’s proposal. Even if the operational improvements are made, we reiterate that opt-out is insufficient because it will not provide effective protection from high cost unrequested credit.

A. It is essential that the proposal go into effect as soon as possible.

Automatic fee-based overdraft loan programs take significant funds from families who have never consented to those fees. In the current economy, these funds are needed at the grocer, the gas pump, and many other places. This is even more important now that the proposal has already been delayed from its original iteration in the May 2008 FTC Act Proposal. We hope that the Board takes this into consideration and sets an effective date as early as possible. We suggest implementation not later than 90 days from the date of the final rule.

²² Letter from Jean Ann Fox, Consumer Federation of America, to Jennifer A. Johnson, Secretary, Board of Governors of The Federal Reserve System, July 18, 2008, *available at* http://www.consumerfed.org/pdfs/FRB_%20TISA_CFA_Comments_7_19_08.pdf.

B. Notice should be provided separately for opt-out as well as opt-in.

We commend the Board for including a requirement that notice explaining the institution's overdraft service be segregated from all other bank communications if the opt-in approach is adopted. This requirement is even more essential if the inferior opt-out approach is chosen, because the opt-out approach defaults consumers into the most expensive program for covering their overdrafts. This is true both for the initial notice provided in section 205.17(b)(1)(i), and for subsequent notices required by 205.17(c)(2).

Two studies confirm that consumers prefer overdraft communications to be separate from the periodic statement. In the Macro study about three quarters of the participants preferred that the bank send a separate notice informing them of their opt-out right each time they overdrew their account, rather than have the information included as part of a periodic statement.²³ The *Consumer Reports* National Research Center poll, with a much larger sample size of 679 individuals, had the same result. Overall, 74% of people polled said they want to be notified about signing up for or canceling a fee-based overdraft loan service in a separate letter, rather than on the bank statement.²⁴

C. Specific language should be included to ensure that consumers have a reasonable opportunity to opt out.

Section 205.17(b)(1)(ii) ensures that banks provide consumers with a reasonable opportunity to either opt in or out (depending upon the approach adopted by the Board) of the bank's automatic overdraft loan program for ATM and debit transactions. If the inferior opt-out approach is adopted, we encourage the Board to make 205.17(b)(1)(ii) more specific by including requirements in the regulatory language. Regulation of a practice that the Board has characterized as unfair under the FTC Act should not be left up to a "reasonableness standard."

Because the opt-out approach defaults consumers into the most expensive program for covering their overdrafts, it is essential that consumers receive adequate time to reply to their institution. A 30 day fee-free time period is essential and should be included in the regulatory language.

In addition, banks should be required to provide consumers with all methods available for communicating a decision to opt out to the bank, including mail, phone and internet. This is supported by the Macro study, in which only 2 of the 18 participants preferred to opt out via mail, while the remaining participants preferred to communicate via phone or the internet.²⁵ If banks provide only a mail-in opt-out communication, consumers could be discouraged from using their right to opt out.

We also support including as a requirement that banks provide the opt-out notice at or before account opening and require the consumer to make the decision in order to proceed with opening the account. This is the best way to ensure that the consumers take note of their right to opt out. Without this, there is no way of knowing whether the consumer received the information.

²³ MACRO INT'L, *supra* note 22, at iv.

²⁴ FINANCIAL REGULATION POLL, *supra* note 1, at 10.

²⁵ MACRO INT'L, *supra* note 22, at iii.

V. Payment of checks should not be conditioned upon consumer's decision regarding overdraft coverage of ATM and debit transactions.

We appreciate and support the Board's attempt to prevent banks from circumventing consumer choice by discouraging consumers from invoking their rights under this rule. As such, the Board should prohibit institutions from conditioning payment of overdrafts for checks, ACH and recurring transactions, on the consumer's decision regarding coverage of overdrafts for ATM and debit transactions.

The Board explained that it made the decision to place this overdraft proposal in Regulation E, because the Board believed that some consumers may benefit from having certain transactions covered by an overdraft service, mainly checks and ACH payments.²⁶ Allowing banks to condition their coverage of checks on the consumer's decision with respect to ATM and debit transactions could prevent consumers from benefiting from the targeted nature of this rule.

One solution is for the Board to adopt opt-out for check, ACH and recurring debit transactions, while adopting an opt-in for ATM and one-time debits. At the very least, we urge the Board to adopt the restrictive language "shall not" in Section 17(b)(2) of both the opt-in and opt-out approaches.

VI. The Board should adopt Alternative A of Section 205.17(b)(3) because the terms and conditions of a consumer's bank account should be identical regardless of the decision regarding overdraft coverage of ATM and debit transactions.

We encourage the Board to adopt a final rule that avoids any perception that consumers' decisions regarding overdraft coverage of ATM and debit transactions may negatively affect them. We understand that Alternative B, Section 205.17(b)(3), specifies that the variation in terms may not be so substantial as to discourage a reasonable consumer from opting in or out, but we feel that this alternative allows for an unnecessary level of choice by the bank.

The Board uses the example that a financial institution may wish to price some account services differently for an "opt-out" account. But unfortunately this goes against consumer preference and may significantly sway consumers' decision to opt in or out. The *Consumer Reports* National Research Center poll clearly shows that most consumers want their checking accounts to cost the same regardless of whether or not they decline overdraft coverage. Three-quarters said that they want the same type of bank account whether or not they agreed to pay for an overdraft service.²⁷

VII. If the opt-in approach is adopted, existing customers should not be assessed fees without getting the same notice and opportunity to sign up, as new customers. Likewise a hybrid approach requiring existing customers to opt out is not sufficient.

If the opt-in approach is adopted, the notice requirement in §205.17(c)(1) for existing accountholders must be strengthened to ensure that all consumers get the same protections. We appreciate that the Board included a notice requirement for both new and existing customers under the opt-out alternative, as it was an important issue that we raised in our

²⁶ 74 Fed. Reg. 5212, 5231.

²⁷ FINANCIAL REGULATION POLL, *supra* note 1, at 11.

comments to the May 2008 FTC Act Proposal.²⁸ These same protections must be included for all customers if the opt-in approach is adopted.

The current proposal allows banks to use discretion and notify existing customers about their right to opt in either on the first periodic statement after the rule's effective date, or following assessment of an overdraft fee. A basic purpose of the opt-in approach is to give consumers a choice to decide whether to participate in an expensive program before being assessed fees. Starting the opt-in requirement only after a fee is assessed permits an unnecessary cost to consumers. Requiring pre-fee opt-in notice only to new accounts severely limits the consumers who receive it.

As an example, JP Morgan Chase ended 2008 with a total of 24.5 million checking accounts. Only one million of those accounts were newly opened.²⁹ Under the proposed rule, Chase would be prohibited from assessing fees for covering ATM and debit overdrafts without getting affirmative consent from these one million new customers. The 23.5 million existing customers on the other hand, may not receive any notification until they incur at least one additional fee. The *Consumer Reports* National Research Center poll found that 14% of consumers surveyed had received an ATM or debit card overdraft fee in the past six months.³⁰ That amounts to 3,290,000 existing Chase customers who will receive an overdraft fee before being notified of their opt-in right. Chase bank charges \$25 the first time a customer overdrafts using their ATM or debit card.³¹ Therefore under the proposed rule, even if the opt-in approach is adopted, Chase bank will be able to charge \$82,250,000 in overdraft fees before sending notification to all consumers.

We do understand that there are operational costs for banks to notify every single customer about a service which many don't use, but this cost should be weighed against the cost of the average \$34 fee,³² for each individual consumer. Therefore we offer a simple solution to ensure that the rule is equally fair to existing customers. We asked that the Board prohibit banks from assessing any overdraft fees starting 60 days after the effective date, to consumers who have not opted into the program. This will encourage banks to advertise this service by providing notification to as many consumers as possible. On the effective date, the 60 day clock provided in Section 205.17(g) will start running. If the customer does not opt in after 60 days, then their overdraft coverage is cancelled and the bank may not assess any additional fees for covering ATM and debit overdrafts.

The Board should not adopt a hybrid approach under the opt-in model, which would require existing customers to opt out of overdraft coverage. By adopting the opt-in approach, the Board is giving consumers a choice to decide whether to participate in an expensive program, before being assessed fees. Allowing existing customers to incur fees before being notified of their rights, denies them the choice to enroll. This would be very detrimental to the many existing customers who have been negatively affected by these programs. They should not have to incur more fees and take affirmative steps to cancel a program that new customers are not being forced into.

²⁸ LETTER FROM LAUREN ZEICHNER, CONSUMERS UNION, TO JENNIFER A. JOHNSON, SECRETARY, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, June 27, 2008, at Section VIII., *available at* <http://www.consumersunion.org/pdf/Overdraft-Comm2-0608.pdf>.

²⁹ Telephone Interview with Tom Kelly, Media Relations, J.P. Morgan Chase (Feb. 6, 2009).

³⁰ POLL, *supra* note 1, at 13.

³¹ Telephone Inquiry to unnamed Chase Bank telephone banker (Mar. 6, 2009). This fee increases to \$32 and subsequently \$35 depending on the number of overdrafts per month.

³² ERIC HALPERIN & PETER SMITH, CTR. FOR RESPONSIBLE LENDING, OUT OF BALANCE 11 (2007), *available at* <http://www.responsiblelending.org/pdfs/out-of-balance-report-7-10-final.pdf>.

VIII. The Board should be aware of a potential loophole in the Section 205.19 regarding debit holds.

Section 205.19 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. Many consumers do not know that holds are often placed by retailers when they use their debit card to make a purchase. In a 2008 Consumers Union online questionnaire,³³ consumers were asked how they found out that money had been frozen after they filled up at the gas station. Over 10% of respondents said that the only reason they realized a debit hold had been placed was because they received an overdraft fee. This provision 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. We raised one concern with this provision in Section II.C. above, regarding overdrafts caused by deposit holds. In addition, we'd like to bring to the Board's attention a potential loophole in the language of Section 205.19 that our consumer story collection has highlighted.

The language of this provision allows institutions to assess overdraft fees when the overdraft occurs in connection with a debit hold that is *equal to or less than* the transaction amount. There are situations where consumers have sufficient funds in their account to cover the transaction, the debit hold was equal or less than the transaction amount, and they still overdrew the account because the transaction posts while the hold is still in place, without displacing it.

Nancy from Florida told us in February of this year that she has had problems with debit holds that were less than the transaction amount, which were reflected on her account at the same time as the entire transaction. This led her to overdraw her account. Here is what Nancy told Consumers Union:

In her banking experience, Nancy has had problems with restaurants placing holds on her debit card. She explains, "I had a \$20 meal - [the restaurant] swiped my card and I received a \$20 hold. After I added \$5 for the tip, they swiped another \$25. [The bank] was now applying two holds for a total of \$45 against my account. It took 3 days for the first hold of \$20 to drop off." These holds cause overdraft fees that cause even more overdraft fees because her account remains in the negative – even though she actually did have enough money in the account to pay for the meal initially.

This story illustrates the fact that the debit hold and the transaction amount can be reflected in the account at the same time. The exception provided in Section 205.19, will lead consumers to continue to be penalized for a problem caused by the banks' decision to place a debit hold on the consumer's checking account.

IX. Conclusion

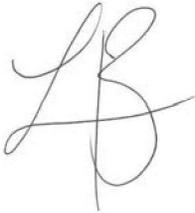
We applaud the Board for recognizing, through this proposed rule that overdraft loan programs are inherently unfair if consumers are not clearly notified that they are enrolled in the service. The opt-out solution is a partial step forward, but it does not go far enough to protect the consumers who are affected by these unfair practices. We respectfully ask the Board to adopt

³³ Information on file with Consumers Union. Unlike the *Consumer Reports* National Research Center poll, the online questionnaire did not use a sampling technique.

the second alternative and to provide consumers the right to affirmatively opt into these expensive overdraft loan programs before any fee can be charged.

We look forward to the continuing work of the Board on this important issue.

Sincerely,

A handwritten signature in black ink, consisting of the letters 'L' and 'B' in a cursive, stylized font.

Lauren Z. Bowne
Staff Attorney
Financial Services Campaign
Consumers Union

Appendix A



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 assess any overdraft fee until after the first overdraft instance when explicit opt-out notice is given.

West Coast Office
1535 Mission Street ■ San Francisco, CA 94103
415.431.6747 Tel ■ 415.431.0906 Fax

- 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

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

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.

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 regulations¹² 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

....

... 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 NSF's 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.

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

Appendix B



Final Report

Financial Regulation Poll

**For Public
Release**

**February 13, 2009
NRC #2009.07**

Consumer Reports National Research Center

© 2009 Consumers Union of U.S., Inc.



Methodology

- Telephone surveys were conducted among 1,001 random adults comprising 500 men and 501 women 18 years of age and older. Respondents were screened for possession of a checking account with either an ATM card or a debit card. The analysis is based on the 679 adults who reported having a checking account with ATM or debit card. Interviewing took place over February 5-8, 2009.
- The questionnaire was fielded via Opinion Research Corporation's Caravan twice-weekly national telephone omnibus survey. ORC used random digit dialing to achieve a nationally representative probability sample and weighted completed interviews by age, sex, geographic region and race.
- The results of this study are intended for external communications. Methodology statement for public release:

The Consumer Reports National Research Center conducted a telephone survey using a nationally representative probability sample of telephone households. 679 interviews were completed among adults aged 18+ who reported having a checking account with an ATM card or a debit card. Interviewing took place over February 5-8, 2009. The sampling error is +/- 3.8% at a 95% confidence level.



Implications

- **This study was commissioned to investigate consumers' beliefs about current bank policies involving overdraft fees, and how consumers prefer that banks handle overdrafts.**
- **Only qualified respondents participated in this telephone survey. Around 7 in 10 (69%) satisfied the two screening criteria—have a checking account and an ATM card or debit card—and were allowed to proceed (page 5).**
- **Our analysis indicates that many consumers are misinformed about common bank overdraft policies. They also expressed strong preferences for policies that are more favorable toward bank customers.**
- **Only half (52%) of respondents with a debit card had the correct impression of how banks commonly treat debit card overdrafts—namely, the bank allows the transaction to proceed, covers the shortage from the next deposit and also charges a fee. More young consumers aged 18-34 years (68%) expressed accurate knowledge of bank policy. In contrast, more than one-quarter (28%) erroneously thought that the bank would block an overdraft debit purchase, and 11% thought the bank would allow it to proceed and recover the difference later without charging a fee. Those aged 55+ years demonstrated the poorest understanding (page 6).**
- **Consumers are even more misinformed about ATM overdrafts. Only 31% correctly said that the bank will permit the transaction, subsequently dock the account and charge for the loan. In contrast, nearly half (48%) incorrectly said the ATM card would not work at all if the account balance were too low. Although 1 in 10 understood the first two components of the policy—the transaction proceeds, is covered later—they were unaware of the fee (page 7).**



Implications (cont.)

- **The majority of consumers prefer bank overdraft policies that are more favorable to them. Two-thirds said they want an opt-in policy, where banks cannot cover overdrafts—and charge for the service—unless a customer expressly authorizes the service. Only 27% preferred an opt-out policy, which allows banks to provide overdraft loans for a fee until the customer instructs otherwise (page 8).**
- **Moreover, two-thirds (65%) of consumers said that banks should deny a debit card or ATM transaction outright if it would overdraw the account. Young consumers, those with household income under \$40,000 and women were most likely to express this viewpoint. Only one-third said the bank should permit the transaction, even if they incur a fee (page 9).**
- **Regardless of whether a bank follows an opt-in or opt-out policy for overdrafts, consumers don't want the notification buried in their regular bank statement. To the contrary, three-quarters (74%) said they should be notified in a separate letter (page 10).**
- **Consumers also don't want to be punished for declining the bank's overdraft service. Overall, 73% of respondents said they should receive the same type of bank account whether or not they agree to pay for an overdraft service. Young, female and low-income consumers had the strongest feelings about this (page 11).**
- **If the law were changed to require that banks follow an opt-in policy, overwhelmingly (90%) consumers want to receive notification before they incur additional fees (page 12).**
- **Overall, 14% of consumers recalled being assessed an ATM or debit card overdraft fee during the past six months (page 13).**



Screening Criteria

- Consumers were screened to ensure that they have a checking account plus associated ATM card or debit card. Those who failed to satisfy these requirements were not qualified to participate.
- Overall, nearly 7 in 10 consumers (69%) contacted by telephone said they have both a checking account and ATM or debit card. These individuals (679 total) proceeded with the survey.
- Qualified consumers disproportionately were:
 - ✓ High-income (90% of those reporting household earnings of \$75,000 or more satisfied the screeners)
 - ✓ Middle-aged (75% of those 35-54 years old qualified)
 - ✓ Residents of the West (74%) or South (70%)

QD1A-C - Please tell me which of the following you have.

	TOTAL	Gender		Age			Household Income			Region			
		Men	Women	18-34	35-54	55+	<\$40K	\$40-74K	\$75K+	NE	NCntrl	South	West
Checking account	84	83	85	73	87	92	70	91	98	84	83	85	85
<i>Checking account with ATM or debit card (Net)</i>	69	69	68	68	75	62	52	76	90	66	63	70	74
ATM card with checking account	65	66	64	62	72	58	50	72	84	65	57	65	71
Debit card with checking account	62	62	61	64	68	50	48	68	81	61	57	60	68
Don't know/Refused	2	1	3	2	1	3	1	1		1	3	3	1
NO ANSWER	14	16	13	25	13	6	29	8	2	15	14	13	15



Overdraft via Debit Card

Base: Checking With Debit Card

- Only half (52%) of respondents with a debit card correctly described banks' typical policy regarding debit card overdrafts—the bank permits the transaction, docks your next deposit and charges you for the loan. Young (68%) and low-income (57%) consumers were most likely to understand debit card policy.
- Nearly half of consumers are misinformed. Almost 3 in 10 (28%) of respondents said the bank would block the transaction, and an additional 1 in 9 (11%) expected the bank to allow the purchase and deduct the shortage later without imposing a fee.
- Overall, older consumers (aged 55+ years) were the least informed. At least 30% of respondents aged 35 years or more thought that the bank would deny a debit purchase if it would overdraw the account.

QD2 - If you had \$25 in your checking account and you tried to make a \$40 purchase with your debit card, what do you think would happen?

Base: Checking Account With Debit Card

	TOTAL %	Gender		Age			Household Income			Region			
		Men %	Women %	18-34 %	35-54 %	55+ %	<\$40K %	\$40-74K %	\$75K+ %	NE %	NCntrl %	South %	West %
Your bank would allow the purchase and then deduct the shortage from your next deposit, and also charge you a fee	52	53	50	68	47	39	57	44	53	52	52	49	54
Your bank wouldn't allow you to make the purchase	28	28	29	22	32	30	29	30	30	31	36	25	25
Your bank would allow the purchase and then deduct the shortage from your next deposit	11	10	12	6	12	15	8	15	10	9	8	13	11
Don't know/Refused	9	9	9	4	8	17	7	10	6	8	4	12	10



Overdraft via ATM Card

Base: Checking With ATM or Debit Card

- Consumers evaluated a companion scenario about overdrafts at an ATM machine. Only 31% knew what the most-likely result would be—the bank permits the overdraft, docks the account later on and tacks on a fee. Young (42%) and low-income (39%) respondents revealed the highest awareness of actual bank policy.
- In contrast, nearly half (48%) of consumers incorrectly said the ATM card would not work if they attempted to overdraw. Another 10% said the bank would permit the withdrawal and cover the shortage with their next deposit.

QD3 - If you had \$25 in your checking account and you tried to take \$40 out of the ATM machine, what do you think would happen?

Base: Checking Account With ATM or Debit Card

	TOTAL %	Gender		Age			Household Income			Region			
		Men %	Women %	18-34 %	35-54 %	55+ %	<\$40K %	\$40-74K %	\$75K+ %	NE %	NCntrl %	South %	West %
Your ATM card wouldn't work	48	50	47	44	56	43	43	49	49	47	47	52	45
Your bank would allow the withdrawal and then deduct the shortage from your next deposit and also charge you a fee	31	30	33	42	27	27	39	27	34	34	36	25	36
Your bank would allow the withdrawal and then deduct the shortage from your next deposit	10	11	10	7	10	15	8	11	10	11	15	9	8
Don't know/Refused	10	9	10	7	8	15	9	13	7	7	2	14	12



Overdraft Fee Policy Preference

Base: Checking With ATM or Debit Card

- After the two questions about beliefs regarding bank overdraft policy, the telephone interviewer explained to respondents how banks usually treat debit and ATM overdrafts, and then asked them to indicate a preference for opt-in vs. opt-out.
- Two-thirds of consumers said they prefer to expressly authorize overdraft coverage, so that there would be no overdraft loan—or fee—until they opted into the service. More high-income and middle-aged consumers chose opt-in than others, along with Northeasterners.
- Only 27% of respondents preferred an opt-out policy, where the bank provides overdraft coverage and charges a fee until the customer requests otherwise.

QD4 - When you use your debit or ATM card and make a purchase or a withdrawal for more than you have in your account, your bank may charge you a fee to cover the overdraft. This is a fee-based overdraft loan service, which your bank may call overdraft protection. If your bank provides this service, which policy do you prefer?

Base: Checking Account With ATM or Debit Card

	TOTAL %	Gender		Age			Household Income			Region			
		Men %	Women %	18-34 %	35-54 %	55+ %	<\$40K %	\$40-74K %	\$75K+ %	NE %	NCntrl %	South %	West %
Your bank should be required to have you sign up before covering your overdrafts, if it wants to charge you for them. This means that you wouldn't pay the fee, and wouldn't get the overdraft loan, unless you asked for it	66	66	66	64	70	63	63	63	72	71	67	63	67
Your bank should be able to provide the overdraft loan for a fee until ask the bank to stop providing this service	27	26	27	30	26	24	31	30	22	23	29	27	26
Don't know/Refused	7	7	7	5	4	14	6	7	6	6	4	10	7



Deny vs. Cover Overdraft

Base: Checking With ATM or Debit Card

- This question focused on whether consumers want an overdraft transaction to proceed. Two-thirds (65%) said that banks should deny a debit card or ATM transaction if the checking account balance is too low. Young and low-income consumers, and women, were mostly likely to express this preference.
- One-third of respondents—disproportionately middle-aged and male—want the bank to cover the transaction, even if a fee is involved.

QD5 - If you don't have enough money in your account to cover a debit card or ATM transaction, what do you want your bank to do?

Base: Checking Account With ATM or Debit Card

	TOTAL %	Gender		Age			Household Income			Region			
		Men %	Women %	18-34 %	35-54 %	55+ %	<\$40K %	\$40-74K %	\$75K+ %	NE %	NCntrl %	South %	West %
Your bank should deny the transaction	65	63	68	73	63	62	70	66	63	67	64	65	66
Your bank should cover transaction, even if it costs you a fee	33	36	29	25	37	34	29	32	34	31	35	32	32
Don't know/Refused	2	2	2	2	1	4	1	2	2	2	1	2	2



Opt-in/Opt-out Notification Preference

Base: Checking With ATM or Debit Card

- A strong majority of respondents (74%) said they want to be notified about signing up for or canceling a fee-based overdraft loan service in a separate letter.
- In contrast, only 23% would like notification via the bank statement.

QD6 - How do you want your bank to notify you about signing up for or canceling a fee-based overdraft loan service?

Base: Checking Account With ATM or Debit Card

	Gender		Age			Household Income			Region				
	TOTAL	Men	Women	18-34	35-54	55+	<\$40K	\$40-74K	\$75K+	NE	NCntrl	South	West
	%	%	%	%	%	%	%	%	%	%	%	%	%
In a separate letter from the bank	74	74	75	72	76	76	69	74	76	68	75	76	76
On your bank statement	23	23	22	26	23	18	27	25	22	29	23	21	20
Don't know/Refused	3	3	3	2	1	6	3	1	2	4	2	3	4



Punitive Pricing

Base: Checking With ATM or Debit Card

- Nearly three-quarters (73%) said that a checking account should cost the same regardless of whether the customer declines the bank's overdraft service. Segments that were most adamant: age 18-34 years, women, low-income.
- One-quarter (24%) of respondents said the bank should be able to set its product offering and pricing.

QD7 - Should your bank be permitted to charge you more for basic banking if you decline the overdraft service?

Base: Checking Account With ATM or Debit Card

	TOTAL %	Gender		Age			Household Income			Region			
		Men %	Women %	18-34 %	35-54 %	55+ %	<\$40K %	\$40-74K %	\$75K+ %	NE %	NCntrl %	South %	West %
No, you should receive the same type of bank account whether or not you agree to pay for an overdraft service	73	68	77	79	71	68	76	71	74	72	76	71	73
Yes, the bank should be able to decide what products to offer and at what price	24	29	19	18	27	26	20	26	24	23	20	27	24
Don't know/Refused	3	2	4	3	2	5	5	3	2	4	4	2	3



Notification After Regulatory Change

Base: Checking With ATM or Debit Card

- Overwhelmingly, respondents said that if an opt-in law is passed, banks should have to notify existing customers about their rights before they incur additional fees.
- Only 1 in 11 respondents felt that the bank should be able to charge an initial fee before notifying existing customers of their new rights.

QD8 - Suppose that a new law requires that the bank get your permission before assessing an overdraft fee.

When would you want to be notified of your new rights?

Base: Checking Account With ATM or Debit Card

	TOTAL	Gender		Age			Household Income			Region			
		Men	Women	18-34	35-54	55+	<\$40K	\$40-74K	\$75K+	NE	NCntrl	South	West
	%	%	%	%	%	%	%	%	%	%	%	%	
Before being charged any additional fees	90	87	92	90	91	88	91	93	88	90	92	91	87
After being charged the first fee in order to avoid future fees	9	11	7	9	9	8	8	7	10	8	7	9	12
Don't know/Refused	1	1	1	1		3	1		1	2	1	1	1



ATM-Debit Card Fees

Base: Checking With ATM or Debit Card

- Overall, 14% of consumers recalled being assessed a fee for an ATM or debit card overdraft during the past half-year. Respondents aged 18-34 years (26%) were most likely to be aware of a fee.

QD9 - In the PAST 6 MONTHS, have you been charged a fee by your bank for using your debit card to make a purchase or your ATM card for an ATM withdrawal that exceeded the balance in your account?

Base: Checking Account With ATM or Debit Card

	Gender		Age			Household Income			Region				
	TOTAL %	Men %	Women %	18-34 %	35-54 %	55+ %	<\$40K %	\$40-74K %	\$75K+ %	NE %	NCntrl %	South %	West %
Yes	14	15	14	26	10	7	18	16	11	11	8	16	19
No	85	85	85	72	90	92	80	84	89	87	91	83	81
Don't know/Refused	1	0	1	2		1	2			1	1	0	0



Profile

- **Women and men were equally represented in the poll, and the median age of respondents was 44 years.**
- **Overall, 43% of participants reported having at least a four-year college degree, but 30% had no education beyond high school.**
- **Median household income of interviewed consumers was about \$66,000, and 46% said they are employed full time.**
- **Most respondents (59%) said they are married, and around 8 in 10 identified themselves as Caucasian.**

Profile

Base: Checking Account With ATM or Debit Card

	Gender		Age			Household Income			
	TOTAL	Men	Women	18-34	35-54	55+	<\$40K	\$40-74K	\$75K+
	%	%	%	%	%	%	%	%	%
UNWEIGHTED BASE	679	346	333	104	256	318	155	183	245
<u>GENDER</u>									
Male	49	100		45	52	49	44	42	58
Female	51		100	55	48	51	56	58	42
<u>AGE</u>									
18-34	30	28	33	100			44	35	15
35-44	20	23	17		48		7	20	32
45-54	22	21	22		52		16	19	31
55-64	15	16	15			55	13	15	16
65+	13	12	14			45	20	11	6
Refused/Nr	0		0						
MEDIAN (Years)	43.9	43.8	45.0	26.0	45.3	63.2	43.4	41.6	45.9
<u>EDUCATION</u>									
Some HS or less	7	8	5	12	4	5	12	5	3
HS graduate	23	22	24	29	19	23	37	27	12
Some college	26	24	29	25	27	26	28	29	23
College grad+ [Net]	43	45	41	33	51	43	22	39	62
College grad	27	29	26	24	33	23	14	29	37
Postgrad degree	15	16	15	9	17	20	8	10	25
Refused/Nr	1	1	2	1	1	3		0	
<u>HOUSEHOLD INCOME</u>									
Under \$25,000	12	10	14	24	5	11	48		
\$25,000 but less than \$50,000	20	17	23	21	16	28	52	24	
\$50,000 but less than \$75,000	24	22	25	29	21	22		76	
\$75,000 but less than \$100,000	14	17	12	6	22	11			37
\$100,000 or more	25	29	20	14	34	21			63
Refused	5	5	5	6	2	8			
MEDIAN (000s)	\$65.8	\$73.2	\$59.6	\$52.0	\$83.5	\$58.2	\$26.0	\$58.6	\$121.0

Consumer Reports National Research Center

Profile (cont.)

Base: Checking Account With ATM or Debit Card

	Gender		Age			Household Income			
	TOTAL	Men	Women	18-34	35-54	55+	<\$40K	\$40-74K	\$75K+
	%	%	%	%	%	%	%	%	%
UNWEIGHTED BASE	679	346	333	104	256	318	155	183	245
EMPLOYMENT									
Employed full time	46	54	38	38	65	26	27	48	62
Retired	17	16	18		4	54	23	15	11
Not currently employed	14	8	21	27	10	7	18	19	7
Self-employed	12	15	10	12	15	8	11	12	13
Employed part time	10	7	14	22	5	5	20	6	7
Refused/Nr	0		0		0		1		
MARITAL STATUS									
Married	59	62	56	44	70	58	30	67	77
Single and never been married	21	23	19	50	10	5	35	15	13
Divorced	9	7	10	1	10	14	18	9	3
Widowed	5	3	7		1	17	10	4	2
Living as married	3	3	3	3	3	2	4	2	3
Separated	2	2	3	1	4	0	3	3	2
Refused/Nr	1	1	2	1	1	3	0		0
RACE*									
White/Caucasian	79	79	80	68	81	89	74	75	86
Black/African-American	10	8	12	15	9	5	12	16	3
Asian/Asian-American	1	1	1	2	0	1	1	1	1
Some other race	11	13	9	15	10	7	15	9	10
Refused/Nr	1	1	1	1	2	0	1	0	0
*Multiple responses allowed									
REGION									
Northeast	18	16	20	19	20	15	18	16	20
North Central	20	21	20	21	24	15	26	19	21
South	37	39	36	41	34	38	31	40	34
West	24	24	24	19	23	32	25	25	25



Appendix: Survey Questions

On another subject . . .

D1 Please tell me which of the following you have. Do you have a . . .
[DO NOT ROTATE ITEMS]

- 01 YES
- 02 NO
- 99 DON'T KNOW/REFUSED

- A. Checking account
- B. ATM card [ASK IF D1A (01)]
- C. Debit card [ASK IF D1A (01)]

IF HAVE CHECKING ACCOUNT AND ATM CARD OR DEBIT CARD, [D1A [01] AND (D1B [01] OR D1C [01])], CONTINUE.
ALL OTHERS SKIP TO NEXT SECTION

ROTATE ASKING ORDER OF D2-D3

[ASK IF D1C (01)]

D2 If you had \$25 in your checking account and you tried to make a \$40 purchase with your debit card, what do you think would happen? Would you say . . .
[READ ENTIRE LIST BEFORE RECORDING ONE ANSWER]

- 01 Your bank wouldn't allow you to make the purchase
- 02 Your bank would allow the purchase and then deduct the shortage from your next deposit
- 03 Your bank would allow the purchase and then deduct the shortage from your next deposit and also charge you a fee
- 99 DON'T KNOW/REFUSED

D3 If you had \$25 in your checking account and you tried to take \$40 out of the ATM machine, what do you think would happen? Would you say . . .
[READ ENTIRE LIST BEFORE RECORDING ONE ANSWER]

- 01 Your ATM card wouldn't work
- 02 Your bank would allow the withdrawal and then deduct the shortage from your next deposit
- 03 Your bank would allow the withdrawal and then deduct the shortage from your next deposit and also charge you a fee
- 99 DON'T KNOW/REFUSED

- D4 When you use your debit or ATM card and make a purchase or a withdrawal for more than you have in your account, your bank may charge you a fee to cover the overdraft. This is a fee-based overdraft loan service, which your bank may call overdraft protection.

If your bank provides this service, which policy do you prefer?

[READ ENTIRE LIST BEFORE RECORDING ONE ANSWER. ROTATE]

- 01 Your bank should be required to have you sign up before covering your overdrafts, if it wants to charge you for them. This means that you wouldn't pay the fee, and wouldn't get the overdraft loan, unless you asked for it (OR)
02 Your bank should be able to provide the overdraft loan for a fee until you ask the bank to stop providing this service (OR)
99 DON'T KNOW/REFUSED

- D5 If you don't have enough money in your account to cover a debit card or ATM transaction, what do you want your bank to do? Would you say . . .

[READ ENTIRE LIST BEFORE RECORDING ONE ANSWER. ROTATE]

- 01 Your bank should deny the transaction (OR)
02 Your bank should cover the transaction, even if it costs you a fee (OR)
99 DON'T KNOW/REFUSED

- D6 How do you want your bank to notify you about signing up for or canceling a fee-based overdraft loan service? Would you say . . .

[READ ENTIRE LIST BEFORE RECORDING ONE ANSWER. ROTATE]

- 01 On your bank statement (OR)
02 In a separate letter from the bank (OR)
99 DON'T KNOW/REFUSED

- D7 Should your bank be permitted to charge you more for basic banking if you decline the overdraft service? Would you say . . .

[READ ENTIRE LIST BEFORE RECORDING ONE ANSWER. ROTATE]

- 01 Yes, the bank should be able to decide what products to offer and at what price (OR)
02 No, you should receive the same type of bank account whether or not you agree to pay for an overdraft service (OR)
99 DON'T KNOW/REFUSED

- D8 Suppose that a new law requires that the bank get your permission before assessing an overdraft fee. When would you want to be notified of your new rights? Would you say . . .

[READ ENTIRE LIST BEFORE RECORDING ONE ANSWER]

- 01 Before being charged any additional fees
02 After being charged the first fee in order to avoid future fees
99 DON'T KNOW/REFUSED

D9 In the PAST 6 MONTHS, have you been charged a fee by your bank for using your debit card to make a purchase or your ATM card for an ATM withdrawal that exceeded the balance in your account?

- 01 YES
- 02 NO
- 99 DON'T KNOW/REFUSED