Testimony of Eric Halperin, Center for Responsible Lending
U.S. House of Representatives Committee on Financial Services
"The Overdraft Protection Act of 2009"

October 30, 2009

Good morning Chairman Frank, Ranking Member Bachus, Congresswoman Maloney, and other members of the Committee. Thank you for inviting me to testify on H.R. 3904, the Overdraft Protection Act of 2009. The Center for Responsible Lending enthusiastically supports this bill as a crucial measure for protecting consumers from abusive bank overdraft fees.

I am the director of the DC office of the Center for Responsible Lending (CRL), a not-for-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, which consists of a credit union and a non-profit loan fund. For the past 28 years, Self-Help has focused on creating ownership opportunities for low-wealth families, primarily through financing home loans to low-income and minority families who otherwise might not have been able to purchase homes. Self-Help has provided over $5.6 billion in financing to more than 62,000 low-wealth families, small businesses and nonprofit organizations in North Carolina and across the United States.

Self-Help has operated a North Carolina-chartered credit union since the early 1980s. In 2004, Self-Help Credit Union (SHCU) merged with three community credit unions offering a full range of retail products,[1] and it now services over 3,500 checking accounts and approximately 20,000 other deposit accounts.[2] In 2008, Self-Help founded Self-Help Federal Credit Union (SHCU) to expand Self-Help's scope of work. SHCU does not offer a fee-based overdraft program, and it routinely denies debit and ATM transactions when the customer does not have sufficient funds. If a debit card overdraft is inadvertently paid, SHCU does not charge the customer a fee for covering the payment. SHCU customers can apply for an overdraft line of credit of up to $500, carrying an interest rate of 16 percent, with no transfer fees.

In my testimony, I will describe the explosion of overdraft fees in recent years and the lack of meaningful action by bank regulators to curb these abuses. I will also summarize the reforms needed to stop unfair overdraft practices and explain how H.R. 3904 would implement these reforms.

I. Overdraft Fees Have Exploded in Recent Years

Overdraft fees are the fees charged when an institution chooses to pay a customer's debit card, check, ATM or other electronic transaction, even though the customer's account lacks sufficient funds to cover the charges. In 2008, overdraft fees cost consumers $23.7 billion and we project that in 2009, fees will reach $26.6 billion.[3] In 2004, these fees cost $10.3 billion – which means these fees are now a whopping two-and-a-half times the size they were just half a decade ago.[4] Overdraft fees paid now exceed the amount of credit extended in overdraft loans themselves.[5]

By far, the most common triggers of overdraft fees are small debit card transactions, transactions that could easily be denied at the point of sale at no cost to the consumer.

Total overdraft fees have increased due to both an increase in cost and an increase in frequency:

- ***Cost.*** From 1997 to 2007, the average overdraft fee charged by financial institutions increased from $16.50 to $29.[6] CRL estimates that the average fee *paid* by consumers is $34,[7] which is unsurprising since the sixteen largest banks charge an average fee of $35.[8] The FDIC's 2008 survey, which included many smaller financial institutions, found an average among its institutions of $27 per overdraft.[9]

- ***Frequency***. As recently as 2004, 80 percent of institutions denied debit card transactions that would have overdrawn the account.[10] Today, approximately 80 percent of institutions routinely approve these transactions and charge a fee for each overdraft.[11] This shift has increased the frequency of overdrafts significantly, particularly given the overall increase in debit card use.[12]

Overdraft fees affect a very large number of consumers each year. CRL recently estimated that over 50 million Americans overdraw their accounts annually, with 27 million paying five or more overdraft or NSF fees.[13] Most of these fees are paid by a relatively small number of consumers – the FDIC found that 93 percent of all overdraft fees are paid by only 14 percent of account holders. These consumers are more likely to be lower-income, non-white or young account holders least able to afford such fees.[14] In the midst of a recession, abusive overdraft practices are making the dire financial situations faced by many families even worse.

II. Regulators Have Failed to Stop the Abuses

In January 2009, the Federal Reserve Board (FRB) promulgated a set of proposed rules related to debit card and ATM overdraft fees. However, the FRB proposal does not adequately address the fundamental problems with today's fee-based overdraft programs. The strongest possible version of the FRB's proposal would establish an opt-in requirement for fee-based overdraft on debit card and ATM transactions applicable to both new and existing accounts.

While we have strongly encouraged the FRB to choose this outcome because express consent is an essential baseline protection for any credit product, this measure alone is inadequate. The FRB's proposal does not address checks and electronic payments at all; it condones the approval of debit card overdrafts that could easily be denied for no fee; it does nothing to address the dramatic disparity between the amount of the overdraft and the amount of the fee institutions charge for covering it; and it does nothing to address the excessive number of overdraft fees borne by a relatively small portion of consumers.

In short, neither the FRB nor any other banking regulator has meaningfully addressed the harm to consumers caused by abusive overdraft programs. Since regulators first recognized high-cost overdraft programs as a problem in the early 2000s, practices have only grown worse, and consumers have paid more than $100 billion in overdraft fees. *See* Appendix A for further discussion of how the regulatory agencies have failed to stem these abusive practices.

III. H.R. 3906 Will Provide Much-Needed Reform of Overdraft Practices

Given the federal regulators' lack of significant action to address abusive overdraft practices, we are very encouraged to see the House of Representatives considering the meaningful protections proposed by H.R. 3904. The bill contains the following provisions that we consider essential to addressing the fundamental problems with today's overdraft programs:

- A requirement that overdraft fees be reasonable and proportional to the actual cost to the institution of covering the overdraft.

- A limit of six overdraft fees per year. Once a customer has incurred six fees in a 12-month period, the institution would be required to provide a longer-term, lower cost alternative, such as a line of credit, in order to continue covering the customer's overdrafts for a charge.

- A prohibition on overdraft fees unless institutions have obtained the customer's affirmative consent, or "opt-in."

These provisions correspond well with the best practices provided in the 2005 Joint Guidance addressing overdraft programs. The Guidance suggested that institutions consider making overdraft coverage unavailable for transactions other than checks; monitor excessive overdraft program usage, which may indicate a need for an alternative credit arrangement or other services; and obtain customers' affirmative consent to receiving overdraft coverage.[15]

IV. The Problems with Today's Fee-Based Overdraft Programs

Today's fee-based overdraft programs cause substantial injury to account holders. The cost of overdraft fees far exceeds any benefit they may provide. Moreover, the large majority of fees are paid by a relatively small number of account holders who incur numerous fees and are least able to quickly recover from them. For these account holders, one overdraft fee causes even more overdraft fees, driving them further into debt and ultimately making them less likely to be able to meet essential expenses. As our real-life case study detailed below demonstrates, fee-based overdraft leaves these account holders worse off than cheaper overdraft alternatives or even than no overdraft coverage at all.

A. The cost of overdraft fees far exceeds any benefit provided.

In the aggregate, fee-based overdraft programs cost consumers nearly $24 billion each year, which is even more than the $21.3 billion in loans extended in exchange for those fees.[16] The most common triggers of overdraft fees, debit card transactions, cause an average overdraft of under $17 yet trigger an average fee of $34.[17] This fee—twice the size of the loan itself—does not even provide the account holder the benefit of avoiding a denied transaction fee because the cost of a denied debit card transaction is zero.[18]

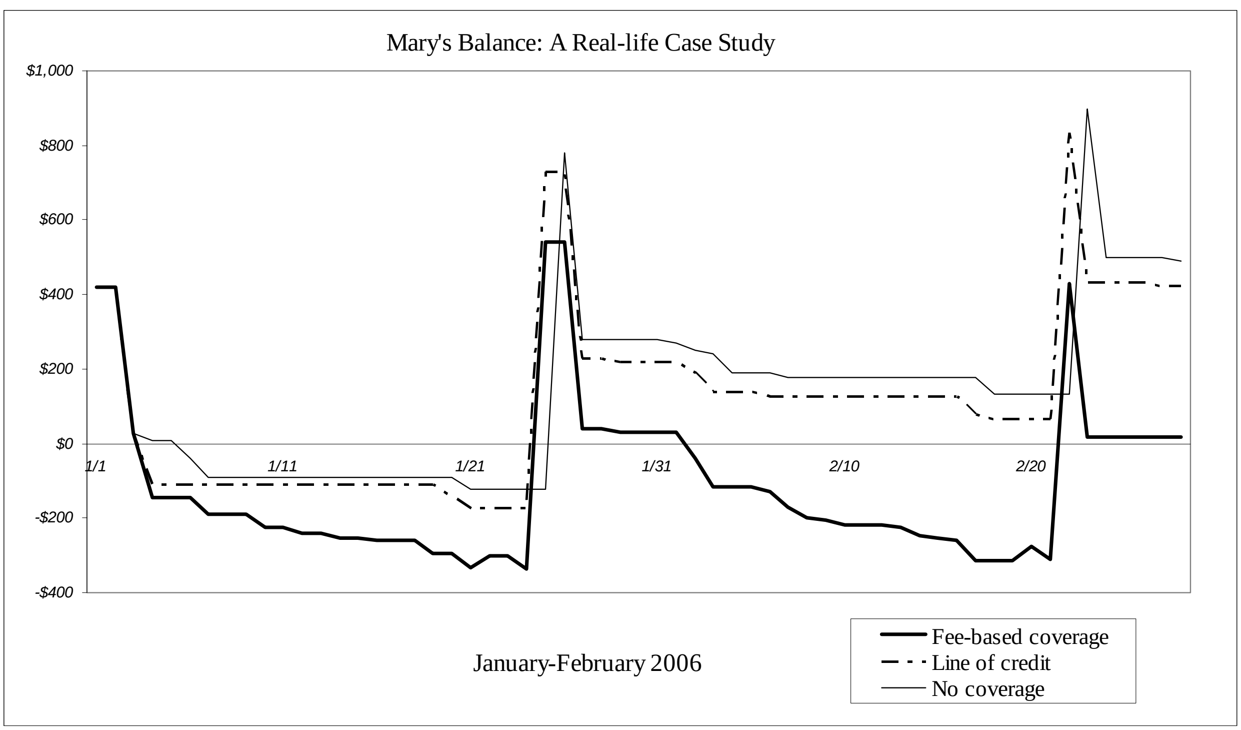
In other contexts, federal regulators have taken steps to address high fees imposed for low levels of credit. In the credit card context, for example, the FRB determined that the excessive fees associated with "fee harvester" credit cards "diminish the value of the account"; as a result, the FRB limited upfront fees on these cards to 50% of the total credit provided and required any fees exceeding 25% of the credit line to be charged over a six-month period.[19]

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

The large majority of fees are paid by overdrafters who pay large numbers of fees and are least able to recover from them. The FDIC's recent study of overdraft programs, consistent with CRL's previous research, found that account holders who overdrew their accounts five or more times per year paid 93 percent of all overdraft fees.[20] It also found that consumers living in lower-income areas bear the brunt of these fees.[21] Seniors, young adults, military families, and the unemployed are also hit hard.[22] Americans aged 55 and over pay $6.2 billion in total overdraft fees annually—$2.5 billion for debit card/ATM transactions alone[23]—and those heavily dependent on Social Security pay $1.4 billion annually.[24]

C. Overdraft fees leave account holders worse off than lower cost coverage or even no coverage at all.

Not only do fee-based overdraft leaves account holders worse off than cheaper overdraft alternatives, but they even leave account holders worse than *no overdraft coverage at all*. In a recent report on the impact of overdraft fees on older Americans, we followed two months of actual checking account activity of one panelist, whom we call Mary, from our database.[25] Mary is entirely dependent on Social Security for her income. We compared the actual activity with what her account activity would have been with an overdraft line of credit. We then added a third scenario: no fee-based coverage at all. The results are graphically demonstrated below.



During January and February of 2006, Mary overdrew her account several times and was charged $448 in overdraft fees. At the end of February, she had $18.48 in her account. She was trapped in a destructive cycle of debt, using the bulk of her monthly income to repay costly overdraft fees.

With an overdraft line of credit at 18 percent, after two months, Mary would have paid about $1 in total fees for her overdrafts and would have had $420 in the bank.

Even if Mary had had no overdraft coverage at all, she would have been better off than she was with fee-based overdraft. Five of her transactions, totaling $242, would have been denied—two point-of-sale transactions and three electronic transactions. She would have been charged no fee for the two point-of-sale transactions. She might or might not have been charged an NSF fee for each of the three denied electronic transactions. She also might have been charged late fees if any of the electronic transactions were bills. Assuming, conservatively, that she was charged an NSF fee *and* a late fee for each of the three transactions, her ending balance still would have been $489—enough to cover the value of the denied transactions.

Mary's situation illustrates a problem common among the chronic overdrafters who pay the vast majority of the fees: Overdraft fees simply beget more overdraft fees. *Ultimately, fee-based overdraft coverage prevents account holders from being able to meet obligations they otherwise would have been able to meet.*

D. Overdraft fees are not reasonably avoidable by many consumers.

1. Account holders often lack sufficient information about their accounts.

The FRB has acknowledged the difficulty of knowing one's own checking account balance, noting that "consumers often lack information about key aspects of their account" and "cannot know with any degree of certainty when funds from a deposit or a credit from a returned purchase will be made available."[26] Debit holds (occurring when institutions make a portion of a customer's account balance unavailable pending settlement of the final amount of a purchase) and deposit holds (occurring when institutions delay a customer's access to deposited funds) and the lack of transparency about the order in which transactions are cleared contribute to account holders' confusion about their balances. Making matters worse, account balance disclosures sometimes include funds available for overdraft, without including warning that accessing those funds could trigger fees, potentially leading customers to unwittingly spend more money than they have.[27]

2. Economic hardship prevents those who pay the large majority of fees from reasonably avoiding them.

The FRB has acknowledged in multiple contexts that broader economic hardship could prevent consumers from reasonably avoiding injury. In the context of raising interest rates on existing credit card balances, for example, the FRB cited several sources indicating that loss of income, illness, or other factors outside the consumer's control lead to delinquency.[28]

Likewise, in its discussion of ability to repay in the final HOEPA rule, the FRB identified several reasons why borrowers, especially in the subprime market, cannot necessarily avoid unsustainable loans, including that "they may . . . urgently need the cash that the loan will provide for a household emergency."

In the overdraft context, there is no question that economic hardship contributes to many account holders' inability to avoid fees.[29]

3. Widespread practices are aimed at maximizing overdraft revenue.

The increase in overdraft fees—both the cost and the frequency—over the past several years is the result of a concerted effort on the part of many financial institutions to maximize overdraft revenue. These institutions:

- have purchased specialized software that helps them maximize fee revenue and paid consultants to help them do so;

- have expanded their overdraft programs to debit card purchases and ATM transactions;

- often post debits as quickly as possible, while delaying for as long as possible making those deposits available for use;[30] and

- manipulate the order in which they clear transactions.[31] (Institutions often clear purchases in order from highest to lowest, rather than the order in which they occurred, in order to deplete the account to below zero more quickly. Once the account balance is negative, the institution is able to charge an overdraft fee on each subsequently posted transaction, often resulting in significantly more overdraft fees.)

V. H.R. 3904 Addresses the Fundamental Problems with Today's Overdraft Programs

H.R. 3904 addresses three key unfair features of fee-based overdraft programs: (1) charging fees that are not reasonable or proportional to the cost to the institution of covering the overdraft; (2) charging excessive numbers of fees that create a debt trap for those paying the majority of overdraft fees; and (3) charging overdraft fees without obtaining a customer's affirmative consent to having overdrafts covered.

A. Addressing High Cost: Reasonable and Proportional Requirement.

H.R. 3904 would require that overdraft fees be reasonable and proportional to the actual cost to the institution of covering the overdraft, with the FRB providing additional guidelines for what constitutes "reasonable and proportional," potentially including a safe harbor.

As noted earlier, the average overdraft fee exceeds the amount of the overdraft covered. This disparity is particularly outrageous given the short period of time for which the typical overdraft is outstanding—three to five days[32]—and the low default risk overdrafts carry. Indeed, the only circumstances under which an overdraft loan is not repaid is when another deposit is never made into the account or when the customer walks away from the account. Operational cost is also low because most programs are highly automated.

The recently passed CARD Act requires the FRB to promulgate standards for reasonable penalty fees and specifies that penalty fees be proportional not only to cost but also to the violation or omission. We support H.R. 3904's slightly different approach, which does not authorize consideration of the "violation or omission" because it is overwhelmingly clear that overdraft fees as currently administered do not deter overdrafting.[33] In fact, institutions' overdraft practices have evolved from approving the occasional overdraft as a customer courtesy to routinely approving transactions, even those they could easily deny at the point of sale for no fee. These practices encourage rather than discourage overdrafts.

In addition, the primary effect of the increase in the average overdraft fee charged over the last decade has not been deterrence; rather, it has been to increase the number of overdraft occurrences by chronic overdrafters, due in large part to the debt trap created by high fees.

The obvious way to deter overdrafts is to deny transactions that would overdraw the account—not to approve them for an exorbitant fee that only drives consumers deeper into debt and makes them more likely to overdraw their account again.

We note that while H.R. 3904 would exclude overdraft fees from the interest rate cap applicable to federal credit unions, we do not support such exclusion and believe all credit extended by federal credit unions should be subject to the interest rate cap.

B. Addressing Frequency: Annual Limit on the Number of Fees.

H.R. 3904 would limit the number of overdraft fees an institution may charge a customer to six per year. After six fees have been incurred, the institution may continue covering overdrafts for a charge only if it offers the customer a lower-cost alternative. The banking agencies have long advised institutions to discourage excessive use of overdraft programs, but this guidance has not, by and large, been followed.[34]

Banking regulators have also long discouraged practices analogous to excessive overdraft loans.[35] The repeat borrowing illustrated in our case study above is analogous both to loan flipping of other high-cost short-term loans, such as payday loans, loan flipping in the mortgage context, and pyramiding late fees:

- ***Other high-cost, short-term loan flipping.*** Excessive overdraft loans create a debt trap similar to that caused by other high-cost, short-term lending. CRL's recent research finds that over three-fourths of payday loan volume is generated within two weeks of a customer's previous payday loan.[36] While technically a borrower typically closes an old payday loan and opens a new one, effectively the borrower is being flipped from one loan into another—unable to repay one loan and meet essential expenses without taking out another loan.[37] Payday loans beget payday loans, much like overdraft loans beget overdraft loans.

- ***Mortgage loan flipping, which has already been identified as abusive***. The repeated extension of overdraft loans is also analogous to flipping borrowers from one mortgage loan to the next. In the mortgage context, an originator sells the borrower an unaffordable loan only to later refinance the borrower into another unsustainable loan, extracting fees and stripping home equity from the borrower in the process. Earlier this session, the House of Representatives passed H.R. 1728, which would ban this practice for mortgage loans. In the overdraft context, cash is similarly stripped from customers who are flipped.

- ***Pyramiding late fees, which the FRB has prohibited as an unfair practice.*** Pyramiding late fees occur when lenders apply future payments to the late fee first, making it appear future payments are delinquent even though they are, in fact, paid in full within the required time period. As a result, lenders charge additional late fees.[38] These fees provide no benefit to the consumer while driving them further into debt.[39] For customers who incur the majority of overdraft fees, they often would have had sufficient funds in their account to meet future expenses *but for* the excessive overdraft fees they have incurred in previous periods.

How regulators have addressed these analogous abuses informs what is appropriate in the overdraft context. In 2005, the FDIC limited excessive refinancings of payday loans by prohibiting the entities it regulates from making payday loans to anyone who has had payday loans outstanding for three months in any 12-month period.[40] The FDIC guidance encourages lenders to offer borrowers an alternative longer term product at that point but notes that even if such alternative is not available, "an extension of a payday loan is not appropriate under such circumstances."[41] Assuming a 14-day pay period, this standard limits the number of loans any borrower can have to six per year, alleviating the debt trap while continuing to allow loans to the occasional users. The FDIC further urges institutions to require "cooling off" or waiting periods between payday loans.[42] The limit on fees in H.R. 3904 is closely analogous to the FDIC's approach to limiting payday loans. It would address the debt trap caused by overdraft loans in much the same way.

Similarly, the FRB has long prohibited pyramiding late fees as an unfair practice through its Credit Practices Rule,[43] and it recently reinforced its stance by prohibiting the same under TILA through its recent HOEPA final rule.[44]

C. Permitting Customers to Opt In is Crucial.

Consumers should be provided a meaningful choice about whether to participate in fee-based overdraft programs. Automatically enrolling a customer in the program, even if an institution allows the customer to opt out later (often after the damage has been done), does not provide a meaningful choice.

An opt-in arrangement provides the customer a moment during which he or she may evaluate the options available and affirmatively choose the one most suitable. In its proposed rulemaking, the FRB recognized the productive incentives an opt-in arrangement would offer: "[Opt-in would] provide an incentive for institutions to persuade consumers of the benefits of the overdraft service and enable the consumer to make an informed choice about the merits of the service before he or she incurs any overdraft fees."[45]

While an opt-in requirement must be coupled with other substantive protections, greater transparency will foster competition in the marketplace, resulting in better choices for consumers. Allowing no choice at all, or allowing automatic enrollment with only an opportunity to opt out, are anti-consumer, non-transparent practices that have facilitated the race to the bottom in this area over the past several years. For a complete discussion of this issue, see our 2008 and 2009 regulatory comment letters.[46]

VI. Conclusion

We support H.R. 3904 for comprehensively addressing the most abusive features of today's overdraft programs. The bill would limit the high costs of these fees, would cut down on the frequency which fees are charged to those least able to shoulder them, and would require the customer's express consent.

Thank you again for the opportunity to testify today. I look forward to your questions.

APPENDIX A: Regulators Fail to Curb Abuses

Regulators first identified overdraft practices as a problem as early as 2001, when the OCC noted the "complete lack of consumer protections" associated with these programs. Since then, overdraft practices have grown exponentially worse. While regulators have taken no meaningful steps to rein in abuses, *Americans have paid well over $100 billion in overdraft fees.*[47]

2001—OCC Interpretive Letter discusses numerous concerns about automated overdraft programs, noting "the complete lack of consumer safeguards built into the program," including a lack of limits on the number of fees charged per month; similarities between overdraft fees and other "high interest rate credit;" and the failure of banks to meet the needs of repeat overdrafters in a more economical way. [48]

2002—The FRB issues a preliminary request for comment on overdraft programs.[49]

2005—Three years later, the FRB affirmatively exempts overdraft loans from the protections of the Truth in Lending Act when it chooses to address overdraft programs under the Truth in Savings Act instead.[50] Overdrafts continue to be made without consumers' explicit consent and with no cost-of-credit disclosures to allow comparisons of overdraft fees to less costly options.

2005—Regulators issue joint guidance, which reflects several of the OCC's 2001 concerns. But rather than explicitly prohibiting any of these practices as unfair and deceptive, the guidance only provides "Best Practices." When asked whether this guidance would be treated as law, regulators responded: "The best practices, or principles within them, are enforceable to the extent they are required by law."[51] But the regulators required none of them by law, and the guidance has largely been ignored in the years since.

2007—Despite its joint guidance acknowledging that overdrafts are an extension of credit, the OCC asserts in *Miller v. Bank of America* that its regulations allow banks to seize exempt benefits such as Social Security to pay overdraft loans and fees, claiming that they are not "collect[ing] a debt."

2008—Regulators issue a proposal under their authority to address unfair and deceptive practices (UDAP). The proposal covers all transaction types (checks, electronic payments, debit card and ATM) but proposes only that consumers have the right to "opt out" of high-cost overdraft programs—not that institutions must obtain consumers' explicit consent before enrolling them. Regulators later withdraw the proposal.

2009—The FRB issues a new proposal addressing only debit card and ATM transactions. It considers two alternative approaches—opt-out and opt-in. It considers no additional substantive protections, such as a limit on excessive fees or a requirement that fees be reasonable and proportional to the cost to the institution of covering the overdraft.

Ongoing—Best Practices Guidance continue to be largely ignored by institutions and the regulators alike. The OCC's Compliance Handbooks make no reference to overdraft programs at all,[52] much less to Best Practices.

[1] SHCU merged with Wilson Community Credit Union and Scotland Community Credit Union in 2004 and with Cape Fear Community Credit Union in 2006.

[2] These include traditional savings accounts, money market accounts, certificates of deposits, and individual retirement accounts.

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

[4] In 2004, CRL first estimated the annual cost consumers paid in overdraft fees at $10.3 billion. Jacqueline Duby, Eric Halperin, Lisa James, *High Cost and Hidden from View: The $10 Billion Overdraft Loan Market*, Center for Responsible Lending (May 26, 2005).

[5] *Overdraft Explosion* at 7 (estimating $23.7 billion in fees charged in exchange for $21.3 billion in credit extended).

[6] Comments of the Center for Responsible Lending to the Board of Governors of the Federal Reserve System, Office of Thrift Supervision, and National Credit Union Administration on Proposed Rule Regarding Unfair and Deceptive Practices—Overdraft Practices (Aug. 4, 2008), notes 62-63, and accompanying text, *available at* http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/overdraft-comments-udap-final-as-submitted-w-appendices-080408-2-1.pdf [hereinafter CRL 2008 UDAP Comments].

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

[8] Consumer Federation of America, *CFA Survey: Sixteen Largest Banks Overdraft Fees and Terms* (updated July 31, 2009), *available at* http://www.consumerfed.org/pdfs/overdraft_fee_report_09.pdf [hereinafter 2009 CFA Survey].

[9] FDIC Study of Bank Overdraft Programs, p. iii of the Executive Summary, *available at* http://www.fdic.gov/bank/analytical/overdraft/FDIC138_ExecutiveSummary_v508.pdf (2008) [hereinafter FDIC 2008 Overdraft Study].

[10] Mark Fusaro, *Are "Bounced Check Loans" Really Loans?*, note 4, at 6 (noting 20% of institutions in June 2004 were applying "bounce protection" to debit cards or ATM) (Feb. 2007), *available at* http://personal.ecu.edu/fusarom/fusarobpintentional.pdf.

[11] FDIC 2008 Overdraft Study at iv (Nov. 2008). Moreover, while as recently as 2004, overdraft loans accounted for 60 percent of institutions' total overdraft/insufficient funds revenue, today they account for approximately 70% percent of that revenue—indicating covering overdrafts, rather than denying them, is increasingly the norm. Eric Halperin and Peter Smith, *Out of Balance: Consumers pay $17.5 billion per year in fees for abusive overdraft loans*, Center for Responsible Lending (June 2007), *available at* http://www.responsiblelending.org/overdraft-loans/research-analysis/out-of-balance-report-7-10-final.pdf [hereinafter *Out of Balance*].

[12] In 2007, the Federal Reserve reported that debit card transactions were increasing at a rate of 17.5 percent per year. 2007 Federal Reserve Payments Study, Financial Services Policy Committee, *Federal Reserve Study Shows That More Than Two-Thirds of Noncash Payments Are Now Electronic* (Dec. 10, 2007), *available at* http://www.federalreserve.gov/newsevents/press/other/20071210a.htm.

[13] *Overdraft Explosion* at 3.

[14] FDIC 2008 Overdraft Study, Executive Summary at IV.

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

[16] *Overdraft Explosion* at 7.

[17] The average overdraft amount for debit card transactions is $16.46. *Debit Card Danger* at 25.

[18] In its Regulation E Proposal, the FRB states: "the consequence of not having overdraft services for ATM and one-time debit card transactions is to have a transaction denied with no fees assessed." 74 Fed. Reg. 5218. Currently, charging NSF fees for denied debit or ATM transactions is not a common practice. *See* Center for Responsible Lending's CRL 2008 UDAP Comments at 18-19 for discussion of why this practice should be prohibited by the FRB.

[19] 74 Fed. Reg. 5542.

[20] FDIC 2008 Overdraft Study at iv.

[21] *Id.* at v. Two CRL surveys, conducted in 2006 and 2008, found that 71 percent of overdraft fees were shouldered by only 16 percent of respondents who overdrafted, and those account holders were more likely than the general population to be lower income, non-white, single, and renters. Respondents reporting the most overdraft incidents were those earning below $50,000/year. Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options*, CRL Research Brief (Apr. 16, 2008) (http://www.responsiblelending.org/overdraft-loans/research-analysis/consumers-want-informed-choice-on-overdraft-fees-and-banking-options.html. *See* CRL 2008 UDAP Comments at 19-21 for further discussion.

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

[23] Leslie Parrish and Peter Smith, *Shredded Security: Overdraft practices drain fees from older Americans*, Center for Responsible Lending (June 18, 2008), *available at* http://www.responsiblelending.org/overdraft-loans/research-analysis/shredded-security.html. The report found that debit card POS and ATM transactions account for 37.4 percent and 2.5 percent, respectively (p.7), which, when calculated, together equal $2.5 billion.

[24] *Id*. at 6, Table 1. "Heavily dependent" was defined as recipients who depended on Social Security for at least 50 percent of their total income.

[25] CRL analyzed 18 months of bank account transactions, from January 2005 to June 2006, from participants in Lightspeed Research's Ultimate Consumer Panel. For further discussion of our database and methodology, *see Out of Balance* at 13-14.

[26] 73 Fed. Reg. 28929.

[27] *See* 2008 Proposed Rule to amend Regulation DD, 73 Fed. Reg. 28743-44. While the FRB's final Regulation DD rule will require that the first balance displayed exclude overdraft funds available, it will allow a second balance to be displayed that includes overdraft funds available, even with no disclosure that accessing such funds will or may incur a fee. 74 Fed. Reg. 5593.

[28] 74 Fed. Reg. 5523. The FRB cites the FTC Credit Practices Rule, which found "the majority [of defaults] are not reasonably avoidable by consumers" because of factors such as loss of income or illness; Bank of America testimony noting that falling behind on an account is likely due to circumstances outside the customer's control; and an economic journal finding conclusive evidence that unemployment is critical in determining delinquency.

[29] Some may posit that the injury caused by overdraft fees must be avoidable because only a relatively small portion of consumers frequently overdraw their accounts. But the FRB has already concluded that, although injury may be avoidable by some consumers under some circumstances, it may not be reasonably avoidable as a general matter. In its analysis of payment allocation methods in the credit card context, the FRB noted that "[a]lthough a consumer could avoid the injury by paying the balance in full every month, this may not be a reasonable expectation as many consumers are unable to do so." It applied a similar analysis to increasing interest rates on existing balances. The FRB acknowledged that the injury resulting from increases in the annual percentage rate "may be avoidable by some consumers under certain circumstances," but it nonetheless concluded that, "as a general matter," consumers cannot reasonably avoid interest rate increases on existing balances." 74 Fed. Reg. 5522. In both circumstances, the FRB concluded that the injury caused by these practices was not reasonably avoidable.

[30] *See* CRL 2008 UDAP Comments at 37, Part III.B.

[31] *See* CRL 2008 UDAP Comments at 38, Part IV. Recently, an advisor on overdraft and card strategies at Profit Technologies acknowledged that fees are a key driver of institutions' transaction clearing practices: "'Banks will say (high-to-low clearing) is for the consumer,' he says. 'Bottom line is, when it was pitched, we'd say ... a side effect is that it results in more fee income to you because it bounces more checks.' [The advisor] says that after leaving Profit Technologies, he joined a credit-counseling firm and saw the damage fees did to consumers." Kathy Chu, *Banks' 'courtesy' loans at soaring rates irk consumers*, USA Today, July 13, 2009.

[32] *Debit Card Danger* at 25.

[33] There are two primary penalty fees charged in the credit card context today—late fees and over-the-limit fees. A reasonable late fee is not as likely as an overdraft fee to simply perpetuate the scenario it purports to deter. In the credit card context, avoiding an additional late fee requires that the customer pay only a minimum payment on time—not the entire outstanding balance, including fees. In the overdraft context, the entire loan, plus all fees, are repaid upon the customer's next deposit, typically three to five days later. Therefore, customers have more time to recover from a late fee than they do from an overdraft fee, and late fees are not as likely to beget late fees as overdraft fees are to beget overdraft fees.

Overdraft fees in the debit card context are very similar to over-the-limit fees in the credit card context in that they result from transactions the institution approves that it could easily deny for no fee. The clear way to deter the behavior in both contexts is to deny the transaction.

[34] 2005 Joint Guidance; OTS Guidance, 70 Fed. Reg. 8428 (2005).

[35] *See, e.g.*, OCC Advisory Letter on Abusive Lending Practices, AL 2000-7, July 25, 2000; FDIC Financial Institution Letters, Guidelines for Payday Lending, FIL 14-2005, February 2005; FDIC Financial Institution Letters, Affordable Small-Dollar Loan Products, Final Guidelines, FIL-50-2007, June 19, 2007.

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

[37] The typical payday borrower pays an additional $45 in interest every two weeks, with effectively no reduction in principal—i.e., no benefit—and ultimately pays $450 in interest on a $300 loan.

[38] 12 CFR 227.15 (Regulation AA).

[39] 16 CFR 444.

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

[41] *Id.*

[42] *Id.* The OCC, in its payday guidance, has noted that its guidance addressing abusive lending practices more generally should also be applied in the context of payday lending. That guidance identifies the following indicators of abusive lending: pricing and terms that far exceed the cost of making the loan; loan terms designed to make it difficult for borrowers to reduce indebtedness; and frequent and multiple refinancings. OCC Advisory Letter on Abusive Lending Practices, AL 2000-7, July 25, 2000.

[43] 12 CFR 227.15(a).

[44] The FRB noted that pyramiding late fees "give rise to charging excessive or unwarranted fees to consumers, who may not even be aware of the default or fees . . . . Once consumers are in default, these practices can make it difficult for consumers to catch up." 73 Fed. Reg. 44569.

[45] 74 Fed. Reg. 5225.

[46] CRL 2008 UDAP Comments at 25-27; CRL 2009 Regulation E Comments at 8-18.

[47] Determined as follows:

2009	$20.0B	(per CRL's projection for 2009, *Overdraft Explosion*, through September)
2008	$23.7	(per CRL 2009 report, *Overdraft Explosion*)
2007	$20.6	(assumes midpoint between 2006 and 2008 figure)
2006	$17.5	(per CRL 2007 report, *Out of Balance*)
2005	$14.0	(assumes midpoint between 2004 and 2006 figure)
2004	$10.3	(per CRL 2005 report, *High Cost and Hidden From View*)
Total	**$106.3 B**	(Conservative estimate as it does not include any fees paid in 2001, 2002, or 2003.)

[48] OCC Interpretive Letter # 914 (August 3, 2001), *available at* http://www.occ.treas.gov/interp/sep01/int914.pdf. The OCC raised compliance issues with respect to TILA, TISA, EFTA, ECOA, and Regulation O (extensions of credit to bank insiders).

[49] 67 Fed. Reg. 72620 (2002).

[50] 70 Fed. Reg. 29582 (May 2005).

[51] *Id.*

[52] There is little evidence to suggest that the OCC has instructed its examiners to even evaluate overdraft practices—much less attempted to encourage best practices. A search of the OCC's Compliance Handbook for depository services finds no reference to the guidance and a search of the OCC's "Other Consumer Protections" Compliance Handbook finds no reference to overdraft protection, or, indeed, to the FTC Act's UDAP provisions at all. Moreover, the OCC's message to its banks' customers has essentially been that the banks can do as they please. For example, the OCC's online consumer reference "HelpWithMyBank" has a FAQ on its overdraft section concerning transaction posting order (generally manipulated by banks to maximize overdraft fees) that validates the banks' own claim that they can post transactions in whatever order they please. http://www.helpwithmybank.gov/faqs/banking_overdraft.html#drop08. Additionally, Consumer Federation of America's 2009 survey of overdraft fees at the 16 largest banks finds that their average fee is $35, compared to $27 at FDIC-regulated institutions. 2009 CFA Survey. Eleven of the 16 largest banks are OCC-supervised.