Comments to the

Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Office of the Comptroller of the Currency, Treasury

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Proposed Agency Information Collection Activities

by

Center for Responsible Lending

The Center for Responsible Lending (CRL) is a not-for-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, which consists of a state-chartered credit union (Self-Help Credit Union (SHCU)), a federally-chartered credit union (Self-Help Federal Credit Union (SHFCU)), and a non-profit loan fund. SHCU has operated a North Carolina-chartered credit union since the early 1980s. Beginning in 2004, SHCU began merging with community credit unions that offer a full range of retail products. In 2008, Self-Help founded SHFCU to expand Self-Help's mission. CRL has consulted with Self-Help's credit unions in formulating these recommendations.

I. Introduction

We welcome the proposal by the Federal Reserve Board (the Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) (collectively, the Agencies) to revise Call Report requirements to include separate reporting of overdraft-related fees.

As the Agencies note, Call Report data is used for "monitoring the condition, performance, and risk profile of individual institutions and the industry as a whole," including "identifying areas of focus for on-site and off-site examinations . . . and other public policy purposes."[1] We limit the scope of our comments to the reporting of overdraft-related fees and revenue derived from bank payday lending, or "deposit advance" products, both of which warrant heightened attention from examiners because they pose clear safety and soundness and policy concerns.

Summary of Recommendations:

Overdraft-related fees:

- We support the Agencies' proposed requirement that banks report overdraft-related fees as a separate component of service charge income.
- We urge that the Agencies require banks to report separately the two components of overdraft-related fees: overdraft fees (fees charged on paid items) and non-sufficient funds (NSF) fees (fees charged on unpaid items).
- We urge that the Agencies require banks to report overdraft fees triggered by debit card purchases and automated teller machine (ATM) transactions separately from overdraft fees triggered by checks and automated clearinghouse (ACH) transactions.

Bank payday lending revenue:

- We urge that the Agencies require revenue derived from bank payday lending, or "deposit advance" products, be reported as its own Call Report line item.

II. Overdraft-related Fees

A. The Agencies should require that overdraft-related fees be reported as a separate component of service charge income.

The Agencies explain that greater understanding of overdraft fees is "necessary to assess institutional health and enhance the understanding of the costs and potential risks

[1] 78 Fed. Reg. 12142.

financial services pose to consumers."[2] Both the empirical and regulatory records clearly support this need.

Overdraft fees are a leading cause of involuntary bank account closures and a significant cause of voluntary account closures, demonstrating they pose significant risks to both banks and consumers.[3] Accordingly, the Agencies have expressed concerns about high-cost overdraft programs for well over a decade. In 2001, the OCC declined to issue a comfort letter related to a bank's proposed high-cost overdraft program, instead identifying a host of concerns.[4] In 2005, the Agencies' joint guidance raised safety and soundness and consumer protection concerns with overdraft programs.[5] In 2009, the Board's rulemaking came in response to exploding volumes of overdraft penalty fees being triggered by debit card and ATM fees.[6] In 2010, the FDIC identified continuing problems in the wake of the Board's rule and issued additional guidance addressing both safety and soundness and consumer protection concerns.[7]

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[2] 78 Fed. Reg. 12146

[3] A survey in the Detroit area found that among those surveyed who formerly had a bank account, 70 percent chose to close the account themselves, citing moving, worrying about bouncing checks, and excessive fees as their reasons for closing the account. The remaining formerly banked, 30 percent, reported that their bank closed their account; the primary reason was bounced checks and overdrafts. *See* Michael S. Barr, *Financial Services, Savings and Borrowing Among Low- and Moderate-Income Households: Evidence from the Detroit Area Household Financial Services Survey* 12, (Mar. 30, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121195##. The FDIC's most recent survey of unbanked and underbanked households found that, of formerly banked households whose bank had closed their account, almost half (45.8 percent) of them had their account closed because of overdrafts or bounced checks. FDIC, *2011 National Survey of Unbanked and Underbanked Households* (Sept. 2012), *available at* http://www.fdic.gov/householdsurvey/2012_unbankedreport.pdf. *See also* Dennis Campbell, Asis Martinez Jerez, and Peter Tufano, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures* 6, (June 6, 2008), *available at* http://www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf (noting that virtually all involuntary bank account closures, when the financial institution closes a consumer's account, occur because the customer overdrew the account an excessive number of times).

[4] OCC, Interpretive Letter # 914 (Aug. 3, 2001), *available at* http://www.occ.gov/static/interpretations-and-precedents/sep01/int914.pdf. In declining to provide a bank a "comfort letter" regarding an overdraft program, the OCC identified a host of compliance, consumer protection, safety and soundness, and "policy issues," (e.g., "banks participating in the Program will, in essence, attempt to entice their customers to write NSF checks more frequently and on purpose in order to generate fee income").

[5] OCC, Board, FDIC, and National Credit Union Administration, *Joint Guidance on Overdraft Protection Programs*, 70 Fed. Reg. 9127 (Feb. 24, 2005); FDIC, *Supervisory Guidance for Overdraft Protection Programs and Consumer Protection*, FIL-81-2010 (Nov. 24, 2010).

[6] Federal Reserve Board, Final Rule, Electronic Funds Transfers, Regulation E, Docket No. R-1343, 74 Fed. Reg. 59033 (Nov. 17, 2009).

[7] FDIC, Financial Institution Letters, FIL 81-2010, *Overdraft Payment Programs and Consumer Protection* (Nov. 24, 2010).

Despite this long record of regulatory concern, overdraft fees continue to amount to billions of dollars annually, in part because many banks continue to engage in practices that maximize them. These include charging fees on debit card and ATM transactions—which could easily be declined when the account lacks sufficient funds at no cost to the consumer—and posting certain transactions in order from largest to smallest to deplete the account more quickly and trigger more fees. In 2012, the CFPB expressed concerns about overdraft practices and began collecting information from the largest banks.[8] The prudential regulators should understand what portion of their supervisee banks' service charges income is comprised of fees that remain the subject of intense regulatory scrutiny.

Moreover, including overdraft fees as an unsegregated part of the larger service charge income line item allows the volume of overdraft fees to remain unknown. This in turn incents some banks to continue to engage in practices that maximize overdraft fees. More action is needed to address overdraft fees, and one appropriate next step is greater transparency.

B. The Agencies should further require that banks report separately the two components of overdraft-related fees: overdraft fees (fees charged on paid items) and non-sufficient funds (NSF) fees (fees charged on unpaid items).

Overdraft fees and non-sufficient funds (NSF) fees are different in nature, pose different safety and soundness concerns, and require differently tailored policy responses. To provide adequate transparency around these fees, the Agencies should require that they be reported separately on the Call Report.

Since overdraft fees are charged when the bank pays a transaction instead of declining it, they are a fee charged in connection with a credit transaction. And while traditionally, overdraft fees were charged only on paper checks, they are now triggered not only by paper checks and electronic automated clearing house (ACH) transactions, but also by debit card and ATM transactions.

On the other hand, NSF fees are charged when the bank declines, rather than pays, a check or ACH transaction when the account lacks sufficient funds. Thus, they are not associated with a credit transaction. They also are not typically triggered by debit card or ATM transactions.[9]

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[8] CFPB, Request for Comment on Impacts of Overdraft Programs on Consumers, 73 Fed. Reg. 12031 (Feb. 28, 2012); *see also* Richard Cordray, Director, CFPB, Prepared Remarks, CFPB Roundtable on Overdraft Practices, New York, New York (Feb. 22, 2012), *available at* http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-at-the-cfpb-roundtable-on-overdraft-practices/.

[9] In its final Regulation E rule in November 2009, the Board indicated that such a practice would raise unfairness concerns: "A few commenters suggested the possibility that financial institutions may create new fees for declining ATM or one-time debit card transactions. While the final rule does not address declined transaction fees, the Board notes that such fees could raise significant fairness issues under the

The Agencies' approach to overdraft programs in other contexts supports evaluating overdraft fees separately from NSF fees. The 2005 joint guidance and the 2010 FDIC guidance both address overdraft fees without addressing NSF fees. Moreover, the Board's approach to Regulation DD supports not only the merits of distinguishing between overdraft and NSF fees, but also the operational feasibility of doing so. The Board requires institutions to report overdraft fees and NSF fees, both period-to-date and calendar year-to-date, on customers' periodic statements as two separate line items; it explains this requirement generally as intending to help customers better understand the costs associated with their account.[10] In developing Regulation DD, the Board recognized that overdraft and NSF fees tell consumers distinct information about how their transactions are being handled; likewise, they tell regulators distinct information about how banks are managing overdraft programs. They are relevant not only in their absolute volumes, but also in their ratio to each other.

C. The Agencies should also require that banks report overdraft fees triggered by debit card purchases and ATM transactions separately from overdraft fees triggered by checks and ACH transactions.

As the federal regulators have long recognized, overdraft fees triggered by debit card and ATM transactions are fundamentally different from those triggered by checks and ACH transactions. An institution can typically decline debit card and ATM transactions when the customer lacks sufficient funds, and the customer incurs neither an NSF fee nor a merchant fee, which declined checks or ACH transactions may trigger. Indeed, less than a decade ago, 80 percent of financial institutions simply declined debit card and ATM transactions when the account lacked sufficient funds.[11]

The Agencies' regulatory responses to these overdraft fees have also been different. The Agencies' 2005 joint guidance strongly suggested that overdraft fees on debit card and ATM transactions were inappropriate, advising banks to consider limiting overdraft fees to check transactions.[12] The Board's 2009 rule required that banks obtain customers' opt-in before charging overdraft fees on debit card and ATM transactions in part because, unlike for checks and ACH transactions, customers incur no fee when these transactions are simply declined.[13]

FTC Act, because the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction." Federal Reserve Board, Final Rule, Electronic Funds Transfers, Regulation E, Docket No. R-1343, 74 Fed. Reg. 59033, 59041 (Nov. 17, 2009).

[10] 74 Fed. Reg. 5587.

[11] Mark Fusaro, *Are "Bounced Check Loans" Really Loans?*, note 4, at 6 (noting 20 percent of institutions in June 2004 were applying "bounce protection" to debit cards or ATM) (Feb. 2007).

[12] 70 Fed. Reg. 9132: "Institutions should consider making access to the overdraft protection program unavailable through means other than check transactions, if feasible."

[13] 74 Fed. Reg. 59035.

The Board's rule resulted in a significant shift in the marketplace, as some banks, including the largest debit card issuer, Bank of America, stopped charging overdraft fees on debit card purchases altogether.[14] HSBC also stopped doing so, and Citibank never has.[15] Among banks that do charge overdraft fees on debit card and ATM transactions, the portion of the bank's total overdraft fees triggered by those transactions could differ dramatically depending on the portion and make-up of customers' "opt-in"s the bank has obtained.[16]

Given how policy responses to date have differed with respect to overdraft fees on debit card and ATM transactions, how future policy responses may differ, and how significantly this subset of overdraft revenue may vary across institutions, it is important that the prudential regulators understand what portion of banks' overdraft fees are triggered by these transactions.

II. Bank Payday Lending Revenue: The Agencies should require that revenue derived from bank payday lending be reported as its own Call Report line item.

A handful of large banks—Wells Fargo Bank, U.S. Bank, Fifth Third Bank, Regions Bank, and Bank of Oklahoma and its affiliates[17]—are making payday loans they call deposit advances. These banks deposit the loan amount directly into the customer's account and then repay themselves the loan amount, plus a very high fee, directly from the customer's next incoming direct deposit of wages or public benefits. If the customer's direct deposits are not sufficient to repay the loan, the banks typically repay themselves anyway within 35 days, even if the repayment overdraws the consumer's account, triggering high fees for subsequent overdraft transactions.

Payday loans pose severe safety and soundness and public policy concerns, as the Agencies have long acknowledged.[18] Banks making payday loans do so without regard

[14] Transcript, Brian Moynihan, CEO, *Bank of America Q3 2010 Earnings Call* (Oct. 19, 2010), *available at* http://www.morningstar.com/earnings/18372176-bank-of-america-corporation-bac-q3-2010.aspx.

[15] Consumer Federation of America, Survey of OCC Bank Overdraft Loan Fees and Terms (July 2011).

[16] For example, many banks may have relatively low opt-in rates but may have targeted their marketing encouraging "opt-in" to those customers who overdraw most frequently, thereby retaining a large portion of their debit card overdraft revenue. *See* Center for Responsible Lending, *Banks Target, Mislead Consumers As Overdraft Deadline Nears*, Center for Responsible Lending (Aug. 5, 2010), *available at* http://www.responsiblelending.org/overdraft-loans/research-analysis/Banks-Target-And-Mislead-Consumers-As-Overdraft-Dateline-Nears.pdf; Center for Responsible Lending Research Brief, *Banks Collect Opt-Ins Through Misleading Marketing* (Ap. 2011), *available at* http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/banks-misleading-marketing.html.

[17] Bank of Albuquerque, Bank of Arizona, Bank of Arkansas, Bank of Kansas City, Bank of Texas, and Colorado State Bank and Trust.

[18] OCC, Advisory Letter AL 2000-10, *Payday Lending* (Nov. 27, 2000); FDIC, Financial Institutions Letter FIL-14-2005, *Guidelines for Payday Lending* (Feb. 25, 2005). In 2003, a Board-supervised bank stopped

to the borrower's ability to repay the loan without reborrowing, a practice the prudential regulators have long recognized as unsafe and unsound.[19] Borrowers already struggling with regular expenses or facing an emergency expense with minimal savings are typically unable to repay the entire lump-sum loan and fees and meet ongoing expenses until their next payday. Consequently, though the payday loan itself may be repaid because the lender puts itself first in line before the borrower's other debts or expenses, the borrower must take out another loan before the end of the pay period, leading to a cycle of repeat loans. CRL's most recent analysis found that the median bank payday borrower took out 13.5 loans in 2011 and spent at least part of six months during the year in bank payday debt.[20] Over a third of borrowers took out more than 20 loans, bringing the mean number of loans per borrower to 19.[21]

In addition to violating the basic safety and soundness principle of lending based on a borrower's ability to repay a loan, bank payday loans also pose severe reputational risk, as evidenced by sweeping negative reaction to these products,[22] and risk violation of a range of laws, including laws prohibiting unfair and deceptive acts and practices and discriminatory credit practices.[23]

While the number of banks making these loans today remains small, there is risk that without definitive regulatory action, this product could spread rapidly. To enhance the Agencies' ability to evaluate the safety and soundness risk this product poses, the Agencies should require that revenue derived from this product to be separately reported on Call Reports.

Conclusion

We thank the Agencies for their recognition that overdraft-related fees warrant separate reporting on Call Reports. We urge further breakout of those fees into overdraft fees triggered by debit card purchases and ATM transactions; overdraft fees triggered by

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partnering with a payday lender, citing in its Securities and Exchange Commission filing "materially increased regulatory requirements for participation in that line of business that the Bank does not believe it can satisfy." Republic First Bancorp Inc. (parent company of First Bank of Delaware), Form 8-K, June 27, 2003, *available at* http://www.secinfo.com/dsVsz.2hz.htm.

[19] OCC, Board, FDIC, and OTS, *Expanded Guidance for Subprime Lending Programs* (Jan. 31, 2001).

[20] Center for Responsible Lending, *Triple Digit Danger: Bank Payday Lending Persists* (March 21, 2013), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/Triple-Digit-Bank-Payday-Loans.pdf.

[21] *Id.*

[22] *See* Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns*, January 17, 2013, *available at* http://rspnsb.li/10wra0y.

[23] For further detail regarding the safety and soundness risk bank payday lending poses, *see* Center for Responsible Lending, *Prudential Regulators Should Apply Safety and Soundness Standards to Bank Payday Loan Products*, January 24, 2013, *available at* http://rspnsb.li/Yqd0uH.

checks and ACH transactions; and NSF fees. We further urge that, in light of safety and soundness risk posed by bank payday lending, Agencies require that this revenue be disclosed as a separate line item as well.