

July 1, 2019

The Honorable Kathleen Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Submitted electronically to <http://www.regulations.gov>

Re: Overdraft rule review pursuant to the Regulatory Flexibility Act, Docket No. CFPB-2019-0023

Dear Director Kraninger:

I. Introduction

I'm a single mother of three, and for as long as I can remember overdraft fees have always been one of the most difficult and challenging parts of my life. Overdraft fees put me in the arena of living paycheck to paycheck, and sometimes without a paycheck. The reason for this is that these exorbitant fees left me, many times, in the negative. How could I run a household in a constant downward spiral? Every money moment in my life was shared with the fear of a dreaded overdraft fee.

I remember a time when I was working at JC Penney's but struggling to cover rent and groceries. I got hit with two overdraft fees, \$60 or \$70 in total in one week. I am a responsible adult but did not understand why these fees would accumulate. I may have been off 15 cents or a bill came in early. So, the banks became who I worked for. At one point I ended up making cloth diapers for my children out of t-shirts and an old sweater for liners, not because I wanted to but because I had no choice. It felt like the banks legally stole my money.

Over time, I've probably paid over \$2,500 in overdraft fees. At times I've gotten hit with three fees in one day – how can they charge you three times in one day?

Eventually I've lost account after account and been reported to Chexsystems. I worked so hard to get a better job but the better paying and better benefit jobs I could not get. Those employers would not give me a chance.

For me, overdraft fees meant missing work because I couldn't get a bus pass because my account was overdrawn. To the banks I say: you get rich off of overdraft fees, I still hear my son complain and moan of hunger, and I feel guilty, yet defenseless because the money is gone. I still see my newly walking toddler cringe with pain because of a diaper rash. \$15-\$35 is a momentous amount for a low-income family.

As the matriarch of a family, feeling unable to provide for my family due to overdraft fees worsened my depression and sometimes made it hard to get out of bed in the morning. They just made it feel impossible to get ahead.

The saga continues — My oldest daughter has a bank account now, and I see the banks doing the same thing to her.

—Stacy, Connecticut

The above account appeared in *An Analysis of Bank Overdraft Fees, A Report by the Office of Senator Cory A. Booker* (August 2018).¹

I have paid over {\$3000.00} in less than XXXX years because of this. I am a single mom of XXXX, that makes enough to cover bills. however with what i pay in overdraft fees it has put me in a hole. i pay the fees, then ontop of that I have to pay for my bills putting me back into the hole. i get paid every XXXX weeks, in XXXX week i had to pay over {\$630.00} because of how they processed the transactions, i only make {\$690.00} every two weeks.

—CFPB Complaint ID 1408210 (received 6/5/2015).

The **Center for Responsible Lending (CRL)**,² the **National Consumer Law Center (on behalf of its low income clients) (NCLC)**³, **National Association for the Advancement of Colored People (NAACP)** ⁴,

¹ *An Analysis of Bank Overdraft Fees, A Report by the Office of Senator Cory A. Booker* (August 2018), <https://www.scribd.com/document/385303657/An-Analysis-of-Bank-Overdraft-Fees-Final>.

² The **Center for Responsible Lending (CRL)** is a nonprofit, 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, one of the nation's largest nonprofit community development financial institutions. Over 37 years, Self-Help has provided over \$7 billion in financing through 146,000 loans to homebuyers, small businesses, and nonprofits. It serves more than 145,000 mostly low-income members through 45 retail credit union locations in North Carolina, California, Florida, Greater Chicago, and Milwaukee.

³ Since 1969, the nonprofit **National Consumer Law Center (NCLC)** has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

⁴ Founded in 1909, the **National Association for the Advancement of Colored People** (hereinafter **NAACP**) is our nation's oldest, largest and most widely known grassroots civil rights organization. The principal objectives of NAACP are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate racial prejudice among the citizens of the United States; to remove all barriers of racial

National Coalition for Asian Pacific American Community Development (National CAPACD)⁵, and **National Fair Housing Alliance (NFHA)**⁶ submit these comments in response to the Consumer Financial Protection Bureau (CFPB)'s request for comment on its review of the overdraft opt-in rule, pursuant to the Regulatory Flexibility Act (RFA) (the Notice).

The considerations prescribed by the RFA strongly support strengthening protections against overdraft fees on debit card and ATM transactions. More broadly, comprehensive reform of unfair and abusive overdraft practices is badly needed.

The RFA sets forth five factors to consider in an RFA review. Consideration of these factors in the opt-in rule context shows clearly that any effort to weaken the rule would be unwarranted, and, rather, protections against overdraft abuses must be strengthened. Moreover, consideration of these factors make clear that the opt-in rule should not be weakened for smaller institutions. A weaker opt-in rule for smaller banks would cause harm, confusion, and anger for consumers in the marketplace, and harm small institutions themselves, as they would become known as less safe places to bank.

These factors are as follows:

- (i) *continued need for the rule.* The Bureau's extensive research makes plain that overdraft fees, including those on debit card and ATM transactions, continue to inflict substantial harm on consumers and would inflict more without the overdraft opt-in rule;
- (ii) *nature of public complaints or comments on the rule.* Comments by consumers to the Bureau's 2012 Request for Information on overdrafts, as well as on the opt-in proposal in 2009, and the thousands of complaints regarding overdrafts in the Bureau's complaints database support retaining the overdraft opt-in rule as well as the need for additional reform. By contrast, there were very few complaints about the opt-in rule from financial institutions;

discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof.

⁵ **National Coalition for Asian Pacific American Community Development (National CAPACD)** is a progressive coalition of local organizations that advocate for and organize in low-income AAPI communities and neighborhoods. We strengthen and mobilize our members to build power nationally and further our vision of economic and social justice for all. Our members include more than 100 community-based organizations in 21 states and the Pacific Islands. They implement innovative affordable housing, community development and community organizing strategies to improve the quality of life for low-income AAPI communities.

⁶ Founded in 1988, the **National Fair Housing Alliance (NFHA)** is a consortium of more than 220 non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the U.S. Headquartered in Washington, D.C., NFHA, through comprehensive education, advocacy, enforcement programs, and neighborhood-based community development programs, ensures equal access to apartments, houses, mortgage loans, and insurance policies for all residents of the nation. Over 30 years, NFHA has assisted 750,000 victims of housing discrimination; assisted over 700 1st-time homebuyers purchase affordable homes; expanded housing opportunities for millions of consumers; assisted in the creation of 20,000 accessible housing units; assisted more than 200,000 consumers receive financial literacy training; rehabbed 700 abandoned homes; assisted 800 homeowners to avoid foreclosure; facilitated improved maintenance of 750,000 foreclosed properties; and created fair housing education and outreach materials that have reached millions of consumers.

- (iii) *complexity of the rule.* The overdraft opt-in rule is not complex; complaints when it was adopted that it would be so difficult to implement that it would force the end of overdraft coverage proved to be incorrect. And at this point, the rule is fully incorporated into bank procedures.
- (iv) *extent to which the rule overlaps, duplicates, or conflicts with other laws or rules.* Overdraft credit when extended through debit and ATM cards linked to checking accounts is unjustifiably regulated differently than credit extended through prepaid debit cards, credit cards, and other credit under the Regulation Z. These inconsistencies argue for comprehensive reform of overdraft practices on checking accounts, particularly electronic transactions. In addition, overdraft fees as currently administered are unfair and abusive practices under the Dodd-Frank Act. These inconsistencies argue for strengthening regulation of overdraft and show there is certainly no basis to widen the conflict with other credit laws even further by weakening a baseline “opt-in” consent requirement.
- (v) *time since the rule was evaluated or the degree to which technology, market conditions, or other factors have changed.* Overdraft abuses still drain billions from the pockets of consumers, and the increase in debit card use and evolving payments present more opportunities for banks to charge overdraft fees than in 2009.

As discussed below, financial institutions combine a number of unfair and abusive practices to in order to impose high, repeat overdraft fees on their customers. These fees create hardships from which many consumers do not recover. Comprehensive sound regulatory policy around overdraft fees—rules that prohibit unfair and abusive practices in overdraft programs—can restore health to the market, make space for far better products, and save families from being washed away by the very institutions that hold themselves out as vehicles for those families’ financial security.

In the context of the RFA review of the opt-in rule, a review of the market since the rule was finalized in 2009 makes plain that protections around overdraft fees on debit card purchases and ATM withdrawals must be strengthened. Weakening the opt-in rule in any way is plainly unsupportable. In particular, we urge the Bureau to:

- Prohibit overdraft fees on debit card purchases and ATM withdrawals;
- Short of a full prohibition, at the very least, apply the protections now applicable to overdraft fees on prepaid cards to debit cards on checking accounts, which in this context should:
 - Prohibit obtaining opt-ins until 30 days after account opening;
 - Require an ability-to-repay determination for overdraft credit extended;
 - Limit fees in the first year to 25% of the credit line;
 - Allow payments to be due no more frequently than once a month, 21 days after a statement.
- Prohibit practices that increase overdraft fees, including posting transactions in order from highest to lowest and charging fees on transactions that were authorized against available funds.
- If the opt-in rule is generally retained as is:
 - provide that consent expire after six total overdraft fees in a rolling twelve months; and
 - allow financial institutions no additional discretion in opt-in disclosures, and prevent misleading marketing or approaches to obtaining opt-ins.

- Require that fees be reasonable and proportional to the cost to the institution of covering the overdraft.

Moreover, comprehensive reform of all overdraft fees is needed. In addition to the above, we urge CFPB to subject overdrafts on all transactions to credit protections, including permitting repayment in affordable installments. This is particularly warranted for overdraft fees that exceed those that may be occasional and inadvertent—fees exceeding more than one per month and six per year.

II. Financial institutions engage in unfair and abusive overdraft practices that regulators have enabled.

Financial institutions combine a number of unfair and abusive practices to charge account holders high, repeat overdraft fees, from which many consumers do not recover. First, the fee is often grossly out of proportion to the size of the overdraft itself. For debit card point-of-sale (POS) overdrafts, which trigger more overdraft fees than any other transaction type, the median overdraft is only \$20, yet the fee is \$35, a penalty approaching twice the size of the actual overdraft.⁷ Secondly, once a consumer's account is overdrawn, he or she is often charged a series of overdraft fees. Financial institutions typically charge a fee for every individual overdraft transaction; they often charge additional “sustained” or “extended” overdraft fees if the account remains negative for several days; and many use transaction posting practices that maximize the number of transactions that post against a negative balance and trigger a fee.

Further, the financial institution repays itself the fees and the value of all overdraft transactions directly from the customer's next incoming deposit (pay or benefits, like Social Security, military/veteran's, or unemployment). This repayment typically occurs only three days later,⁸ which is telling in at least two ways. First, the bank extends the overdraft credit for a very short period, meaning that the cost of funds to the bank is very little. Second, the short repayment period connotes an account holder who almost makes it to payday, only to be hit with one, or several, or many, disproportionate fees.

Some financial institutions permit certain customers to avoid high overdraft fees by linking their accounts to overdraft lines of credit or a credit card. Other customers may link their account to a savings account to have funds transferred into their checking account to cover overdraft transactions. These services are typically far lower cost than the fee-per-transaction model. But these links are typically only available to those with relatively strong credit histories or available savings. Others are relegated to a predatory product.

Overdraft programs did not always operate this way. Historically, financial institutions occasionally covered account holders' paper checks when the account lacked sufficient funds as a courtesy; sometimes, they charged a fee. The Federal Reserve exempted overdraft fees from “finance charges” under the Truth In Lending Act (TILA) based on the premise that these were for occasional and

⁷ Rebecca Borné & Peter Smith, *The State of Lending in America & its Impact on U.S. Households* at 3, Center for Responsible Lending (July 2013), <https://www.responsiblelending.org/sites/default/files/uploads/8-overdrafts.pdf>.

⁸ CFPB Data Point: *Checking account overdraft* at 23 (July 2014) http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf [CFPB 2014 Data Point].

inadvertent overdrafts, rather than routine extensions of credit. As a result, overdrafts were not subject to credit regulations under TILA.⁹

In the early 2000s, financial institutions extended overdraft fees to debit card transactions, even though there was no rational basis for doing so. First, these were debit cards, not credit cards—they were not designed to put consumers into debt. Moreover, these transactions, unlike paper checks, could simply be declined at check-out, at no cost to the financial institution, when the customer lacked sufficient funds. The extension of overdraft fees to debit cards—a rapidly growing payment mechanism, with many consumers using their debit card multiple times daily—fueled an exponential growth in overdraft fees during the 2000s.¹⁰ Though it was clear that overdrafts were neither “occasional” nor “inadvertent”—banks encouraged them—the Federal Reserve continued to exempt them from coverage under Regulation Z, opting in 2004 to regulate them under the Truth In Savings Act instead.¹¹

In 2009, the Federal Reserve took a modest step under Regulation E of the Electronic Fund Transfer Act (EFTA) by requiring that financial institutions obtain a customer’s one-time “opt-in,” or nominal consent, before charging the customer overdraft fees on future debit card POS or ATM transactions. This action was based on significant evidence that consumers did not want to be charged overdraft fees on debit card transactions and would have preferred to skip a transaction than be charged the fee. The rule—a bare minimum step to address overdraft abuses—had mixed results. On one hand, it spared some consumers from these fees, and total overdraft fees consumers paid annually decreased substantially as a result. On the other hand, the rule did nothing to protect consumers from whom financial institutions managed to obtain an “opt-in.” It did not address the size of the fee; the number of fees a customer may be charged; practices banks engage in to maximize fees; or the unaffordability of this credit for so many account holders. And it did not address overdraft or NSF fees on checks or electronic bill-pay transactions at all.

The result has been that, today, we continue to have a profoundly dysfunctional checking account market caused and perpetuated by unfair and abusive overdraft programs. When consumers shop for a bank account, they are likely to consider factors like fixed monthly and annual costs of the account. Thus, they may choose an account that appears “free”—with no upfront monthly fee—but be unaware that they will pay more for the account due to overdraft charges than they would have on an account that has a modest monthly fee but more responsible overdraft fee practices. Instead, overdraft charges operate as “back-end” or “gotcha” fees that undermine consumer choice and a healthy market and fuel aggressive, deceptive marketing efforts to convince people to “opt-in,” rather than transparent upfront price tags. These dynamics are the same regardless of the size of the financial institution.

⁹ See FRB’s 2005 rule applying Truth in Savings (instead of Truth in Lending) to overdraft fees: **“Paying consumers’ occasional or inadvertent overdrafts is a long-established customer service provided by depository institutions.** The Board recognized this longstanding practice when it initially adopted Regulation Z in 1969, to implement the Truth in Lending Act (TILA); the regulation provided that these transactions are generally exempt from coverage under Regulation Z where there is no written agreement between the consumer and institution to pay an overdraft and impose a fee. See § 226.4(c)(3). **The exemption from Regulation Z was designed to facilitate depository institutions’ ability to accommodate consumers on an ad-hoc basis.”** 70 Fed. Reg. 29582 (May 24, 2005).

¹⁰ See Leslie Parrish, *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years* (October 2009), <http://responsiblelending.org/overdraft-loans/research-analysis/crl-overdraft-explosion.pdf>.

¹¹ FRB’s 2005 Regulation DD (Truth in Savings) Final Rule, 70 Fed. Reg. 29582 (May 24, 2005).

III. Overdraft programs cause consumers substantial harm, with costs to consumers grossly disproportionate to costs to financial institutions.

*“The high cost of being poor has two main implications. First, inequality is worse than income figures alone suggest. This is true even before non-financial disparities, such as the implications for health of living on a low income, are considered. Second, finding ways to reduce these costs, for instance by making it easier to claim the EITC without borrowing, or **by changing the rules on overdraft fees (which at the moment are used to cross-subsidise banking for other customers), would be a cheap way of helping low earners—and bargains are rare for the poor.**”¹² –The Economist, Editorial, Sept. 2015 (emphasis added)*

The CFPB estimated that overdraft-related fees cost consumers approximately \$15 billion annually, and this shows no sign of decreasing.¹³ CRL’s 2014 analysis found that, in total, overdraft-related fees cost Americans more than twice what they spend annually on eggs (\$7.4 billion), far more than they spend on baby clothes (\$9.7 billion), and more than they spend on books, newspapers, and magazines combined (\$13.1 billion).¹⁴

But even more striking is what some individual households pay in these fees. The Bureau’s data found that nearly 80% of overdraft-related fees are borne by only 9% of accounts, who tend to carry low balances—averaging less than \$350—and have relatively low monthly deposits.¹⁵ For one group of hard-hit consumers, the median number of overdraft fees was 37, nearly \$1,300 annually, meaning some pay much more.

For further discussion of the impact these fees have on households, see CRL’s *Broken Banking* paper, attached as Appendix A.

The diversion of cash needed for living expenses toward fees is alone enough to devastate a family living on the margins. But the consequences do not stop there. Overdraft fees prevent some account holders from regaining their footing, marking a lasting economic setback. Overdrafts are the leading reason that consumers lose their checking accounts. The FDIC’s 2017 survey of unbanked and underbanked households indicates that over 500,000 households who once had bank accounts are currently

¹² The Economist, Editorial, *It’s expensive to be poor: Why low-income Americans often have to pay more*, Sept. 5, 2015, <http://www.economist.com/news/united-states/21663262-why-low-income-americans-often-have-pay-more-its-expensive-be-poor> (emphasis added).

¹³ This estimate, based on 2016 data, includes \$11.41 billion from banks with assets over \$1 billion that are required to break out this fee revenue on call reports, plus an additional estimated \$3.49 billion (or 31.5% of the total from reporting banks) from smaller banks and all credit unions. See Jackie Wattles, *Americans paid \$15 billion in overdraft fees last year, CFPB says*, CNN Money, Aug. 4, 2017, <https://money.cnn.com/2017/08/04/pf/overdraft-fees-cfpb/index.html>. Public call report data suggest that this figure has not decreased since 2016.

¹⁴ Data derived from Bureau of Labor Statistics Consumer Expenditures, based on average household spent by 127,006,000 American households, <http://www.bls.gov/cex/2014/combined/age.pdf>.

¹⁵ CFPB 2014 Data Point at 12, Table 3; see also CFPB Data Point: *Frequent overdrafters* at 16, Table 2 (Aug. 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf [CFPB 2017 Data Point].

unbanked primarily because of high or unpredictable fees.¹⁶ It is likely that in the majority of those cases, the fees at issue were overdraft/NSF fees, as they are both the largest fee and comprise the majority of checking account service charge revenue.

Once ejected from the banking system, the account holder is reported to a database, like Chexsystems or Early Warning Service—a blacklist, essentially, where the consumer’s name remains for five years, often preventing the consumer from being offered a checking or savings account with another financial institution.

Lack of a bank account is a problem felt most acutely by lower-income individuals¹⁷ and communities of color. Communities of color have historically been disproportionately left out of the traditional banking system, a disparity that persists today. About 17 percent of African American and 14 percent of Latino households are unbanked, compared to 3 percent of white households.¹⁸ Civil rights leaders have noted the cost of this financial disenfranchisement when urging reform of bank overdraft practices:

“Once a person is ejected from the mainstream financial system, it becomes difficult to reenter. And the unbanked and underbanked are more likely to end up with no choice except alternative financial services, which are often more expensive and less secure than a responsible mainstream checking account.”¹⁹

One consumer’s complaint to CFPB described it this way:

“...I am a ... single mother ... I am writing this complaint as I have no where else to turn ... The overdraft on my account was simply an over sight. It was no way intended to cause fraud [as was presumably reported to a database like Chexsystems] ... The overdraft amount was {\$7.00} according to my print out. I paid [the bank] for the overdraft and any associated fees a few years ago. The word Fraud [] has been hanging over my head ever[] since I am a law abiding working citizen that made a minor mistake and its costing me dearly.” –Consumer complaint filed with CFPB²⁰

¹⁶ FDIC 2017 National Survey of Unbanked and Underbanked Households at Appendix Table A.17 (noting (There are 3,854,000 unbanked households who were previously banked. Of those, 10.9% cited account fees too high as the main reason they are unbanked, and 2.3% cited account fees unpredictable as the main reason, totaling 13.2%, or 508,728 previously banked households.)

¹⁷ Unbanked rates decrease with income: Those making less than \$15,000: 25.7%; \$15-30,000: 12.3%; \$30-50,000: 5.1%; \$50-75,000: 1.5%; \$75,000+: 0.6%. FDIC 2017 Survey of Unbanked and Underbanked Households at 19 Table 3.2, <https://www.fdic.gov/householdsurvey/2017/2017report.pdf>.

¹⁸ *Id.*

¹⁹ Wade Henderson, President and CEO of The Leadership Conference on Civil and Human Rights, and Hilary Shelton, Washington Bureau Director for the NAACP, *Predatory Overdraft Practices Should Be Stopped*, The Hill, Aug. 20, 2013, available at <http://thehill.com/blogs/congress-blog/economy-a-budget/317679-predatory-overdraft-practices-should-be-stopped>.

²⁰ Complaint ID 1375562 (received 5/14/2015). The complaint continues: “And if [this bank] does not want my business, I understand but please dont make it hard for me to move on to another financial institution ... Life is a struggle as it is and with paying additional fees to cash my payroll check or pay for pre-paid cards is really hard on

Banks' practices play a dominant role in shaping their customers' experiences with overdrafts and, thus, the success or failure of the customer's banking relationship. Some banks, including several of the largest, do not permit point-of-sale and/or ATM transactions to trigger high-cost overdraft fees at all,²¹ thereby removing the possibility for their account holders to lose their accounts as a result of those kinds of overdrafts.

Those who defend high-cost overdraft programs are often quick to note that account holders who pay overdraft fees have little in the way of "other options" to obtain liquidity.²² However, overdraft programs are an extremely high-cost, hair trigger credit feature, without credit protections. They are likely to exacerbate the financial problems of those who overdraw frequently, making them only less likely to be able to save or obtain mainstream credit. Banks should replace these affirmatively harmful practices with ones that facilitate savings and credit building.

In addition, a growing body of research has pointed to the income and expense volatility many families experience.²³ Notably, the Bureau's research suggests that while frequent overdrafters had lower incomes than other account holders, there was not a strong correlation between income volatility and overdrafting.²⁴ In any event, excessive overdraft fees are likely to increase volatility, rather than smooth it, putting the account holder only deeper in the hole. With debit card and ATM transactions in

me ... I have suffered enough. Again, please review your records as the account was not intended to be used for any mis-leading purposes. I have attached the printout that was given to me and a letter."

²¹ For example, Citi and HSBC do not have POS or ATM high-cost overdraft programs, BoA does not have a POS high-cost overdraft program, and Chase does not have one for ATM transactions.

²² See, e.g., American Bankers Association, Letter to CFPB, Oct. 17, 2013, available at <https://www.aba.com/Advocacy/LetterstoCongress/Documents/LetterCFPBConsumerSurveyOct2013.pdf> ("Regular users [defined by the ABA here as those with more than six overdraft fees in twelve months] would have few options if access to overdraft services is limited . . . The Consumer Survey revealed that overdraft protection provides an important liquidity bridge for middle income consumers who are increasingly challenged to 'make ends meet' . . . An important question to be answered by policy-makers is where regular users will turn for emergency funds if they no longer have access to overdraft protection"). Notably, the ABA both calls overdraft funds "emergency funds" even while its survey appears to have found that the funds are more likely to go toward routine, recurring expenses than unexpected expenses (*Id.* at 8).

See also G. Michael Flores, Bretton Woods, Inc., and Todd J. Zywicki, George Mason University School of Law, *Commentary: CFPB Study of Overdraft Programs*, http://www.law.gmu.edu/assets/files/publications/working_papers/1360.pdf (noting the significantly lower credit scores of those who overdraw relatively frequently and criticizing the CFPB's white paper on overdraft programs by noting that "it fails to address its own central question, which is whether less expensive alternatives are available to those who use it").

²³ See U.S. Financial Diaries, <http://www.usfinancialdiaries.org/charts>, at slide 2.7, 2.10 (finding 56% and 31% income volatility (even excluding tax refunds) among the lowest and second-lowest earning households studied, and that income and expense spikes often do not coincide); JP Morgan Chase & Co. Institute, *Weathering Volatility: Big Data on the Financial Ups and Downs of U.S. Individuals* (May 2015), available at <http://www.jpmorganchase.com/corporate/institute/document/54918-jpmc-institute-report-2015-aw5.pdf> (finding that individuals experience a high level of income volatility, and an even higher level of consumption volatility, across the income spectrum, and that, again, these volatilities do not move in tandem).

²⁴ CFPB 2017 Data Point at 6.

particular, the original transaction could be declined at no cost, allowing the account holder to seek out other resources or postpone the transaction until funds are available.

IV. Overdraft fees on debit card transactions and ATM withdrawals are the least justifiable overdraft fees.

Financial institutions transformed debit cards from the plastic that couldn't put consumers into debt, into high-cost overdraft products. In 2004, 80 percent of financial institutions declined debit card transactions that would have overdrawn a customer's account.²⁵ But over the course of a few years, banks and credit unions regularly began allowing these transactions to go through, charging a large overdraft fee for each one.

Banks and credit unions have long defended overdraft fees by saying they protect customers from bounced checks, which typically trigger insufficient funds (NSF) fees and potentially merchant fees. But the same justification could not be made for debit card purchases, since there are no NSF or merchant fees charged for debit card transactions that are declined at check-out when the customer's account is short.²⁶

In addition to being unjustifiable as protection against NSF transactions, overdraft fees on debit cards tend to be particularly harmful because of their effective cost and their frequency. As discussed above, overdrafts triggered by debit cards tend to be smaller than the fees they trigger, and debit card transactions for everyday purchases tend to be more numerous than paper checks. Thus, there is significant potential for numerous overdrafts to be incurred over a short period of time at a very high cost.

Further, repeatedly, a large majority of consumers have stated that they prefer that banks decline debit card overdrafts rather than approve them in exchange for the typical fee.²⁷ Some institutions do not charge overdraft fees on debit card purchases (Bank of America, Citibank, HSBC) or ATM transactions (Citibank, HSBC, Chase), showing that it is more than possible to offer only bank accounts that decline such transactions without a fee.

V. The opt-in rule was a modest regulatory approach.

In 2009, the FRB proposed two alternatives to address fees on debit card and ATM transactions: requiring institutions to allow consumers to opt out, or to obtain consumers' opt-in. The FRB received over 20,700 comments on this proposal. The majority were submitted by individual consumers, and the

²⁵ 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).

²⁶ The FRB, in its discussion of the final Regulation E opt-in rule, indicated that charging declined transaction fees on ATM or one-time debit card transactions "could raise significant fairness issues." 74 Fed. Reg. 59041.

²⁷ *Overdraft Fees and Opting In: A survey of consumer preferences*, Center for Responsible Lending (March 2009) (2008 survey found more than three-quarters of consumers preferred debit card transactions be declined rather than approved in exchange for a fee; The Pew Center on the States, *Overdraft America: Confusion and Concerns about Bank Practices* at 5 (May 2012), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/SCIBOverdraft20America1pdf.pdf .

“overwhelming majority of individual consumers who commented urged the Board to adopt the opt-in approach.”²⁸ Members of Congress, federal and state regulators, and consumer advocates did as well.²⁹

The FRB emphasized several factors when finalizing the opt-in rule, all of which are as true today as they were then:

- that “[t]he primary objective of the EFTA is the provision of individual consumer rights”,³⁰
- that the FRB’s consumer testing indicated that many participants would prefer to have their debit card and ATM transactions declined if they had insufficient funds, rather than incur an overdraft fee;³¹
- that, unlike for a check, there is no fee for a declined transaction; that consumer testing indicated that many consumers are unaware that they can incur overdrafts on these transactions;³² and
- that these transactions had been “a key driver behind the growth in the volume and the cost of overdraft fees.”³³

In addition, the FRB sought to balance the benefits to consumers of an opt-in approach against the additional burdens the rule would impose on account-holding institutions.³⁴ In particular, the FRB adopted a model form to “ease compliance” with the rule, which it revised and simplified versus the proposal stage. It also provided a safe harbor to institutions that permits them to rely upon a third party’s coding of a one-time debit card transactions or a recurring debit card transaction, so long as the institution has reasonable procedures for distinguishing such transactions.³⁵

The administrative record in 2009 established clearly that reform was necessary. The FRB could have taken far more extensive protective steps than it ultimately took. EFTA provides clear authority to prohibit or limit overdraft fees, as did the FRB’s unfairness authority (and now the CFPB’s unfairness or abusive authority). The FRB also could have chosen to regulate overdraft fees under the Truth In Lending Act and later, after it became law, under the Credit CARD Act.

VI. The opt-in rule has saved consumers billions in harmful fees.

Though insufficient, the opt-in rule has saved consumers billions of dollars in harmful fees. Total service charge income for banks, an estimated 37% of which in 2011 was attributable to overdraft-related fees, dropped from its peak of approximately \$37 billion in mid-2009 to just over \$30 billion two years later. Leading up to 2009, service charge income was on the rise.

²⁸ 74 Fed. Reg. at 59036.

²⁹ 74 Fed. Reg. at 59036.

³⁰ 74 Fed. Reg. at 59050.

³¹ 74 Fed. Reg. at 59034-35.

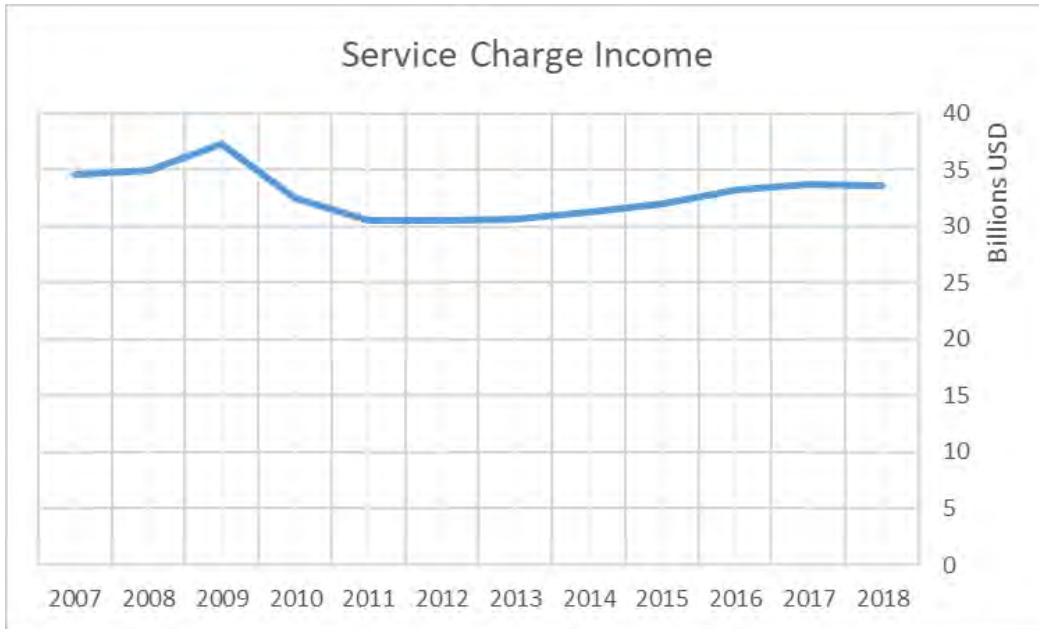
³² 74 Fed. Reg. at 59034-35.

³³ 74 Fed. Reg. at 59034-35.

³⁴ 74 Fed. Reg. at 59051.

³⁵ 74 Fed. Reg. at 59051.

Figure 3: Service charge income for banks with assets of \$1 billion or more



Source: FDIC Call Report Data

Because overdraft and NSF fees were not reported separately until 2015, and due to other changes to overdraft practices,³⁶ it is difficult to precisely estimate the cumulative savings resulting from opt-in, but it is clearly in the tens of billions of dollars. CRL’s estimate of total market overdraft fees decreased from nearly \$24 billion in 2009 (which, at 35% more than in 2007, was rapidly rising at the time) to \$14 billion in 2015.³⁷

These savings have been realized despite aggressive and often deceptive efforts by banks and credit unions to obtain customers’ opt-ins.³⁸ Many who have “opted in” did so based largely on the misconceptions banks aggressively pushed. A CRL survey found that most account holders who opted in believed: (1) that opting-in to debit card overdraft coverage would prevent their paper checks from bouncing (it would not); or (2) that they would incur a fee if they did not opt-in and their debit card transaction were declined (they would incur no fee).³⁹ Nearly half of consumers who opted-in did so

³⁶ These include voluntary limits on the number of daily fees, de minimis thresholds, and Bank of America’s decision to stop charging overdraft fees on point-of-sale transactions.

³⁷ *Broken Banking: Overdraft Penalties Harm Consumers, Discourage Responsible Products*, Center for Responsible Lending (2016). These estimates exclude non-sufficient funds fees.

³⁸ Research Brief, *Banks Collect Overdraft Opt-ins Through Misleading Marketing*, Center for Responsible Lending (April 2011), <http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/CRL-OD-Survey-Brief-final-2-4-25-11.pdf>.

³⁹ *Id.*

simply to stop the aggressive opt-in solicitations via mail, phone, email, in-person, and on-line.⁴⁰ As discussed in section VIII.A.2. below, aggressive and deceptive marketing of opt-in persists today.

VII. The ongoing costs to small financial institutions of the opt-in rule are modest and clearly justified in light of the risks to consumers, while other small businesses enjoy economic benefits from the rule.

Small financial institutions actively engage in overdraft programs on debit card and ATM transactions. Soon following the opt-in rule became effective, about half of small institutions indicated that they had collected opt-ins from more than 70% of both existing and new customers.⁴¹

Upfront implementation costs of the opt-in rule are well in the past, and the ongoing costs of the rule are modest. For the most part, ten years following the rule, opt-ins are likely primarily obtained from new customers at account opening, requiring but one more disclosure among many, and logging whether or not a customer has opted in. This process affects a small portion of checking account holders every year, as checking account turnover is very low: The average U.S. adult has used the same checking account for 16 years.⁴² In terms of transaction processing, core processors typically handle this function for small banks, including determinations as to whether transactions are authorized or declined based on opt-in status.

Indeed, an analysis of comments by industry representatives in response to the 2012 Request for Information on Overdraft Programs supports the idea that the costs of the opt-in rule are modest. A review of the comments of 80 banks, credit unions, and trade associations reflected very little concern about the burden of the opt-in rule.⁴³ And to be sure, the costs pale dramatically compared to the tens of billions the rule has saved checking account holders.

Moreover, the economic impact of the opt-in rule on small businesses is not limited to financial institutions. Other small businesses benefit from a rule that leaves billions of dollars, which would have been funneled to banks, in consumers' pockets for spending. Every one of the tens of billion dollars saved by the opt-in rule is a dollar that can go into the cash registers of local grocery stores, coffee shops, clothing stores, plumbers and other small businesses.

VIII. Protections against debit card/ATM overdraft fees rule should be strengthened in light of the considerations under the RFA.

As the Notice lays out, the RFA requires consideration of five factors: (i) the continued need for the rule; (ii) the nature of public complaints or comments on the rule; (iii) the complexity of the rule; (iv) the extent to which the rule overlaps, duplicates, or conflicts with other laws or rules; and (v) the time since

⁴⁰ *Id.*

⁴¹ Independent Community Bankers of America, *The ICBA Overdraft Payment Services Study* at 35, n.20 (June 2012), <https://www.icba.org/docs/default-source/icba/solutions-documents/knowledge-vault/icba-surveys-whitepapers/2012overdraftstudyfinalreport.pdf>.

⁴² See Amanda Dixon, *Our long, long, long relationships with banks: Are we missing out on better deals?*, Bankrate, Oct. 23, 2017, <https://www.bankrate.com/banking/best-banks-consumer-survey/>.

⁴³ We reviewed the 2012 comments of 29 banks, 28 credit unions, and 23 trade associations.

the rule was evaluated or the degree to which technology, market conditions, or other factors have changed. As discussed in the following subsections, every factor, without exception, argues for stronger protections against overdraft fees on debit card and ATM transactions and against weakening it for any institutions, regardless of their size. (We discuss factors (i) and (v) together in subsection A. below, and the remaining factors in the subsequent subsections.)

A. The need for protections against debit card overdraft fees is greater now than in 2009.

1. The Bureau’s extensive research has cast more light on the harm overdraft fees cause despite the opt-in rule.

The Bureau’s extensive research makes plain that overdraft fees, including those on debit card and ATM transactions, continue to inflict substantial harm on consumers despite the opt-in rule and would inflict even more without the rule. The Bureau’s findings include:

- Opted-in accounts are three times as likely to have more than 10 overdrafts per year as accounts not opted in;⁴⁴
- The reduction in fees per account following implementation of opt-in was \$347 greater, on average, for accounts not opted-in versus those that were;⁴⁵
- Frequent overdrafters were opted-in at nearly three times the rate of non-frequent overdrafters;⁴⁶
- The average overdraft-related fees paid by accounts with at least one overdraft was \$225 in 2011 across the study banks;⁴⁷
- The median transaction amount leading to an overdraft was \$24; the median across all transaction types was \$50;
- More than half of consumers who overdraft bring their accounts positive within three days, and over three-fourths within one week;⁴⁸
- “Opt-in” rates varied from 40% at some banks to less than 10% at others, and annual overdraft fees per consumer who overdraft are nearly twice as high at some institutions than at others.⁴⁹ (These disparities underscore that opaque choices banks make about how to implement their overdraft program can have a dramatic impact on consumers.)

The Bureau has also shed light on who is paying the vast majority of these fees, and their correlation with lost bank accounts:

⁴⁴ CFPB 2014 Data Point at 2.

⁴⁵ CFPB Study of Overdraft Programs: a white paper of initial data findings at 5 (June 2013), https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf [CFPB 2013 White Paper].

⁴⁶ CFPB 2013 White Paper at 6 (44.7% compared to 15.2%).

⁴⁷ CFPB 2013 White Paper at 5.

⁴⁸ CFPB 2014 Data Point at 2.

⁴⁹ CFPB 2013 White Paper at 5.

- As noted earlier, 80% of overdraft fees are paid by those with average account balances of less than \$350;⁵⁰
- Median annual deposits for frequent overdrafters range from approximately \$27,000-\$31,000;⁵¹
- Overdraft fees hit hardest those with deep subprime credit scores, in the 563-585 range;⁵²
- Involuntary account closure rates were 2.5 times as high for opt-in accounts as for accounts that had not opted in at several study banks.⁵³

The Bureau’s research has also shown a significant dynamic at play, which the Notice references: account holders who overdraft frequently but have not opted in often have their debit card transactions authorized with a sufficient balance, but then settle later against insufficient funds.⁵⁴ These consumers are not charged a fee on these transactions because they haven’t opted in. Frequent overdrafters who are not opted in average 12 such transactions a year.⁵⁵ Opted-in accounts have seven times as many overdrafts that result in fees as accounts that are not opted in.⁵⁶ Opted-in account holders who overdraft frequently overdraft 22% more than those not opted in, but they pay 260% more in overdraft fees.⁵⁷

This dynamic has clear implications. First, it shows that banks have gamed “opt-in” by overstating its so-called benefits. Indeed, when institutions claim that debit cards “won’t work the same as they used to” unless consumers opt in, their claim is largely inaccurate. The card often does work the same as it would if consumers didn’t opt in, and the only difference is that the opted-in consumer pays fees. In this way, the opt-in regime creates a windfall to financial institutions, generating fees for them on transactions that would be authorized and paid even without a consumer’s opt-in.

Second, this dynamic illustrates how inexpensive it must be for financial institutions to cover these overdrafts: We have not heard that banks close the accounts of the non-opted-in frequent overdrafters because their costs or risks are so great on these “free,” likely very short-term, overdrafts. In short, this dynamic shows that there should be no fee at all on debit card or ATM overdraft transactions.

⁵⁰ *CFPB 2014 Data Point* at 12, Table 3; see also *CFPB 2017 Data Point* at 16, Table 2.

⁵¹ *CFPB 2017 Data Point* at 16, Table 2.

⁵² *Id.*

⁵³ *CFPB 2013 White Paper* at 34.

⁵⁴ 84 Fed. Reg. at 21731.

⁵⁵ *CFPB 2017 Data Point* at 32-33 (“The median opted-in frequent overdrafter incurs 12 overdrafts with fees on debit card transactions per year and one overdraft without a fee on debit card transactions. The median frequent overdrafter who is not opted-in incurs no overdrafts with fees on debit card transactions but 12 overdrafts without fees on debit card transactions. This difference is most likely the result of authorize positive/settle negative transactions. If so, this would mean that the decision whether to opt in has substantial consequences for consumers over and above simply increasing the likelihood that a transaction will be authorized and result in overdraft fees when there are insufficient funds at the point of authorization.”).

⁵⁶ *CFPB 2014 Data Point* at 2.

⁵⁷ *CFPB 2017 Data Point* at 32.

The Bureau has highlighted with concern the practice of charging a fee on a transaction that was authorized against sufficient funds.⁵⁸ And in a positive development, the Federal Reserve recently cited the practice as an unfair practice.⁵⁹ But there is no evidence that the practice does not remain widespread.

Finally, Bureau research shows that banks have continued to push opt-in in misleading ways, leading to consumer confusion about opt-in. In addition, consumer concern about overdraft programs more generally, and about the high fee in particular, remains very high. In November 2017, the CFPB released a report with findings from interviews that the CFPB held with consumers regarding their various experiences with overdraft programs. Many participants didn't know that institutions were required to obtain opt-in to charge debit card overdraft fees, and many who did not recall opting in or who were not aware they had a choice had incurred those fees nonetheless.⁶⁰ These findings were consistent with other research showing that over half of consumers who had been charged an overdraft fee on a debit card transaction never recall having "opted-in."⁶¹ Many participants in the CFPB's study expressed uncertainty about how financial institutions charged overdraft fees more broadly, and all participants expressed concern about the high cost of overdraft fees.⁶²

The Bureau's extensive research has led it to conclude that concerns about overdraft practices that regulators have identified for years—including that a significant segment of consumers incur large numbers of overdraft fees, and that even those with "moderate" overdraft usage may pay hundreds of dollars annually—persist today.⁶³

2. Supervisory and enforcement activity show the extent to which institutions aggressively and unfairly inflict overdraft fees.

Supervisory and enforcement activity by CFPB and the prudential banking regulators demonstrate the degree to which institutions stack the deck against consumers in their efforts to generate fees and highlight the need for stronger protections. Practices identified by CFPB include tricking consumers into

⁵⁸ CFPB Supervisory Highlights at 8-9 (Winter 2015), https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf.

⁵⁹ Federal Reserve, Consumer Compliance Supervision Bulletin at 11 (July 2018), <https://www.federalreserve.gov/publications/files/201807-consumer-compliance-supervision-bulletin.pdf>; see also 2016 Interagency Overdraft Services Consumer Compliance Webinar at 20, <https://www.consumercomplianceoutlook.org/outlook-live/2016/interagency-overdraft-services-consumer-compliance-discussion/> ("Unfair Practice: Assessing an overdraft fee based on the available balance at the time a transaction is posted when there were sufficient funds in the available balance to cover the transaction when it was authorized").

⁶⁰ CFPB, *Consumer voices on overdraft programs* at 15 (Nov. 2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-voices-on-overdraft-programs_report_112017.pdf.

⁶¹ Pew, *Overdrawn: Persistent Confusion and Concern about Bank Overdraft Practices* at 5 (June 2014).

⁶² CFPB, *Consumer voices on overdraft programs* at 15 (Nov. 2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-voices-on-overdraft-programs_report_112017.pdf.

⁶³ CFPB 2013 White Paper at 61.

believing opting-in was mandatory;⁶⁴ misleading consumers by defining opt-in as having their debit card “work as it does today”;⁶⁵ pushing back on consumers who challenged opt-in in by using emotionally charged hypotheticals;⁶⁶ failing to obtain opt-in before charging fees;⁶⁷ misleading customers about fees charged, consequences for not opting in, and types of transactions covered by overdraft programs;⁶⁸ manipulating assessment of overdraft fees by switching from the consumer’s “available balance” to “ledger balance” in determining whether fees would be assessed on a transaction;⁶⁹ and assessing overdraft fees in a manner inconsistent with disclosures’ overall net impression.⁷⁰ The FDIC has also raised concern about sustained (negative balance) overdraft fees being charged despite the consumer having deposited a check that would cure the overdraft when the deposit is subject to a Regulation CC hold.⁷¹

Finally, as noted above, the practice of charging a fee on a debit card transaction that was authorized against sufficient funds has received negative attention from regulators, including being cited as an unfair practice by the FRB.

3. Increase in debit card use and evolving payments present more opportunities for charging overdraft fees than in 2009.

Debit card use has continued to rise, as debit card transactions grew by 7.7% from 2012-2015, 6.8% 2015 to 2016, and 10.4% from 2016 to 2017. Moreover, this growth rate exceeds the rate at which the total value of debit card transactions has increased (6.6%, 6.2%, 7.0%, respectively), suggesting that the

⁶⁴ CFPB, Press Release, *CFPB Sues TCF National Bank for Tricking Consumers Into Costly Overdraft Service: Bank Obscured Fees, Adopted Loose Definition of Consent to Preserve Overdraft Revenue*, Jan. 19, 2017, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-tcf-national-bank-tricking-consumers-costly-overdraft-service/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Regions, CFPB, Press Release, *[CFPB] Orders Santander Bank to Pay \$10 Million Fine for Illegal Overdraft Practices: Bank Deceptively Marketed Its Overdraft Service to Consumers, Violated “Opt-in” Rule*, July 14, 2016, <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-orders-santander-bank-pay-10-million-fine-illegal-overdraft-practices/>.

⁶⁸ *[CFPB] Orders Santander Bank to Pay \$10 Million Fine for Illegal Overdraft Practices: Bank Deceptively Marketed Its Overdraft Service to Consumers, Violated “Opt-in” Rule*, July 14, 2016, <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-orders-santander-bank-pay-10-million-fine-illegal-overdraft-practices/>.

⁶⁹ CFPB Supervisory Highlights at 8-9 (Winter 2015), https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf.

⁷⁰ *Id.*

⁷¹ 2016 Interagency Overdraft Services Consumer Compliance Webinar at 40, <https://www.consumercomplianceoutlook.org/outlook-live/2016/interagency-overdraft-services-consumer-compliance-discussion/>.

average size of debit card transactions is decreasing, and that overdraft fees may grow more disproportionate going forward.⁷²

The rise of payment apps like Venmo and other emerging payment systems present additional opportunities for banks to expand overdraft practices. Venmo payments that are linked to a checking account can cause overdrafts. While other evolving faster payment systems are generally premised on a good funds model, financial institutions are seeking the option to authorize a real-time payment even if it could trigger an overdraft.⁷³ The Bureau should prohibit overdraft fees on emerging payment systems from the outset. Regulators got overdraft wrong, and especially on debit cards, enabling financial institutions to inflict severe harm on their account holders through a mechanism that was supposed function as electronic cash. With the emergence of faster payments, they need to get it right. Otherwise, overdraft fees could defeat the very promise of faster payments: allowing people to manage their money better and avoid fees.

4. Overdraft fees, including those from smaller institutions, continue to drain billions from consumers.

Beginning in 2015, banks with \$1 billion or more in assets began reporting their overdraft-related fees as a discrete line item. Total fees from reporting banks totaled \$11.41 billion in 2016. The Bureau estimated that total fees, including small banks and credit unions, were \$15 billion.⁷⁴ Thus, those institutions alone generated an estimated \$3.59 billion annually.

The harm persists despite encouragement from CFPB to offer and market safe checking accounts without overdraft and NSF fees and despite such accounts sprouting up on a limited basis.⁷⁵ The abusive overdraft model continues to overwhelmingly dominate the checking account market. And it will likely continue to do so until unfair practices are reined in and a level playing field replaces the existing race to the bottom.

⁷² *Reserve Payments Study, 2018 Annual Supplement*, <https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm> (cumulative annual growth rates for non-prepaid debit cards).

⁷³ See Faster Payments Task Force, *Faster Payments Effectiveness Criteria* at 16, S.3.1 (January 26, 2016), <https://fedpaymentsimprovement.org/wp-content/uploads/fptf-payment-criteria.pdf>

⁷⁴ See Jackie Wattles, *Americans paid \$15 billion in overdraft fees last year, CFPB says*, CNN Money, Aug. 4, 2017, <https://money.cnn.com/2017/08/04/pf/overdraft-fees-cfpb/index.html>.

⁷⁵ In early 2016, CFPB wrote letters to the 25 largest retail financial institutions urging them to offer and market such accounts, <http://www.consumerfinance.gov/newsroom/cfpb-takes-steps-to-improve-checking-account-access/>. Examples of such accounts are Bank of America's SafeBalance (<https://www.bankofamerica.com/deposits/safebalance-bank-account.go#footnote2>); Chase's Secure Checking, (<https://www.chase.com/personal/secure-banking>); and Key Bank Hassle Free Account (<https://www.key.com/personal/checking/key-bank-hassle-free-account.jsp>).

B. Complaints and public comment support more protective action.

1. Consumer complaint narratives to CFPB illustrate a deck stacked against consumers.

Complaints to CFPB about overdraft fees are common.⁷⁶ As the Bureau has described, consumers have complained regularly about the size of the overdraft fees when making small dollar purchases. They have also submitted complaints about posting order, confusion around the availability of funds, and confusion as to why a fee had occurred after they had denied coverage.⁷⁷ A review of the Annual Reports from the Bureau's Consumer Response unit finds over 13,500 complaints involving bank accounts and "problems caused by your funds being low," which is the category that includes (and we believe is predominately composed of) overdraft-related complaints.

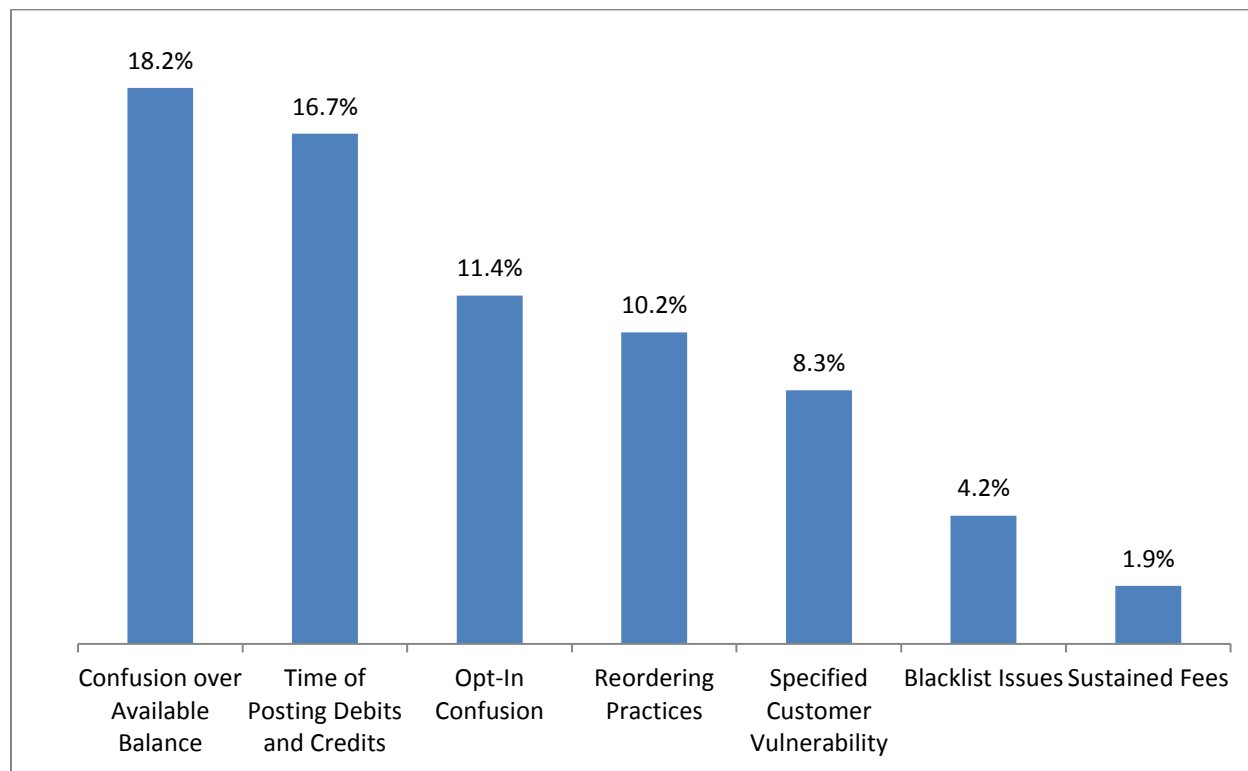
In 2016, the Bureau made public those complaint narratives consumers have filed with the agency about checking accounts and consented to have published, offering a qualitative perspective into consumer experiences with overdraft fees. A search of these narratives today reveals about 6,000 complaints including the word "overdraft."

CRL reviewed the narratives submitted during a six-month period of 2015 that mentioned overdraft products and categorized them by a specific one or two issues they raised. Between March and August 2015, approximately 265 complaints were filed with CFPB that mentioned overdraft products. Following is a chart displaying the seven most frequent issues, explained in more detail below. One of the most salient themes within these complaints is the difficulty consumers experience avoiding overdrafts even when consumers believed they would. Often, this was related to bank practices that make it difficult for consumers to know balance availability, transaction timing, or whether or not overdraft transactions would be paid or declined. Implicit in many complaints are the unreasonably high fees per transaction, and the lack of meaningful limits on how many fees a consumer can be assessed.

⁷⁶ CFPB, Consumer Response annual report covering 2016 at 26-27 (March 2017), https://files.consumerfinance.gov/f/documents/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF.

⁷⁷ See CFPB, Consumer Response annual reports covering 2016 at 26-27 and 2018 at 43-44.

Figure 5: Top Overdraft-related Complaint Issue, by Percentage of Total Overdraft-related Complaints, March-Aug 2015



Further explanation of each category:

Confusion over available balance: These customers conveyed that based on their actual review of their available balance, often including any “pending” transactions, they believed funds were available for transactions they made, but later learned the transactions had triggered overdraft fees.

The following example depicts a customer charged \$150 in overdraft fees after believing, based on on-line balance information, that the account would not become overdrawn:

“I thought I had positive balance when in actuality I had a negative balance because what was on the website was not the real balance. I attached my last withdrawal, when I thought I had enough in my account to do so. I would have taken out less cash if I had known they took the pending debits off my balance. That 's tricky they used. I ended up being charged overdraft fees and then extended overdraft fees that added up to around {\$150.00}.” CFPB Consumer Complaint Database, Complaint ID 1419143 (received 6/12/2015).

Timing of transaction posting (debits and credits): These complaints reflected the often opaque nature of institutions’ policies relating to the timing of availability of deposits or posting of debits.

The following example depicts a customer who was charged an overdraft fee even after, based on her review of account activity, her check appeared to have posted against adequate funds:

“My account had a balance of {\$220.00} on XXXX XXXX, 2015 when a check written for {\$200.00} was posted to my account. I spoke to a representative who advised me that there were insufficient funds to cover this check. This is very misleading because my account showed a positive balance of {\$26.00} after this check was posted on XXXX XXXX, 2015 . . . Please see evidence of transaction activities attached.” CFPB Consumer Complaint Database, Complaint ID 1462545 (received 7/10/2015).

A review of the complaints captured by both of these two most frequent categories finds consumers who are carefully trying to avoid overdraft, and often believe they will avoid it—often checking their available balance daily or even more often—only to end up being hit by exacting fees nonetheless.

Opt-in confusion: These complaints reflected confusion around the opt-in rule. Typically, it appeared that consumers either did not know they were opted-in, or did not understand that the rule provides no protection related to overdraft fees triggered by other types of transactions, like electronic bill pay transactions or paper checks.

The following examples illustrate that bank transaction processing and related overdraft practices are inherently confusing, and that the opt-in rule is limited.

“I am not opted in to any overdraft protection [] at my bank. They allowed XXXX debit card transactions to complete on my account for XXXX and XXXX. They stated that even though they are debit card transactions and not electronic funds transfers or checks, they are not considered XXXX ‘debit card transactions since they are paid at the same time and amount every month and I am therefore not protected by consumer protection laws for these transactions.” CFPB Consumer Complaint Database, Complaint ID 1397594 (received 5/29/2015).

“Time and time again I told [Bank] that I do not wish to Opt into their overdraft protection plan, but yet and still I am being charged overdraft fees.” CFPB Consumer Complaint Database, Complaint ID 1354191 (received 4/29/2015).

Reordering Practices: These complaints addressed the practice of reordering incoming debit transactions to post larger ones before smaller ones, depleting the account more quickly and thus triggering more overdraft fees.

The following example depicts a customer whose \$300 purchase was posted before three smaller purchases, which occurred earlier, resulting in \$140 in fees:

“[Bank] consistently changes the order of my transactions to put me in the negative and then rails me with overdraft fees. The {\$300.00} charge on my account is being charged before prior purchases, as to put me in the negative, and then hand me {\$35.00} overdraft fees on 3 very small purchases I had made prior while in the positive. I am about to be out {\$140.00} in fees alone because of this malicious practice.” CFPB Consumer Complaint Database, Complaint ID 1460386 (received 7/9/2015).

Specified Customer Vulnerability: These complaints specifically mentioned facts indicating the customer was struggling financially to maintain a positive account balance, including, for example, lost employment; single parent on limited income; relying on Social Security benefits.

The following example depicts a single parent trying hard to monitor his or her account but still being hit with multiple, unreasonably large overdraft fees:

“I live paycheck to paycheck. I check my bank account balance daily if not XXXX a day. The bank I use ... offers online and text banking so it makes it very convenient. The problem is they do not match up. Some of the dates that transaction posts change. For example on XXXX night, the XXXX, I checked my balance through text banking. I had {\$380.00} in my account. The next morning, XXXX the XXXX, when I got to work at XXXX I went online and checked my balance and transactions. It still said I had a balance of {\$380.00} Again, I went online and I see that both those absent checks had cleared but XXXX of those had a date of XXXX the XXXX. That transaction was not on my statement in the morning. They hit me with XXXX overdraft fees. ... I would really appreciate it if someone would look into this ... I only bring home {\$XXXX} a week and I 'm a single parent of XXXX. Thank you.” CFPB Consumer Complaint Database, Complaint ID 1429242 (received 6/19/2015).

Blacklist issues: These complaints conveyed that overdraft fees had resulted in the consumer’s being listed in Chexsystems or Early Warning Service, which makes it difficult or impossible for a consumer to access a checking or savings account at another financial institution.

The following example depicts a customer unable to open a new account despite persistent efforts, including demonstrating he or she had paid what she owed on a prior closed account:

“I have been denied from every financial institute you can think of and this is becoming a huge burden and hindering the progression of my business. I have tried everything from disputing the info, providing documents showing it has been paid in good faith and spoke with early warning several times and I am being told that the information will stay on my record preventing me from opening a new account for a total of XXXX years! ... I need an open active account and this is unfair and unjust treatment due to a minuscule amount owed to [bank] but has been paid in full.” CFPB Consumer Complaint Database, Complaint ID 1474368 (Received 7/17/2015).

Sustained fees: These complaints addressed the practice whereby an institution charges additional overdraft fees—typically about \$7 per day, or an additional overdraft fee after several days—if a consumer is unable to return the account to positive quickly.

The following example depicts a customer for whom an extended overdraft fee exacerbated the situation, and subsequent overdraft fees left the customer without needed funds to pay bills:

“[A]fter being a customer for 20 years, with sole income for my XXXX direct deposited every month with no problems, suddenly had a fraudulent overdraft fee. I went to the local branch and they agreed to remove the fee, but 6 days later got an extended overdraft fee. Now I have XXXX more overdraft fees which would not have occurred if they followed through on their agreement. I live check to check and have always been careful in balancing my ledger and had sufficient funds from the very first overdraft fee ... I will not be able to pay XX/XX/XXXX bills thanks to them.”

2. Public comment supports need for greater protections.

The Bureau received more than one thousand comments in response to its 2012 request for information on overdraft programs.⁷⁸ We reviewed approximately 250 comments submitted by individuals, and nearly 90% supported reform and/or complained about current practices.⁷⁹ As noted earlier, we also reviewed the comments of 80 banks, credit unions, and trade associations, which reflected very little concern about the burden of the opt-in rule.⁸⁰

Review of the comments submitted in response to the CFPB's 2018 request for information on inherited regulations provides little new in terms of industry complaints. As the Notice notes, industry representatives raise concerns about the opt-in model form, but they do not present any justification for weakening protections. On the other hand, consumer advocates raise concerns consistent with those raised in these comments demonstrating that greater protections are needed.⁸¹

As also noted earlier, the FRB received over 20,000 comments on the opt-in rule, the vast majority of which supported the stronger of the two proposed protections, opt-in over opt-out.

C. The opt-in rule is not overly complex, and stronger protections are clearly feasible.

The opt-in rule is not overly complex, and it has been in effect now for nearly a decade. On an ongoing basis, banks or credit unions that want to charge (unfair and abusive) overdraft fees on debit card and ATM transactions must provide a model form disclosure and log whether or not an opt-in has been obtained. This is not unreasonably complex.

When the opt-in rule was under consideration, banks raised concerns about feasibility, even claiming that being required to provide different overdraft status for different types of transactions would be so costly it would force the end of overdraft "accommodation[s]" altogether for some institutions.⁸² This does not appear to have been the case on any significant scale and thus supports the idea that the rule is neither overly complex nor burdensome.

Moreover, stronger protections are clearly feasible and not overly complex. Certainly, prohibiting overdraft fees on debit card and ATM transactions altogether would be a simple way forward.

⁷⁸ 84 Fed. Reg. at 21731.

⁷⁹ Of the comments from individuals we reviewed, 222 supported reform or expressed displeasure with the current practices, 20 supported current practices, and 7 did not clearly fit into either category.

⁸⁰ We reviewed the 2012 comments of 29 banks, 28 credit unions, and 23 trade associations.

⁸¹ See, e.g., comments on that docket of CRL, NCLC, Americans For Financial Reform, Consumers Union, and Woodstock.

⁸² See, e.g., Comments of the American Bankers Association to the Federal Reserve on its original UDAP proposal at 18 (July 30, 2018), https://www.federalreserve.gov/SECRS/2008/September/20080911/R-1314/R-1314_21389_1.pdf.

D. Debit card overdraft credit is unjustifiably regulated differently than credit extended through prepaid cards, credit cards, and other credit under the Regulation Z, and debit card overdraft fees should be found unfair and abusive under the Dodd-Frank Act.

There are numerous unwarranted inconsistencies between regulation of overdrafts on debit cards and regulation of other credit. First, the new prepaid card rule regulates overdrafts as credit under Regulation Z, and applies certain protections not provided for overdrafts on debit cards linked to checking accounts. Second, debit cards with overdrafts are regulated differently from credit cards generally, even though banks treat them like credit cards. Thus, overdraft fees lack the protections applied to penalty fees on credit cards, like a requirement that fees be reasonable and proportional to the institution's cost and limited to one per month. Third, overdrafts lack the protection of other credit under Regulation Z, which would require an account agreement and credit disclosures, and should carry an ability-to-repay requirement. Finally, by not acting to prevent unfair and abusive overdraft practices, CFPB is not carrying out the intent of the Dodd-Frank Act. All of these inconsistencies call for strengthening the protections against overdraft fees on debit cards and more broadly.

IX. Overdraft fees on debit card and ATM transactions should be prohibited or, at the very least, substantially stronger protections on these fees should be applied.

A. Overdraft fees on debit card and ATM transactions should be prohibited.

Overdraft fees on ATM and debit card transactions have always represented banks' perversion of their original "customer courtesy" justification for overdraft fees because they can so easily be declined in real time when the account lacks sufficient funds. These fees are unfair and abusive and should be prohibited.

B. At the very least, the protections applicable to overdraft fees on prepaid card should be applied to checking account debit card/ATM transactions.

Short of a full prohibition of these fees, the protections now applicable to overdraft fees on prepaid cards should apply to debit cards on checking accounts. The Bureau chose to apply these protections in large part because it "believe[d] that many of these [prepaid card] consumers lost their checking accounts because they could not handle repeated overdraft fees."⁸³ The Bureau should address this problem *before* bank customers lose their accounts. In the checking account context, the Bureau should:

- prohibit obtaining opt-ins until 30 days after account opening;
- require an ability-to-repay determination for overdraft credit extended;
- limit fees in the first year to 25% of the credit line;
- allow payments to be due no more frequently than once a month, 21 days after a statement.

C. Posting practices that increase overdraft fees should be prohibited.

The Bureau's annual reports from its Consumer Response unit make clear that overdraft fees caused by transaction posting practices remain a significant problem. Posting transactions in an order that increases fees should be explicitly prohibited. Moreover, as discussed above, charging overdraft fees on

⁸³ 79 Fed. Reg. at 77211.

debit card transactions that are authorized against sufficient funds is a common practice that should be prohibited as an unfair practice or under Regulation E.

D. If the opt-in rule is generally retained as is, (1) establish a backstop after six fees in twelve months; and (2) prohibit additional discretion in disclosures and misleading marketing or approaches to opt-in.

If the opt-in rule is generally retained as is, the opt-in consent should expire after six total overdraft fees in a rolling twelve-month period. This requirement would be clearly justified by the pervasive, persistent confusion consumers have about whether they are opted in, as well as provide a backstop against relentless fees imposed against largely very financially vulnerable consumers.

Further, the Bureau should prohibit financial institutions from making any other representations regarding one-time debit card and ATM overdraft transactions apart from the opt-in models disclosures. This will prevent banks from promoting opt-in in heavy handed and often misleading ways. For example, the following language suggests that opt-in applies to all transactions, and that declined debit card transactions carry a fee: *“When your items are paid, this service will help save you the embarrassment of an ATM or everyday debit card transaction being declined or the inconvenience of a check or ACH item being returned, as well as the fee normally charged to you by merchants for items returned to them.”*⁸⁴

Some banks have urged the Bureau to permit additional language on the opt-in form, including additional language describing which balance (e.g., ledger balance, available balance) the bank uses in determining whether a fee is assessed. Permitting additional language would be ill-advised. Posting practices are confusing and will remain that way to consumers. Instead, posting practices that increase fees should be substantively prohibited.

E. Require that fees be reasonable and proportional to the cost to the institution of covering the overdraft.

The size of the overdraft fee is the engine that drives overdraft abuses. The size of the overdraft fee has more than doubled since 1997, even as the cost of processing overdrafts has declined with greater automation. This outsized fee creates a strong and perverse incentive for banks to encourage the overdrafts with additional unfair and deceptive practices.

The fee bears virtual no relation, and is vastly disproportionate, to the cost to the financial institution of covering the transaction. The risk of loss to the bank—which is the highest bank cost involved in overdraft programs—is small. CFPB research found that the amount banks charged off from unpaid overdrafts represented only 14.4% of net overdraft fees.⁸⁵ This statistic is unsurprising since the bank

⁸⁴ Example obtained from Mintel Comperemedia database of marketing materials, on file with authors. *See also Banks Target, Mislead Consumers As Overdraft Deadline Nears*, Center for Responsible Lending (Aug. 5, 2010), available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/Banks-Target-And-Mislead-Consumers-As-Overdraft-Dateline-Nears.pdf>; Center for Responsible Lending Research Brief, *Banks Collect Opt-Ins Through Misleading Marketing* (Apr. 2011), available at <http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/banks-misleading-marketing.html>.

⁸⁵ CFPB 2013 White Paper at 17.

repays itself first from the customer's next incoming deposit. While this cost does not include processing and administrative costs, estimates of such costs range from 54 cents to \$3.50.⁸⁶

The Credit CARD Act required that penalty fees on credit cards—including fees for exceeding the card's credit limit—be reasonable and proportional to the "violation." The Federal Reserve determined that this requirement included that the fee must be reasonable and proportional relative to the cost to the institution, and that the fee could not exceed the size of the violation. In the overdraft context, where overdrafts cost the institution very little, this would mean the fee should be significantly less than the average fee today, and should in no case exceed the size of the overdraft itself.⁸⁷

X. Comprehensive overdraft reform is needed.

The checking account market is broken. A similar dynamic—low upfront costs, high back-end, hidden costs—was once at play in the credit card market, where interest rates were often low, but back-end penalty fees were unrestrained. The Credit CARD Act reined in abusive fees and penalty rates, and the market shifted toward more transparent, upfront pricing and greater consumer satisfaction with their credit cards.

A shift toward more upfront pricing for checking accounts would provide incentive for financial institutions to have more responsible checking account models, rather than one that preys upon those with the least resources. And it would likely still permit many to maintain "free" checking accounts—banks often waive fees for those with direct deposit, or other features—but it would make the distribution of costs far more closely correspond to receipt of services.

Comprehensive reform of overdraft practices is not a far-fetched notion. The UK's Financial Conduct Authority recently established rules, effective 2020, to end fixed fees for overdrafts; require pricing by a simple annual interest rate; and allow no difference between "arranged" and "unarranged" overdraft prices.⁸⁸ The regulator reports that the typical cost of borrowing 100 pounds through an unarranged overdraft would drop from 5 pounds a day to less than 20 pence.⁸⁹

Recommendations:

- **Regulate overdrafts as credit under Regulation Z, subject to an ability-to-repay assessment and repayment through installments.** Overdraft fees have long enjoyed a regulatory pass in many respects because banks have posited that overdraft is not being used as credit but instead is merely an occasional courtesy. However, data showing that many consumers are charged many fees annually belies this argument. When financial institutions routinely pay a customer's transactions when the account lacks sufficient funds, the financial institution is clearly extending

⁸⁶ Chi Chi Wu, *Restoring the Wisdom of the Common Law: Applying the Historical Rule Against Contractual Penalty Damages to Bank Overdraft Fees*, National Consumer Law Center, at 6 (April 2013), <https://goo.gl/p25SGA>

⁸⁷ *Id.*

⁸⁸ Financial Conduct Authority, PS19/16: High-Cost Credit Review: Overdraft Policy Statement (July 6, 2019), <https://www.fca.org.uk/publications/policy-statements/ps19-16-high-credit-review-overdrafts>.

⁸⁹ See BBC News, *Bank Overdraft Fees Targeted in Major Shake-up*, June 7, 2019, <https://www.bbc.com/news/business-48553193>.

credit to that customer, and the product should be regulated as credit. This means that it should only be extended based on a determination that the customer has the ability to repay it, consumers should get credit disclosures to enable them to compare different forms of credit, and the credit should be repayable in manageable installments.

- **Require that fees be reasonable and proportional to cost.** If overdraft fees are not treated as credit and their fees as finance charges, they should be required to be reasonable and proportional to the cost to the institution of covering the overdraft, as noted above.
- **Limit overdraft fees to one fee per month, and six per year, and prohibit predatory posting practices.** Once an account has gone negative and the customer has incurred an overdraft fee, the customer should have sufficient time to bring the account back to positive before being charged additional fees. Again, the Credit CARD Act limited over-the-limit fees to one per month, and the FRB determined in the credit card context that requiring “reasonable and proportional fees” meant that no more than any kind of penalty fee could be charged per single event or transaction. The closest parallel to the typical “violation” in the credit card context is the monthly statement cycle. Account holders struggling to keep their account positive often do not have the capacity to pay multiple fees, and this practice causes them a harm they cannot reasonably avoid. Thus, CFPB should limit fees to one fee per month, and six per year; prohibit “sustained” or “extended” fees; and prohibit posting practices that result in unnecessary overdrafts and fees.

XI. Conclusion

We appreciate your consideration of our comments and would be happy to discuss them further.

Sincerely,

Center for Responsible Lending
National Consumer Law Center (on behalf of its low income clients)
Americans for Financial Reform Education Fund (AFREF)
National Association for the Advancement of Colored People (NAACP)
National Coalition for Asian Pacific American Community Development (National CAPACD)
National Fair Housing Alliance (NFHA)

Appendix A

Broken Banking: Overdraft Penalties Harm Consumers, Discourage Responsible Products, Center for Responsible Lending (2016)

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