COMMENTS

of the

CENTER FOR RESPONSIBLE LENDING
CONSUMER FEDERATION OF AMERICA
NATIONAL CONSUMER LAW CENTER (on behalf of its low-income clients)

and

CONSUMER ACTION
CONSUMERS UNION

on the

Supplemental Guidance on
Overdraft Protection Programs
OTS-2010-0008

June 28, 2010

VIA ELECTRONIC SUBMISSION

Chief Counsel's Office
Office of Thrift Supervision
Washington, DC 20552

The Center for Responsible Lending,[1] Consumer Federation of America,[2] and the National Consumer Law Center (on behalf of its low-income clients),[3] along with Consumer Action[4] and Consumers Union,[5] provide the following comments regarding the Office of Thrift Supervision's proposed Supplemental Guidance on Overdraft Protection Programs.

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[1] The **Center for Responsible Lending** (CRL) is 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 state-chartered credit union (Self-Help Credit Union (SHCU)), a federally-chartered credit union (Self-Help Federal Credit Union (SHFCU)), and a non-profit loan fund.

SHCU has operated a North Carolina-chartered credit union since the early 1980s. Beginning in 2004, SHCU began merging with community credit unions that offer a full range of retail products. In 2008, Self-Help founded SHFCU to expand Self-Help's mission. SHCU and SHFCU comply with the National Credit Union Administration's (NCUA) regulations on overdraft practices, and they must do so as relatively small providers of retail services.

[2] The **Consumer Federation of America** is a nonprofit association of over 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

[3] The **National Consumer Law Center, Inc.** (NCLC) is a non-profit corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes and regularly updates a series of sixteen practice treatises and annual supplements on consumer credit laws, including Truth In Lending, Cost of Credit, Consumer Banking and Payments Law, Foreclosures, and Consumer Bankruptcy Law and Practice, as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide comprehensive comments to the federal agencies on the regulations under these laws.

[4] **Consumer Action** is a national non-profit education and advocacy organization that has served consumers since 1971. Consumer Action (CA) serves consumers nationwide by advancing consumer rights in the fields of credit, banking, housing, privacy, insurance and utilities. CA offers many free services to consumers and communities. Consumer Action develops free consumer education modules and multi-lingual materials, for its network of more than 11,000 community based organizations. The modules include publications in Chinese, English, Korean, Spanish and Vietnamese.

[5] **Consumers Union** is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about goods, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with more than 5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

I. <u>Introduction</u>

High-cost overdraft programs were first recognized as a problem by regulators, including the Office of Thrift Supervision (OTS), in the early 2000s. In the intervening years, many of these practices have only grown worse, and as a result, consumers have paid more than $100 billion in overdraft fees.[6]

We commend the OTS for its proposal to update its 2005 overdraft best practices in the wake of changes to Regulation DD and Regulation E. We especially applaud the OTS for recognizing that, "in some circumstances, failure to impose a reasonable limit on aggregate overdraft fees is an unfair trade practice under the FTC Act."[7] We urge the OTS to impose a reasonableness standard with respect to both the amount and frequency of overdraft fees. A meaningful reasonableness standard would represent significant reform, and we hope the other federal banking regulators will follow the OTS's lead in this regard.

We further commend the OTS for instructing thrifts that the failure to disclose relevant information to consumers about overdraft coverage may be considered deceptive and therefore a violation of the FTC Act and the OTS Advertising Rule. This proposed enhancement provides needed clarity to thrifts that relevant disclosure is not merely a suggestion, but that failure to provide adequate disclosure is unacceptable.

Enhanced consumer protections resulting from changes to Regulation DD and Regulation E were a needed step in the right direction, but abusive practices remain. Current regulations governing overdraft fees (1) do not address the dramatic disparity between the amount of the overdraft and the amount of the fee institutions charge for covering it, or the frequency with which fees can be charged; (2) allow institutions to re-order transactions to generate additional overdraft fees; (3) fail to address the problem of an excessive number of overdraft fees being borne by a relatively small and vulnerable group of consumers; and (4) continue to allow steep fees for debit card overdrafts which could easily be denied at no charge, while failing to address consent with respect to coverage of checks and electronic payments at all. These and other abusive overdraft practices can make checking accounts unattractive to unbanked consumers, who fear becoming indebted with cascading overdraft fees.

The OTS is taking steps to address these continuing abuses through this update to its guidance. However, as both the OTS' and the other regulators' Joint Guidance of 2005 demonstrate, guidance is only effective to the extent it is enforced. *The best practices of 2005 have been largely ignored*, as regulators have not only failed to adequately

[6] From 2004-2009, total overdraft fees assessed by banks and credit unions exceeded $100 billion dollars. See Figure 2 in Leslie Parrish, *Overdraft Explosion: Bank fees for overdraft increase 35% in two years*, Center for Responsible Lending, (October 6, 2009), available at http://www.responsiblelending.org/overdraft-loans/research-analysis/crl-overdraft-explosion.pdf, for estimated annual costs of overdraft fees in this six year period.

[7] 75 Fed. Reg. 22688.

encourage best practices, but also failed to adequately discourage worst practices. We are pleased that the OTS has added questions addressing overdraft practices to its Preliminary Examination Response Kit.[8] We urge it to indeed apply "heightened review" and take meaningful actions when institutions do not comply with its guidance. But we further urge the OTS to explicitly, firmly prohibit abusive overdraft practices wherever it has legal authority to do so under the Home Owners Loan Act or the Federal Trade Commission Act. We have highlighted a few instances where such authority could be used throughout this comment.

As we discuss in greater detail in the following section, we recommend that the OTS:

- ensure fees are reasonable and proportional by (1) requiring that fees bear some relationship to the lower of the amount of credit extended or the cost to the thrift of covering the overdraft, and (2) limiting the number of fees a thrift can charge before offering a more suitable alternative and banning sustained overdraft fees;

- declare the re-ordering of transactions from largest to smallest—a practice designed to maximize overdraft fees—an unfair trade practice;

- require thrifts to disclose the availability and cost of all overdraft programs offered in an easy-to-understand format, and allow consumers the choice as to whether to opt-in to any type of payment method, including checks and electronic payments which are not currently covered by Regulation E.

II. <u>Recommendations</u>

A. Require that fees be reasonable and proportional, both in amount and frequency

The OTS has asked whether its final guidance should include a "reasonable and proportional" standard for overdraft fees. We strongly support the adoption of such a standard and urge that such standard require that overdraft fees bear a reasonable and proportional relationship to the lower of the amount of credit extended or the cost to the institution of covering the overdraft.

As the OTS notes, a "reasonable and proportional" standard would be analogous to the standard set forth in Section 102 of the Credit Card Accountability, Responsibility and Disclosure (CARD) Act for credit card penalty fees. The logic and rationale behind the Credit CARD Act's "reasonable and proportional" standard – to prevent excessive fees that bear no relationship to the cost incurred by the institution for the alleged violation but serve as a profit center or "bonanza"[9] – is applicable to overdraft fees as well.

[8] 75 Fed. Reg. 22684.

[9] *See* 71 Cong. Rec. S5314 (May 11, 2009) (statement of Sen. Dodd) (noting that the Credit CARD Act was intended to put "an end to the exorbitant and unnecessary fees that drive families further into debt.")

Indeed, there are clear parallels between overdraft fees and credit card penalty fees. As consumer groups have noted before, an ATM or debit card that permits access to overdraft coverage is nothing more than a very high-priced credit card. Furthermore, there is a strong similarity between overdraft practices for bank accounts and over-the-limit practices for credit cards. Both practices involve an institution permitting the consumer to exceed a certain fixed limit, then imposing a steep fee for the very behavior that the institution permitted, often taking advantage of the fact that it is difficult for the consumer to know when they have exceeded the limit. The Credit CARD Act's "reasonable and proportional" standard clearly applies to over-the-limit fees. There is no reason that an analogous standard should not apply to overdraft fees.

In addition, we urge the OTS to limit the number of overdraft fees a thrift can charge before it must offer the account holder a more suitable alternative. The OTS has clear authority to issue regulations limiting the number of overdraft fees imposed on a consumer, as Congress has provided it with expansive rulemaking power under the Home Owners' Loan Act (HOLA).[10] Common banking practices increase the number of overdraft incidents rather than minimize them, and institutions often charge additional "sustained" overdraft fees if an account is not brought current within a few days.[11]

As the OTS recognizes in its proposal, a small number of people bear the brunt of these abusive practices.[12] Unfortunately, these accountholders are often the consumers who can least afford thousands of dollars annually in overdraft fees. Two CRL surveys, conducted in 2006 and 2008, found that account holders who are repeatedly charged abusive overdraft loan fees were more likely to be lower income, single, and non-white.[13] Similarly, a 2009 survey commissioned by CFA found that while 13% of all adults

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[10] *See* 12 U.S.C. §§ 1462a(b)(2), 1463(a)(2) and 1464(a).

[11] Examples of thrifts which charge sustained overdraft fees include (1) Sovereign Bank, which charges an initial $35 fee per overdraft and $5 per day if the overdraft and fee are not repaid within five days; (2) Flagstar Bank, which charges $34 for overdrafts that exceed $10, then adds $12.50 per day when the overdraft and fee are not repaid in five days, and (3) First Niagara Bank, which adds a second $35 sustained overdraft fee if the overdraft and initial $35 fee are not repaid in a week. See Sovereign Bank, "Important Changes to Your Account," www.sovereignbank.com/personal/promotions/overdraft-opt-in.asp, visited June 16, 2010; Flagstar Bank, "Important Overdraft Protection Changes," https://www.flagstar.com/reg-e.html, visited June 16, 2010 and Flagstar "Disclosure Guide," 2010-06, page 11; and First Niagara, "Overdraft protection - new changes and your options, " https://www.fnfg.com/ODPChanges/, visited June 16, 2010.

[12] 75 Fed. Reg. 22685.

[13] Lisa James & Peter Smith, *Overdraft Loans: Survey finds growing problem for consumers*, Center for Responsible Lending, (April 24, 2006), available at http://www.responsiblelending.org/overdraft-loans/research-analysis/ip013-Overdraft_Survey-0406.pdf and Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options*, Center for Responsible Lending, (April 16, 2008), available at http://www.responsiblelending.org/overdraft-loans/research-analysis/final-caravan-survey-4-16-08.pdf.

reported an overdraft within the last year, 18% of accountholders with incomes of $25,000 and 26% of African Americans had incurred an overdraft fee.[14]

(i) Limit the amount of the fee based on the lower of the amount of credit extended or the cost to the institution of covering the overdraft.

In the aggregate, fee-based overdraft programs cost consumers nearly $24 billion each year.[15] This amount actually exceeds the $21.3 billion in credit extended in exchange for these fees. Overdraft fees dwarf the amount of credit actually extended because financial institutions assess a flat fee of around $34 per incident, regardless of the size of the transaction that results in an overdraft. While most overdrafts are caused by small debit card transactions, even overdrafts triggered by other methods of payment are relatively small given the average overdraft fee, as shown in the table below:

	Fee per overdraft*	**Median size of transaction***	**Median amount overdrawn***	**Median fee per dollar overdrawn****
Debit card	$34	$20	$16	$1.94
ATM withdrawal	$34	$40	$40	$0.78
Electronic Transaction	$34	$29	$28	$0.98
Check	$34	$60	$41	$0.73

*Amounts rounded to the nearest dollar.
**The median fee is calculated by taking the median of fees assessed and amounts overdrawn for a series of cases, rather than a direct ratio of the overall median fee and median amount overdrawn by payment method. For more information about this methodology see Eric Halperin, Lisa James, and Peter Smith. *Debit Card Danger*, Center for Responsible Lending (January 25, 2007).

The disparity between the amount of an overdraft fee and the amount of the overdraft is particularly outrageous given the short period of time for which the typical overdraft is outstanding—three to five days—and the low default risk overdrafts carry.[16] Indeed, the only two circumstances under which an overdraft loan is not repaid are when another deposit is never made into the account or when the customer walks away from the account. Operational costs are also low because most programs are highly automated.

Recent regulatory action suggests that current overdraft fees far exceed what is appropriate. The Federal Reserve's final rule under the Credit CARD Act limits credit card penalty fees to the lower of the amount associated with the violation or the cost to

[14] ORCI Poll for CFA, July 2009.

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

[16] Eric Halperin, Lisa James, & 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, (January 25, 2007), available at http://www.responsiblelending.org/overdraft-loans/research-analysis/Debit-Card-Danger-report.pdf.

the institution of the violation.[17] Thus, for example, a consumer who exceeds his or her credit card limit by $15 may not be charged an over-the-limit fee exceeding $15.

Indeed, based upon the "reasonable and proportional" standard as interpreted by the Federal Reserve, overdraft fees should be even lower than the safe harbor the Fed determined for credit card penalty fees ($25 for the first violation, $35 for subsequent violations). In its rulemaking, the Federal Reserve generally considered delinquency resolution costs to be the only permissible factor in setting credit card penalty fees. Such costs are extremely minimal in the overdraft context -- and far lower than in the credit card context - as the institution repays itself from the customer's subsequent deposit.

Under the best circumstances, since an overdraft fee is in fact a fee charged for access to credit, financial institutions should not charge more for fee-based overdrafts than they do for overdraft lines of credit—typically 18 percent APR.

(ii) Limit the number of overdraft fees charged monthly and annually, and ban sustained overdraft fees

In addition to limiting the size of overdraft fees to an amount that is reasonable and proportional, the OTS should limit the frequency with which overdraft fees may be charged. As the OTS acknowledges in its proposal, excessive numbers of overdraft fees can create unmanageable debt for account holders.[18] They also threaten the viability of maintaining a bank account. Overdraft fees, and practices used by banks to maximize overdrafts, are a primary reason consumers give in a Federal Reserve study for why they distrust banks.[19] The risk and uncertainty that a mistake will trigger a cascade of $34 overdraft fees[20] makes owning a low-balance account scary for consumers and drives

[17] 12 C.F.R. § 226.52(b)(2)(i)(A) (issued June 15, 2010).

[18] 75 Fed. Reg. 22688 (noting that "[w]hen fees become excessive, consumers may have difficulty both repaying overdrafts and bringing accounts current, which may cause them to incur additional fees.")

[19] *A Study of the Unbanked & Underbanked Consumer in the Tenth Federal Reserve District*, Federal Reserve Bank of Kansas City (May 2010).

[20] For example, Sovereign Bank will charge up to nine overdraft fees in one day and sets no dollar threshold to trigger fees, Wilmington Trust charges $35 each for up to ten overdrafts per day, and American Savings Federal Savings Bank sets no limit on the total overdraft fees charged. In contrast, some thrifts do not allow debit card overdrafts and/or limit the number of fees charged per day. USAA Federal Savings Bank is one example of a thrift which does not allow consumers to overdraw using their debit card and also limits overdraft charges on other payment methods such as a check to two per day. See Sovereign Bank, "Important Changes to Your Account," www.sovereignbank.com/personal/promotions/overdraft-opt-in.asp, visited June 16, 2010; Wilmington Trust, "Personal Deposit Products Fee Schedule," January 2010 and "What You Need to Know about Overdrafts and Overdraft Fees," accessed at www.wilmingtontrust.com/repositories/wtc_sitecontent/PDF/REG_E_Overdraft_Election; American Savings, FSB, "Overview of Overdraft Changes FAQ," www.ambfinancial.com/opt-in.htm, visited June 16, 2010 and Link to Schedule of Service Fees, Effective October, 2009; and USAA Service Fee Schedule, May 21, 2010.

accountholders out of the banking system after they incur costs they cannot afford to repay.[21]

The OTS clearly has the authority to issue regulations limiting the number of overdraft fees imposed during a certain time period. Congress has provided the OTS with expansive rulemaking power under HOLA, including the authority to:

- "prescribe such regulations and issue such orders as the [OTS] may determine to be necessary for carrying out this Act and all other laws within the [OTS]'s jurisdiction." 12 U.S.C. § 1462a(b)(2);
- "issue such regulations as the [OTS] determines to be appropriate to carry out the responsibilities of the [OTS]." 12 U.S.C. § 1463(a)(2); and
- issue "such regulations as the [OTS] may prescribe (1) to provide for the organization, incorporation, examination, operation, and regulation of [federal thrifts]" 12 U.S.C. § 1464(a).

(OTS could also impose a limit on the number of overdraft fees under its FTC Act unfairness authority. Indeed, cascading overdraft fees are clearly analogous to pyramiding late fees, which the OTS has long prohibited as an unfair trade practice through its Credit Practices Rule.[22])

We urge the OTS to adopt the proposals currently under consideration in Congress, which would limit overdraft fees to one per month and six per year.[23] In accordance with this limit, sustained overdraft fees—assessed after an account is overdrawn for a few days—should be banned. The Federal Reserve Board's reasoning in prohibiting credit card issuers from imposing multiple penalty fees based on a single event or transaction could also be applied to sustained overdraft fees, permitting only one fee per overdraft incident.[24]

[21] Virtually all involuntary bank account closures—in which the financial institution closes a consumer's account—occur because the customer overdrew their account an excessive number of times. See Dennis Campbell, Asis Martinez Jerez, and Peter Tufano, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures*, Harvard Business School (June 6, 2008).

[22] 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. These fees provide no benefit to the consumer while driving them further into debt. The OTS has long prohibited pyramiding late fees as an unfair practice through its Credit Practices Rule (12 CFR 535). Overdraft fees, as they are currently charged, drive consumers deeper into debt in much the same way. 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, as demonstrated in subsection 3 above. And like pyramiding late fees, the injury caused by overdraft fees far exceeds any cost to the institution of collecting the overdraft.

[23] HR 3904, The Overdraft Protection Act of 2009 and S. 1799, the FAIR Overdraft Coverage Act of 2009.

[24] 12 C.F.R. § 226.52(b)(2)(ii) (issued June 15, 2010).

The monthly limit would prevent banks from piling on multiple fees for each overdrawn transaction during a single day or event, as well as prohibit sustained overdraft fees when consumers are unable to repay the overdraft and initial fee in just a few days. Not only will this limit protect frequent users of overdrafts, but it also will provide an incentive for financial institutions to market their more affordable and appropriate products such as overdraft lines of credit, transfers from savings, and small dollar loans. The monthly limit will also provide predictability for low-balance customers who cannot afford the open-ended risk of multiple overdraft fees.

The annual limit of six fees would also prevent the consumer from being mired in unmanageable and unaffordable debt. The annual limit recognizes that if a customer qualifies for a lower cost form of overdraft coverage, the institution may provide that coverage to the customer. And if the customer doesn't qualify for lower cost coverage, that customer is clearly not in a position to shoulder more than six overdraft fees a year.

The annual limit of six fees per year is based on the FDIC guidelines on payday loans. In 2005, the FDIC limited excessive refinancing 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.[25] 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."[26] 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. This proposal to limit the number of overdraft fees that can be charged is closely analogous to the FDIC's approach to limiting payday loans and would address the debt trap caused by overdraft loans in much the same way.

B. Declare posting transactions in order from highest to lowest to maximize overdraft fees an unfair practice

The best practice addressing transaction re-ordering as currently proposed in the Supplemental Guidance is inadequate. The proposal discouraging varying transaction-clearing rules on a customer-by-customer basis will likely have little impact because it continues to allow "high-to-low" transaction clearing (i.e., in order from largest to smallest) to be applied to all customers uniformly. This method of transaction clearing is widely applied and inherently designed to maximize overdraft fees. The OTS should ban high-to-low transaction clearing under HOLA, or declare it an unfair trade practice because it clearly meets the three-pronged FTC unfairness test.

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[25] Federal Deposit Insurance Corporation, *Payday Lending Programs Revised Examination Guidance*, (March 1, 2005), available at http://www.fdic.gov/news/news/financial/2005/fil1405.html.

[26] FDIC Financial Institution Letters, *Payday Lending Programs Revised Examination Guidance*, FIL-14-2005 (March 1, 2005).

First, high-to-low transaction ordering causes substantial consumer injury. CRL's report, *Out of Balance*, provided a hypothetical example demonstrating the dramatic difference in overdraft fees that can result when an account holder's transactions are cleared high-to-low versus in the order in which they were presented to the institution by the processor.[27] In this example, if the account holder's ten transactions were cleared in the order in which they were presented to the institution, the account holder would have overdrawn the account once, paid one $34 overdraft fee, and had a negative balance of $177. If, instead, the institution posted the transactions in order from high to low, the account holder would have been charged eight $34 overdraft fees, totaling $272, and had a negative balance of $415.[28] This illustration is attached to these comments in the Appendix.

Second, the injury is not reasonably avoidable by the consumer. Account holders have no control over the order in which institutions clear transactions, and they have little knowledge of the practice. Institutions' vague disclosures about the order in which they clear transactions do not provide account holders meaningful guidance. In fact, the ABA has argued that communicating clearing practices clearly to account holders is next to impossible for banks.[29] In reality, institutions are vague because they don't want to disclose that they clear transactions in whatever order maximizes overdraft fees.

Third, the injury is not outweighed by countervailing benefits to consumers or competition. With respect to benefit to consumers, institutions often assert that customers appreciate their clearing transactions high-to-low because it better ensures that larger, presumably more important transactions are paid. But this assertion is disingenuous in today's environment of fee-based overdraft programs that pay the vast majority of all overdrafts anyway. With respect to competition, institutions are not competing based on the order in which they clear transactions. The vast majority of institutions clear transactions high-to-low, so account holders have no real choice.

Indeed, the public wants banks to pay transactions in the order in which they are received. In a poll of 1,018 people conducted by Caravan Opinion Research Corporation for CFA in 2009, 70% supported (53% strongly supported) this requirement.

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[27] 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).

[28] *Id.*

[29] Jean Ann Fox and Patrick Woodall, *Overdrawn: Consumers Face Hidden Overdraft Charges From Nation's Largest Banks*, Consumer Federation of America (June 9, 2005), *supra* note at 82 (citing Nessa Feddis, Senior Federal Counsel ABA, Letter to Jennifer J. Johnson, Secretary Board of Governors of the Federal Reserve System, Re: Proposed Interagency Guidance on Overdraft Protection Programs, August 6, 2004, at 6). CFA states, "The ABA contends that [the] order in which debits are processed is so complex that it is 'virtually impossible to explain in a manner understandable to most consumers' and would require several pages to disclose to consumers."

C. Require meaningful disclosure of pricing for all types of overdraft programs, and greater choice of overdraft coverage for all payment methods.

In addition to limiting the amount and frequency of overdraft fees which can be assessed, and ending the practice of re-ordering transactions to generate more overdraft fees, we also request that thrifts provide better information and choice to their customers as part of their overdraft offerings. This could be done by providing a way to compare all types of overdraft coverage offered and providing customers the ability to choose whether they want overdraft coverage on any payment method, including checks and electronic transactions which are not currently covered by Regulation E opt-in rules.

(i) Require disclosure of pricing information for all types of overdraft programs available

We urge the OTS to *require* that federal thrifts disclose the availability and cost of all types of overdraft coverage they offer, in an easy-to-understand tabular format. As proposed, section III.A.2 of the Supplemental Guidance merely *recommend*s *as a Best Practice* that federal thrifts provide such information when informing consumers about fee-based overdraft coverage, and it does not require any particular format. Consumers must be given information about the comparative costs of each alternative in order to make a truly informed and meaningful choice. (Information about alternatives, but not their fees, is also required by Regulation E and the Federal Reserve Board's Model Form for soliciting opt-ins for fee-based overdraft coverage.)

Furthermore, we urge the OTS to require disclosure that the cost of not opting in to ATM and one-time debit card overdraft coverage is "$0." The groups submitting this comment recently sent the OTS a letter outlining our concerns regarding aggressive marketing efforts to entice consumers to opt in to overdraft coverage of ATM and one-time debit card transactions. The letter was prompted in part by marketing by a national bank that used misleading statements to urge consumers to opt in. One reason that the bank may have been able to convince consumers to opt in is that Regulation E does not explicitly require banks to disclose that the cost of not doing so is "$0." In fact, the national bank's marketing went even further, deceptively stating that "Debit Card Overdraft Coverage costs $0 to keep active on your account." This statement misleadingly suggested that opting in to overdraft coverage of ATM and one-time debt card transactions is the lowest cost alternative. Instead, a required disclosure should clearly convey that if consumers decline to opt in, *they will never incur any overdraft fees for ATM and everyday debit card transactions.*

As we have learned in the credit card context, the format of cost comparisons is critical, which is why the Federal Reserve Board has mandated disclosures in the form of a summary table for all stages of a credit card account. We propose that a similar summary table of the costs of each overdraft alternative be included on the model form. Most importantly, such table must show that the cost of declining to opt in is "$0."

The table should also include sample Annual Percentage Rate disclosures, which the OTS could mandate under its broad authority under HOLA.[30] Without a sample APR disclosure, cost comparisons between fee-based overdraft loans and a traditional overdraft line of credit or transfer from a credit card may be themselves deceptive, because only the latter two require an APR disclosure. The OTS should require thrifts to disclose a sample APR for each of these forms of credit, based upon a hypothetical $100 overdraft repaid in 2 weeks. Such disclosure would also be beneficial because it will allow consumers to compare the cost of overdraft protection to other credit options offered by the financial institution.

Type of Overdraft Coverage for ATM and Everyday Debit Card Transactions	Fees/Interest	Total Cost per Transaction	Sample Annual Percentage Rate (assuming $100 overdraft for 2 weeks)[31]
None[32]	$0	$0.00	NA
Standard Overdraft Coverage	$34 per transaction	$34.00	886%
Overdraft Line of Credit	$5 per transaction plus 18% APR	$5.69	148%
Transfer from Savings	$5 per transaction	$5.00	N/A
Transfer from Credit Card	$5 per transaction plus 24% APR	$5.92	154%

(ii) Require opt-in for overdraft coverage of all payment methods.

As part of the update to its proposed best practices, the OTS continues to encourage thrifts to obtain consumer consent before covering overdrafts for a fee. We applaud the OTS for recognizing that thrifts should "provide their customers with the opportunity to affirmatively choose or 'opt in' to overdraft protections for transactions outside the scope of Regulation E's opt-in requirement,"[33] but we believe that the OTS should use its authority under HOLA to *require* thrifts obtain the consumers' consent or opt in to all

[30] 12 U.S.C. §§ 1462a(b)(2), 1463(a)(2) and 1464(a).

[31] These sample APRs would be calculated as follows: The amount of the fee divided by the amount of the overdraft; divided by the number of days between when the overdraft occurred and when it was repaid; multiplied by 365 days; expressed as a percentage. Note that the two week assumption for repayment is very generous, since most overdraft loans are repaid within five days. However, at least it will provide consumers some idea of how costly these loans are in relation to other alternatives.

[32] Note that if financial institutions are required to get consent from consumers before charging an overdraft fee for other payment methods (such as a check or ACH transaction) in the future, any cost associated with declining these transactions in the event of an overdraft should be disclosed as part of this table. Currently, financial institutions typically charge an NSF fee when declining checks or ACH transactions that would overdraw an account, and merchants may assess an additional fee.

[33] 75 Fed Reg 22,687 (April 29, 2010).

forms of fee-based overdrafts.[34] As the OTS notes, while Regulation E offers this protection for one-time debit card transactions and ATM withdrawals, it does not address other payment methods. At many thrifts, consumers will continue to be automatically enrolled in overdraft coverage for their checks and electronic payments, and—in many cases—not even be given the opportunity to opt out if they do not want the coverage.

Consumers should be provided a meaningful choice about whether to participate in a fee-based overdraft program for all methods of payment. Customers would then be allowed to opt into or out of overdraft coverage for each type of payment method separately, so that, for example, a consumer is able to opt in to overdraft coverage for checks, but not for transactions involving electronic or debit card payments.

An opt-in arrangement provides the customer a moment of choice, during which he or she may evaluate the options available and affirmatively choose the one most suitable. While an opt-in requirement must be coupled with other substantive protections such as those described elsewhere in this comment, greater choice will foster competition in the marketplace, resulting in better product offerings for consumers. Allowing no choice at all, or allowing automatic enrollment with only an opportunity to opt out, are anti-competitive, non-transparent practices that have facilitated the race to the bottom in this area over the past several years. For further discussion of the importance of an "opt-in" regime for checks and ACH transactions, *see* CRL's previous comment letters addressing the OTS and other federal banking regulators' 2008 UDAP proposal[35] and the Federal Reserve Board's 2009 Regulation E proposal.[36]

III. Conclusion

We commend the OTS for revisiting its 2005 overdraft guidance. Despite the recent improvements to Regulation DD and Regulation E, abusive overdraft practices remain rampant throughout the industry which can drive financially vulnerable consumers away from the financial mainstream. We enthusiastically applaud the OTS for questioning whether overdraft fees are assessed in a reasonable and proportional manner, and urge it to limit the amount of excessive overdraft fees, as well as their frequency. We further urge the OTS to prohibit clearing transaction in order from highest to lowest. Finally, improving disclosures for all overdraft programs and requiring opt-in for overdraft coverage of all types of transactions would empower consumers with better information and choices with regards to their bank accounts.

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[34] 75 Fed Reg 22,687 (April 29, 2010).

[35] 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 (August 4, 2008) at 32-33.

[36] Comments of the Center for Responsible Lending, along with the other organizations authoring this current comment, to the Board of Governors of the Federal Reserve System on Proposed Regulation E—Overdraft Practices (March 30, 2009) at 7-8.

APPENDIX

Example of how transaction re-ordering from high-to-low can generate additional overdraft fees[37]

Scenario A: Chronological Ordering of Charges

Transaction	Charge	Account Balance	Overdraft Fee
		$750	
Credit card payment	$90	$660	
Water bill	$30	$630	
Groceries purchase	$65	$565	
Gas purchase	$25	$540	
Lunch purchase	$10	$530	
Drugstore purchase	$15	$515	
Family gym fees	$40	$475	
Coffee purchase	$8	$467	
Bookstore purchase	$10	$457	
Rent	$600	$(143)	$34
Total overdraft credit extended		**$(143)**	
Total overdraft fees			**$34**
Balance with fees deducted		**$(177)**	

Scenario B: High to Low Ordering of Charges

Transaction	Charge	Account Balance	Overdraft Fee
		$750	
Rent	$600	$150	
Credit card payment	$90	$60	
Groceries purchase	$65	$(5)	$34
Family gym fees	$40	$(45)	$34
Water bill	$30	$(75)	$34
Gas purchase	$25	$(100)	$34
Drugstore purchase	$15	$(115)	$34
Lunch purchase	$10	$(125)	$34
Bookstore purchase	$10	$(135)	$34
Coffee purchase	$8	$(143)	$34
Total overdraft credit extended		**$(143)**	
Total overdraft fees			**$272**
Balance with fees deducted		**$(415)**	

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[37] Excerpt from 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), at 6-7.