CFA U.S. PIRG Federation of State PIRGs

August 4, 2008

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

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552

Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

RE: FRB Docket No. R-1314; OTS-2008-0004; NCUA RIN 3133-AD47

Dear Secretary Johnson, Deputy Director Bowman, and Secretary Rapp:

Consumer Federation of America (CFA)[1], U.S. Public Interest Research Group[2] and the state consumer organizations signed below submit comments addressing overdraft transactions in the above referenced dockets. CFA and other consumer organizations are very concerned about the impact of overdraft loans on American consumers and the gaps in federal consumer protections that deprive consumers of essential information and control of their bank accounts while permitting banks to profit from outrageous overdraft loan fees.

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[1] CFA is a nonprofit association of some 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through research, advocacy and education. CFA has filed comments with the Federal Reserve Board on overdraft issues, testified before the House Financial Services Subcommittee on HR 946, and issued numerous reports on bank NSF and overdraft fees and practices. For more information, go to www.consumerfed.org.

[2] U. S. PIRG serves as the federation of and national advocacy office for state Public Interest Research Groups, which are non-profit, non-partisan organizations with over one million members nationwide. U.S. PIRG regularly testifies before Congress on unfair bank practices and credit card reform issues and has issued numerous policy reports on these matters.

We appreciate that the Federal Reserve Board, the Office of Thrift Supervision, and the National Credit Union Administration (the Agencies) are addressing overdraft lending as an unfair trade practice under the Federal Trade Commission Act. While we have urged the Federal Reserve to apply the Truth in Lending Act to cost disclosures for bank overdraft loans[3], we also support rules under Reg AA to curb unfair trade practices by banks when transactions that exceed the balance in an account are covered and consumers are charged a fee.

Currently most banks extend credit to overdrawn customers by paying or authorizing checks, debit card purchases, preauthorized payments, and ATM withdrawals. Banks charge a fee for each overdraft and collect payment for both the overdraft and the fee by withdrawing payment from consumers' bank accounts. Banks do not get consent from their customers to use overdraft programs, do not warn customers that a transaction will trigger an overdraft, do not provide cost of credit disclosures, and do not extend overdrafts under a firm agreement to pay overdrafts with clear terms. As a result, consumers pay billions to inadvertently borrow from banks without the benefit of consumer protections that apply to equivalent small loan products.

The Agencies' proposals refer to overdraft "services." We will not use that misnomer, since it is no "service" for banks to extend unauthorized credit at their highest rates to consumers who did not apply for or contract for or know they were using this credit product. When banks pay or authorize transactions that overdraw a consumer's bank account, charge a fee, and later require repayment, credit has been extended. Yet, the Agencies' proposals fail to require banks to comply with federal consumer credit protections. As a result, these proposals will not adequately protect consumers, ensure the safety and soundness of banks, or foster a competitive market for credit products. Our organizations call for the Agencies to do the following:

- **Require banks to get consumers' affirmative consent to use overdraft loans,** making it an unfair trade practice for a bank to charge for paying an overdraft if the consumer has not had the opportunity to affirmatively contract for this form of high cost credit. The Agencies' proposal only provides the opportunity to opt-out of overdraft loans. The accompanying Federal Reserve Truth in Savings Act (TISA) proposal implies the proposed initial right of opt-out would only apply to new account holders.[4] Whether the final rule calls for opt out or opt in, it should be an unfair trade practice for any bank customer, new or existing, to be charged for a loan without having had the opportunity to take action. If opt-in is not required, the Agencies should ban overdraft loans through ATM and debit card transactions as patently unfair trade practices.

[3] CFA, Comments, Federal Reserve System, 12 CFR Part 230 Docket No. R-1197, Proposed Amendments to Regulation DD, August 6, 2004 at http://www.consumerfed.org/pdfs/Document.pdf; CFA Comments, FRB Docket No. R-1136, January 27, 2003 at http://www.consumerfed.org/pdfs/frbcomments.pdf.
[4] CFA filed comments with the FRB on the TISA proposal to provide notice language for opt out forms. Reg. DD, R-1315. http://www.consumerfed.org/pdfs/FRB_%20TISA_CFA_Comments_7_19_08.pdf

- **Require banks to comply with Truth in Lending** cost disclosures and other TILA protections. Instead of addressing overdraft loans through the inappropriate Truth in Savings Act, the Federal Reserve should change the Reg Z provision and Official Staff Commentary sections that exempt banks from TILA cost disclosures as long as the bank does not contract to cover overdrafts and does not charge more for overdrafts than the bank charges as an insufficient funds fee.[5] Consumers need cost of credit information to make informed choices between alternate forms of credit. The Agencies (other than the OTS) noted in the Interagency Guidance to banks issued in 2005 that credit is extended when a bank covers an overdraft. It is a logical next step to put banks on a level regulatory field with all other consumer creditors in having to comply with the nation's credit laws.

- **Require banks to provide overdraft loans subject to a contract** that clearly spells out the types of transactions that will be covered, limits on the amount of overdraft coverage provided, the repayment schedule for extensions of credit via overdraft, and other terms and conditions that apply to this transaction. Banks should be required to provide notice of an overdraft loan with enough time to repay without incurring additional fees. See discussion below on current bank contract language that leaves consumers in a quandary over when and if a particular transaction will be covered. Some bank agreements state that an overdraft and its fee are due without notice or demand from the bank.

- **Expand the proposal that bans overdraft fees caused by the merchant's hold placed on accounts when debit cards are used to also include overdrafts caused by deposit holds**. The Expedited Funds Availability Act time periods for holding deposits has not been updated since it took effect in 1990. Although funds now move quickly due to Check 21 and electronic check conversion, banks can still hold a deposited check for days after the check has cleared, depriving consumers of access to their own money. It is a double hit on consumers to both be deprived of access to their funds and be charged an overdraft fee when a transaction that would have been paid overdraws the account. This protection should extend to insufficient funds fees triggered by debit and deposit holds as well.

- **Prohibit banks from ordering withdrawal processing to result in more overdrafts** or insufficient funds transactions and fees. Banks choose the order in which deposits and withdrawals are handled for purposes of applying overdraft

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[5] Reg. Z § 226.4 (c)(3). Charges imposed by a financial institution for paying items that overdraw an account are not "finance charges" unless the payment of such items and the imposition of the charge were previously agreed upon in writing. Official Staff Commentary on this section states: "A charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items." Official Staff Commentary § 226.4(c). In addition, the Official Staff Commentary § 226.4(b)(2)-1 excludes a fee on a deposit account with a credit feature from being considered a finance charge if the fee does not exceed the charge for an account that does not include a credit feature.

and insufficient funds fees. Most large banks process the largest check first which will result in additional fees for smaller transactions for consumers who live close to the edge from payday to payday.

We note that this rulemaking only applies to overdraft provisions of accounts as defined in TISA, Regulation DD and part 707, limiting coverage to "a deposit account at a depository institution that is held by or offered to a consumer." This leaves out consumers who "bank" by stored value card. This is another example of the two-track financial services market, where banked consumers and unbanked and usually lower-income consumers do not benefit from the same set of rules.[6] We urge the Agencies to extend all overdraft loan protections to prepaid debit cards that function as a bank account for families. We also urge the Agencies to support upgrades to payment card protections that apply high level protections to all forms of payment.

Bank Customers Need Federal Credit Consumer Protections

Bank overdraft loans are treated as "credit" for every purpose except informing and protecting consumers. The Interagency Guidance issued by the Federal Reserve, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration stated: "This credit service is sometimes offered to transaction account customers as an alternative to traditional ways of covering overdrafts...When overdrafts are paid, credit is extended."[7] Overdraft loans meet the basic test of an extension of credit: Consumers use the bank's money, are obligated for a debt, and then repay it, with an additional sum. Banks argue that overdraft fees are flat fees that do not increase with the size of the "loan." Yet sixty percent of the largest banks also impose sustained overdraft fees which charge more the longer the debt goes unpaid. Despite these credit-like product characteristics as well as regulators' recognition that overdrafts are a credit product, consumers are deprived of the protections provided by the Truth in Lending Act and the resulting impact TILA cost disclosures would likely have on banks' design and deployment of this product.

If overdraft loans were subject to TILA/Reg Z cost disclosure requirements, consumers would be given comparable price tags to use in deciding whether to borrow $50 from the bank at a cost of $35 which translates to the equivalent APR for a closed end loan of 3,640 percent if repaid in one week (and the bank did not also charge sustained overdraft fees.) Given that cost information, a consumer might decide to forego the debit card point-of-sale purchase or to use another form of payment. For overdraft loans triggered by a debit card, TILA protections would prevent banks from extending credit without the consumer's affirmative request.

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[6] SVC overdraft loan fees are extremely expensive. See Testimony, Jean Ann Fox, CFA, Subcommittee on Social Security, Ways and Means Committee, "Hearing on Protecting Social Security Beneficiaries from Predatory Lending and Other Harmful Financial Institution Practices," June 24, 2008. http://www.consumerfed.org/pdfs/Jean_Ann_Fox_Testimony_Ways_and_Means_Social_Security_6-24-08.pdf

[7] Joint Guidance on Overdraft Protection Programs, OCC, Federal Reserve System, FDIC, NCOA, Feb. 17, 2005, p. 4. At page 7, "When overdrafts are paid, credit is extended."

Banks would have to provide cost information in an easy to read and uniform format compared to the current situation where banks often fail to provide account fee schedules or other key terms at branches despite the Truth in Savings Act requirements. Consumers would have recourse against violations. As CFA noted in comments filed in the related TISA docket and described in the GAO report to Congress[8], many banks fail to provide fee information or terms for overdraft loans to consumers shopping for a bank account. At some banks, CFA surveyors had to prove they were already bank customers in order to get account terms and conditions. Some banks do not make fee schedules readily available. Because TISA has no private right of action and the GAO found that bank regulators fail to confirm that required disclosures are actually given to prospective customers, TISA provides vastly inferior remedies compared to TILA.

If banks had to tell the truth about the cost of borrowing using overdraft loans and had to get consumer consent ahead of time to provide this product, competitive pressures would have some impact on the cost and terms of borrowing money in this manner. Clear cost disclosures would likely motivate more consumers to apply for other forms of lower cost overdraft protection. Uniform cost disclosures would enable consumers to make informed choices between overdraft loans for a fee and the bank's overdraft line of credit.

If overdraft loans were subject to TILA disclosures and opt-in selection, banks would have to offer affordable repayment schedules instead of unilaterally taking money out of consumers' bank accounts to repay fees and overdrafts before consumers can pay for rent, food, or other family needs. Since overdraft "fees" are treated as a checking account "fee" under Truth in Savings Act, banks can and do use their right of set-off to pay themselves first. (See Appendix B for examples of bank account agreements that spell out payment terms of overdraft loans.)

Instead of requiring banks to tell the truth about their most expensive loans, the Federal Reserve persists in letting banks hide their loan costs in poorly disclosed fee listings. All other forms of comparable cash advances are required to disclose the finance charge and the annual percentage rate, including pawn shops, payday lenders, small loan companies, and credit card cash advances. While Congress could enact legislation to clearly apply TILA to overdraft loans, the Federal Reserve can take action to protect the millions of bank customers who pay $17.5 billion a year to borrow $15.8 billion in unauthorized loans.[9]

Debit Transactions Drive Overdraft Volume

Bankers, faced with a dwindling proportion of paper checks that could "bounce" and the increase in small transactions paid with debit cards and other forms of electronic payment that historically were denied for insufficient funds without incurring a fee, found

[8] GAO Report, "Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Document Prior to Opening Checking or Savings Accounts," GAO-08-281, Jan. 2008.
[9] Eric Halperin and Peter Smith, "Out of Balance: Consumers Pay $17.5 Billion Per Year in Fees for Abusive Overdraft Loans," Center for Responsible Lending, July 11, 2007, page 11.

a way to keep the billions in NSF fee revenue flowing in. Up until recently, banks simply denied debit transactions that overdrew accounts. Charging fees on small debit overdrafts has become a major source of unfair fee revenue for banks. Heavy debit card users are more likely to overdraw than consumers who seldom use their cards. Visa USA reported that consumers spent $459 billion using Visa consumer debit cards in 2006, up almost 12 percent from 2005. VISA's April 2007 poll found that 76 percent of consumers in the 18 to 25-year range "never leaves home without a payment card, and one-third rarely carries cash."[10] The increasing use of debit cards leads to increased overdraft fees. Bank service company Furnace, Giltner & Associates Inc. studied fifty banks with up to $25 billion in assets and determined that consumers who use their debit cards more than twenty times a year paid an average $223 in overdraft fees, compared to an average of $155 when using debit cards less than twenty times a year. Customers averaged only $40 in insufficient funds fees who did not use a debit card at all.[11] And, small dollar debit card transactions cost the same $34 overdraft fee as a $700 mortgage check.

Consumers Think the Current Overdraft Product is Unfair

Consumers by a wide margin believe they are treated unfairly when banks permit them to overdraw at the ATM without warning. A 2004 survey poll of a representative sample of 1,000 adult Americans conducted for CFA by Opinion Research Corporation International (ORCI) found that an overwhelming majority (82 percent) of consumers thought permitting overdrafts without any notice at the ATM was unfair, while 63 percent said it was "very unfair." Fewer than one in five (17 percent) people thought it was fair.

Banks do not seek affirmative consumer assent when permitting overdraft loans, and consumers are charged expensive overdraft fees without their consent or any prior warning except deep inside the fine print of account disclosure agreements or a notice at the time an account is opened. Consumers think they should be provided the opportunity to affirmatively opt-in to overdraft provisions of their checking accounts. In CFA's 2004 ORCI poll, more than twice as many consumers thought it would be unfair for banks to permit overdrafts without obtaining their customers' consent (68 percent) rather than fair (29 percent).

Consumers Do Not "Benefit" from Unauthorized Overdraft Loans

The Agencies apparently believe that consumers benefit when banks permit and cover overdrafts for a fee, even when consumers did not consent to these loans or know they were using them. This view may be based on the fact that a paper check that is returned unpaid will also trigger a merchant's fee. Yet we do not use this rationale to authorize credit card issuers to mail out activated unsolicited cards with no disclosures to almost every mailbox.[12] While this unsolicited credit card could be used to make an essential purchase, American law prohibits lenders from mailing out live cards without

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[10] Jilian Mincer, "'Generation Plastic' unaware of cards' risks," The Columbus Dispatch, July 5, 2007.
[11] Katie Kuehner-Hebert, "Debit Reward Payoff: More Bounce Fees," American Banker, March 1, 2007.
[12] Pub. L. No. 91-508, 84 Stat. 1126-27 (October 26, 1970).

affirmative request from consumers. In the credit card section of this docket, the Agencies have proposed extensive improvements to prohibit unfair practices by credit cards companies. It is disappointing that this positive approach to credit card protections is not applied to much more expensive overdraft loans. If consumers really do benefit from $34 fees to have a $50 overdraft paid, banks should have no trouble getting their customers to sign up for this coverage.

The "benefit" argument breaks down completely in the debit or electronic payment overdraft sector. If banks did not program their systems to permit unfunded debit and electronic payments to be paid, these transactions would be denied and no penalty fees would apply to consumers. A shopper at the point-of-sale could use a different payment method, forego the purchase, or use cash, avoiding the $34 overdraft fee.

Vulnerable Consumers Impacted by Unauthorized Overdraft Loans

In deciding which accountholders' overdrafts will be paid, banks use either consultant-provided programs or internal metrics that do not impose responsible ability-to-repay criteria on the decision to extend credit. This is especially troubling because the burden of paying billions in overdraft and bounced check fees falls on a fraction of bank customers.[13] CFA is most concerned for consumers who have a tenuous hold on mainstream banking and who do not have large balances or linked accounts to provide real overdraft protection. These young and old, minority and less affluent consumers are at risk of losing their bank accounts or having to close them to avoid unexpected and uncontrollable penalty fees. Once a bank customer is black-listed on ChexSystems or similar bank credit reporting services, she may not be able to open a new bank account for up to five years.

Older consumers on fixed incomes also are impacted by overdraft fees. A recent report from the Center for Responsible Lending found that Americans 55 and older pay $4.5 billion annually in overdraft loan fees, while those relying on Social Security income pay nearly $1 billion in fees for these loans that deduct payment from exempt funds direct deposited into seniors' accounts.[14]

A CFA 2004 national opinion poll found that 28 percent of consumers say they overdraw their bank accounts. One third of consumers who overdrew their accounts (9.3 percent of all consumers) had bounced at least three checks in the previous year. In the same poll, the consumers who stated they overdraw their accounts and are most likely to pay overdraft and bounced check fees were moderate-income consumers with household incomes of $25,000 to $50,000 (37 percent). Those 25 to 44 years of age (36 percent) and African Americans (45 percent) were most likely to have bounced checks. Twenty-two percent of the lowest income group surveyed, making less than $25,000 a year, and

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[13] Lisa James and Peter Smith, "Survey Finds Growing Problem for Consumers," Center for Responsible Lending, April 24, 2006.
[14] Leslie Parrish and Peter Smith, "Shredded Security: Overdraft practices drain fees from older Americans," Center for Responsible Lending, June 18, 2008, page 2.

less educated consumers (33 percent) reported that they do not have a bank account to overdraw.

Protecting Consumers who Overdraw Could Also be Good for Banks

Based on the irate letters we get from consumers (or their parents) snared by overdraft loans, banks are cultivating a growing body of disgruntled customers. A 2006 study by Forrester Research Group documented that consumers are "irked" by overdraft fees. While 65 percent of consumers with no overdraft fees said they were very satisfied with their banks, only 53 percent of consumers charged overdraft fees in the last few months reported being very satisfied.[15] By offering contractual overdraft protection by linked savings accounts, low cost lines of credit, and transfers to credit cards, banks can provide real protection at lower cost to consumers and avoid angering a vocal or sympathetic segment of their customers.

CFA Survey Findings: Ten Largest Bank Overdraft Fees and Terms

In mid-2008, CFA staff and member groups collected fee schedules, account agreements, and bank brochures from branches and websites at the ten largest banks to learn more about current fees and overdraft terms and practices. This provides an update to a larger study conducted by CFA in 2005.[16] In the earlier study, CFA found that 80 percent of the 33 largest banks had contract terms that permitted non-contractual overdrafts. Current information from the ten largest banks indicates that all of them permit consumers to overdraw and all impose steep fees for those transactions. None of the ten largest banks provide consumers the opportunity to affirmatively sign up for overdraft loans and only U.S. Bank provides instructions on how to opt-out of coverage. For more information on the largest banks' fees, contract terms, and processing order, please see the appendices. Summary information follows.

Big Bank Overdraft Fees

Big bank fees for unauthorized overdraft loans range from $19 for the first overdraft to $37.50 at U.S. Bank. Washington Mutual (WaMu) gives one free overdraft per account. The average top fee charged by the largest ten banks is $34.65 per transaction that overdraws an account. By comparison, CFA's 2005 report on fees charged by 33 large banks found that the average fee for overdrafts was $28.57.[17] Comparing the same ten banks, the average highest overdraft fee in 2005 was $30.30.

Half of the ten largest banks have tiered overdraft fee schedules, charging higher fees for more than one overdraft over a rolling thirteen month time period. In addition to per incident overdraft fees, six banks charge sustained fees when overdrafts are not repaid

[15] CUNA News: "Consumers ignore ATM fees, get irked at overdraft fees," January 17, 2006
[16] Jean Ann Fox and Patrick Woodall, "Overdrawn: Consumers Face Hidden Overdraft Charges from Nation's Largest Banks," Consumer Federation of America, June 2005
[17] Jean Ann Fox and Patrick Woodall, "Overdrawn: Consumers Face Hidden Overdraft Charges from Nation's Largest Banks," Consumer Federation of America, June 2005, page 8.

within a few days. The sustained overdraft fees range from a flat $12.50 after five days at Chase and $35 on the seventh day of unpaid overdrafts at SunTrust to $6 to $8 per day. Despite the Agencies' Best Practices[18] recommendation, only three banks set maximum fees per day while the other seven banks charge an unlimited number of fees for a string of transactions that overdraw an account in one day. For additional information on bank overdraft fee terms, see Appendix A.

Bank	OD Fee	Sustained OD Fee	Maximum Fees
Bank of America	$25 first $35	No	7 per day/$245
Chase	$25 first OD $32 2 to 4 OD $35 5 or more	$12.50 after 5 days	No max
CitiBank	$30	No	No max
Fifth Third Bank	$33	$6/day after 3 days	No max
National City Bank	$30 to $36	$8/day after 3 days	No max
PNC Bank	$31 1 to 3 OD $34 4 to 6 OD $36 7 or more	$6/day after 4 days Max $30 sustained	No max
SunTrust	$35	$35 on 7th day	No max
U.S. Bank	$19 first OD $35 2 to 4 $37.50 5 or more	$8/day after 3 days	6 OD and 6 NSF up to $450/day
Wachovia	$22 first OD $35	No	No max
WaMu	Free first OD $34 up to 5/day	No	5 OD or $170/day

The following chart illustrates the high cost imposed on consumers who overdraw and are unable to immediately repay the amount of the overdraft and the fee. An overdraft repaid after seven days would cost consumers fees ranging from $30 at CitiBank to $69.50 at U.S. Bank, using the highest fees charged by these banks plus sustained overdraft fees where charged. Assuming just one transaction overdrew the

[18] Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9,127, 9,129-30 (Feb. 24, 2005)

account and payment was delayed for seven days, the combined initial fee and sustained overdraft fee is noted.

Bank	OD Fee	Sustained OD Fee	Total
Bank of America	$35	0	$35
Chase	$35	$12.50	$47.50
CitiBank	$30	0	$30
Fifth Third	$33	4x$6=$24	$57
National City	$36	4x$8=$32	$68
PNC	$36	3x$6=$18	$54
SunTrust	$35	$35	$70
U.S. Bank	$37.50	4x$8=$32	$69.50
Wachovia	$35	0	$35
WaMu	$34	0	$34

This chart assumes that only one transaction triggers an overdraft. As this example illustrates, multiple overdrafts result in multiple fees.

> *A California consumer was notified by Bank of America that three transactions had overdrawn his account. Two checks for $57.34 and $44.35 were paid, along with a $200 electronic transaction. The bank charged three $35 fees ($105) for these overdrafts. One week later, he got another notice for a $60 electronic overdraft that was paid for a fee of $35. The incidents happened two days apart.*[19]

Big Bank Fine Print Makes Overdrafts Unfair to Consumers

In addition to the high cost of borrowing through overdrafts, consumers encounter several other unfair tactics as spelled out in bank terms and conditions. Based on bank disclosures and fine print, consumers are unable to rely on their bank to honor overdrafts, are held responsible for immediately repaying the bank in many cases without notice or demand from the bank, and can have their overdraft "service" terminated at any time for any reason. Banks employ contract language making it a discretionary transaction to avoid triggering Reg Z TILA requirements. As a result, a consumer writing a check or paying by debit card never knows for sure whether the bank will honor or reject the

[19] Bank of America Notice of Insufficient Funds notices, on file with CFA.

overdraft. The consumer has no way of knowing whether any particular transaction will trigger merchant NSF fees, penalties for non-payment, or legal problems from writing an unfunded check. Examples of contract terms: (See Appendix B for complete bank contract language and citations.)

> Bank of America: "We may, without notice to you and in our sole discretion, either pay or permit the insufficient funds item and overdraw your account." Account terms say that the bank is not obligated to pay even if they have paid overdrafts in the past and can stop paying for overdrafts without cause or notice.
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> Chase: Its agreement says that consumers must pay the overdraft, fees and accrued interest immediately and agree that the bank can take money out of the next deposit to pay the overdraft and fees. If an accountholder doesn't want her exempt federal funds to be taken to pay for overdrafts, the only option given is to terminate direct deposit of Social Security and other federal benefits into the account.
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> CitiBank says it pays overdrafts at the bank's sole discretion and each account owner is liable to pay. CitiBank also promotes its real overdraft protection services in the account agreement section on overdraft loans.
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> SunTrust's agreement bluntly tells consumers not to rely on the bank to honor an overdraft and that just because the bank paid an earlier overdraft doesn't obligate the bank to pay other transactions that overdraw an account. On the other hand, the bank's contract does obligate the consumer to pay the overdraft immediately upon notice, including the bank's cost of collections.
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> Wachovia's account terms have similar one-sided language obligating consumers to pay overdrafts and fees immediately but not promising that the bank will honor overdrafts. Wachovia says consumers "should not rely on us to honor any overdraft even if we have done so in the past."
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> WaMu states that they are not liable for paying or rejecting a transaction that overdraws an account even if the bank sets an overdraft limit and the customer asked the bank not to set a limit for that account. In other words, you can ask the bank not to permit overdrafts up to a certain limit, but they can still do so and charge a fee. WaMu customers agree to pay overdrafts immediately and without notice or demand and can be required to pay in cash. WaMu says an overdraft limit is at the bank's sole option that can be changed without notice, and that the bank can choose not to pay anytime without notice even if the bank has paid overdrafts in the past and if the current transaction does not exceed the bank's limit.

Bank fine print also illustrates that banks hold all the cards in deciding that a transaction overdraws the account. Depending on the bank's decision in programming the computer, consumers can be hit with multiple fees even though the bank balance shown at online bank statements shows a positive balance. Washington Mutual Bank's agreement gives the most detail on this bank practice:

> WaMu can use one of the following to determine if the available balance is enough to cover a transaction:
> a. When the bank receives the transaction
> b. When the bank processes the transaction
> c. When the bank receives notice of the transaction
> d. When the bank receives a request to authorize the transaction
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> WaMu's contract permits the bank to charge an overdraft fee even if the balance was enough to cover the transaction at a different time.

The Agencies should regard the current overdraft loan arrangements as blatantly unfair to consumers. Banks make no promise to pay an overdraft while obligating consumers to immediately repay both the overdraft and the fee in a single balloon payment (often without notice or demand). Banks use set-off to extract payment out of the next deposited funds, even when those funds are exempt federal benefits. Even when consumers attempt to opt out, that may not stop banks from permitting transactions to overdraw the account. Overdraft loans are the most expensive credit issued by any lender. It is little wonder that banks are resisting having to ask their customers to affirmatively choose such one-sided credit offers.

Transaction Clearing Practices

Another tactic used by banks to maximize overdraft and insufficient funds fees is to order the sequence of withdrawals to pay the largest transaction first. The Agencies did not propose rules regarding unfair trade practices involved in banks that order the processing of withdrawals in a manner that increases the number of transactions that trigger overdraft fees for low-balance customers. We urge the Agencies to prohibit banks from ordering transaction withdrawal to maximize overdrafts or insufficient funds fee revenue. Ordering should be smallest to largest with deposits processed before withdrawals. Given the confusing language used by banks for this practice, we would not recommend offering an opt-in scenario for other methods of processing withdrawals for purposes of assessing overdraft or insufficient funds fees.

No Rules Currently Protect Consumers Against Account Order Manipulation

Currently banks can use any order they choose for processing withdrawals despite the impact on customers. State law does not prohibit high to low check clearing. The Uniform Commercial Code (UCC) authorizes banks to clear withdrawals in any order the bank selects, although a few states include comments to the UCC that specifically prohibit a bank from adopting a procedure designed to maximize the number of dishonored checks in order to increase fee income.

The Comptroller of the Currency issued Interpretive Letters approving high to low check clearing (i.e. largest to smallest sized check or debit) when banks have followed the OCC regulation considerations in adopting this policy. Those considerations include: the cost incurred by the bank in providing the service; the deterrence of misuse by customers of banking services; the enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and the maintenance of the safety and soundness of the institution.[20] None of the OCC's considerations involve consumer protection.

In our view, processing withdrawals high-to-low is a revenue enhancing proposition for banks. As one Comptroller's interpretive letter noted, "The Bank's submission contains projections that revenue is likely to increase as a result of adopting a high-to-low order of check posting."[21] Findings of fact issued by the San Francisco Superior Court in a case involving Bank of America found: "...the Bank has also adopted a practice of processing checks, ATM withdrawals, point of sale transactions and other debits in order from largest to the smallest. Processing debits in this order causes accounts to be overdrawn more quickly, increasing the number of NSF fees collected by the Bank. The larger items will be more likely to overdraw the accounts, causing the subsequently processed smaller items, which might otherwise have cleared, to trigger additional NSF fees."[22]

The Office of Thrift Supervision (OTS) addressed manipulation of transaction-clearing rules in the Final Guidance on Thrift Overdraft Programs issued in 2005. The OTS advised thrifts that transaction-clearing rules (including check-clearing and batch debit processing) should not be administered unfairly or manipulated to inflate fees.[23] The Guidelines issued by the other federal regulatory agencies merely urged banks and credit unions to explain the impact of their transaction clearing policies. The Interagency "Best Practices" state: "Clearly explain to consumers that transactions may not be processed in the order in which they occurred, and that the order in which transactions are received by the institution and processed can affect the total amount of overdraft fees incurred by the consumers."[24] Even that vague requirement, if followed, fails to give consumers reliable information on how their bank orders withdrawals.

Ten Largest Banks' Processing Order

CFA reviewed the fine print for the ten largest banks and found obfuscation and legal double talk about withdrawal processing at most banks.[25] None of the largest banks disclose their withdrawal processing order in customer brochures or consumer information on their websites. Instead, their practices are found in the fine print of

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[20] Comptroller of the Currency, Interpretive Letter #997, August 2004, 12 USC 24(7), 12 CFR 7.4002.
[21] Comptroller of the Currency, Interpretive Letter #916, May 22, 2001.
[22] Findings of Fact, "Paul Miller vs. Bank of America N.T. and S.A., Superior Court of California, County of San Francisco, Case No.: CGC-99-301917, page 13.
[23] Office of Thrift Supervision, Guidance on Overdraft Protection Programs, February 14, 2005, p. 15.
[24] Dept. of Treasury, Joint Guidance on Overdraft Protection Programs, February 15, 2005, p. 13.
[25] CFA was unable to obtain an account agreement from National City Bank and is relying on findings from the 2005 Bank Fee report that included National City Bank as processing high to low. PNC Bank did not provide an account agreement but confirmed its high to low processing order via electronic communication.

account terms and conditions that are hard to obtain at bank branches and on some bank websites. (See Appendix C for full text of bank processing terms and citations.)

Seven of the largest banks state that they process withdrawals largest first, while six banks claim to use any order they choose even if that results in more overdrafts for their customers. Given these disclosed terms, it is highly likely that all of the ten largest banks pay withdrawals high to low. Four of the ten also state that the bank can change processing order at any time without notice to its customers. The only large bank that processes payments smallest first is CitiBank at its branches in Texas.

Fifth Third Bank states that "Bank (not Customer) has the right to decide the order of the items that will be paid and which items will be returned, if any." SunTrust Bank tells customers "We may choose our processing method at our discretion, regardless of whether additional fees or penalties will result." U.S. Bank lays out its options, then states "We have all these options each time you might overdraw an account. What we do one time does not make a rule you can rely on for the future." WaMu states "we may process payment to us or any of our affiliated companies first." CitiBank divulges that it pays for securities purchased from Smith Barney before paying checks in the order of largest to smallest dollar amounts.

Bank	**Pay High to Low**	**Pay Smallest First**	**Pay in Any Order**
Bank of America	X		X
Chase	X		X
CitiBank	X	Texas only	
Fifth Third	X		X
National City	X (2005)		
PNC	X		
Sun Trust			X
U.S. Bank			X
Wachovia	X		X
WaMu			X

(See Appendix C for Bank Account Agreement Terms)

Consumer Groups Urged Bank Regulators to Use FTC Act when Banks Process High to Low while Paying Overdrafts

In 2005 CFA, along with Consumers Union, U.S. Public Interest Research Group, the Center for Responsible Lending and the National Consumer Law Center, wrote to federal bank regulators to urge stronger protections against unauthorized overdraft loans. We reported that nearly half of the largest banks disclosed using high to low debit clearing which causes more fees to be levied when the largest check processed causes other transaction to bounce. We noted that big banks justify high to low check clearing as serving consumers who want their largest and most important transactions to be paid but that banks that routinely pay overdrafts cannot use that justification. We stated that banks that provide overdraft "bounce" loans while also using processing order to enhance overdrafts are using unfair practices to enhance revenue at the expense of their customers. We urged the Agencies to bring Federal Trade Commission Act cases against banks that order debit processing to maximize fee revenue while routinely covering overdrafts for their account holders.[26]

The reply from the agencies was written by a Federal Reserve official stated that "depending on the circumstances there may be a trade off between a policy that results in fewer fees and a policy that may help to ensure that the customer's largest and most critical transactions are paid…Institutions generally impose a dollar limit on the total amount that an account can be overdrawn…an institution that pays items from smallest to largest may be unable to pay the consumer's largest and most significant obligation if the total amount of overdrafts and fees exceeds the limit established for the account when the largest transactions are presented for payment."[27]

As the largest banks' customer agreements quoted verbatim in Appendix B and C illustrate, banks do not disclose the dollar limit on overdrafts and do not give consumers clear information on the order in which payments are deducted from accounts. CitiBank even notes that payments to its investment arm Smith Barney take precedence over paying the mortgage. Most large banks reserve the right to process withdrawals in any manner they choose and to change processing order at any time without warning or consent. Consumers can have no reliance on bank processing order to game the system for reliable payment of multiple transactions that arrive at the bank on the same day. Given that a mortgage payment or other recurring big ticket item is a once a month event, a bank's practice every day of deducting the largest transaction first, resulting in multiple small transactions that trigger overdraft fees, is not persuasive that the bank has the consumer's best interest at heart.

If low-balance consumers want to be sure that their largest and most important payments are honored, they can sign up for banks' contractual and lower-cost overdraft protection products, including transfers from savings, a line of credit, or transfer to a

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[26] Letter from CFA, and others to FRB Chairman, Comptroller of the Currency, FDIC, and OTS, June 8, 2005. Available at: http://www.consumerfed.org/pdfs/bounce_loan_regulator_letter.pdf
[27] Letter from Sandra F. Braunstein, Federal Reserve, to Jean Ann Fox, CFA, July 12, 2005. On file with CFA.

credit card. In our opinion, the real purpose for clearing the largest transactions first is to maximize the imposition of multiple overdraft fees for low balance customers. That method has been touted in the past by bank profit consultants as a way to bolster overdraft and NSF fee revenue, not as a "consumer protection."

CFA Poll Shows Consumers Disagree With Banks on Processing Order

CFA polled consumers on their views about check clearing order in a national 1998 Opinion Research Corporation International poll. While bankers claim that consumers want banks to clear the largest transaction first, to make sure the mortgage, insurance or car payment is covered, consumers say they want banks to clear checks in the order in which the bank receives them (65 percent) or to pay the smallest checks first to minimize the number of checks that bounce (16 percent). Only 13 percent agreed with bankers that they wanted banks to "pay the largest checks first, since those may be the most important."[28]

Proposal on Debit Holds Should be Expanded to Deposit Holds

The Agencies propose a narrow provision to prevent overdraft fees from being imposed if a merchant's debit hold is not for the final amount expended. For example, this happens at gas stations or hotels when a hold may be larger than the actual expenditure. Since the bank does not actually have to pay the debit until it is received by the bank, there is no reason a bank should be able to levy a fee for a phantom overdraft or insufficient funds transaction. The Agencies should expand this provision to apply both to overdraft and insufficient funds fees, since consumers should not have to pay either fee due to debit holds.

Banks should also be prohibited from charging an overdraft or NSF fee when the hold on a cleared deposit causes subsequent transactions to overdraw the account. The time period for holding deposits has not changed since the Expedited Funds Availability Act took effect in 1990. Banks can hold deposited checks for days after the deposit actually clears, depriving consumers of access to their hard-earned money and permitting banks to layer on NSF and overdraft fees on transactions that would be covered by deposited funds. Banks are even permitted to hold cash deposited over the counter for one day before the funds become available to cover checks written. That is unfair and should be addressed by the Agencies in this docket and by the Federal Reserve in updating its rules on funds availability. We concur in the unfairness analysis on deposit holds included in comments filed by Consumers Union.

FTC Act and Standards for Determining If a Practice is "Unfair"

We concur with the FRB/OTS/NCUA legal analysis that overdraft "services" cause substantial injury to consumers, one of the standards of an unfair trade practice as covered by the FTC Act and the Commission's rules on what constitutes an unfair

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[28] Insufficient Bank Funds Fees, ORCI Caravan Poll conducted for Consumer Federation of America, May 7, 1998.

practice. The same analysis should extend to bank insufficient funds fees where appropriate.

The FTC's credit practices rule describes as unfair several parallel transactions to overdraft loans. The Agencies should consider an unauthorized overdraft loan that is repaid out of direct bank access to the next deposit of family funds as an unfair trade practice. We have called for the Federal Trade Commission to extend its rules against wage assignments to payday loans which are the modern equivalent of a wage assignment that cannot be canceled. Just as payday loans are based on paychecks and benefits direct deposited into bank accounts, banks that "attach" the consumer's next deposit of pay or benefits should not be permitted to use set-off to repay loans.

Comment on Other Issues in Reg. AA Proposal

The Agencies are considering letting banks charge overdraft fees if the institution did not "knowingly" authorize a transaction that resulted in an overdraft. If banks don't know the consumer's real-time account balance, it is unreasonable to expect consumers to be able to keep track, given the many electronic ways funds are paid out of an account and the vagaries of deposit holds. The rule should not permit banks to collect fees for an overdraft if the bank permitted the transaction to overdraw the account. Small banks that still do batch processing would have a financial incentive to enroll its accountholders for a modest line of credit to cover any overdrafts that occur and cannot be detected under current off-line procedures. Small bank deficiencies should not be an excuse to charge consumers $34 for a $5 overdraft loan that the bank permitted. We urge no exceptions.

The Agencies propose a notice to consumers both before the institution assesses a fee or charge for paying an overdraft and at least once during or for each periodic statement cycle in which any overdraft fee or charge is assessed. We support a requirement that banks provide the opt-out notice (preferably an opt-in notice) once per statement period when an overdraft was charged. But, requiring a notice only once per statement period is insufficient. Consumers should get a take-action notice every time an overdraft or series of overdrafts is charged. Since the majority of large banks charge sustained overdraft fees that start within a few days, banks should be notifying accountholders of overdrawn status and can easily include the notice to opt out.

Implementation Time Period

The Agencies requested comment on when final rules should be effective and whether a one-year time period is appropriate. We urge the Agencies to implement overdraft protections as quickly as possible.

Conclusion

We appreciate the opportunity to comment on proposed additions to Reg AA to apply the FTC Act to unfair bank practices involving unauthorized overdraft loans. We urge regulators to strengthen the proposals by requiring banks to get their customers' affirmative consent to be enrolled in the banks' most expensive credit product which is currently provided under one-sided and obscure terms. The Federal Reserve should repeal the obsolete provision of Reg Z which permits banks to ignore Truth in Lending Act disclosures as long as overdrafts are discretionary on the bank's part and cost the same as bounced checks. The low and moderate-income cash-strapped families who pay most overdraft loans need clear cost disclosures and protection against bank practices that rig the system in banks' favor and result in unnecessary fees, including ordering withdrawals high to low and permitting debit and deposit holds to trigger fees.

Our goal should be to make it safe for consumers to use bank accounts to handle their daily financial transactions. At a time when the federal government requires federal benefit recipients to receive exempt funds through direct deposit to accounts at depository institutions and public policy strongly encourages consumers to be banked, the least bank supervisors can do is make sure it is safe for low-balance consumers to have and use bank accounts. Our goal should also be to treat all forms of small cash loans under the same set of rules to enable consumers to make informed choices about credit options. Overdraft loans are the bank-equivalent of payday loans. At the very least, banks should have to comply with the same federal credit laws that apply to payday lenders, pawn shops, and small loan companies.

Sincerely,

Jean Ann Fox
Director of Financial Services
Consumer Federation of America

Edmund Mierzwinski
Consumer Program Director
U. S. Public Interest Research Group

Steve Cleary
AkPIRG (Alaska)

Phyllis Rowe
Arizona Consumers Council

Lynda DeLaforgue
Citizen-Action, Illinois

Robin Acree
GRO-Grassroots Organizing, Missouri

Sue Berkowitz
South Carolina Appleseed Legal Justice Center

Randall Chapman
Texas Legal Services Center

Irene Leech
Virginia Citizens Consumer Council

Jay Speer
Virginia Poverty Law Center

Appendix A

Big Ten Bank Overdraft Loan Fees and Disclosures[29]

CFA staff and volunteers attempted to collect overdraft and NSF fee information and account agreements from the largest ten banks early summer 2008. We encountered the same difficulties in getting fee schedules and account agreements as described by the GAO in its report to Congress[30]. In order to get a copy of Wachovia Bank's terms and conditions with overdraft fee information, a CFA staff member had to prove he had an account at the bank. We had to comb through the fine print of multi-page account agreements to find fee and overdraft practice information. Examples:

Bank of America has a colorful brochure on lobby racks titled "Our account fees explained" which describes overdraft item and NSF Returned Item fees but does not mention what the fees are. To find out the fees, CFA requested a copy of the 12-page Personal Schedule of Fees from a bank teller. On page 8, the Overdraft Items and NSF: Returned Item fees are listed as $25 per item for the first day of an occurrence and $35 each for subsequent overdrafts. This brochure also states that Bank of America will impose up to seven overdraft fees per day which can total $245 for a string of small debit card purchases that overdraw the account on one day.[31]

In 2005, Bank of America charged $19 each for the first two overdrafts, $31 for the third to fifth overdraft, and $34 for six or more overdrafts in a year. The per-day limit on overdrafts in 2005 was five.

Chase does not provide overdraft fee information in literature available at the branch or on its website. The Chase Account Rules and Regulations 47-page booklet does not contain a fee schedule provided separately. CFA had to call the bank to learn the fees for both paid and unpaid overdrafts and return to a branch to ask that the fee schedule be printed out. Chase charges $25 for the first overdraft in a thirteen month period. Two to four overdrafts cost $32 each, with the fifth and subsequent overdrafts costing $35 each.[32] If an overdraft is unpaid for five consecutive business days, Chase adds $12.50 per occurrence, defined as a day with at least one insufficient funds or returned item. The bank's brochure mentions Overdraft Protection for contractual services including transfers from savings and onto credit cards, with the transfer fees free for Chase Premium Platinum Checking.[33] Chase's website touts contractual overdraft protection

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[29] 2005 fee information from CFA report, "Overdrawn: Consumers Face Hidden Overdraft Charges From Nation's Largest Banks, June 9, 2005, pages 25 and 26.

[30] GAO Report: "Bank Fees. Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts." January 2008. GAO-08-281.

[31] Bank of America, "Our Account Fees Explained," 91-11-3800B(02/07), from Arizona branch. Bank of America "Personal Schedule of Fees," Arizona, 03-11-3000B, 02/2008, pages 8 and 9.

[32] Chase "Deposit Personal Fees" print out from branch in Arizona. http://products.bankone.net/ProductReferenceGuide/Cards/Fees/PersonalFees/AZMiscPersonalFees020108.html, printed 7/29/08.

[33] Chase, "Welcome to a Better Banking Experience," BR-PRODSUM508, page 3, provided in Arizona.

with a footnote explaining that credit cards and lines of credit used for Overdraft Protection are subject to credit approval and that fees apply.[34]

In 2005 JPMorganChase charged $30 per overdraft, without using tiered fees. Its subsidiary Bank One, NA in 2005 charged $30 per overdraft plus a $5 sustained overdraft fee after five days.

CitiBank discloses its overdraft and other service fees on page 22 of its Marketplace Addendum, a separate publication to the Client Manual. Citi charges $30 for "Check/Item Returned/Paid Against Insufficient/Unavailable Funds (overdraft). (An insufficient funds item may be created by check, in-person withdrawal, ATM withdrawal or other electronic means.)" This fee applies to both regular and Citigold accounts.[35]

This is the only large bank in our survey that has not increased its fee in the last three years. In 2005, CitiBank charged a flat fee of $30 per overdraft.

Fifth Third Bank includes its overdraft fees in the glossy brochure on checking accounts and on its website in the description of Fifth Third Free Checking account terms. The bank charges $33 per item that overdraws an account plus $6 per day the account is overdrawn after three days.[36] In 2005, this bank charged $30 per overdraft and the $6 per day sustained overdraft fee after one day.

National City Bank charges both an overdraft and sustained overdraft fee. The initial overdraft fee ranges from $30 to $36 per item, depending on previous overdraft or insufficient funds activity, length of account relationship and account balances. National City's fee schedule does not spell out those factors and the bank does not post an account agreement on its website for more information. National City Bank charges $8 per day for continuous overdrafts when accounts remain overdrawn more than three consecutive days. No limit on the number of overdraft fees per day is given in the fee schedule.[37]

In 2005, National City Bank's overdraft fee was $30 to $36 plus $6 per day after five days.

PNC Bank refused to email an account agreement or overdraft information to a CFA staff member and account and fee information was not available on PNC's website. PNC requires a prospective accountholder to visit a bank branch to receive account information. A schedule of fees brochure at a branch in DC discloses that PNC charges $31 each for one to three overdrafts, $34 for four to six, and $36 for seven or more overdrafts over a one year period. This tiered fee schedule took effect May 2, 2008. Prior to that PNC bank charged $31 per item. PNC also charges $6 per day each day an

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[34] Chase Personal-Banking – Overdraft Protection, visited May 30, 2008.
[35] CitiBank, "Marketplace Addendum," Item Us70002SE-CNPMD (Rev. 9/07) Pkg. 25, page 22.
[36] Fifth Third Bank, "Checking Accounts," Special Fees That Apply to All Accounts" 10/07, 652524.
[37] National City Bank, Pricing Schedule Personal Accounts, Effective April 28, 2008, page 3.

account is overdrawn after four consecutive calendar days up to a maximum $30 sustained overdraft charge.[38]

In 2005 PNC Bank charged $31 per overdraft and $15 sustained overdraft fee after nine days.

SunTrust charges $35 for each overdraft as well as an additional $35 imposed on the 7th day when an account remains overdrawn for 7 consecutive calendar days. No limit is given on the number of overdraft fees the bank will charge in one day.[39] The Bank can change fees at its own discretion. Fees are deducted from an account without prior notice to the customer. In 2005, SunTrust charged $32 per overdraft plus another $32 sustained overdraft fee after seven days.

U.S. Bank posts its Service Fees and deposit account agreement on its website. The fee schedule notes the first overdraft fee in a 12-month period costs $19. Two or more overdrafts cost $35 each and five or more cost $37.50 per item. If an overdraft is not paid within three days, U.S. Bank charges $8 per day "continuous overdraft fee" beginning on the fourth calendar day. U.S. Bank will charge up to six paid overdraft items and six returned items for a total of twelve fees per day. For a customer who has overdrawn more than once, the total cost can be as much as $450 in fees for one day.[40]

In 2005 U.S. Bank charged $30 per overdraft for the first three occurrences in one year, rising to $34 for the fourth or more overdrafts and $7 per day sustained overdraft fee after three days.

Wachovia's schedule of fees and funds availability document is not available on the bank's website. To get a copy, a consumer has to be applying to open an account or already be a bank customer. Wachovia charges $22 for the first overdraft occurrence over a thirteen month span and $35 each for additional overdrafts, with no limit on total overdrafts charged per day. An "occurrence" is a business day with at least one insufficient funds/unavailable funds/overdraft item. The per item overdraft fees apply to checks, in-person withdrawals, ATM withdrawals, point-of-sale transactions, or other paper or electronic transactions.[41]

In 2005 Wachovia charged a flat $30 per overdraft.

Washington Mutual (WaMu) gives one free overdraft to WAMU Free Checking customers, but then charges $34 for each overdraft up to five per day for a total of $170 per day. Fee information is provided in a two-page fee brochure.[42] WaMu customers can

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[38] PNC Bank Account Information Consumer Schedule of Service Charges and Fees, Effective March 1, 2008.
[39] SunTrust, "Personal Accounts Fee Schedule," Greater Washington and Maryland, page 3.
[40] U.S. Bank Service Fees – Arizona, Effective February 11, 2008, accessed online May 21, 2008, page 5 and 6.
[41] Wachovia, Schedule of Fees and Funds Availability for Personal Accounts, District of Columbia, Effective July 16, 2007. Provided to CFA staff member after proving he had an account at the bank.
[42] WaMu, "Our Fees and Frees," Statement of Fees for Utah Accounts, 5666 (04/08), page 1.

set up account alerts to warn via email or cell phone when the account balance goes below the amount specified by the customer. In 2005 WaMu charged $22 per overdraft.

Appendix B

Big Bank Contract Terms That Permit Payment of Overdrafts[43]

Bank of America

Insufficient Funds-Overdrafts

Overdraft Fees and Returned Items Fees

You can avoid fees for insufficient funds and the possibility of returned items by ensuring that your account contains sufficient available funds for all of your transactions. We offer tools to help you avoid overdrafts and returned items on your account......

When you do not have enough available funds in your account to cover a check or other item, then we consider the check or other item an insufficient funds item. If you have enrolled in one of our overdraft protection plans and have enough available coverage under the plan, we transfer funds to cover the item. Otherwise, we may, without notice to you and in our sole discretion, either pay or permit the insufficient funds item and overdraw your account or we may return, decline or reject the insufficient funds item without payment. In any case, we may charge you a fee for each insufficient funds item whether we pay, permit, return, decline or reject the item. We may also charge you an overdraft fee for overdrafts created by fees or by deposited items that are returned to us unpaid. The applicable overdraft item fee and returned item fee is listed in the Schedule of Fees for your account.

Whether we pay, permit, return, decline or reject an insufficient funds item depends on a number of factors, including the amount of the item and the past activity in your account. If we overdraw your account, you agree to repay us immediately, without notice or demand from us. We may use deposits you or others make to your account to pay overdrafts, fees and other amounts you owe us. If we pay insufficient funds items by overdrawing your account on one or more occasions, we are not obligated to continue paying any future insufficient funds items. We may stop paying your insufficient funds items and decline, reject or return them unpaid without cause or notice to you.

Insufficient funds items include all orders and instructions for the payment, transfer, or withdrawal of funds from your account. As examples, an insufficient

[43] All indented text below is verbatim from bank contracts and other bank publications.

funds item includes a check, draft, demand draft, image, substitute check, image replacement document, electronic item (such as an ACH, ATM or point-of-sale instruction to withdraw funds), preauthorized payment, automatic transfer, telephone-initiated transfer, Online Banking transfer or bill payment instruction, withdrawal slip and in-person payment, transfer or withdrawal instruction.

Please note that funds in your account are not available to cover a check or other item if we determine that they are subject to a hold, dispute or legal process that prevents their withdrawal at the time the check or other item is presented to us for payment."[44]

Chase

Insufficient Funds:
We have no obligation to pay or honor any item or withdrawal request unless it is drawn or requested against available funds credit to your Account at the opening of business on the day the item is presented for payment or the request is received, even if we paid an item or honored a withdrawal request drawn or requested against insufficient funds in the past. If we pay an item or honor your request that overdraws your Account, a deposited item has been returned unpaid, or for any other reason your Account has become overdrawn, you agree to pay the amount of the overdraft together with any fee and accrued interest identified in this Agreement immediately, whether or not you signed or requested the withdrawal or participated in the transaction creating the overdraft.

You hereby authorize us to apply any subsequent deposit to the Account against the amount of any overdraft and resulting fees or charges, including any federal or state benefit payments that you choose to deposit in any Account (including direct deposit of Social Security." You understand and agree that if you do not want your benefits applied in this way, you may change your direct deposit instructions to the benefits payor at any time.[45]

CitiBank

Overdrawing Your Account.
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In the even of insufficient funds to pay your checks, we may return your checks and charge you a fee. At our sole discretion, we may create an overdraft by paying the check or permitting the transaction. Either way, there will be a service charge. (See *Service Fees and Charges section of the Marketplace Addendum.*) Each account owner is jointly and severally responsible for paying any overdrafts created by any authorized signer(s) or party to the account, whether or not the owner participates in the transaction or benefits from its proceeds. We have a line of credit called Checking Plus, which will cover these checks and prevent

[44] Bank of America, Deposit Agreement and Disclosures, February 1, 2008, pages 19 and 20.
[45] Chase, "General Account Terms and Conditions," Catalog #40803, Arizona, page 26.

returned or "bounced" checks. We also have Safety Check, which lets you link a Money Market or Day-to-Day Savings account to cover overdrafts or use of uncollected funds in your checking account.[46]

Fifth Third Bank

11. In case of overdraft or overpayment of any account, whether by error, mistake, inadvertence, or otherwise, the amount of such overdraft shall immediately be paid to the Bank. An overdraft fee may be assessed by the Bank whether Bank pays the item or not...If the collected funds in any Customer account plus available credit in a related overdraft protection plan is insufficient, at any time to pay all items authorized or (including, but not limited to, a check, ACH, ATM, over-the-counter, bill payment, or other debit transactions) presented for payment on the account, the Bank may, at its option, pay or return any item regardless of the order of presentment of items, or whether payment creates an overdraft. Customer acknowledges that the amount authorized and the amount presented for payment may be different. Customer agrees to immediately pay to Bank the amount of any overdrafts, plus any fees assessed on the account. Customer agrees and acknowledges that such payment does not constitute an application for credit and that the amount of deficiency, whether from the amount of the overdraft(s) or any fees assessed, in the account is immediately due and payable without further demand.[47]

National City Bank

CFA was unable to obtain a Personal Account Agreement in 2008. According to the 2005 CFA survey of large banks, National City contract language authorized the bank to pay overdrafts for a fee.

PNC Bank

CFA staff member was unable to get an account terms and conditions booklet at a PNC branch in the District of Columbia. The bank's online service representative declined to forward one via email. Account terms and conditions are not available on the Bank's website. In 2005, PNC contract terms permitted paid overdraft transactions.

SunTrust Bank

Insufficient Funds. Checks or other items drawn against *insufficient funds* in your Account, which have not been covered by overdraft protection, are subject to a penalty, also referred to as a fee, set forth in the Bank's then current fee schedule. This penalty will be charged to your Account. We may determine whether your

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[46] CitiBank Client Manual Consumer Accounts, U.S. Market Effective July 15, 2007, page 33.
[47] Fifth Third Bank, Rules and Regulations Applicable to All Fifth Third Accounts and Cards, March 2008, page 5.

Account contains sufficient funds to pay a check or other item at any time between the time the check or other item is received by us and our return deadline, and only one determination of the Account balance is required. The Bank under no circumstances shall be required to examine or consider balances which you may maintain in your other Accounts. If that determination reveals insufficient funds to pay the check or other item, we will not be required to honor the check or other item and may return it. Alternatively we may honor the check or other item and *create an overdraft.*

However, honoring one or more overdrafts does not obligate us to honor any future overdrafts, and you should not rely on us to honor an overdraft.

We are not required to send you prior notice on checks returned for insufficient funds. You agree to deposit sufficient funds to cover any overdraft and any penalties assessed immediately upon notice of any overdraft, and to reimburse us for any costs, including but not limited to reasonable attorney's fees, we incur in collecting any overdraft from you.[48]

U.S. Bank

Insufficient Funds and Overdrafts

"Overdraft" means a transaction has caused the available balance on an account to become a negative number. An overdraft can happen, for example, if:

- We [we pay a withdrawal item, that is more than your available or collected account balance;
- A deposit you made and on which we let you make withdrawals gets reversed; or
- A charge is made to your account that exceeds your available balance.

Our Options: When an item of yours overdraws an account, we can either pay or refuse to pay the item.

Our Fees:...An overdraft fee is assessed for each item or transaction that causes the available balance to become negative or occurs while the available balance is negative on the checking account.

Your responsibilities: If you have an overdraft, you must deposit enough money into your account to pay the overdraft and the fees we charge, and you must do so immediately. If you share ownership of your account with someone else, you are responsible to us for the overdraft, whether or not you personally caused the overdraft or benefitted from it. You have the option to direct us to return overdraft items, but you may still be charged an insufficient funds fee for returned

[48] SunTrust Rules and Regulations for Deposit Accounts, page 17.

items. If you wish to request all overdraft items be returned contact your branch of account of call U.S. Bank 24 Hour Banking.[49]

Wachovia

13. Insufficient Funds/Overdrafts. We may determine whether or not your account contains sufficient funds to pay a check or other item, authorize a point-of-sale transaction, in person withdrawal, ATM withdrawal, or process any other electronic transaction at any time between the time we receive the check or other item, point-of-sale transaction authorization request, in person withdrawal, ATM withdrawal , or other electronic transaction and our return deadline, and only one determination of the account balance is required. If that determination reveals insufficient available funds to pay the check or other item, or in person withdrawal, authorize the point-of-sale transaction, or process the ATM withdrawal, or other electronic transaction you agree to pay a service charge, and we are not required to honor the check or other item, or in person withdrawal, authorize the point-of-sale transaction, or ATM withdrawal, or process the other electronic transaction and may return and/or decline it. Alternatively, we may honor the check, other item, or in person withdrawal, authorize the point-of-sale transaction, or ATM withdrawal, or process the other electronic transaction and create an overdraft and impose a service charge for paying the overdraft. You are responsible for the full amount of any overdraft and the related service charges. We can enforce overdraft liability in the joint account against any joint owner individually (and each joint account owner agrees to be liable for all overdraft liability in the joint account), even if the joint owner did not sign the item or authorize the point-of-sale or other electronic transaction creating the overdraft or receive any benefits from its proceeds. You agree to deposit sufficient funds to cover the overdraft and the related service charge immediately upon notice of the overdraft and to reimburse us for any costs we incur in collecting the overdraft from you including, without limitation, reasonable attorneys' fees and the costs of litigation to the extent permitted by law. However, the honoring of one or more overdrafts does not obligate us to honor any future overdrafts, and you should not rely on us to honor an overdraft even if we have done so in the past. Moreover, we are not required to send you prior notice on checks returned for insufficient funds.[50]

WaMu

Non-sufficient Funds Transactions Including Overdrafts
NSF Transactions: If the Available Balance in your account is not enough to cover a transaction, we may pay, authorize or reject the transaction. We call these Non-Sufficient Funds (NSF) Transactions. Types of NSF Transactions include any transfer or withdrawal request, such as, checks, ATM withdrawals and transfers, Debit Card purchases and electronic bill payments.

[49] U.S. Bank Deposit Account Agreement, accessed online May 21, 2008, page 9 and 10.
[50] Wachovia Deposit Agreement and Disclosures for Personal Accounts, February 8, 2008, page 10.

We may choose when to determine if the Available Balance is enough to cover a transaction. For example, we may make this determination when we receive a transaction, when we process it, when we receive notice of it, or when we receive a request to authorize it. We will not be liable to you based on our determination that a transaction is an NSF Transaction even if the Available Balance is enough to cover the item at a different time. We also will not be liable to you for paying, authorizing or rejecting a transaction regardless of whether we have established an Overdraft Limit or you have requested that we do not establish an Overdraft Limit.

Fees: Whether we pay or reject an NSF Transaction, we will charge you a fee. Fees will be assessed regardless of the amount of the NSF Transaction.

- Overdraft Charge if we pay an NSF Transaction, or
- Any of these fees may be charged at any time, including on the day the NSF Transaction occurs, the day we make the determination that it is an NSF Transaction or any day after that.

Overdrawn Balance Immediately Due: You agree to pay any overdrawn amount immediately and without notice or demand. We may require you to make payment in cash or other good funds (such as a cashier's check). We may also exercise our right of offset by taking money from any other account you (or any of you if there is more than one accountholder) have with us...If you do not pay us immediately, we may close your account at any time without notice, except where notice may be required by law. This is in addition to any other rights we have to close your account.

Overdraft Limit (OD Limit): We may set an OD Limit on your account to help us make the decision to pay or not to pay an NSF Transaction. If we set an OD Limit, we may pay (or authorize) an NSF Transaction up to the amount of the OD Limit, but we are not obligated to do so. When we determine whether the OD Limit has been reached, we may include any charges to your account, for example, prior overdrafts, the current NSF Transaction, and any other deductions from your account, like fees or returned deposited items.

If we set an OD Limit, we may list it on your statement. If we do, it will be accurate as of the statement end date. We may have changed it since that date, even before you receive your statement.

The OD Limit is not a line of credit. You still must pay any overdrawn amount immediately and without notice or demand. The OD Limit is provided at our sole option, and we may increase, decrease, or remove it at any time without notice. We may also choose not to pay (or authorize) a particular NSF Transaction at any time without notice, even if we have in the past, and even if the OD Limit has not been reached.

You can ask that we do not use an OD Limit on your account. Just call us or visit your local financial center. If we do not set an OD Limit, we may still pay or authorize NSF transactions, and your account may still become overdrawn due to NSF Transactions or other deductions from your account.[51]

Appendix C

Big Bank Processing Order Disclosures

Bank of America:

Processing and Posting Orders When you do not have enough available funds to pay all checks and other items on a given day, we may pay or permit one or more checks or other items, and decline, reject or return others, in any order we deem appropriate. Some posting orders may result in more insufficient funds items and more fees than other orders....[52]

Processing and Posting Orders We may determine in our discretion the order of processing and posting deposits, fees, charges, checks, debits and other items to your account. We may credit, accept, pay, certify or return depsoits, fees, charges, checks, debits and other items arriving to your account on the same day in any order at our option. We may give preference to any fees, charges, checks, debits or other items payable to us. We may change our processing and posting orders at any time without notice to you. ....

When you do not have enough available funds in your account to cover all of the items presented that day, some posting orders may result in more insufficient funds items and more fees than other orders. We may choose our processing and posting orders regardless of whether additional fees may result. If you want to avoid fees for insufficient funds and the possibility of returned items, you should ensure that your account contains sufficient available funds for all of your transactions.

Even if we provisionally post deposits, fees, charges, checks, debits or other items to your account during the day, we may treat them as if we received all of them at the end of the day and post them in any order we choose. We do not process and post transactions in the order in which they occurred.

In most states we process and post items within each category from the highest to lowest dollar amount. If you do not have enough available funds to cover all of your transactions on any given day, the high-to-low posting order may result in

[51] WaMu Account Disclosures and Regulations, page 9.
[52] Bank of America, ibid, page 20

more insufficient funds items and more fees than may have resulted if we had used another posting order.[53]

Chase

Items will be posted to your Account in highest to lowest dollar amount each business day (Monday through Friday, federal holidays not included). However, certain transactions like wire transfers may be posted before others. We reserve the right to change this posting order without notice. We may assess a fee for any item or withdrawal request, such as a check, in person withdrawal, ATM withdrawal, or other electronic means, when there are insufficient funds in your Account based upon the posting method identified above, whether or not the item is paid or the request honored, or whether or not an overdraft to your account has occurred. We may assess an additional fee for overdraft balances that are not promptly repaid and/or charge interest for any overdraft on your Account. You agree to pay all costs and expenses, including attorney's fees, incurred by us in the collection of any overdraft.[54]

CitiBank

Overdrawing Your Account. In the event the available balance in your account is insufficient to cover your day's transactions, we generally will utilize the following payment hierarchy:

We pay all electronic debits (ATM withdrawals, ACH debits, online bill payments, and point-of-sale transactions) first. We then process all debits for purchasing of securities through Smith Barney. If available funds remain after processing these transactions, we pay your checks in the order of largest to smallest dollar amount. For accounts maintained with a Financial Center located in the State of Texas, we will pay your checks in order of the smallest to the largest dollar amount.[55]

Fifth Third Bank

If multiple items are presented to the Bank for payment and there are not sufficient collected funds to pay all of those items, Bank (not Customer) has the right to decide the order of the items that will be paid and which items will be returned, if any. Bank may select any payment order at any time, which may include paying the largest items first such as your mortgage, rent or car payment.[56]

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[53] Id, page 18.
[54] Chase, "General Account Terms and Conditions," Arizona, page 26
[55] CitiBank, Client Manual, ibid, page 32-33.
[56] Fifth Third Bank, Rules and Regulations Applicable to All Fifth Third Accounts and Cards, March 2008, page 5.

National City Bank

CFA did not obtain a Personal Account Agreement from National City Bank. In 2005, the bank paid withdrawals high to low.

PNC Bank

Since account terms and conditions are not available at the branch or online, CFA exchanged email with PNC bank and was told that the bank pays higher transactions first. The explanation provided CFA's staff member: "It was determined that larger transactions that come through our customers accounts are items such as mortgage payments, car payments, insurance payments, tuition, etc. With these in mind, it was decided that it would be best to pay these larger transactions first, to insure that they are paid, and if items needed to be returned, we would not be returning your more important transactions."[57]

SunTrust Bank

Checks and Other Debits: We may credit items to and debit other items from your Account in any order determined by us, including debiting items from largest to smallest dollar amount. We may establish processing priorities for checks and other items. For example, we may process cashed checks, ATM withdrawals, Check Card purchase debits, and automatic payments before other incoming checks or debits. We may change the priority or order at any time without notice to you. If you do not have sufficient funds available in your Account to pay all items presented on a given day, some processing methods may result in more insufficient funds or unavailable funds penalties than other methods. We may choose our processing method at our discretion, regardless of whether additional fees or penalties may result.[58]

U.S. Bank

Our Options: When an item of yours overdraws an account, we can either pay or refuse to pay the item.

If we get a batch of such items in a day (checks typically come in batches), and if one, some or all of them would overdraw the account if paid, we can pay or refuse to pay them, in any order, or no order. For example, if one large check and six small checks are offered to us for payment, and the one large check would empty the account, we can:
(1) pay the one large check and refuse to pay the six small checks;
(2) pay the small checks and refuse to pay the large check;
(3) pay all of them, creating an overdraft; or
(4) pay some and reject others.

[57] Email communication from PNC Bank Customer Service office to CFA staff member, May 22, 2008.
[58] SunTrust Rules and Regulations for Deposit Accounts, 316012 (3/07), page 14.

We have all these options each time you might overdraw an account. What we do one time does not make a rule you can rely on for the future.[59]

Wachovia

12…Withdrawals are generally made first from finally collected funds and, unless prohibited by law or by our written funds availability policy, we reserve the right to refuse to pay any check or other item drawn against uncollected funds, impose a special fee for each such item, or both. We may pay checks or other items drawn upon your account (including those payable to us or on which we may be liable) in any order determined by us, even if (1) paying a particular check or item results in an insufficient balance in your account to pay one or more other checks or other items that otherwise could have been paid out of your account; or (2) using a particular order results in the payment of fewer checks or other items or the imposition of additional fees. Although we generally pay larger items first, we are not obligated to do so and, without prior notice to you, we may change the order in which we generally pay items.[60]

WAMU

Order of Processing Transactions
We may process and account for transactions on your account received on the same Business Day in any order we want. This may not be in the order you initiated them. This applies to all types of transactions – credits, debits (e.g., fees, checks, ACH, ATM, Point of Sale or other electronic transactions) and returns. For example, we may process payment to us or any of our affiliated companies first.

The order of processing may affect which transactions are paid or returned and the fees that may be charged if the Available Balance in your account is not enough to cover all your transactions.[61]

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[59] U.S. Bank Deposit Account Agreement, pages 9 and 10.
[60] Wachovia Deposit Agreement, page 10.
[61] WaMu "Our Account Disclosures and Regulations," Effective February 2008, 5873 (04/08), page 9

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General Comment

To view comments, please see attachment.

Attachments

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