



National Bank Regulator Enabled Overdraft Abuses

CRL Policy Brief

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Executive Summary

Our nation's largest banks extract billions of dollars in fees from their customers each year through abusive overdraft loan programs. Over the last ten years, these programs developed and proliferated under the Office of the Comptroller of the Currency (OCC), the national banks' primary regulator. The OCC recognized problems with the systems early on but has taken no meaningful action to address them. Today, financial institutions routinely approve even the smallest debit card transaction that results in an overdraft. The overdraft programs at the OCC's banks are among the worst in the industry, and the OCC should stop the practices now.

Abusive Overdraft Practices Grew Rampantly Over the Past Ten Years

Overdraft protection was once offered on an occasional basis as a courtesy to accountholders who might otherwise bounce a check. But overdraft coverage has changed dramatically during the past decade. Now, most national banks have adopted automated overdraft systems through which the bank routinely lends accountholders the money to cover any transaction—including those conducted with debit cards that banks could easily prevent and that customers often would prefer not to be covered.¹ Banks charge a fixed fee averaging about \$34 per incident and engage in a number of abusive practices that help to maximize overdraft fee revenue.²

Bank accountholders now pay nearly \$24 billion a year in overdraft fees—more than the funds financial institutions extend to cover the overdraft loans themselves. This marks an increase of 35 percent since just two years earlier and a 130 percent increase since 2004. Nearly half of these fees are generated by debit card transactions—which on average are far smaller than the \$34 overdraft fee.³

While the Federal Reserve recently issued a rule requiring financial institutions to give customers a choice about whether they are enrolled in overdraft systems for certain types of debit card and ATM transactions, abusive practices are still prevalent throughout the industry. Banks continue to re-order transactions to generate more overdraft fees, charge multiple overdraft fees per day, and charge large, flat fees on even the smallest transactions that trigger an overdraft. Regulators will continue to allow these practices to be applied to debit card transactions and ATM withdrawals for customers that the banks persuade to opt in to the overdraft coverage.

Overdraft Practices of Our Large, National Banks

CRL conducted a review of readily available fee and term disclosures on overdraft practices from the 13 largest national banks. Together, these institutions make up about 80 percent of the over \$4 trillion in domestic deposits held by banks regulated by the Office of the Comptroller of the Currency (OCC), the primary regulator of our national banks.⁴ We found that these banks’ overdraft practices are among the worst in the industry.

National banks engage in practices that make overdraft programs very expensive for consumers, costing them as much as \$100 or more in overdraft fees per day. Most of these fees would be avoided if the banks engaged in fair and transparent overdraft practices. While the Federal Reserve’s recent rules allow customers a choice about whether they want fee-based overdraft coverage for certain debit card and ATM transactions, the rule does nothing to prohibit the other practices documented below.

Common abusive overdraft practices at OCC-regulated banks

√	Automatically enroll customers in the most expensive overdraft program they offer	All 13 institutions <i>automatically enroll</i> their customers in a high-cost, fee-based overdraft program, ⁵ despite having lower cost alternatives.
√	Cover and charge for debit card and ATM overdrafts that could easily be denied for no fee	12 of the 13 institutions cover debit card point-of-sale overdrafts, and 11 of the 13 cover ATM withdrawals that result in an overdraft – generally charging a fee for <i>each</i> overdraft.
√	Charge fees that can be several times greater than the amount overdrawn	All institutions charge a flat fee, generally ranging from \$30-\$39, regardless of the amount by which the account is overdrawn. ⁶ At some banks, a lower fee is charged for the first overdraft.
√	Allow multiple fees to be charged per day	All the institutions allow multiple fees to be charged per day. Seven of the 13 banks disclosed a limit on how many overdraft fees can be incurred in a single day. This limit ranges from three to ten. ⁷ Even a limit of three, at a charge of \$30 each, results in \$90 in fees in a single day.
√	Charge additional fees if customer remains overdrawn for more than a few days (i.e., “sustained overdraft fees”)	All but two of the 10 banks with fee schedules available for review charge sustained overdraft fees if an account remains below zero for several days. ⁸
√	Post transactions in an order that maximizes overdraft fees	Seven of the 13 institutions disclose their processing orders. Transactions are generally processed from the largest to smallest, with some banks processing by category (check, ACH, debit card) and then by size within each category. Two of these seven banks acknowledge that their processing order can result in greater overdraft incidents. ⁹ (The other six institutions may also process from largest to smallest, but their methods are not disclosed.)

The OCC Has Enabled These Overdraft Abuses to Grow and Persist

The OCC recognized problems with overdraft products nearly a decade ago.

The OCC recognized several overdraft practices as problematic as early as 2001, when a bank the OCC supervised asked it for a “comfort letter,” or explicit approval, for the high-cost overdraft program it wanted to implement. Rather than providing this approval, the OCC articulated a number of compliance concerns about the program, noting “the complete lack of consumer safeguards built into the program.” Specifically, the OCC noted the lack of limits on the numbers of fees charged per month, the similarities between overdraft fees and other “high interest rate credit,” and the lack of efforts by banks to identify customers incurring numerous overdraft fees and to meet their needs in a more economical way.¹⁰

However, even after acknowledging these concerns, the OCC failed to take any action addressing high-cost overdraft programs until 2005 — and even this action was largely ineffective. Meanwhile, these practices spread widely.

The OCC issued “Best Practices” and non-discrimination guidance in 2005.

In 2005, the OCC issued joint guidance addressing overdraft systems. Rather than explicitly prohibit or even effectively discourage the troubling practices it had identified in 2001, the OCC merely issued recommendations that financial institutions engage in “best practices.” These included requiring affirmative consent to overdraft coverage; limiting overdraft coverage to checks alone (i.e., excluding debit card and other transaction types); alerting customers before an overdraft is triggered; establishing daily limits on fees; and monitoring excessive usage.¹¹

This guidance also cautions institutions that overdraft systems pose certain legal risks, including potential violations under the Equal Credit Opportunity Act (ECOA). This Act prohibits discrimination in the context of a credit transaction, and the guidance notes that “steering or targeting consumers . . . for [higher cost] overdraft protection programs while offering other consumers overdraft lines of credit or other more favorable credit products . . . will raise concerns under the ECOA.”¹² This warning should be of great concern to the banks, as multiple surveys have found that communities of color bear a disproportionate share of high-cost overdraft fees.¹³

The OCC has failed to enforce its guidance, rendering the guidance ineffective.

Without regulator enforcement, financial institutions can, and often do, entirely ignore recommended “best practices.” And there is little evidence to suggest that the OCC instructed its examiners to evaluate overdraft practices at all. The Compliance Handbook used by OCC examiners in their evaluation of banks makes no mention of these best practices, sending a message to the OCC’s banks that they may do whatever they please.¹⁴ And indeed, they have: The chart in the previous section illustrates that OCC banks have virtually ignored the best practices.

Moreover, the OCC has sent the same message to the *customers* of national banks. One striking example: The OCC’s online consumer reference, “HelpWithMyBank,” has a Frequently Asked Question concerning transaction posting order (generally manipulated by banks to maximize overdraft fees), and the OCC’s response simply mirrors the position frequently taken by banks in their fine print—effectively, that they reserve the right to post transactions in whatever order they please.¹⁵

Recommendations

The OCC should take immediate steps to stop abusive overdraft practices at the banks it regulates:

- It should start by enforcing the Best Practices it identified in 2005 and issue additional guidance to the extent necessary.
- It should investigate the impact of high-cost overdraft systems on communities of color and take appropriate enforcement action where it finds violations of fair lending laws.
- It should support the promulgation of formal rules that address the high cost of today’s overdraft fees, limit their frequency, and explicitly prohibit the unfair practices documented above.

¹ CRL has conducted several surveys which show that the overwhelming majority of consumer want a choice about whether overdraft coverage is included with their account, and would prefer that debit card transactions which would otherwise result in an overdraft be declined. For example, see Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options*, Center for Responsible Lending (April 16, 2008). Available at www.responsiblelending.org/overdraft-loans/research-analysis/final-caravan-survey-4-16-08.pdf.

² 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 www.responsiblelending.org/overdraft-loans/research-analysis/Debit-Card-Danger-report.pdf.

³ A CRL analysis found that the median debit card transaction causing an overdraft was for \$20. See 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 www.responsiblelending.org/overdraft-loans/research-analysis/Debit-Card-Danger-report.pdf.

⁴ These banks are as follows: Bank of America, Chase, Wachovia, Wells Fargo, Citibank, U.S. Bank, TD Bank, National City, Capital One, PNC, HSBC, RBS Citizens, and Keybank.

⁵ While five banks have announced changes to allow customers to later opt out of overdraft coverage for all transaction types, they will continue to automatically enroll the customers in the program at the outset.

⁶ One bank no longer charges a fee if an account is less than \$10 overdrawn at the end of the day; however, if the customer overdraws by \$10.01 in total, he/she is charged for every overdraft incident that day, regardless of the size. Three banks have announced plans not to charge a fee for accounts overdrawn by \$5 or less.

⁷ Bank of America and Chase have announced that, in the future, they will limit the number of debit card-triggered overdraft fees charged annually, and U.S. Bank has announced that it will limit overdraft fees on all transactions charged annually. While Wells Fargo has announced a future limit of four fees per day, they continue to charge up to ten fees per day as of January 2010.

⁸ Sustained overdraft fees are generally either smaller fees (\$7-8) paid on a daily basis after being overdrawn for a period of time or a one-time larger fee (\$25-35) after the customer has remained overdraft for some number of days.

⁹ For example, Bank of America states: “We ordinarily process and post debits within each category from the highest to lowest dollar amount, regardless of the order in which they occur or we receive them . . . high-to-low

posting order may result in more overdraft items and returned items and more fees than may have resulted if we had used another posting order” and TD Bank states: “[w]hen you do not have enough funds in your Account to cover all the checks and other items presented that Business Day, some processing orders may result in more insufficient funds items and more fees than others.” See Bank of America Deposit Agreement and Disclosures and TD Bank Personal Deposit Account Agreement. Chase has announced that, in the future, it will process debit card transactions in the order in which they occur.

¹⁰ OCC Interpretive Letter # 914 (August 3, 2001), available at www.occ.treas.gov/interp/sep01/int914.pdf. The OCC raised compliance issues with respect to the Truth in Lending Act, the Truth in Savings Act, the Electronic Fund Transfer Act, ECOA, and Regulation O (extensions of credit to bank insiders).

¹¹ OCC, Federal Reserve Board, FDIC, and National Credit Union Administration, Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9127, 9132 (Feb. 24, 2005).

¹² *Id.* at 9131.

¹³ Consumer Federation of America’s (CFA) 2004 survey found that 45 percent of African Americans had experienced overdrafts, compared to only 28 percent of consumers overall. In 2006 and 2008, CRL found that only 16 percent of people who overdraft pay 71 percent of all overdraft fees, and those individuals are more likely than the general population to be lower income and non-white. CFA conducted another survey in July 2009, finding that African Americans were twice as likely as consumers overall to have experienced overdrafts.

¹⁴ See <http://www.occ.treas.gov/handbook/compliance.htm>. A review of all the compliance manuals, including “Depository Services,” “Truth in Lending,” “Fair Lending,” and “Other Consumer Protection Laws and Regulations,” reveals that overdraft programs are only discussed in the context of disclosures required under the Truth in Savings Act and the interaction between funds availability schedules and overdraft programs. There is no indication whatsoever that the OCC considers the best practices in its examinations.

¹⁵ See http://www.helpwithmybank.gov/faqs/banking_overdraft.html.