



Statement for the Record

of

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

for hearing on

**Examining Overdraft Fees and Their Effects on Working Families
before the**

Subcommittee on Financial Institutions and Consumer Protection

of the

Senate Committee on Banking, Housing and Urban Affairs

Wednesday, May 4, 2022

1. Introduction and Summary

Thank you for the opportunity to submit this statement for the record and for holding this hearing on the overdraft fee practices that cost consumers billions of dollars each year.

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has worked for consumer justice and economic security for low-income and other disadvantaged people in the United States through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. This statement was written by Associate Director Lauren Saunders and Staff Attorneys Carla Sanchez-Adams and Chi Chi Wu.

It is long past time to end overdraft fees as a deceptive and abusive form of high-cost credit. Financial institutions must stop exploiting low-income families and communities of color by making profits at the expense of their customers' financial health.

Recently, a number of financial institutions have made changes that reduce the likelihood of incurring overdraft fees. Among large banks, Capital One and Ally Bank have set the gold standard by completely eliminating overdraft and NSF fees, with Bank of America close behind. Others have made partial changes.

But we cannot rely on voluntary actions or half measures. Consumers must be safe no matter where they bank, and voluntary changes can be undone when the winds change. Congress should pass S. 2677 (Booker), the Stop Overdraft Profiteering Act of 2021 and H.R. 4277 (Maloney), the Overdraft Protection Act of 2021. The CFPB should adopt comprehensive rules to ensure that all consumers are safe from abusive overdraft charges. The bank regulators should not wait for new rules, but should take action now to stop abusive practices by the banks they oversee.

The CFPB and bank regulators should also stop new forms of overdraft and overdraft avoidance fees, such as “tips” and inflated expedite charges on nonbank banking apps.

In this statement, we cover:

- The history of overdraft fee abuses (pp. 1-4)
- Recent changes to bank overdraft practices (pp. 4-5)
- Will “tips” become the new overdraft fee? (pp. 5-11)
- Inflated expedite fees on nonbank banking apps that disguise the costs of covering overdrafts (pp. 11-17)
- Recommendations (pp. 17-18)

2. An abbreviated history of overdraft fee abuses

Overdraft fees have long been one of the most pernicious and deceptive taxes on being poor. Years ago, overdraft fees were charged rarely, merely to cover the cost and risk to the bank for the occasional courtesy of covering a check that would otherwise bounce. Many banks also

offered overdraft lines of credit that charged a reasonable interest rate, costing only pennies if the overdraft was quickly paid off.

But as consumers began to receive wages and other income by direct deposit and to make payments using debit cards that can be approved or declined in real time, financial institutions and their consultants saw an opportunity to push consumers to overdraft and to make money off people who struggle paycheck to paycheck. A variety of practices sprang up that put financial institutions at odds with their customers, focused on increasing profits rather than helping improve consumers' financial health.

A perverse form of competition led to a race to the bottom. Instead of competing honestly with transparent monthly fees, financial institutions promoted "free checking" but covered their costs with back-end fees imposed on their most vulnerable customers. Many banks eliminated reasonably priced overdraft lines of credit in favor of "courtesy" overdraft programs that just meant a lot of fees.

A vicious cycle led to piling on overdraft fees that triggered more overdrafts and more overdraft fees. Banks have engaged in practices¹ including:

- Unreasonably high fees for each overdraft, typically \$35, far higher than needed to cover the banks' costs;
- Multiple overdraft fees per day, with no limits at some banks and as many as six \$35 fees (\$210) even at banks that limit the number;
- "Extended" or "sustained" overdraft fees, making it more difficult for a struggling account holder to recover;
- Opaque and often manipulative practices to increase overdraft fees involving deposit clearing, debit holds, and transaction posting order. Fees may even be charged when the consumer had sufficient funds in the account when the transaction was authorized.
- Overdraft fees on debit card purchases and ATM withdrawals instead of simply declining the transaction at no charge.
- Automatically collecting the overdraft by offsetting the next deposit, even when it is Social Security, unemployment, military/veterans compensation, public benefits or wages needed to pay for necessities.

Bank regulators went along these pernicious practices. While regulators have long recognized that banks are offering credit when they choose to cover an overdraft,² the Federal Reserve

¹ These practices are described in Peter Smith et al., Center for Responsible Lending, Banks Must Stop Gouging Consumers During the COVID-19 Crisis at 1-2 (June 2020), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-overdraft-covid19-jun2019.pdf> ("CRL, Banks Must Stop Gouging Consumers").

² The CFPB has confirmed that overdraft loans are "credit" within the meaning of the TILA, but the Federal Reserve Board (when it had authority over TILA prior to the CFPB's creation) made a policy decision not to apply Regulation

Board carved out an exception for overdraft fees that allowed overdraft credit to be exempt from the protections of the Truth in Lending Act. The Office of the Comptroller of the Currency and the now-abolished Office of Thrift Supervision were more concerned about preempting state laws that protected consumers than stopping abusive practices at their banks.³ The Federal Deposit Insurance Corporation and the National Credit Union Administration occasionally expressed concern about overdraft fees but ultimately did little to nothing to address the problem.

The Federal Reserve Board did ultimately adopt an amendment to Regulation E under the Electronic Fund Transfer Act that required consumers to “opt in” before an overdraft fee could be charged on a one-time debit or ATM card transaction. But banks found ways to manipulate consumers into opting in or had processes that misled consumers. The Pew Charitable Trust found that 68 percent of those who overdrew and incurred a fee would have preferred to have transactions declined rather than pay a \$35 fee, and that people are deeply confused and are not making opt-in choices based on correct information.⁴ The “opt in” rule also does not address most of the overdraft fee abuses described above or prevent millions of consumers from incurring fees that can add up to hundreds or even thousands of dollars a year.

In 2020, before the stimulus money and reduced spending triggered by the COVID crisis, JPMorgan Chase earned \$1.5 billion in overdraft fees, Bank of America made \$1.1 billion, and Wells Fargo collected \$1.3 billion.⁵ Some smaller banks, such as Woodforest National Bank, have had especially aggressive overdraft fee practices.⁶ Overall, banks collected nearly \$12 billion in overdraft fees in 2019, according to a report by the Center for Responsible Lending.⁷

Z. See 81 Fed. Reg. 83,934, 84,154–84,157, 84,167–84,168 (Nov. 22, 2016); 79 Fed. Reg. 77,205–77,208 (Dec. 23, 2014).

³ For example, they even preempted the longstanding common law rule that contracts cannot contain penalties higher than the anticipated cost of a violation. See Chi Chi Wu, National Consumer Law Center, Restoring the Wisdom of the Common Law: Applying the Historical Rule Against Contractual Penalty Damages to Bank Overdraft Fees (April 2013), https://www.nclc.org/images/pdf/high_cost_small_loans/common-law-overdraft-fees.pdf.

⁴ Nick Bourke & Rachel Siegel, Pew Charitable Trusts, “Customers Can Avoid Overdraft Fees, but Most Don’t Know How; Bank disclosures and poor communication obscure options despite federal law” (Mar. 21, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/03/21/customers-can-avoid-overdraft-fees-but-most-dont-know-how>.

⁵ See Alexander Sammon, The American Prospect, “Big Banks Charged Billions in Overdraft Fees During the Worst Months of the Pandemic; Recent financial disclosures show overdraft to be lucrative for commercial banks, and a burden on their most vulnerable customers” (Apr. 22, 2021), <https://prospect.org/economy/big-banks-charged-billions-in-overdraft-fees-during-pandemic/>.

⁶ Aaron Klein, Brookings, A few small banks have become overdraft giants (Mar. 1, 2021), <https://www.brookings.edu/opinions/a-few-small-banks-have-become-overdraft-giants/> (listing Woodforest among six banks whose overdraft revenues accounted for more than half their net income); Polo Rocha, American Banker, “Small banks face bigger threat to overdraft fees this time around” (July 27, 2021), <https://www.americanbanker.com/news/small-banks-face-bigger-threat-to-overdraft-fees-this-time-around#:~:text=Banks%20with%20assets%20of%20%2410,with%20assets%20over%20%2410%20billion> (identifying Woodforest as one of 16 banks that derived 20% or more of their fee income from overdraft-related fees, compared to 4.49% average for other banks with assets of \$10 billion or less and 2.78% for larger banks); Office of the Comptroller of the Currency (OCC), News Release 2010-122, “Woodforest National Bank Enter

CFPB research in 2017 found that 79% of bank overdraft and non-sufficient funds (NSF) fees are borne by only 9% of accounts.⁸ Frequent overdrafters tend to have low end-of-day balances, low or moderate credit scores, and low or moderate monthly deposits.

Overdraft and NSF fees are one of the leading reasons that people are unbanked. After allowing, and in some cases encouraging, people to overdraft, banks have closed the accounts of those who struggled to bring their accounts out of the red. The resulting negative reports to account screening agencies such as ChexSystems and Early Warning Services then stop people from getting new accounts and exile them from the banking system.⁹ Other consumers choose to be unbanked out of fear of overdraft and NSF fees.

3. Recent changes to bank overdraft practices

The good news is that the trend towards increasing overdraft fees has begun to turn in the opposite direction. But changes have been uneven and still leave many vulnerable consumers exposed to high overdraft fees.

The Consumer Financial Protection Bureau has been shining a light on overdraft fee practices and the cost and impact on the most vulnerable consumers. The CFPB has not only published important research, but has made clear that it will be addressing problematic overdraft fee practices, resulting in several banks voluntarily reforming their overdraft practices.¹⁰

Years of hard work by consumer advocates and others to expose the abuses of overdraft fees have begun to pay off. The Black Lives Matters movement and other racial justice efforts, along with the awareness driven by the COVID crisis that we all depend on low-paid essential workers, have led to a growing realization that it is simply unacceptable for banks to drive profit off low-income families and the communities of color who have long been deprived of income and assets.

An increasing number of financial institutions – 231 and counting – offer safe “Bank On” accounts with no overdraft or NSF fees and other terms that meet the requirements of Cities for

Agreement to Reimburse Consumers” (Oct. 9, 2010), <https://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-122.html> (OCC concluded the bank engaged in unfair or deceptive practices by assessing excessive amounts of overdraft fees and improperly assessing recurring fees, or "continuous overdraft fees" against certain consumers).

⁷ CRL, Banks Must Stop Gouging Consumers at 6.

⁸ CFPB, Data Point: Frequent Overdrafters Frequent Overdrafters (Aug. 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf.

⁹ See NCLC, Press Release, Report: Account Screening Consumer Reporting Agencies Impede Access for Millions (Oct. 19, 2015), <https://www.nclc.org/media-center/report-account-screening-consumer-reporting-agencies-impede-access-for-millions.html>.

¹⁰ See CFPB, CFPB Research Shows Banks’ Deep Dependence on Overdraft Fees (Dec. 1, 2021) (“The CFPB will be enhancing its supervisory and enforcement scrutiny of banks that are heavily dependent on overdraft fees.”), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/>.

Financial Empowerment’s National Account Standards.¹¹ The American Bankers Association has been a helpful partner in this effort to promote Bank On accounts.¹² Many financial institutions meet not only the “core” Bank On standards but also the recommended ones, including limiting their use of account screening agencies and only denying new customers for past incidences of actual fraud, not overdrafts.

In the past few months, many financial institutions have announced changes to their overdraft and NSF fee practices. Among large banks, Capital One and Ally Bank have set the gold standard, completely eliminating overdraft and NSF fees. Bank of America has come close, eliminating NSF fees, ending overdraft fees on ATM and debit card transactions, reducing its overdraft fee to \$10, limiting the number of overdraft fees, and making other moves that reduced its overdraft revenues by 97% from where they were in 2009.¹³

These moves show that it is possible for banks – including some with the overhead costs of significant brick and mortar branch networks – to make the choice to eliminate overdraft and NSF fees that harm the most vulnerable consumers and push them out of the banking system.

Other banks, including Synovus, Citizens, Santander, Huntington, and PNC, have taken partial steps to reduce the number of overdraft fees that their customers incur. These steps include 24 hour grace periods, free overdraft cushions, reducing the size or number of overdraft fees, and eliminating “extended” or “sustained” overdraft fees.¹⁴

Any measure that reduces overdraft fees is a step in the right direction. But in among themselves, smaller steps are ultimately insufficient and more needs to be done. And too many financial institutions still rake in profits off of the backs of families who pay overdraft and NSF fees.

4. Will “tips” become the new fintech overdraft fee?

In recent years, fintech banks and nonbank fintechs offering banking services have begun to offer redesigned deposit accounts without overdraft or NSF fees and with features to help people manage their finances. But it is important to keep an eye on emerging fintech overdraft practices that may appear to be friendlier but could become the new, evasive form of overdraft fee. And nonbank banking and payment apps also pose other issues, including in some cases gaps in or

¹¹ See <https://joinbankon.org/accounts/>. The National Consumer Law Center works with CFE to certify accounts that meet the standards.

¹² See <https://www.aba.com/banking-topics/consumer-banking/inclusive-banking/bank-on>.

¹³ See Bank of America, Press Release, “Bank of America Announces Sweeping Changes to Overdraft Services in 2022, Including Eliminating Non-Sufficient Funds Fees and Reducing Overdraft Fees” (Jan. 11, 2022), <https://newsroom.bankofamerica.com/content/newsroom/press-releases/2022/01/bank-of-america-announces-sweeping-changes-to-overdraft-services.html>.

¹⁴ See CFPB, Rebecca Borné & Amy Zirkle, “Comparing overdraft fees and policies across banks” (Feb. 10, 2022), <https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/>; CFPB, Overdraft/NSF metrics for Top 20 banks based on overdraft/NSF revenue reported, https://files.consumerfinance.gov/f/documents/cfpb_overdraft-chart_2022-02.pdf.

lack of deposit insurance, and an emerging business model that may make money by pushing cryptocurrencies or other risky investments that are dangerous for low and moderate income families.

Fintech apps are increasingly collecting “tips” as a form of payment. The “tips” model can be found on fake earned wage access products, cash advance loans and overdraft features on nonbank banking apps, and “peer-to-peer” loan platforms.¹⁵ The use of purportedly voluntary “tips” to disguise overdraft fees and other charges is inherently deceptive, and “tips” should be treated like any other payment.¹⁶

One application of the “tips” model is found on “nonbank banking” apps – banking services offered by so-called “challenger banks” or “neo banks” that are not actually banks¹⁷ but partner with a bank to offer deposit accounts through an app and associated debit card. These banking apps are essentially a form of prepaid account, but they style themselves as a bank account and do not comply with the CFPB’s prepaid accounts rules under Regulation E.¹⁸

The “tips” model is spreading. For example, the following nonbank banking apps offer overdraft or credit features that collect tips:

- Dave’s home page advertises “no overdraft fees” and features an image of a text message: “Your phone bill may cause overdraft! I can spot you up to \$250 with 0% interest to prevent it.”¹⁹ But Dave collects “tips” and “donations,” and also charges an “Optional Express Fee” of \$1.99 to \$5.99, which increases as the amount advanced increases.²⁰

¹⁵ See Testimony of Lauren Saunders, National Consumer Law Center, Before the U.S. House Committee on Financial Services Task Force on Financial Technology On “Buy Now, Pay More Later Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products” at 14-17(Nov. 1, 2021), <https://bit.ly/LS-BNPLtestimony> (“Saunders Fintech Cash Flow Testimony”).

¹⁶ California recently clarified that voluntary payments such as tips are still “charges” subject to the cost protections of California law. See Calif. Department of Financial Protection and Innovation, Interpretive Letter-Flexwage, OP 8206 at 6 n.4 (Feb. 11, 2022), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf>.

¹⁷ Chime, for example, was forced to stop calling itself a bank in response to state enforcement actions. See Anna Hrushka, BankingDive, California regulator orders Chime to stop calling itself a bank (May 6, 2021), <https://www.bankingdive.com/news/california-regulator-orders-chime-to-stop-calling-itself-a-bank/599710/>; State of Illinois, Dep’t of Fin’l and Prof’l Reg., Settlement agreement and Consent Order, In re Chime Financial, Inc., No. 2021-DB-01 (March 25, 2021), <https://www.idfpr.com/banks/cbt/Enforcement/2021/2021%2003%2025%20Chime%20-%20IL%20Settlement%20Agreement%20and%20Consent%20Order.pdf>

¹⁸ See 12 C.F.R. § 1005.2(b)(3)(i)(D)(1) (exempting checking accounts from the prepaid accounts rule); NCLC, Consumer Banking & Payments Law § 7.2.3.2.5 (6th ed. 2018), updated at library.nclc.org (explaining that accounts without checks should be viewed as prepaid accounts, especially if they have overdraft fees).

¹⁹ <https://dave.com/> (last accessed Mar. 28, 2022)

²⁰ <https://dave.com/terms> (last accessed Mar. 30, 2022).

- Chime offers “overdraft fee-free up to \$200,” comparing the “\$0” Chime SpotMe fees to a \$34 traditional overdraft fee.²¹ But Chime requests tips after it covers an overdraft.²²
- Current proclaims: “With Overdrive™, overdraft up to \$200² without any overdraft fees.”²³ But Current collects payments of tips.²⁴
- Albert states: “We don’t believe in overdraft fees. Instead, we’ll spot you up to \$250 so you can make ends meet. If you’re enjoying Instant, add an optional tip. There are no late fees, interest, or credit check.”²⁵
- MoneyLion offers “cash advances up to \$250 with no interest.” MoneyLion collects “tips” plus “delivery fees” of \$3.99 to \$4.99 for instant delivery.²⁶
- Earnin offers payday advances in two different forms: as “Cash Out,” to “turn every day into payday,”²⁷ and as a “Balance Shield” feature: “Stay covered with Balance Shield Cash Outs. Get automatic access to \$100 of your earnings to keep your balance out of the red.”²⁸ Both collect fees in the form of purportedly voluntary tips. The Earnin is currently a freestanding cash advance app, but the company is piloting a banking app that will include those features in connection with a deposit account.²⁹

These nonbank banking apps are typically aimed at struggling consumers who are living paycheck to paycheck and are attracted by the ability to overdraft. Users are likely to be disproportionately people of color in communities that have long been deprived of income and assets. Thus, “tips” will come out of the pockets of those least able to afford them. Like traditional overdrafts and payday advances, these fintech overdraft and cash advances are repaid in a balloon-payment immediately from the next deposit. These advances undoubtedly lead to the same cycle of debt and repeat overdrafting or reborrowing that traditional overdraft services do.

The request for and cost of “tips” is typically downplayed in, or sometimes entirely absent from, promotions for these apps, which imply that their overdraft and credit features are free. Although the cash advance features on Albert, Money Lion and Dave are not automatically activated by overdrafts the same way that Chime’s is, they serve an equivalent function by advancing funds to consumers to avoid an overdraft. The apps may even identify impending overdrafts and prod the

²¹ <https://www.chime.com/> (last accessed Mar. 30, 2022).

²² <https://www.chime.com/spotme/> (last accessed Apr. 4, 2022).

²³ <https://current.com/> (last accessed May 3, 2022).

²⁴ https://current.com/overdraft_protection_terms_of_service/ (last accessed May 3, 2022).

²⁵ <https://albert.com/instant/> (last accessed Mar. 28, 2022).

²⁶ <https://www.moneylion.com/instacash/> (last accessed Mar. 30, 2022).

²⁷ <https://www.earnin.com/products/cash-out> (last accessed Mar. 30, 2022).

²⁸ <https://earnin.com/products/balance-shield> (last accessed Mar. 30, 2022). Earnin does not, however, have any connection to payroll or actual earnings.

²⁹ <https://earnin.com/products/earnin-express> (last accessed Mar. 30, 2022).

consumer to take an advance. But like overdraft credit, they do not provide loan disclosures or comply with lending laws.³⁰

The “tips” model is evasive and deceptive. Though purportedly voluntary, companies have continuously evolving ways of pressuring people into “tipping” or making it difficult not to tip. The tips are unlikely to be truly voluntary, and even if they are, the label does not change the cost to or the impact on consumers. The tipping model takes advantage of consumers’ lack of awareness of how the tips add up.

Companies can employ strategies to make it difficult not to tip or to make the consumer feel compelled to tip.³¹ Default tip amounts are often set in advance and may be difficult to undo.³² Apps may also use different user interfaces to send psychological signals and encourage quick action without thought about the default tip. Disingenuous statements encourage borrowers to “pay it forward” and to support a “community,”³³ ignoring the large companies and wealthy hedge fund investors who profit from the “tips.”

Earnin users reported having their access to advances restricted if they did not tip enough.³⁴ Earnin appears to have changed that practice after it became public, but now, Earnin has another way to stop providing overdraft advances to consumers who do not tip. “Balance Shield Cash Outs” automatically advance funds if the balance is below \$100.

³⁰ They likely view themselves as exempt from the Truth in Lending Act because they do not require repayment in more than four installments and claim that the “tip” is not a finance charge. See Regulation Z, 12 C.F.R. § 1026.2(a)(17)(i).

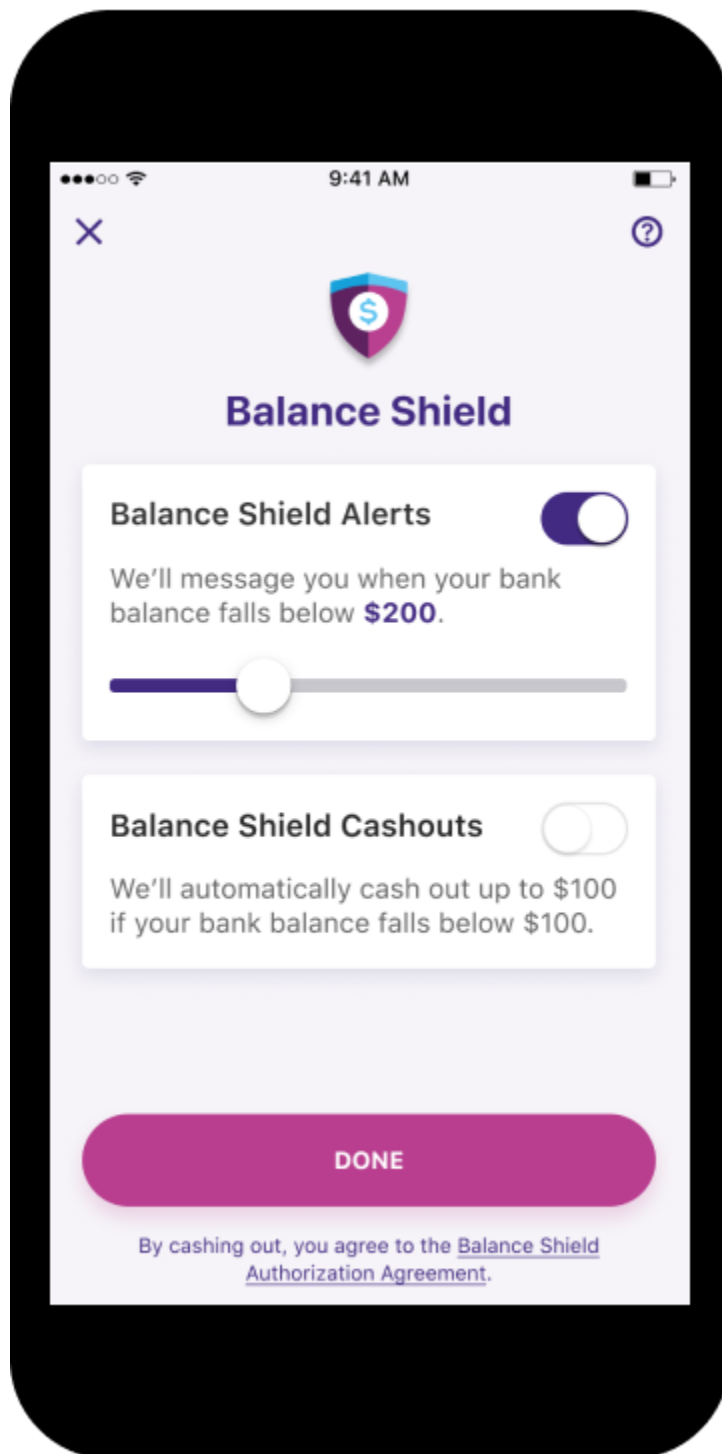
³¹ For example, in 2019 Earnin “encouraged users to leave a tip of anywhere between zero and \$14 on a \$100 weekly loan,” and users who didn’t leave a tip “appear to have their credit restricted.” Kevin Dugan, New York Post, [Cash-advance app Earnin gets subpoenaed by NY regulator: source](#) (Mar. 28, 2019). Additionally, the SoLo app – which requires consumers to designate the “tip” in advance of funding -- “notes that loans are much more likely to be funded when users tip the maximum amount.” Fast Company, [These 2 Black founders aim to offer a fairer alternative to payday loans](#) (Feb. 18, 2021).

³² An Earnin user reported being completely unable to undo the default tip, even after deleting the app and reinstalling it. Conversation with Brent Adams, Woodstock Institute. An article about SoLo noted that “the only way to avoid [a tip] is through a toggle in SoLo’s settings menu, which must be reactivated for each request. There’s no way to opt out of donations while making the request itself.” Fast Company, [These 2 Black founders aim to offer a fairer alternative to payday loans](#) (Feb. 18, 2021).

³³ <https://www.chime.com/spotme/>.

³⁴ Kevin Dugan, [Cash-Advance App Earnin Gets Subpoenaed by NY Regulator: Source](#), New York Post, Mar. 28, 2019 (“Earnin encouraged users to leave a tip of anywhere between zero and \$14 on a \$100 weekly loan. Users who don’t leave a tip appear to have their credit restricted. Meanwhile, a \$14 tip would equate to a 730-percent APR—nearly 30 times higher than New York’s 25 percent cap.”).

Get peace of mind with Balance Shield
Cash Outs.



But Terms and Conditions state that consumers who do not tip will lose those automatic overdraft advances -- unless they realize that the alerts have been turned off and manually turn them back on after each advance:

Balance Shield

Allows you to set an alert to have Earnin send you a notification when your Bank Account falls below an amount that you set (\$0–\$400) to help you monitor your Bank Account’s balance. Balance Shield also incorporates Cash Out, by automatically setting a cash out of up to \$100 when your Bank Account balance has fallen below \$100. Note, that a Balance Shield Cash Out is subject to your available earned wages, your Daily Max and Pay Period Max requirements. You are responsible for monitoring your Daily Max and Pay Period Max to ensure that the Cash Out application of Balance Shield is available to you. We may limit the amount we send you for Balance Shield Cash Out at any given time or over a period of time. We may also decline to offer Balance Shield to you at any time, without prior notice, if we reasonably believe such refusal is necessary or advisable for legal or security reasons, or to protect the Services.

Balance Shield alerts can stay on indefinitely until you turn them off. **There is no fee or charge to use Balance Shield alerts. Generally, Balance Shield Cash Out will need to be turned on manually after each Balance Shield Cash Out, however, setting a voluntary tip (\$1.50–\$14.50) triggers Earnin to automatically keep Balance Shield Cash Out on even after a Balance Shield Cash Out.** If you choose to enable Balance Shield Cash Out to activate automatically, Balance Shield Cash Out will stay on indefinitely until you turn it off, and will automatically debit your account for the amount and tip you have set. Earnin will send you an annual reminder that Balance Shield is turned on.³⁵

This means that, unless the consumer tips, the Balance Shield alert will be turned off if one is sent, and the consumer will have to manually turn it back on. In other words, for consumers who do not tip, the alerts will be turned off for the very consumers who have used them, and Earnin will stop providing advances to those consumers unless they know and remember to manually turn the alert back on each time.

Even without direct messages or policies to disadvantage low tippers, consumers may believe they must make ample tips or will be penalized in some manner – a threat to people who live paycheck to paycheck. Companies also exploit the psychological phenomenon of “reciprocity,”

³⁵ Earnin, [Terms and Privacy](#) (last updated Sept. 22, 2021) (emphasis added).

i.e., that most people will feel compelled to give a tip and recognize actions designed to activate “obligatory giving.”³⁶

Some consumers may manage to use tip-based services for free. But for-profit enterprises count on tips as a profit center. Furthermore, with investors who need a significant return on investment, the apps are unlikely to put up with a lot of non-paying users.

Regulators cannot be expected to constantly monitor the subtle and ever-changing ways that companies will push people into tipping. When caught using practices to coerce tips, companies may change their policies and then devise new ways to ensure that they get paid.

Using the “tips” label does not make an overdraft fee any less dangerous or any less likely to lead to a cycle of debt and reborrowing. As we make progress on traditional overdraft fees, regulators must put a stop to the tips model before it spreads further to become the new overdraft fee.

5. Inflated expedite fees on nonbank banking apps disguise the costs of covering overdrafts

In addition to “tips,” another recent way that nonbank banking apps are disguising the cost of their cash advance overdraft avoidance loans is through inflated expedite fees. As discussed in the previous section, a number of nonbank banking apps have payday loan features that advance funds in order to cover anticipated overdrafts. In addition to “tips,” many of these companies collect expedite fees if the consumer wants the money instantly – which they certainly will if they are trying to cover an anticipated overdraft. Moreover, the “standard” delivery time for advances appears in some instances to be deliberately slowed down to push consumers to pay the expedite fee. These apps typically deliver funds for free through standard delivery, from one to five days. But banking apps that include a deposit account do not need to move money through the ACH system to cover an overdraft – it is merely an internal bookkeeping maneuver. Even freestanding cash advance apps that are not linked to a deposit account can normally move funds in one business day – not five days – if they use the ACH system.

The fees for instant delivery appear to be far more than the cost to the provider. Instant delivery can happen through two types of channels. If the consumer has a deposit account with the app provider—as is the case of the nonbank banking apps—“delivery” is likely a mere bookkeeping change with no actual money movement; the provider just increases the balance in the account and makes those funds available. Thus, the cost to the provider is essentially zero.

If funds are delivered to an outside account, the provider likely uses one of the instant delivery channels such as The Clearing House’s RTP or Visa Direct. The \$1 to \$5.99 price of instant

³⁶ See Linda and Charlie Bloom, Psychology Today, “Honoring the Rule of Reciprocation” (Oct. 10, 2015), <https://www.psychologytoday.com/us/blog/stronger-the-broken-places/201510/honoring-the-rule-reciprocation>.

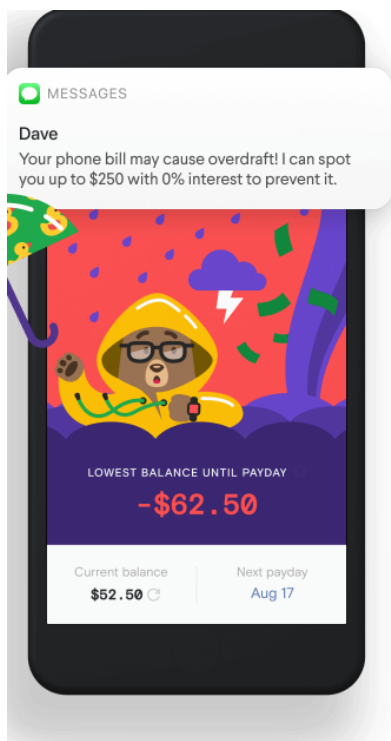
access for consumers severely exceeds the \$0.45 cost to for an instant transfer using RTP.³⁷ The costs of Visa direct and MasterCard Send are likely in a similar range.³⁸

Inflated expedite fees mask the cost of the advances. They evade TILA disclosure requirements, leading the providers to disclose 0% APR or no APR at all.

Delivery fees also often vary based on the size of the advance. Yet RTP has a fixed \$0.45 fee regardless of the amount sent,³⁹ and the other instant delivery options likely also do not vary, at least for the range of advances—\$20 to around \$300—that these apps offer. Thus, there is a particularly strong argument that expedite fees that increase with the amount of credit are disguised finance charges imposed “as an incident to or a condition of the extension of credit.”⁴⁰

Many nonbank banking apps have deceptive marketing that implies that overdrafts or advances are free even while most consumers will likely make payments for those services.

Dave’s website boasts: “Goodbye fees,” showing a picture of a text message warning “Your phone bill may cause overdraft! I can spot you up to \$250 with 0% interest to prevent it.”⁴¹



Goodbye fees

With Dave Banking, there are no overdraft fees, no minimum balance fees and no ATM-fees from 32,000 MoneyPass ATMs.

³⁷ The Clearing House, [Simple, Transparent, Uniform Pricing for All Financial Institutions](#) (last visited Apr. 25, 2022).

³⁸ For example, this article noted that Uber drivers paid \$0.50 to get instant access to their pay through Visa Direct. Tom Groenfeldt, Forbes, [Visa Direct Is The Engine Behind Zelle and Venmo](#) (Mar. 15, 2019).

³⁹ See The Clearing House, [Simple, Transparent, Uniform Pricing for All Financial Institutions](#) (last visited Apr. 25, 2022).

⁴⁰ Reg. Z, 12 C.F.R. § 1026.4(a).

⁴¹ <https://dave.com/> (last visited May 2, 2022).

But deep in the terms and conditions is language stating that consumers who want their advances quickly will pay an “Express Fee” of \$1.99 to \$5.99, depending on the amount advanced.⁴²

9.2 Express Fees

You may request that Dave expedite disbursement of your Advance by paying an optional fee (the “Express Fee”). While you can generally receive an Advance within three (3) business days depending on processing times, if you choose to pay the Express Fee, we will use a faster delivery method that will deliver the Advance to you within 8 hours. The amount of the Express Fee is determined by the amount of your Advance:

Advance Amount	Optional Express Fee
\$5.00 or less	\$1.99

\$5.01 to \$15.00 \$2.49

\$15.01 to \$20.00 \$2.99

\$20.01 to \$74.99 \$3.99

\$75.00 to \$99.99 \$4.99

\$100 to \$200.0 \$5.99

In other words, despite declaring “Goodbye fees” and “0% interest,” a \$100 advance to cover an overdraft will likely cost \$5.99 plus any “tips” the consumer feels compelled to give.

MoneyLion offers “CASH ADVANCES UP TO \$250 WITH NO INTEREST,”⁴³ stating: “Link your checking account to qualify for 0% APR cash advances. No credit check.” In addition to tips, MoneyLion charges a “Turbo Fee” if people want their advance faster than “regular delivery.” Only by scrolling to the bottom of the Instacash page and opening up the answer to the FAQ on “How much does Instacash cost?” does the consumer see this fee schedule:⁴⁴

⁴² Dave, [Dave Terms of Use](#) (last visited Apr. 8, 2022).

⁴³ See <https://www.moneylion.com/instacash/> (last visited Apr. 8, 2022).

⁴⁴ *Id.*

Each time you get an Instacash advance, you can select from these disbursement options, some of which have associated costs:

- Regular delivery (12 – 48 hours) to your RoarMoney account – \$0
- Regular delivery (3 – 5 business days) to your external checking account – \$0

Disbursement Amount	Turbo Fee	
	RoarMoney account	External debit card
\$5 or less	\$ 0.99	\$ 1.99
\$10 to \$15	\$ 1.49	\$ 2.49
\$20	\$ 1.99	\$ 2.99
\$25 to \$35	\$ 2.99	\$ 3.99
\$40 to \$70	\$ 3.99	\$ 4.99
\$75 to \$95	\$ 4.99	\$ 6.49
\$100	\$ 5.99	\$ 7.99

The “regular delivery” times appear to be deliberately slowed down to induce people to choose instant delivery. Delivery to a MoneyLion RoarMoney account is 12 to 48 hours, even though that is an internal move and MoneyLion can probably make those funds available instantly at essentially no cost. Delivery to an external debit card is three to five business days, but that delivery likely takes place through an ACH transfer, which normally takes only one business day.

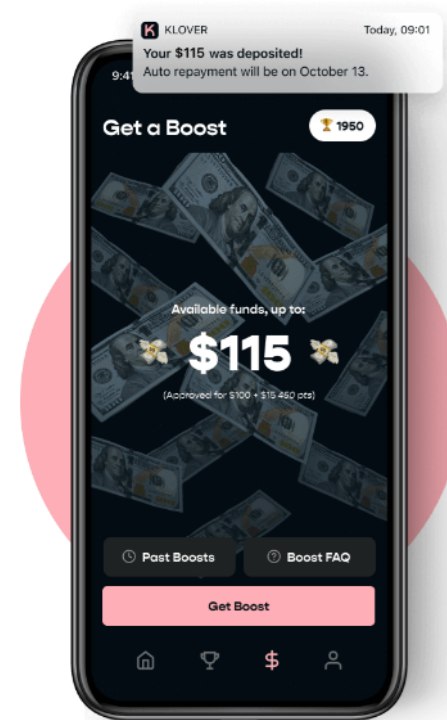
Other cash advance apps and nonbank bank apps with cash advance features have similarly inflated and varying expedite fees. Klover offers cash advances—which they appear to deny are credit⁴⁵—“in seconds” that have “No interest” and “No hidden fees.”⁴⁶

You're Approved

Need some extra cash before payday? No problem. Get access to a cash advance in seconds. With our proprietary algorithm, we approve significantly more customers!

- ✓ No interest
- ✓ No credit check
- ✓ No hidden fees

[Get Cash Now](#)



But in addition to tips and subscription fees, Klover collects expedite fees up to \$9.99. Klover states: “While you will generally receive a Balance Boost within three (3) business days depending on processing times, if you choose to pay the Express Fee, the Balance Boost will be delivered to you within 24 hours.”⁴⁷ Expedite fees are: “Up-to \$250, (\$9.99); Up-to \$50 (\$7.49); Up-to \$25 (\$2.99); Up-to \$10 (\$1.99).”⁴⁸

Klover makes no mention of its tips or expedite fees in answer to the question “How does Klover make money?”⁴⁹

⁴⁵ The terms and conditions say: “Klover offers a service that provides advances or ‘Balance Boost(s)’ based on your anticipated income (‘Balance Boost Service’). The Balance Boost Service is a non-recourse sale of future wages to Klover.” Klover, [Klover Terms and Conditions](#) ¶ 6.1 (last visited Apr. 8, 2022). For a discussion of why “non-recourse” arguments do not take credit out of TILA coverage, see *NCLC/CRL EWA Letter to CFPB* at 16–20. For discussions under state law, see National Consumer Law Center, Consumer Credit Regulation § 9.10.4.4.1 (3d ed. 2020), *updated at* library.nclc.org; [Comments of National Consumer Law Center & Center for Responsible Lending to California Dept. of Financial Protection & Innovation re: PRO 02-21, Proposed Rulemaking under the California Consumer Financial Protection Law: Earned Wage](#) at 16–20 (Mar. 15, 2021).

⁴⁶ See <https://www.joinklover.com/> (last visited Apr. 8, 2022).

⁴⁷ Klover, [Klover Terms and Conditions](#) ¶ 6.2 (last visited Apr. 8, 2022).

⁴⁸ *Id.* ¶ 6.3.

⁴⁹ Klover, [FAQs](#) (last visited Apr. 8, 2022).

💰 How does Klover make money?

+

Your custom profile enables Klover to show you relevant offers in the form of advertising, to earn or save with our partners, and to gather anonymous market research.

We'll always stay true to our mission of leveraging data to give you access to great financial services.

As described in the tips section, Albert's home page offers advances up to \$250 with "No interest. No credit check."⁵⁰ The "Learn more" link goes to a page that mentions "a small fee to get your money instantly or get cash within 2–3 days for free."⁵¹ That same page also announces in large type "No hidden fees. Ever." But in smaller type below the page mentions "one small fee"—the amount of which is hidden. Even the terms and conditions (which are difficult to find) do not say what that fee is, only that there is "one-time non-refundable fee if [the cash advance is] made on the same day of the request."⁵²

No hidden fees. Ever.

Just one small fee — plus an optional tip — to advance cash instantly. That's it.

Earnin offers a Service called "Lightning Speed" to expedite delivery of its advances, as described in the Terms of Service:

Lightning Speed

Depending on your bank, by providing us your debit card information, or banking routing number and Bank Account information, you may be able to Cash Out with Lightning Speed, a service that enables funds associated with Cash Outs to be expedited. If Lightning Speed is unavailable to you, you will generally receive your Cash Out within the next 2-3 Banking Days after you request a Cash Out in your Bank Account.

Otherwise If [sic] there are no issues you provide us with your debit card information, you should be able to receive your Cash Out within the same Banking Day. **Fees may apply to Lightning Speed in some instances.**⁵³

⁵⁰ See <https://albert.com/> (last visited Apr. 8, 2022).

⁵¹ See <https://albert.com/instant/> (last visited Mar. 28, 2022).

⁵² Albert, [Albert's Terms of Use](#) (Feb. 10, 2022).

⁵³ Earnin, [Terms and Privacy](#) (last updated Sept. 8, 2021) (emphasis added).

Lightning Speed is required for use of Earnin Express,⁵⁴ a deposit account offered by Earnin through Evolve Bank & Trust.⁵⁵ While the Earnin Terms of Service state that fees may apply to Lightning Speed, those fees could not be found from a skim of both the Earnin terms⁵⁶ and the Evolve terms,⁵⁷ and both sets of terms denied charging any fees.

6. Recommendations

We need action to stop overdraft fee abuses, old and new.

Financial institutions should follow the lead of Capital One Bank and Ally Bank and eliminate overdraft fees altogether. They are a relic of a bygone era and only serve to hurt vulnerable consumers.

For institutions that continue to charge overdraft fees, the fees should be strictly regulated and limited. To address longstanding overdraft fee abuses, Congress should pass H.R. 4277 (Maloney), Overdraft Protection Act of 2021 and S. 2677 (Booker), Stop Overdraft Profiteering Act of 2021.

The CFPB also must adopt clear rules that apply to all financial institutions. In the meantime, the banking agencies need to address unfair, deceptive and abusive overdraft fee practices that harm the financial health of consumers.

Critical elements of overdraft fee reform include:

- Clarify that overdraft coverage is credit and that overdraft fees, beyond 6 fees a year to cover occasional courtesies, are finance charges under TILA and Regulation Z. Additional overdrafts can be covered through affordable overdraft lines of credit or transfers from linked accounts.
- Limit overdraft and NSF fees to one per overdraft episode.
- Use of a debit or ATM card or other access device to access overdraft credit should trigger the protections of the Credit CARD Act, including ability-to-repay rules and the fee harvester limits.
- Limit any overdraft and NSF fees to amounts that are reasonable and proportional to financial institutions' costs in the overdraft coverage.

⁵⁴ *Id.* (“Because Earnin Express requires Lightning Speed, funds from your Earnin Express Account that are to be credited to your Bank Account, will arrive within the same Banking Day.”)

⁵⁵ “Earnin Express is a new app feature that gives our community an upgraded Cash Out experience. It’s a way for you to potentially reach a higher pay period Max and a possibility to receive your paycheck early by routing your paycheck through Earnin.” Earnin, [What Is Earnin Express and How Does It Work?](#) (last visited Apr. 8, 2022).

⁵⁶ Earnin, [Terms and Privacy](#) (last updated Sept. 8, 2021) (“There are no fees or costs associated with Earnin Express.”).

⁵⁷ Earnin, [Evolve Bank & Trust Customer Account Terms](#) (“We do not charge any fees for your Accounts. Earnin may charge you fees separate for its Services, pursuant to the Earnin Terms of Service.”) (last visited Apr. 8, 2022).

- Prohibit overdraft or NSF fees on transactions that were authorized when the balance was positive.
- Prohibit reordering transactions in a manner that increases overdraft or NSF fees.
- Require consumers to opt in to any overdraft coverage, not just for ATM and debit card transactions, and give them clear up-front information about their options for covering overdrafts.

Financial institutions should not wait to be told what to do. They should eliminate overdraft and NSF fees altogether or get as close as possible to that goal. They should also offer and promote Bank On accounts. But offering a Bank On account is not a substitute for reforming overdraft practices on all accounts.

To prevent new fintech forms of overdraft fees, the CFPB and bank regulators should:

- Subject nonbank banking apps to the CFPB’s prepaid account rules, as they are not checking accounts and thus are not exempt from those rules. The prepaid account rules are designed for the vulnerable unbanked and underbanked consumers who have had trouble with overdraft fees on traditional accounts and who are typically the audience to whom fintech accounts are targeted.
- View “tips” as fees regardless of the label put on them and regardless of whether they are purportedly voluntary. “Tips” on cash advances should be treated as finance charges under the Truth in Lending Act. “Tips” paid for overdraft advances should be subject to the overdraft fee rules discussed above.

7. Conclusion

We have a moment right now with a growing consensus that financial institutions must stop exploiting their most vulnerable customers, communities of color, and the essential workers on whom we all depend. It is time to end the decades-long scourge of overdraft fees and to prevent new evasive forms from taking root. For more information or with questions, please contact Lauren Saunders at lsaunders@nclc.org.