By Fax (703-518-6660), Email (boardmail@ncua.gov), and First Class Mail

November 30, 2010

The Honorable Deborah Matz
Chairman
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Dear Chairman Matz:

As financial institutions continue their campaigns to persuade consumers to agree to pay steep fees for debit card overdrafts, we urge the National Credit Union Administration to adopt stricter supervisory guidance to curb ongoing overdraft abuses.

Our organizations recently filed comments in a docket opened by the FDIC[1] to update and strengthen its guidelines for overdraft programs. In this letter, we urge NCUA, as we have recently urged the Office of the Comptroller of the Currency, Office of Thrift Supervision, and the Federal Reserve Board, to update your guidance on overdraft programs consistent with our recommendations to the FDIC.

We enthusiastically supported several aspects of the FDIC's proposed guidance, most notably 1) the agency's recognition that more than six overdraft fees within a 12-month period constitutes excessive or chronic use; 2) its instruction that banks stop manipulating the order in which they post transactions to maximize fees; and 3) its instruction that banks not steer frequent overdrafters into high-cost programs while "obscuring" lower-cost alternatives. We also strongly supported the FDIC's caution that such steering raises fair

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[1] Comments on FDIC's Proposed Overdraft Payment Supervisory Guidance, FIL-47-2010 (Sept. 2010), *available at* FDIC at http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/Overdraft-Comment-FDIC-Guidance-Sept-27-2010-FINAL.pdf.

lending concerns and would be "closely scrutinized."[2] These provisions were finalized essentially as proposed last week.[3]

At the same time, we urged the FDIC to more firmly limit overdraft fees to six per year, consistent with its 2005 payday loan guidelines, which effectively addressed payday lending by FDIC-supervised institutions. Similarly today, we urge NCUA to firmly limit overdraft fees to six per year.

We make the following specific recommendations:

- **End excessive overdraft fees at NCUA-supervised credit unions:**
    - **Require that any account holder who chooses overdraft coverage receive the lowest-cost credit for which the account holder qualifies.** Steering borrowers into higher-cost credit than they qualify for will no longer be tolerated in the mortgage context. It should not be tolerated in the overdraft context, either.
    - **Instruct credit unions not to charge more than six overdraft fees within a 12-month period, consistent with the FDIC's 2005 payday lending guidelines.**
- **Prohibit all methods of transaction processing that increase overdraft fees.**
- **Take swift action to stop aggressive or deceptive practices aimed at convincing customers to opt in:**
    - **Review opt-in solicitation materials and practices at each examination and intermittently.**
    - **Provide examples of what constitutes "deceptive" opt-in solicitations.**
    - **Prohibit credit unions from asking account holders more than once if they want to opt-in.**
    - **Assess disparate impact on communities of color.**
    - **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.**

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[2] FDIC Proposed Guidance, *available at* http://www.fdic.gov/news/news/financial/2010/fil10047.pdf.

[3] FDIC 2010 Guidance, FIL-81-2010, Nov. 24, 2010, *available at* http://www.fdic.gov/news/news/financial/2010/fil10081.pdf.

- **Require periodic reporting of data on overdraft program activity, particularly on those account holders incurring multiple fees.**

Public support for the overdraft reforms we recommend is very strong. Earlier this year, a national survey conducted for the Consumer Federation of America found that approximately two-thirds of Americans support limiting overdraft fees to six per year, and 86 percent support requiring banks to process transactions in the order in which they are received.[4]

I. Excessive overdraft fees, like payday loans, cause serious financial harm.

In the aggregate, fee-based overdraft programs cost consumers at least $23.7 billion each year—more than the loans extended in exchange for those fees, which amount to $21.3 billion.[5] Debit card transactions, the most common triggers of overdraft fees, cause an average overdraft of under $17,[6] yet trigger an average fee of $34.[7] We are aware that the median fee charged by credit unions is less, approximately $25.[8] This fee, at nearly 1.5 times the amount of the overdraft itself, is still clearly excessive. And it provides the account holder no benefit of avoiding a denied transaction because the cost of a denied debit card transaction is zero.[9] The size of overdraft fees is particularly striking given the

[4] Consumer Federation of America, "Consumers Overwhelmingly Support Bank Overdraft Reforms," Feb. 4, 2010, *available at* http://www.consumerfed.org/elements/www.consumerfed.org/file/CFA%20OD%20Poll%20and%20Survey%202%204%2010%281%29.pdf. The survey also found that 72 percent support limiting overdraft fees to one per overdraft; two-thirds support requiring that overdraft fees be related to the bank's cost of providing the service; and two-thirds support requiring banks to get consumers' permission before routinely charging overdraft fees on checks, debit cards and ATM withdrawals. The survey was conducted for CFA Jan. 18-21, 2010 by Opinion Research Corporation using telephone interviews. The margin of error is plus or minus three percentage points.

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

[6] The average overdraft amount for debit card transactions is $16.46. Eric Halperin, Lisa James, and Peter Smith, *Debit Card Danger: Banks offer little warning and few choices as customers pay a high price for debit card overdrafts*, Center for Responsible Lending, at 25 (Jan. 25, 2007), *available at* http://www.responsiblelending.org/overdraft-loans/research-analysis/Debit-Card-Danger-report.pdf [hereinafter *Debit Card Danger*].

[7] *Id.*

[8] Kathy Chu, *Courtesy Overdraft Fees Hit Credit Union Customers, Too,* USA Today, August 4, 2009, available at http://www.usatoday.com/money/perfi/credit/2009-08-03-overdraft-fees-credit-unions_N.htm (citing Mike Moebs).

[9] Charging NSF fees for denied debit or ATM transactions is not a common practice, to our knowledge, and in its final Regulation E rule in November 2009, the Federal Reserve indicated that such a practice would raise unfairness concerns: "A few commenters suggested the possibility that financial institutions may create new fees for declining ATM or one-time debit card transactions. While the final rule does not address declined transaction fees, the Board notes that such fees could raise significant fairness issues under the FTC Act, because the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time

short repayment period of the typical overdraft loan: three to five days, when the financial institution repays itself from the account holder's next deposit.[10]

This combination of high cost and short repayment period causes a debt trap for account holders who incur the majority of overdraft fees, analogous to the debt trap caused by payday loans. Ultimately, as our real-life case study below demonstrates, fee-based overdraft coverage leaves these account holders worse off than cheaper alternatives or even no overdraft coverage at all.

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

The large majority of fees are paid by chronic overdrafters who are also those least able to recover from them. The FDIC's recent guidance recognized that "permitting product over-use" can result in "[s]erious financial harm" for customers with a low or fixed income.[11] The FDIC's recent study of overdraft programs, consistent with CRL's previous research, found that account holders who overdrew their accounts five or more times per year paid 93 percent of all overdraft fees.[12] It also found that consumers living in lower-income areas bear the brunt of these fees.[13] Seniors, young adults, military families, and the unemployed are also hit particularly hard.[14] Older Americans aged 55 and over pay $6.2

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debit card transaction." Federal Reserve Board, Final Rule, Electronic Funds Transfers, Regulation E, Docket No. R-1343, 74 Fed. Reg. 59041 (Nov. 17, 2009) [hereinafter FRB 2009 Regulation E Final Rule].

[10] *Debit Card Danger* at 25.

[11] FDIC 2010 Guidance.

[12] FDIC Study of Bank Overdraft Programs at iv.

[13] *Id.* at v. Two CRL surveys, conducted in 2006 and 2008, found that 71 percent of overdraft fees were shouldered by only 16 percent of respondents who overdrafted, and those account holders were more likely than the general population to be lower income, non-white, single, and renters. Respondents reporting the most overdraft incidents were those earning below $50,000. Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options,* CRL Research Brief (Apr. 16, 2008), *available at* http://www.responsiblelending.org/overdraft-loans/research-analysis/final-caravan-survey-4-16-08.pdf [hereinafter CRL Research Brief].

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

billion in total overdraft fees annually[15]—$2.5 billion for debit card/ATM transactions alone[16]—and those heavily dependent on Social Security pay $1.4 billion annually.[17]

The new opt-in requirement under Regulation E may impact these figures. But it will not reduce the harm caused to the account holders whom financial institutions are able to enroll in the program for debit card and ATM transactions through aggressive, often deceptive, marketing campaigns. Regulation E does not address paper checks and ACH overdrafts at all. This consent-based rule fails to address a key substantive problem with the overdraft product—the fact that it operates as an extraordinarily high-cost credit product. It also fails to address the disparate impact these fees have on lower-income consumers. For further discussion of the inadequacy of the opt-in rule, particularly given steering, targeting, and deceptive solicitation concerns, see Part V, below.

B. Multiple overdraft fees leave account holders worse off than lower-cost coverage or even no coverage at all.

Multiple overdraft fees, particularly those charged within a short period of time, leave account holders worse off than cheaper overdraft alternatives *or no overdraft coverage at all*.

In CRL's report on the impact of overdraft fees on older Americans, we graphed two months of actual checking account activity of one panelist, whom we call Mary, from our database.[18] Mary is entirely dependent on Social Security for her income. We also graphed what her activity would have been with an overdraft line of credit. We later added a third scenario to the graph: no fee-based coverage at all, reflected below:

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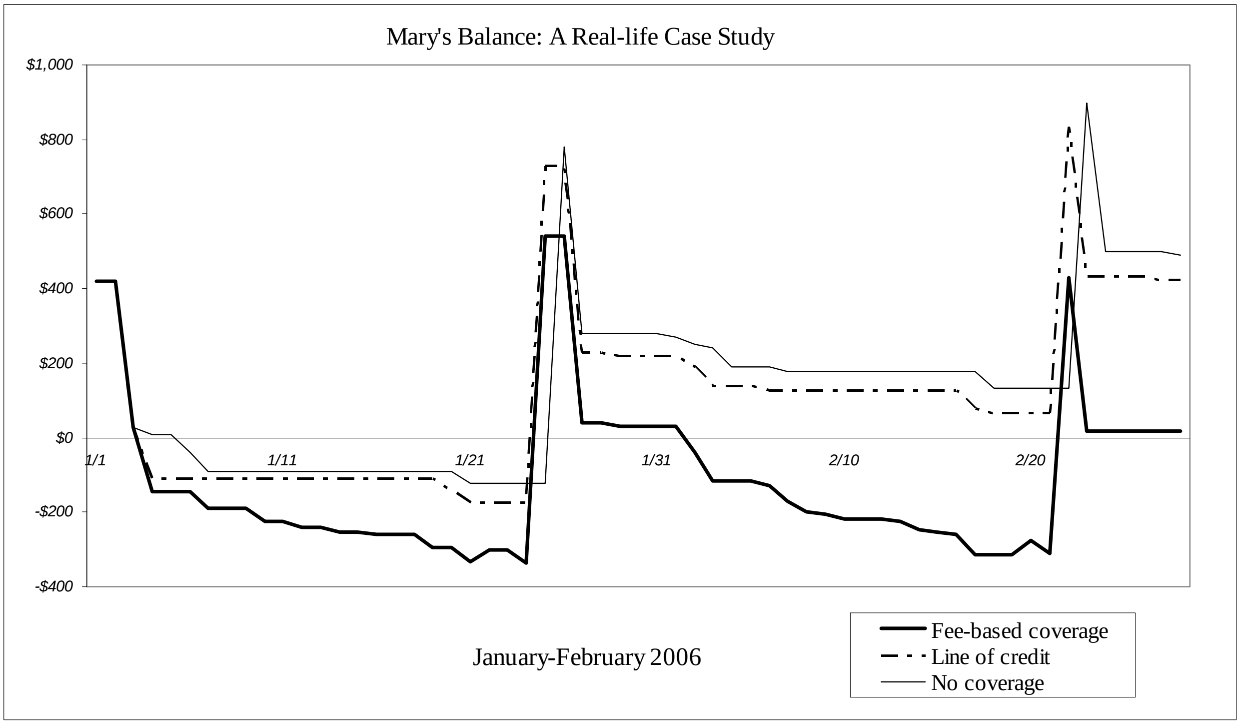
[15] Leslie Parrish and Peter Smith, *Shredded Security: Overdraft practices drain fees from older Americans*, Center for Responsible Lending (June 18, 2008), *available at* http://www.responsiblelending.org/overdraft-loans/research-analysis/shredded-security.pdf [hereinafter *Shredded Security*]. The figures in this report have been updated in the text above to reflect the increase in total overdraft fees paid by all Americans from $17.5 billion in 2006 to $23.7 billion in 2008.

[16] *Id.* The report found that debit card POS and ATM transactions account for 37.4 percent and 2.5 percent, respectively (p.7), which, when calculated as a percentage of $6.2 billion, together equal $2.5 billion.

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

[18] CRL analyzed 18 months of bank account transactions, from January 2005 to June 2006, from participants in Lightspeed Research's Ultimate Consumer Panel. For further discussion of our database and methodology, Eric Halperin & Peter Smith, *Out of Balance: Consumers pay $17.5 billion per year in fees for abusive overdraft loans*, Center for Responsible Lending at 13-14, (July 11, 2007), *available at* http://www.responsiblelending.org/overdraft-loans/research-analysis/out-of-balance-report-7-10-final.pdf [hereinafter *Out of Balance*].



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

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

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

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

C. Excessive overdraft fees are analogous to payday loan flipping.

Overdraft loans have been characterized as a bank's equivalent of a payday loan, and with good reason. Both are very short-term, extremely high-cost loans that are repaid from the borrower's next deposit, before essential expenses. Both are also made without regard to the customer's ability to repay—a concern the FDIC raised about payday lending in its 2005 payday guidelines.[19]

Existing research on repeat payday lending provides insight into the cycle of debt created by products like payday and overdraft loans. CRL's research finds that over three-fourths of payday loan volume is generated within two weeks of a customer's previous payday loan.[20] While technically a borrower typically closes an old payday loan and opens a new one, effectively the borrower is being flipped from one loan into another—unable to repay one loan and meet essential expenses without taking out another loan. The typical payday borrower has nine payday loans per year. Since these loans are generally taken on a back-to-back basis, a borrower would typically incur $45 in fees every two weeks to borrow $300 (for a typical payday loan priced at $15 per $100 borrowed), with effectively no reduction in principal—i.e., no benefit—ultimately paying $405 in *interest* for that $300 in credit.[21] Payday loans beget payday loans, then, much like overdraft loans beget overdraft loans.

In the context of payday loans, NCUA has cautioned that borrowers may find themselves "unable to break free" from the cycle of payday debt, as the "short-term nature of the loans may make it difficult for borrowers to accumulate the needed payoff funds when due."[22] To address this issue, NCUA has suggested limitations on the number of loans per borrower per year; other limitations on renewals; and waiting periods between loans.[23]

In the context of small dollar loans generally, the FDIC has warned that "excessive renewals . . . are signs that the product is not meeting the borrower's credit needs."[24] Recognizing the need to address excessive renewals of payday loans, the FDIC issued

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

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

[21] $45 in fees * 9 payday loan transactions = $405 in fees for $300 in credit extended at a rate of $15 per $100 borrowed.

[22] NCUA Letter to Federal Credit Unions, 09-FCU-05, July 2009, *available at* http://www.ncua.gov/resources/09-FCU-05.pdf.

[23] *Id.*

[24] FDIC Financial Institution Letters, Affordable Small-Dollar Loan Products, Final Guidelines, FIL-50-2007, June 19, 2007.

guidelines in 2005 limiting excessive refinancings by prohibiting banks from making payday loans to anyone who has had payday loans outstanding for three months in any 12-month period.[25]

II. Curb excessive overdraft fees

As a threshold matter, NCUA should inform credit unions that it expects them to provide account holders who want overdraft coverage the lowest-cost coverage for which they qualify. Then, it should firmly address excessive fees by clearly stating that extending account holders high-cost credit more than six times per year is not appropriate.

A. Require that any account holder who chooses overdraft coverage receive the lowest-cost credit the account holder qualifies for.

NCUA and other federal banking regulators have long acknowledged that "[w]hen overdrafts are paid, credit is extended,"[26] even as the Federal Reserve continues to fail to regulate overdrafts under the Truth in Lending Act. Fee-based overdrafts are clearly credit now more than ever: To encourage account holders to opt in, financial institutions are promoting these programs as an emergency source of funds, and in many cases account holders are choosing to opt in with an expectation that they will be "covered."[27] Overdraft programs, then, are clearly being marketed as short-term loans—i.e., credit.

Customers should not be steered into higher-cost credit than that for which they qualify. The Dodd-Frank regulatory reform bill prohibits creditors from offering financial incentives for originators to steer borrowers into more expensive mortgage loans than they qualify for.[28] The Federal Reserve's recently finalized mortgage rules do the same.[29]

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[25] FDIC Payday Lending Guidelines.

[26] Department of the Treasury-Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9127, 9129 (Feb. 24, 2005) [hereinafter 2005 Joint Guidance].

[27] For example, TD Bank calls its overdraft coverage the "TD Debit Card Advance." Claims for its $35 overdraft program read just like the solicitations for a credit product. "This safety net enables you to make a debit card purchase or ATM withdrawal, even when you do not have enough money available in your checking account." The bank's website presents examples of "coverage when you need it most," including Molly who needs to buy asthma medicine, Mike and Karen who get in trouble with a joint account, Lisa who needs to buy groceries, and Mike who wants cash to go on a date. www.tdbank.com/TDadvance/index.html, (last visited Sept. 26, 2010).

[28] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203. Section 1403 prohibits a mortgage originator from receiving, "directly or indirectly, compensation that varies based on the terms of the loan, other than the amount of the principal." It also prohibits originators from steering borrowers from a qualified mortgage (one with generally less risky terms) to a non-qualified mortgage (one with generally riskier terms); to a loan that the consumer lacks a reasonable ability to repay; and to a loan that has "predatory characteristics (such as equity stripping, excessive fees or abusive terms)."

[29] 75 Fed. Reg. 58509, Federal Reserve Board Final Rule, Regulation Z (Sept. 24, 2010), 12 CFR 226.36(e)(1): " In connection with a consumer credit transaction secured by a dwelling, a loan originator

Steering in the context of other forms of credit is no more appropriate than it is in the mortgage context.

Financial institutions typically carry a far lower-cost option—an overdraft line of credit—and many also offer transfers from credit cards or savings, which are also typically less expensive. NCUA clearly recognizes that lower-cost small-dollar credit alternatives should be made available to account holders, as evidenced by its recently announced program to aid small dollar borrowers. But this effort and others to promote affordable small dollar loans are only undermined when the same customers who could most benefit from those efforts remain vulnerable to extremely high-cost overdraft loans.

We recommend that NCUA require the following: Any account holder who indicates a desire for overdraft coverage must be evaluated by the credit union using whatever requirements the credit union uses to determine who qualifies for an overdraft line of credit, a link to a credit card, or any other lower-cost overdraft option the credit union offers. Only account holders who do not qualify for a lower-cost option should be enrolled in fee-based overdraft.

B. Instruct credit unions not to charge more than six overdraft fees within a 12-month period, consistent with the FDIC's 2005 payday lending guidelines.

As noted above, overdraft fees create a cycle of debt for frequent overdrafters much like that caused by payday lending. The FDIC's 2005 payday guidelines instruct institutions to limit payday loan indebtedness to 90 days within a 12-month period. Further, they state that, once that indebtedness limit has been reached, institutions should offer the customer, or refer the customer, to a more suitable product—but that "[w]hether or not an institution is able to provide a customer alternative credit products, an extension of a payday loan is not appropriate under such circumstances."[30]

Assuming a 14-day loan term, the FDIC's standard limits the number of payday loans any borrower can have to six per year, alleviating the debt trap while continuing to allow loans to the occasional users.

The limit of six fees per year should include "sustained" or daily overdraft fees. These fees only make it more likely that overdraft programs will drive already vulnerable account holders into a debt trap.

The FDIC's recently finalized guidance recognizes that incurring six or more overdraft fees within a 12-month period constitutes excessive or chronic use. It instructs institutions

shall not direct or 'steer' a consumer to consummate a transaction based on the fact that the originator will receive greater compensation from the creditor in that transaction than in other transactions the originator offered or could have offered to the consumer, unless the consummated transaction is in the consumer's interest."

[30] FDIC Payday Lending Guidelines.

to make contact with customers after they have incurred six fees to discuss cheaper alternatives. We had urged the FDIC to explicitly tell its institutions that it expects them to stop charging an account holder overdraft fees after the sixth within a 12-month period, and that whether or not the institution is able to provide an account holder alternative credit products, an extension of a high-cost overdraft loan at that point is not appropriate under such circumstances. We urge NCUA to do the same.

III. Prohibit all methods of transaction processing that increase overdraft fees.

We have long urged regulators to prohibit clearing transactions in order from high to low, which the FDIC recently recognized "likely increases the number of items triggering an overdraft."[31] Financial institutions often claim they do account holders a favor by paying the largest, and presumably most important, items first to ensure those items get paid. But this argument is disingenuous in an age of automated overdraft programs because financial institutions typically cover all overdrafts, particularly small debit card overdrafts, regardless of the order in which they are posted. So no matter what order the transactions are cleared in, all items generally get paid. The only difference is how much the account holder pays in overdraft fees.[32]

Beyond clearing transactions in order from high to low, financial institutions can further maximize fees through the order in which they clear different transaction types (debit card, ACH, checks, etc.). A federal court recently found that Wells Fargo had changed its procedure to process all withdrawals together, rather than paying all (typically smaller) debit card transactions before all (typically larger) checks, to maximize fees.[33]

Manipulation of transaction ordering has long been a concern for regulators. The 2005 Joint Guidance raises the issue but only recommends that financial institutions inform customers that transaction ordering may increase fees.[34] In its own 2005 guidance, the OTS went further, explicitly stating that, as a best practice, transaction-clearing processes

[31] FDIC 2010 Guidance.

[32] In its report, *Out of Balance*, CRL provided a hypothetical example demonstrating the dramatic difference in overdraft fees that can result when an account holder's transactions are cleared high-to-low versus in the order in which they were presented to the institution by the processor. In our example, an account holder had $750 in her checking account. Before she realized she did not have sufficient funds, she paid some bills and made several small dollar purchases, leaving her $143 in the negative. If the ten transactions were cleared in the order in which they were presented to the institution, the account holder would have overdrafted once, when the $600 rent check was posted, paid one $34 overdraft fee, and had a total negative balance of $177. If, instead, the institution manipulated the transactions to post them high-to-low, the account holder would have been charged eight $34 overdraft fees, totaling $272, and ended up with a negative balance of $415. *Out of Balance* at 5-7.

[33] *Gutierrez v. Wells Fargo Bank, N.A.*, IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, No. C 07-05923 (August 10, 2010), WL 3155934 (N.D.Cal.), [hereinafter *Gutierrez v. Wells Fargo Bank, N.A.*].

[34] 2005 Joint Guidance, 70 Fed. Reg. 9132; OTS Guidance, 70 Fed. Reg. 8428, 8431 (2005) [hereinafter 2005 OTS Guidance].

should not be manipulated to inflate fees.[35] In its 2009 final Regulation E rule, the Federal Reserve identified transaction posting order as an area that may need additional consumer protections and indicted it would continue to assess it.[36]

In August, a federal court ordered Wells Fargo to reimburse its account holders in California over $200 million in overdraft fees triggered by reordering transactions to maximize fees.[37] After a thorough review of the bank's internal communications, the court concluded that "the only motives behind the challenged practices were gouging and profiteering."[38] The court further found that high-to-low processing is "a trap -- a trap that would escalate a single overdraft into as many as ten through the gimmick of processing in descending order" and that Wells Fargo "exploited that trap with a vengeance, racking up hundreds of millions off the backs of the working poor, students, and others without the luxury of ample account balances."[39]

Last week, the FDIC finalized guidance explicitly advising its supervisees to avoid posting transactions in a manner that maximizes fees. We urge NCUA to do likewise and to explicitly prohibit—

- processing transactions in order from high to low, within a single transaction type or across all transaction types; or
- processing all checks and ACH transactions before all debit card and ATM transactions in order to maximize overdraft fees for account holders who are enrolled in fee-based overdraft for debit card and ATM transactions; or
- otherwise post transactions in an order that maximizes fees.

IV. Actively address deceptive approaches to Regulation E implementation.

Recent reports on opt-in rates have indicated that significant percentages of account holders are opting in to fee-based overdraft for debit card and ATM transactions.[40] This

[35] 2005 OTS Guidance, 70 Fed. Reg. 8341.

[36] 74 Fed. Reg. 59050: "The Board recognizes that additional consumer protections may be appropriate with respect to overdraft services, for example, rules to address transaction posting order. Therefore, the Board is continuing to assess whether additional regulatory action relating to overdraft services is needed."

[37] *Gutierrez v. Wells Fargo Bank, N.A.*

[38] *Id.*

[39] *Id.* at *39.

[40] *See, e.g.*, American Bankers Association, Press Release, *Half of Bank Customers Choose Overdraft Protection: ABA survey shows customers value overdraft service* (Aug. 31, 2010) (noting recent survey showing 46 of customers did or will opt in to debit card overdraft coverage), *available at* http://www.aba.com/Press+Room/083110OverdraftProtection.htm; Moebs $ervices, Press Release, *Overdraft Fee Revenue Drops to 2008 Levels for Banks and Credit Unions* (Sept. 15, 2010) (noting recent Moebs study found that between 60 and 80 percent of customers have opted into coverage, with a median of about 75 percent, and that of customers with 10 or more overdrafts in one year, "almost all" opted in), *available at* http://www.moebs.com/Pressreleases/tabid/58/ctl/Details/mid/380/ItemID/193/Default.aspx.

should not be surprising given the aggressive and deceptive tactics financial institutions are employing to steer account holders to the highest cost overdraft coverage offered.

The FDIC's recent guidance cautions banks not to "steer frequent users" of fee-based overdraft products to opt in or "target[] customers who may be least able to afford such products." It further warns that such activity raises fair lending, UDAP, and other concerns and will be "closely scrutinized."[41]

There is no question that steering and targeting is occurring in the marketplace. Several industry consultants have urged banks and credit unions to prioritize the marketing of debit card overdraft coverage to account holders who overdraft frequently. One consultant even suggests offering a gift or cash offer for opting in to account holders with four or more overdrafts annually, noting that this and other strategies will result in "[s]natching bank revenues from the jaws of Regulation E."[42] The figure below includes the statements of four consulting companies offering opt-in marketing strategies to financial institutions:

SAMPLES OF OPT-IN MARKETING STRATEGIES TO FINANCIAL INSTITUTIONS
"…20 to 29% of your members give you 90% of your NSF income. Target those top 29% and get them to opt in …" **"If they are in the top 29% of abusers, call them."** SOURCE: Rowland Consulting[43]
"Target frequent fliers…focus attention on these customers first." (Frequent fliers identified by i7Strategies as customers who don't pay attention to account balances, live paycheck to paycheck, or intentionally overdraw their accounts.) SOURCE: i7Strategies[44]
"Segment and prioritize based on customers overdraft usage history." SOURCE: Soundbite Communications[45]
"Regulation E offers aggressive bank marketers opportunities to maintain or even increase

[41] FDIC 2010 Guidance.

[42] *See* Press Release, *Consumer Overdraft Opt-in Intentions Surveyed in ACTON Study*, ACTON Marketing LLC (Feb. 23, 2010), *available at* http://eworldwire.com/pressreleases/211495 and http://www.actonfs.com/Optin.aspx.

[43] *See* 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, and Ray Birch, "How to get members to want to opt-in to overdraft programs," *Credit Union Journal* (May 17, 2010).

[44] *See* David Peterson, *The Art of the Opt-In: Helping Your Consumers Make A Good NSF Choice*, i7strategies (Mar. 4, 2010), presentation on file with CRL.

[45] *See* advertisement of Soundbite Communications' Debit Card Overdraft Enrollment Solution, *available at* http://www.soundbite.com/gate_form/795/893.

revenues from their overdraft programs."

"…the customer is offered an incentive that…best entices the customer to respond…a gift or cash offer if they respond…[a]fter all, this is your most profitable fee group."

SOURCE: ACTON Marketing Intelligence[46]

Some financial institutions have adopted this targeted marketing approach. We have several suggestions for how NCUA can implement meaningful supervision of its credit unions' opt-in practices.

A. Review opt-in solicitation materials and practices at each examination and intermittently.

We urge NCUA to closely monitor credit unions' efforts to entice account holders to opt in, both at examinations and intermittently. *Such monitoring should include requiring credit unions to submit to supervisors all materials aimed at soliciting consumers' opt-in—including but not limited to mail advertisements, emails, text messages, telephone and in-person scripts; employee training manuals; and employee incentive policies.* NCUA should also make clear that deception includes not only written but oral statements. Upon identifying deceptive materials or practices, NCUA should take appropriate swift and clear action to bring an end to such activity.

B. Provide examples of what constitutes "deceptive" opt-in solicitations.

We have observed the following deceptive materials or tactics, which NCUA should explicitly identify as such and prohibit.

1. Stating or strongly implying that a cost will be incurred when a debit card overdraft is denied.

In its Final Regulation E rule issued in November 2009, the Federal Reserve stated that charging insufficient funds fees on denied debit card transactions would raise "significant fairness issues" under the FTC Act.[47] In its recent guidance addressing opt-in requirements and related marketing issues, the OCC instructed institutions not to suggest that declined debit card transactions would result in fees.[48] Yet some opt-in solicitations state or suggest that a denied debit card transaction will incur a fee. Some also improperly describe an overdraft fee as an NSF fee, which may confuse borrowers and lead them to believe that a denied debit card transaction will trigger a fee.

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[46] *See* Press Release, *Consumer Overdraft Opt-in Intentions Surveyed in ACTON Study*, ACTON Marketing LLC (Feb. 23, 2010), *available at* http://eworldwire.com/pressreleases/211495 and http://www.actonfs.com/Optin.aspx.

[47] 74 Fed. Reg. 59041.

[48] OCC Bulletin OCC 2010-15, "Overdraft Protection: Opt-In Requirements and Related Marketing Issues," April 12, 2010.

Moreover, most solicitations we have reviewed make no mention of the fact that denied debit card transactions carry no cost.

NCUA should require that credit unions make clear that there is no cost to having a debit card denied.

2. Stating that not opting-in will result in denial without mentioning alternative overdraft options.

Solicitations have often stated that the alternative to "opting-in" is having a debit card overdraft transaction declined. Such presentation completely disregards less-expensive overdraft protection options offered by most financial institutions. Solicitations should not allow financial institutions 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 account holders is addressed in Section E, below.

3. Suggesting that a debit card or an account will not function correctly if the account holder does not opt in.

Some solicitations suggest that a debit card or an account will not function correctly if the account holder does not opt in, noting that new regulations may change the way account holders use their debit card; may prevent the account holder from completing everyday transactions, while obscuring the relevant details; or may keep the account holder's account from operating smoothly.

The OCC's recent marketing guidance specifically instructs institutions not to provide "misleading representations or omissions about . . . the consequences of opting in or failing to opt in for transactions that are affected."[49] NCUA should provide similarly specific guidance and explicitly state that credit unions should not indicate that not opting in will change the way a debit card or an account generally functions.

4. Overpromising overdraft coverage.

Regulation E provides that financial institutions maintain discretion with respect to each decision to cover a transaction that overdraws an account. While the opt-in forms typically emphasize that covering overdrafts is discretionary for the financial institution, some marketing materials present this product using terms and promises one would expect to see for a credit card, a line of credit, or even for a payday loan. Some institutions promote fee-based debit card coverage as providing the account holder "peace of mind" or similarly promising that consumers can avoid embarrassment or dangerous emergencies by opting into debit card overdraft coverage. In reality, there is no assurance that opting in will result in overdraft coverage. NCUA should explicitly provide that such overpromising is deceptive.

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[49] OCC Bulletin OCC 2010-15, "Overdraft Protection: Opt-In Requirements and Related Marketing Issues," April 12, 2010.

5. **Suggesting that fee-based overdraft coverage is free.**

Some solicitations present fee-based overdraft coverage as complimentary or costing nothing, until it is used. They may also present a comparison chart showing fee-based overdraft coverage versus other options, listing annual fees for an overdraft line of credit and/or a savings account. As a result, the fee-based overdraft coverage, at first glance, appears to be the cheapest, when in reality, incurring only one overdraft fee per year would make the fee-based overdraft coverage the most expensive option. Statements that fee-based overdraft coverage is "free" and cost comparisons such as these are very misleading, and NCUA should expressly prohibit them.

6. **Suggesting that fee-based overdraft coverage provides advantages over formal overdraft protection.**

In addition to a deceptive cost comparison like that just mentioned, institutions may attempt other ways to suggest that fee-based overdraft provides advantages over formal overdraft protection. For example, in their promotion of fee-based overdraft, some financial institutions tout availability of "float," whereby debits will be allowed to clear against insufficient funds before deposits have been credited, without incurring a fee. But when they describe formal overdraft protection, "float" is not mentioned. It seems unlikely that any float allowed through a fee-based program would not also be allowed through formal overdraft.

To our knowledge, fee-based overdraft offers no advantages over formal overdraft, and NCUA should explicitly prohibit solicitations that deceptively suggest otherwise.

7. **Suggesting that not opting into coverage will result in denial of checks or other electronic transactions.**

Regulation E expressly prohibits conditioning coverage of checks and electronic transactions on a customer's decision to opt-in to debit card overdraft coverage. But some opt-in marketing materials have combined or conflated their description of coverage for debit card overdrafts with their description of coverage for checks and other electronic transactions, suggesting that the "opt-in" decision will impact coverage of checks and other electronic transactions. NCUA should require that any marketing materials emphasize that a customer's decision not to opt-in to debit card/ATM overdraft coverage will not determine whether or not checks and other electronic overdrafts are covered.

C. Prohibit financial institutions from asking account holders more than once if they want to opt-in.

NCUA should prohibit credit unions from repeatedly asking consumers to opt in. The credit union should be permitted to only ask the consumer one time. If the consumer declines to opt in, or to provide an answer, the credit union should be required to assume that the consumer does not wish to opt in and not solicit the consumer again.

There is ample precedent for a rule that permits an institution to seek a consent only once. For example, the IRS regulations governing the privacy of tax returns provide that a tax preparer may seek the consent of a customer to use tax information for marketing purposes only one time. If the customer declines the request, the tax preparer cannot solicit the customer again for the same type of request.[50]

Furthermore, this repeated badgering and pressuring of consumers to opt in appears to be designed to counter the "default effect" the Federal Reserve clearly intended to establish when crafting its final rule.[51] By undermining the default effect, institutions undermine the intent and effectiveness of the rule, and such efforts should be expressly prohibited.

D. Assess disparate impact on communities of color.

Research has repeatedly found that overdraft fees have a disparate impact on communities of color.[52] We urge NCUA to act vigilantly, including soliciting data that indicates the impact of overdraft practices and fees on communities of color, to identify disparate impact and take appropriate enforcement action, including, as appropriate, referral of such instances to the Department of Justice.

E. 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 opt-in solicitations may be successful is due to a fundamental deficiency of the opt-in model form—it does not provide consumers with a means of comparing the cost of fee-based overdraft loans to other alternatives, such as traditional overdraft lines 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.

We urge NCUA to work with the Board and other federal banking regulators to require a more meaningful disclosure, such as a summary table similar to the credit card "Schumer box" showing the costs of each overdraft alternative. Most importantly, such a table must show that the cost of declining to opt in is "$0." Such a disclosure would also be beneficial because it will allow consumers to compare the cost of overdraft loans to other forms of small dollar credit. A proposed disclosure follows:

[50] 26 C.F.R. § 301.7216-3(b)(3).

[51] 74 Fed. Reg. 59038.

[52] 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. CRL Research Brief. CFA conducted another survey in July of this year, finding that African Americans were twice as likely to have experienced overdrafts than consumers overall.

SAMPLE MODEL FORM COST COMPARISON TABLE			
Type of Overdraft Coverage for ATM and Everyday Debit Card Transactions	**Charges**	**Total Cost per Transaction**	**Sample Effective Annual Percentage Rate Cost (assuming $100 overdraft for two weeks)[53]**
1. None	$0	$0.00	N/A
2. Opt-in to fee-based overdraft coverage	$34 per transaction	$34.00	886%
3. Overdraft line of credit	$5 transfer fee plus 18% interest	$5.69	148%
4. Transfer from credit card	$5 transfer fee plus 24% interest	$5.92	154%
5. Transfer from linked savings account	$5 transfer fee	$5.00	N/A

V. Require periodic reporting of data on overdraft program activity, particularly on those account holders incurring multiple fees.

NCUA should require that credit unions report meaningful overdraft data to the agency, particularly as it relates to recurring overdraft fees, and the agency should review it to assess compliance with the guidelines recommended herein and to address fair lending concerns.

[53] Some financial institutions offer cheaper forms of overdraft lines of credit and linked savings accounts, where no transfer fee is charged. Among these alternatives, only overdraft lines of credit and transfers from a credit card are covered under the Truth in Lending Act, and therefore subject to an APR calculation. The APR calculation given for a $34 overdraft fee is thus for illustrative purposes only. Because a transfer from an account holder's saving account—unlike the other options—is not an extension of credit made by the bank, we do not include an APR in this case.

We appreciate your consideration of our concerns and recommendations, and we would welcome the opportunity to discuss them with you further.

Sincerely,

Rebecca Borné
Center for Responsible Lending

Chi Chi Wu
National Consumer Law Center
(on behalf of its low-income clients)

Lauren Z. Bowne
Consumers Union

Linda Sherry
Consumer Action

Ed Mierzwinski
U.S. Public Interest Research Group

Cora Ganzglass
National Association of Consumer Advocates