

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
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
U.S. PIRG**

on

**Regulation E
pursuant to
12 CFR Part 205
Docket No. R-1343**

and

**Regulation DD
pursuant to
12 CFR Part 230
Docket No. R-1315**

March 30, 2010*

VIA ELECTRONIC SUBMISSION

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

**amended March 31, 2010 to add two organizations as authors of Comment.*

The **Center for Responsible Lending, Consumer Federation of America**,¹ and the **National Consumer Law Center (on behalf of its low-income clients)**,² along with **Consumer Action**,³ **Consumers Union**,⁴ the **National Association of Consumer Advocates**,⁵ and **U.S. PIRG**,⁶ provide the following comments regarding the Federal Reserve Board’s proposed rule to amend Regulation E to clarify certain aspects of its November 2009 final rule and the Board’s proposed rule to amend Regulation DD to clarify its January 2009 final rule.

¹ 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.

² 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.

³ **Consumer Action** (www.consumer-action.org) 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.

⁴ **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.

⁵ The **National Association of Consumer Advocates, Inc. (NACA)** is a nonprofit 501(c)(3) organization founded in 1994. NACA’s mission is to provide legal assistance and education to victims of consumer abuse. NACA, through educational programs and outreach initiatives, protects consumers, particularly low income consumers, from fraudulent, abusive and predatory business practices. NACA also trains and mentors a national network of over 1400 attorneys in representing consumers’ rights.

⁶ The **U.S. Public Interest Research Group** serves as the federation of and federal advocacy office for the state PIRGs, which are non-profit, non-partisan public interest advocacy groups that take on powerful interests on behalf of their members.

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. CRL has consulted with Self-Help's credit unions in formulating these recommendations.

INTRODUCTION

We first commend the Board for adopting the stronger of the alternatives it considered under its Regulation E proposed rule – the opt-in proposal – and for applying the rule to both new and existing customers. We further commend the Board for prohibiting conditioning overdraft coverage of checks and ACH transactions on a customer's opting into coverage for ATM and one-time debit card transactions and for requiring that customers who do not opt in receive the same account terms as those who do. This rule has already impacted some overdraft practices, with Bank of America announcing that it will cease to allow overdraft fees to be charged on debit card transactions at the point of sale this summer.⁷

We also appreciate the Board's commitment in the final rule to “continu[e] to assess whether additional regulatory action relating to overdraft services is needed.”⁸ There is no doubt that further action is needed. The Board's rule, while the stronger of the alternatives it proposed, solely addresses customer consent to a product that remains abusive. The rule addresses neither the high cost of the overdraft fee relative to the overdraft amount nor the frequency with which overdraft fees may be charged. It also does not address manipulation of posting order to maximize overdraft fees. We urge the Board to move swiftly to propose rules, pursuant to its authority to address unfair and deceptive practices under the FTC Act, that would—

- require that overdraft fees be reasonable and proportional to the cost to the institution of covering the overdraft; and

⁷ Press Release, *Bank of America Will Help Customers Avoid Overdrawing Accounts* (Mar. 10, 2010), at <http://newsroom.bankofamerica.com/index.php?s=43&item=8651>.

⁸ 74 Fed. Reg. 59050.

- limit overdraft fees to six per year, at which time an institution must offer the consumer a lower cost overdraft alternative in order to continue covering overdrafts for a charge.⁹

The Board’s failure to address cost and frequency, while problematic unto itself, also heightens concerns about implementation of the Regulation E final rule. Since institutions may continue to charge high, unlimited fees to customers who opt in, institutions have overwhelming incentive to ensure that customers opt in. The Board must play an active role in ensuring that deceptive tactics aimed at obtaining customers’ opt-in are identified and promptly prohibited.

Summary of key recommendations:

- **Take swift action to stop deceptive practices by financial institutions attempting to scare consumers into opting in with misleading statements.**
 - **Prohibit deceptive statements in materials soliciting the consumer’s opt-in.**
 - **Require a “Schumer-box”-like disclosure of the comparative costs of opting in to fee-based overdraft, other overdraft alternatives, and declining to opt-in.**
 - **Closely monitor institutions’ opt-in efforts for deception and disparate impact.**
- **Finalize the following provisions as proposed:**
 - **For customers who have not opted in, prohibit overdraft fees on ATM and one-time debit card transactions regardless of the institution’s policy and practice with respect to such transactions;**
 - **For customers who have not opted in, require that, to the extent tiered fees are based on the amount of a customer’s outstanding negative balance, the fee or charge be based on**

⁹ A six loan per year cap finds precedent in the FDIC’s 2005 guidance addressing excessive refinancing of payday loans. The FDIC limited excessive refinancings 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. FDIC Financial Institution Letters, Guidelines for Payday Lending, FIL 14-2005, February 2005. 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.” Id. 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 occasional users.

the amount of the negative balance attributable solely to checks, ACH, or other transactions not subject to the fee prohibition;

- **Prohibit overdraft fees on ATM and one-time debit card transactions until five business days following the day the institution sends written confirmation of a customer’s opt-in;**
- **For customers who have not opted in, prohibit overdraft fees when the account would not have become overdrawn *but for* ATM or one-time debit card transactions posted to the account that day;**
- **For customers who have not opted in, prohibit sustained overdraft fees when the account would not have become or remained overdrawn *but for* ATM or one-time debit card transactions posted to the account beginning on the day the account first became negative.**

*We emphasize that the Board’s failure to address deceptive opt-in tactics or to prohibit overdraft fees on overdrafts that would not have occurred *but for* approved ATM and one-time debit card transactions threatens to significantly undermine the intent and effectiveness of the Board’s final rule.*

I. IMPLEMENTATION OF THE OPT-IN REQUIREMENT

We are concerned that institutions are already engaging in deceptive tactics aimed at persuading customers to opt in.¹⁰

For example, one major institution, JPMorgan Chase, has designed a cover letter stating in bold print:

**“YOUR DEBIT CARD
MAY NOT WORK THE SAME WAY ANYMORE
EVEN IF YOU JUST MADE A DEPOSIT
Unless we hear from you.”**

The letter later says, **“To keep your debit card working as it currently does, please call”** and **“Remember your debit card transactions will be denied in the future if you do not have sufficient funds in your account”** (emphasis in original). The letter is attached as an Appendix.

¹⁰ See Andrew Martin and Ron Lieber, *Banks Apply Pressure to Keep Fees Rolling In*, N.Y. Times (Feb. 22, 2010).

A. The Board must prohibit any statements in materials soliciting the consumer’s opt-in that are deceptive, misleading, or appear to contradict the protections of the Rule.

The statements in Chase’s letter soliciting the consumer’s opt-in are deceptive. They create the impression that the consumer’s debit card will simply stop working or experience significant problems in everyday usage.

We understand that the institution is referencing its apparent intention not to allow customers who do not opt in to take advantage of the “intraday float” it will afford customers who do opt in. We urge the Board to consider whether this constitutes a substantive violation of the requirement that institutions provide consumers who do not opt in with the same account terms, conditions and features as provided to consumers who do opt in.

However, even if these statements do not violate the “same account terms” rule substantively, they are deceptive and undermine the intent and effectiveness of the Model Form A-9. They misleadingly suggest that the relatively narrow intraday float issue should be a customer’s primary concern, greatly overshadowing all other disclosures, whether on the cover letter or the model form.

In addition, the statement in the solicitation noting that debit card transactions will be denied if the customer lacks funds completely disregards less-expensive overdraft protection options offered by Chase in the form of a linked credit card, savings account, or home equity line of credit. Solicitations should not allow banks to give the erroneous impression that no other alternatives exist to avoid debit card denials. A proposal for additional disclosure to make the full array of options known to accountholders is addressed in the next section.

The Board clearly took great care in developing its model form, noting the form “was edited to make it shorter and clearer to consumers, including by emphasizing certain information,” and prohibiting inclusion of additional information on the form.¹¹ We understand that the final rule allows institutions to provide other information about their overdraft programs in a separate document.¹² But the rule should not permit any statements that deceive a consumer, create a misleading impression, or implicitly contradict the final rule itself or the information in the model form. We urge the Board to add a provision, such as the one proposed below, to Section 205.17(b) prohibiting such statements.

*New 205.17(b)(5) **Deceptive, misleading or contradictory statements prohibited.**
An institution shall not make any written or oral statement that is likely to deceive or create a misleading impression regarding its overdraft service, including any*

¹¹ 74 Fed. Reg. 59047.

¹² 74 Fed. Reg. 59047, footnote 39.

written or oral statements contradicting any of the protections of this section or any of the information required to be disclosed under this section.

B. The Board should require a “Schumer-box”-like disclosure of the comparative costs of opting in to fee-based overdrafts, other overdraft alternatives, and declining to opt-in.

One reason that Chase’s letter may be able to convince consumers to opt in is that it fails to mention that the cost of not doing so is “\$0”. In fact, the letter even deceptively states that “Chase Debit Card Overdraft Coverage costs \$0 to keep active on your account.” While perhaps technically true, such a statement creates the misleading impression that opting in to overdraft coverage of ATM and one-time debt card transactions is the lowest cost alternative.

The deceptiveness of Chase’s letter points out a fundamental deficiency of the model form—it does not provide consumers with a means of comparing the cost of fee-based overdraft loans to other alternatives, such as a traditional overdraft line of credit or transfer from savings. Most importantly, there is no comparison with the cost of not opting in, *i.e., there is no disclosure indicating that declining to opt in means the consumer will never incur any overdraft fees for ATM and debit card transactions.*

Consumers must be given information about the comparative costs of each alternative in order to make a truly informed and meaningful choice. Furthermore, as the Board has recognized in the credit card context, the format of such a cost comparison is critical. That is why the Board 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 a table must show that the cost of declining to opt in is “\$0.”

The deceptiveness of Chase’s letter also demonstrates the significant pitfalls of the Board’s repeated resistance to requiring Truth in Lending disclosures for fee-based overdraft loans. Without an Annual Percentage Rate 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. Thus, we urge the Board to disclose a sample APR for each of these forms of credit, based upon a hypothetical \$100 overdraft repaid in 2 weeks. Such a disclosure would also be beneficial because it will allow consumers to compare the cost of these loans to other forms of short-term credit.

The following is our proposal for a summary table comparing the cost of each overdraft alternative:

Type of Overdraft Coverage for ATM and Everyday Debit Card Transactions	Cost	Total Cost for a \$100 overdraft for 2 weeks	Sample Annual Percentage Rate¹³
None	\$0	\$0	NA
Standard Overdraft Coverage	\$30 per transaction plus \$5 if account remains overdrawn for 5 days	\$40	1,040%
Overdraft Line of Credit	\$5 per transaction plus 18% APR	\$5.69	148%
Transfer from Savings	\$5 per transaction	\$5	N/A
Transfer from Credit Card	\$5 per transaction plus 24% APR	\$5.92	154%

This proposed summary table should be placed following sentence #2 in the Model Form. If the cost disclosure does not appear until later on the form, consumers may be swayed into opting in after reading the first paragraph and jump to the bottom of the form to opt in.

Finally, we repeat our recommendation that the model form require disclosure of the minimum amount of an overdraft that would trigger a fee. One of the Board’s previously proposed versions of a model form included the following statement: “We may charge you this fee even if your overdraft amount is as low as \$_.” This is a critical piece of information for consumers deciding whether to opt in. We note that participants reacted strongly to this information in the Board’s consumer testing—they “reacted negatively” and found the practice “unfair.”¹⁴ This disclosure is especially important because of the attempts by institutions to play on the fears of consumers of declined debit card transactions in case of an “emergency.” Such statements make consumers focus on overdraft amounts that are significant and for important purchases. In contrast, this statement reminds them that they will be charged overdrafts for extremely small amounts, potentially for trivial purchases.

C. The Board must closely monitor institutions’ opt-in efforts for deception and disparate impact.

¹³ 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.

¹⁴ *Review and Testing of Overdraft Notices* at iii and 7, Macro International (Dec. 8, 2008).

We are also concerned that institutions are targeting the most frequent overdrafters and steering them to opt into fee-based overdraft, the most expensive overdraft option. One independent consultant’s webinar urged credit unions to “target ‘abusers’ for opt-in.”¹⁵ Another urged institutions to “identify ‘frequent fliers’”—citing the FDIC survey’s finding that the most frequent overdrafters spend over \$1600 annually in fees—and to “focus attention on these customers first.”¹⁶ A marketing group is offering an “Overdraft Opt-In Program” that segments customers based on how often they use overdraft, with those customers incurring four or more fees annually receiving “a gift or cash offer if they respond . . . After all, this is your most profitable fee group.”¹⁷

Not only is the practice of targeting this vulnerable segment of bank customers inappropriate, it also raises safety and soundness concerns for the institution, since it encourages high levels of unsustainable debt among these accountholders. As research has repeatedly found that overdraft fees have a disparate impact on lower income consumers and communities of color,¹⁸ such practices raise fair lending concerns under the Equal Credit Opportunity Act (ECOA).¹⁹

We urge the Board—in coordination with other bank regulators such as the OTS and OCC—to closely monitor institutions’ efforts to entice customers to opt in. *Such efforts should include requiring institutions to submit all materials aimed at soliciting consumers’ opt-in—including but not limited to mail advertisements, emails, text messages, telephone and in-person scripts, and employee training manuals—to bank*

¹⁵ Webinar, *What Are the Best Ways for CUs to Replace Lost Overdraft Fee Income?* Rory Rowland, Rowland Consulting (Jan. 29, 2010), presentation on file with CRL.

¹⁶ Webinar, *The Art of the Opt-In: Helping Your Consumers Make A Good NSF Choice*, David Peterson, Chief Strategic Officer, i7strategies (Mar. 4, 2010), presentation on file with CRL.

¹⁷ ACTON Marketing LLC, available at <http://www.actonfs.com/Optin.aspx>.

¹⁸ Consumer Federation of America’s 2004 survey found that 45% of African Americans had experienced overdrafts, compared to only 28% of consumers overall. In 2006 and 2008, CRL found that only 16% of people who overdraft pay 71% of all overdraft fees, and those individuals are more likely than the general population to be lower income and non-white. Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options*, CRL Research Brief (Apr. 16, 2008) at <http://www.responsiblelending.org/overdraft-loans/research-analysis/consumers-want-informed-choice-on-overdraft-fees-and-banking-options.html>. CFA conducted another survey in July of this year, finding that African Americans were twice as likely to have experienced overdrafts than consumers overall.

¹⁹ "Reverse redlining" -- targeting unfair, predatory or abusive products with a disparate impact on protected classes -- has been recognized as a fair lending violation in both the housing and auto lending contexts. 15 U.S.C. Sec. 1691 See, e.g. *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000), on reconsideration 147 F. Supp. 2d 1 (D.D.C. 2001); *McGlawn v. Pennsylvania Human Relations Comm'n*, 891 A.2d 757 (Pa. Commw. Ct. 2006). For a discussion of the auto lending cases, see generally National Consumer Law Center, *Credit Discrimination* 8.5 (5th Ed. 2009). (Overdrafts, as banking regulators have recognized, are extensions of credit, even though the associated fee has been excluded from TIL’s definition of a "finance charge" by Board rule. See "Joint Guidance on Overdraft Programs," (February 18, 2005), at <http://www.federalreserve.gov/boarddocs/SRLETTERS/2005/SR0503a1.pdf>)

supervisors. The Board should take appropriate swift and clear action to ensure that any opt-in efforts are in compliance with Regulations E and DD and ECOA and are not otherwise deceptive.

II. PROPOSED CLARIFICATIONS TO REGULATION E

A. The fee prohibition should apply without exception for customers who do not opt-in.²⁰

We welcome the Board's clarification that the prohibition on fees of §205.17(b)(4) applies to all institutions, including those with a policy and practice of declining ATM and one-time debit card transactions when the institution has a reasonable belief that the customer's account has insufficient funds at the time of the authorization.

We agree with the Board's analysis that customers who do not opt-in will reasonably expect that they will not be charged overdraft fees for ATM and one-time debit card transactions under any circumstances. Allowing institutions to charge customers overdraft fees for any ATM or one-debit card transactions would run counter to those expectations. The Board further notes that financial institutions are in a better position to mitigate information gaps than consumers are. We agree.

Moreover, allowing fees on transactions that are authorized on available funds but settle on insufficient funds would create a perverse incentive whereby banks may benefit more from inefficient payment systems or processing procedures (those resulting in longer periods of time between authorization and settlement) than efficient ones. This would perpetuate rather than discourage inefficiencies in the system, such as debit holds, that frustrate consumers by making it difficult for them to know their precise balance at any given time.

We further agree with the Board's assessment that, without its proposed clarification, customers who do not opt in may find greater protection at institutions that routinely approve debit card overdrafts than at institutions with a policy and practice of denying debit card overdrafts.²¹ As denying debit card overdrafts should be the policy encouraged at all institutions, we commend the Board's efforts to ensure that its rule does not promote routine approval of debit card overdrafts.

²⁰ § 205.17(b)(1), 17(b)(4).

²¹ For example, without the clarification that the fee prohibition applies to all institutions, customers of a bank which routinely covers debit card overdrafts for a fee that do not opt-in are assured of not incurring any overdraft fees for one-time debit card transactions. This would compare favorably to the experience of customers from a bank which did not cover debit card overdrafts as a standard practice, where customers could not be ensured to always avoid overdraft fees when using their debit card.

B. Fees should be prohibited for five business days after the institution sends the customer written confirmation of opt-in.²²

We appreciate that the Board wishes to ensure that an institution not assess any overdraft fees or charges until it has sent the customer a written confirmation of the customer's opt-in. However, in order to allow time for the customer to *receive* the notice prior to being charged overdraft fees, the Board should prohibit overdraft fees from being charged for five business days following the day the institution sends the notice.

The Board notes that it aims to balance the interest in ensuring that consumers understand their choice with the interest in providing access to overdraft expeditiously when requested.²³ As discussed above, we expect institutions to employ aggressive tactics aimed at persuading customers to opt in. Allowing five days notice increases the chance a consumer will understand that he/she has opted in prior to being charged fees. Institutions concerned about disappointing consumers by denying their transactions during the interim period are not prohibited from covering transactions during the interim period without charging a fee.

Further, the Board should require institutions not only to adopt “reasonable procedures” designed to comply with the Board's final rule with respect to written confirmations, but to follow those procedures as well.

C. For customers who have not opted in, tiered overdraft fees should be based solely on negative balances attributable to transactions not subject to the fee prohibition.²⁴

We strongly support the Board's proposal to clarify that to the extent tiered fees are based on the amount of a customer's outstanding negative balance, the fee or charge must be based on the amount of the negative balance attributable solely to checks, ACH, or other transactions not subject to the fee prohibition.

D. For customers who have not opted in, per-transaction *and* sustained overdraft fees should be prohibited when the account would not have become or remained overdrawn but for ATM or one-time debit card transactions posted during the relevant period.²⁵

We commend the Board's efforts to clarify how its final rule applies to sustained overdraft fees.²⁶ However, we have serious concerns about this portion of the Board's

²² § 250.17(b)(1)(iv).

²³ 75 Fed. Reg. 9122.

²⁴ Comment 17(b)-8.

²⁵ Comment 17(b)-9.

²⁶ We understand that the purpose of this current rulemaking is to clarify and facilitate compliance with the

proposal—not only as it relates to sustained overdraft fees but also for the implications it has on how per-transaction overdraft fees are charged.

We support the Board’s proposed clarification that, where a negative balance is due solely to ATM and one-time debit card transactions, the institution may not charge a sustained overdraft fee. However, we strongly disagree with the Board’s proposal that, where a negative balance is due in part to an ATM or one-time debit card transaction and in part to a transaction not subject to the fee prohibition, the institution may, in all circumstances, charge a sustained overdraft fee.²⁷ This proposal is inconsistent with the Board’s own acknowledgement that “consumers [who do not opt in] would reasonably expect not to incur daily or sustained overdraft, negative balance, or similar fees or charges due to [ATM and one-time debit card] transactions.”²⁸

The Board’s examples at Comment 17(b)-9.ii.a. and ii.b. both allow for sustained overdraft fees that are indeed due to a one-time debit card transaction—because if the \$60 debit card transaction had not been approved, the customer’s account would not have become overdrawn. Put another way, the overdraft, and the subsequent per-transaction and sustained overdraft fees, were not solely attributable to a check, ACH, or other transaction not subject to the fee prohibition, but were rather caused by approving a one-time debit card transaction.

First, it is critical to view the Board’s proposed clarification in light of the fact that the Board’s final rule does not prohibit an institution from approving ATM and one-time debit card transactions against insufficient funds, even when customers have not opted in, so long as the institution does not charge a fee for such transactions. The Board’s examples assume that the one-time debit card transaction that overdraws the account was one the institution approved with the reasonable belief that there were sufficient funds or where no authorization was obtained. But the Board’s rules do not prohibit the institution from routinely, deliberately approving transactions on insufficient funds in order to drive

Regulation E final rule. We are nonetheless compelled to note that the Board should take swift action to prohibit sustained overdraft fees. A sustained overdraft fee may be viewed in one of two ways—as either (1) an additional overdraft fee for a transaction, or a series of transactions, that has already incurred overdraft fees, or (2) interest on an outstanding negative balance. If the former, the fee should be prohibited because no more than one overdraft fee should be permitted per overdraft transaction. Indeed, the Board recently proposed prohibiting charging more than one credit card penalty fee based on a single event or transaction, noting “imposing multiple fees in these circumstances could be unreasonable and disproportionate to the conduct of the consumer.” Regulation Z, Docket No. R-1384 (Mar. 2010). The same protection should apply in the overdraft context, where more than one fee per transaction is neither reasonable nor, as sustained overdraft fees are applied today, proportional to the institution’s cost of covering the overdraft. On the other hand, if the fee is viewed as interest on an outstanding negative balance, it should receive all the protections Regulation Z affords a finance charge.

²⁷ Comment 17(b)-9.i.

²⁸ 75 Fed. Reg. 9123.

a consumer's balance deeper into the red and to keep it there as long as possible, even despite subsequent customer deposits.

Second, the Board's examples highlight institutions' ability to maximize overdraft fees under the new rule by posting ATM and one-time debit card transactions prior to other transactions for which they may continue to charge overdrafts. In fact, the Board's examples assume that the institution posts ATM and one-time debit card transactions first, while noting that institutions may post transactions as permitted by applicable law.

We have long urged the Board to prohibit institutions from manipulating the order in which they post transactions for the purpose of maximizing overdraft fees. We continue to urge the Board to prohibit this practice immediately. And in the new "opt-in" environment, the Board must address maximization of overdraft fees resulting solely from posting order where many customers will only incur overdraft fees for checks and ACH overdrafts. If not, an institution will have great incentive to post one-time debit and ATM transactions first and then check and ACH transactions, so that the latter are considered the transactions that overdraw the account and thus can be charged overdraft fees. The Board should aim to ensure that institutions do not purposefully evade, and seriously undermine the effectiveness, of the final rule by ensuring overdraft fees are assessed only on negative balances caused solely by transactions not subject to the fee prohibition.

To address both per-transaction overdraft fees and sustained overdraft fees, we propose the following:

For customers who have not opted in to overdraft coverage of ATM and one-time debit card transactions:

- (1) An overdraft fee for a transaction may be charged only if, based on the day's starting balance, the negative balance is attributable solely to check, ACH, or other transactions not subject to the prohibition on assessing overdraft fees and other charges in §205.17(b)(1);*
- (2) A bank cannot, for purposes of assessing sustained overdraft fees, consider ATM and one-time debit card transactions for purposes of calculating a negative balance.*

Within the context of the Board's broader proposal, we agree with the Board's proposal that the date from which the period triggering a sustained overdraft fee is measured should be the date the transaction not subject to the rule is paid. However, the measurement date would not be an issue if, as we propose, the Board prohibits overdraft fees that would not have occurred but for approved ATM and one-time debit card transactions.

We support the Board's proposal that institutions that do not make the necessary systems changes by July 1, 2010, may not charge sustained overdraft fees, even on checks and

other transaction not subject to the opt-in requirement, after the final rule’s compliance date of July 1, 2010.

E. The effective date should remain July 1, 2010.²⁹

We support that the Board does not intend to extend the mandatory compliance date for the Regulation E final rule proposal beyond July 1, 2010.

III. PROPOSED CLARIFICATIONS TO REGULATION DD

A. We support use of the term “Total Overdraft Fees” on periodic statements.³⁰

We commend the Board for requiring in its final Regulation DD rule that institutions not use the generic term “NSF fee” to describe both items returned unpaid and items paid.³¹ Use of the terms “NSF fee” and “overdraft fee” interchangeably has led to confusion for consumers and challenges in obtaining and interpreting statistical data on each type of fee.

We also support the Board’s current proposal to require that the aggregate fee disclosure on periodic statements use the specific term “Total Overdraft Fees” to describe the total dollar amount for all the fees or charges imposed on the account for paying overdrafts.³² We agree with the Board that using other terminology may be confusing to consumers and undermine their ability to understand and compare costs.

B. The Board should require cost disclosures any time institutions disclose a balance that includes funds available for overdraft.³³

The Board proposes to require that when an institution discloses a balance that includes funds available for overdraft, it indicate, when applicable, that funds available under an overdraft line of credit or through transfer from another account may not be available for all transactions. This is a reasonable approach. However, we remind the Board that we urged it in our July 2008 Regulation DD comments to require that any balance that includes overdraft funds available be accompanied by a disclosure of fees associated with accessing those funds. This requirement should apply to fee-based overdraft programs, lines of credit or transfers from another account.

²⁹ 75 Fed. Reg. 9121.

³⁰ § 230.11(a).

³¹ Official Staff Commentary to Regulation DD, Comment 6(a)(3)-2(iv).

³² § 230.11(a)(1)(i).

³³ Comment 11(c)-3.

C. The proposed effective dates are reasonable but should be no longer than proposed.

The Board proposes to make these changes effective 30 days after publication of the final rule, with the exception of the requirement that institutions use the specific term “Total Overdraft Fees,” for which it proposes 90 days. These time periods are reasonable; however, given that generation of periodic statements is a highly automated process, the implementation period for the “Total Overdraft Fees” terminology should certainly be no longer than 90 days.

CONCLUSION

We appreciate that the Board has devoted substantial attention to abusive overdraft practices. We urge the Board to closely monitor institutions’ practices regarding implementation of the Regulation E final rule and to take swift action to curb deceptive tactics.

We further urge the Board to prohibit any overdraft fees—per-transaction or sustained—when an overdraft fee would not have occurred but for an approved ATM or one-time debit card transaction. Any other response threatens to significantly undermine the intent and effectiveness of the Board’s final rule.

We also appreciate that the Board has committed to continuing to evaluate overdraft programs to determine what additional reforms are needed. We urge the Board to address the cost and frequency of overdraft fees without delay.

If the Board wishes to discuss these comments, please do not hesitate to contact us.

Appendix: Letter from JP Morgan Chase Bank



**YOUR DEBIT CARD
MAY NOT WORK THE
SAME WAY ANYMORE
EVEN IF YOU JUST
MADE A DEPOSIT**

Unless we hear from you.



Have you ever made a deposit into your checking account, then used those dollars right away for debit card purchases? Even though most deposits are not immediately available to approve debit card transactions, we may have authorized a debit card transaction when you did not have sufficient available funds.

SOON YOU WILL NOT BE ABLE TO DO THIS ANYMORE - UNLESS WE HEAR FROM YOU.

When a deposit is not available (so you don't have enough money to make a purchase or even pay for an unexpected emergency like a highway tow) Chase Debit Card Overdraft Coverage™ may allow your debit card transactions to be authorized at our discretion.

Please tell us if you want to keep this convenient coverage.

Your debit card may not work the same way anymore even if you just made a deposit.

Chase Debit Card Overdraft Coverage costs \$0 to keep active on your account. And if you do overspend, but make a deposit or transfer the same business day to cover your purchases, you will not pay fees. But fees will apply if you don't make a deposit or transfer money on the same business day. That fee is \$35 each time you use your debit card for a purchase that overdraws your account. The most you will be charged is 3 fees per day, no matter how many times you use your debit card. (Extended overdraft fees apply, see reverse for more information.)

**To keep your debit card working as it currently does,
please call 1.866.532.4273 or stop by any Chase branch before March 29, 2010**

If you don't contact us, your everyday debit card transactions that overdraw your account will not be authorized after August 15, 2010 — even in an emergency. To keep your Chase Debit Card Overdraft Coverage in place, call 1.866.532.4273 or stop by any Chase branch.

Sincerely,

Jennifer Myhre
Senior Vice President

P.S. Remember, your debit card transactions will be denied in the future if you do not have sufficient funds in your account. So call 1.866.532.4273 or stop by any Chase branch today!

Please see back of letter for additional important terms and conditions. Also, please see the enclosed notice, required by Federal law, containing information about Chase's overdraft practices.

HELPFUL ANSWERS TO YOUR QUESTIONS

Q. If I have Chase Overdraft Protection linked to a savings account, credit card or home equity line of credit, do I still need this service?

A. The Chase Overdraft Protection you may already have on your checking account allows us to automatically transfer money from your Chase savings account, credit card or home equity line of credit if the balance in your checking account runs low. However, if you don't have money or credit availability in these accounts to cover you, your everyday debit card purchases will be denied. That's where Chase Debit Card Overdraft Coverage can help. It may allow your debit card to continue working if you're not signed up for Chase Overdraft Protection or if you don't have enough money or credit availability in your savings account, credit card or line of credit. Chase Debit Card Overdraft Coverage may help when you're facing an unexpected emergency.

Q. If I sign up for Chase Debit Card Overdraft Coverage, will my debit card charges always go through?

A. No. Whether a transaction will be paid is discretionary and we reserve the right not to pay. Most overdrafts are paid but there is no guarantee. The amount of Chase Debit Card Overdraft Coverage will vary based on your account history, deposit and spending patterns. You can also sign up for helpful alerts with Chase Debit Card Overdraft Coverage, to get a text message when your balance is low or your account is overdrawn.

Q. Are there fees?

A. Yes. You will pay up to a \$35 fee each time you use your debit card and don't have sufficient funds in your account at the end of the day. We will only charge you a maximum of 3 fees per day. (Effective 3/29/10 this fee will change to a maximum of \$34.) We will also charge you an additional one time fee of up to \$15, if your account remains overdrawn over 5 days. There is no fee if you have the service and don't use it. And in most cases, there is no fee if you accidentally overspend with your debit card, but you make a deposit or transfer that same business day to cover the cost of your purchases.

Q. When do I need to make my deposit to avoid an overdraft fee?

A. You will have until the cut-off time (as posted at the branch or ATM) of the business day of your transaction to make your deposit. If your debit transactions occur on a non-business day, you will have until the cut-off time of the next business day.

Q. What about automatic debit card payments that I set up with a merchant?

A. Debit card purchases that are set up to bill automatically (like a gym membership) may continue to be authorized at our discretion even if you do not sign up for Chase Debit Card Overdraft Coverage.

Q. If I do not sign up for Chase Debit Card Overdraft Coverage, when will you stop paying my everyday overdraft debit card items?

A. If we do not receive a response from you, we will stop paying your everyday overdraft debit card items beginning on 8/15/10. You can plan ahead now and keep your account working as it does today, by telling us to continue your Chase Debit Card Overdraft Coverage.

Q. What if I can't decide or don't want this service?

A. We're happy to talk with you about options for managing your account. Call 1.866.532.4273 or visit a banker to discuss Chase Debit Card Overdraft Coverage, and if you're certain that you don't want your everyday debit card transactions authorized when you don't have sufficient funds in your account, your banker can remove this service from your account. But try to talk with us before 8/15/10. That way, we can keep your account working as conveniently as it does today if you decide to keep your Chase Debit Card Overdraft Coverage.

Q. How do I prevent my child's account from being charged for Overdraft?

A. Our Chase High School CheckingSM accounts are not eligible for Chase Debit Card Overdraft Coverage and are not subject to overdraft fees. Debit card transactions will not be authorized when there are not sufficient funds in the account.

IMPORTANT DETAILS ABOUT CHASE DEBIT CARD OVERDRAFT COVERAGE

- An insufficient funds fee of up to \$35 each time may be imposed for covering overdrafts created by check, in-person withdrawal, debit card transaction or other electronic means. Effective 3/29/10 this fee will change to a maximum of \$34.
- Once an overdraft has occurred, you are obligated to bring your account to a positive balance promptly.
- Whether your overdraft will be paid is at Chase's discretion, and we reserve the right not to pay. For example, we typically do not pay overdrafts if your account is not in good standing, or you are not making regular deposits, or you have had excessive overdrafts.
- Chase Debit Card Overdraft Coverage is different from Overdraft Protection in that it does not transfer money from a credit card, savings account, or home equity line of credit.
- Debit card purchases that are set up to bill automatically (like a gym membership) may continue to be authorized at our discretion even if you do not sign up for Chase Debit Card Overdraft Coverage.