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Volume 10 | Issue 1

Article 12

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2006

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## Recommended Citation

Carolyn M. Gillikin, *Overdraft Protection Programs: Consumers Still in the Dark under Regulation DD*, 10 N.C. BANKING INST. 231 (2006).

Available at: <http://scholarship.law.unc.edu/ncki/vol10/iss1/12>

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# Overdraft Protection Programs: Consumers Still in the Dark under Regulation DD

## I. INTRODUCTION

After a hectic week, Saturday morning has finally arrived and you have a “to-do” list a mile long—gas up the car, pick up the laundry, purchase a birthday gift for a friend, buy a few groceries, and pay your cell phone bill. Each place you go, you pull out that great piece of plastic (debit card) thinking that you have money in your account to pay for your purchases. Sure enough, your debit card transactions are approved each time, and you end the day having spent \$241.38. Life is great until you arrive home from work the following Wednesday to find six overdraft notices in your mailbox with overdraft fees totaling \$180.00.

How could your debit card purchases have been approved if there was no money in your account? The answer: your bank has a “courtesy” overdraft program and may (at its discretion) pay transactions that overdraw your account.

Will the new rule, recently published by the Federal Reserve Board (FRB), help consumers understand their financial institution’s overdraft program (ODP) and the potential cost?<sup>1</sup> Maybe yes, maybe no.<sup>2</sup> While the new rule requires additional disclosures from banks that promote their overdraft service, it excludes banks that do not promote the service.<sup>3</sup> The new rule also fails to meet numerous concerns raised by consumer advocates.<sup>4</sup>

To prevent overdrafts, some consumers obtain lines of credit that advance funds when needed to cover overdrafts.<sup>5</sup> These lines of credit are subject to disclosures under the Truth In Lending Act (TILA)

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1. See *infra* notes 56-99 and accompanying text.

2. See *infra* notes 56-99 and accompanying text.

3. See *infra* notes 57-84 and accompanying text.

4. See *infra* notes 116-20 and accompanying text.

5. OFFICE OF COMPTROLLER OF THE CURRENCY, ET AL., JOINT GUIDANCE ON OVERDRAFT PROTECTIONS 1 (Feb. 18, 2005), available at <http://www.federalreserve.gov/boarddocs/srletters/2005/SR0503a1.pdf> [hereinafter JOINT GUIDANCE ON OVERDRAFT PROTECTIONS].

and Regulation Z.<sup>6</sup> If the consumer does not have a contractual line of credit, a financial institution may decide to pay overdrafts on an ad hoc basis.<sup>7</sup> The non-sufficient fund (NSF) fee is charged whether the overdraft is paid or not.<sup>8</sup> To facilitate the overdraft process, many institutions have automated the decision.<sup>9</sup> In the past, institutions did not market their ODP service.<sup>10</sup> Recently, some financial institutions have begun marketing formalized ODPs that appear to be “short term credit facilities.”<sup>11</sup> Consumers are normally provided with the limit that they are allowed to overdraw their account.<sup>12</sup>

Overdraft services are a potential “win-win” situation for the consumer and the institution.<sup>13</sup> For consumers, having to pay only one overdraft fee, a fee to the bank, instead of possibly two overdraft fees—one to the bank and one to the retailer, is a benefit.<sup>14</sup> Additionally, ODP saves the consumer potential embarrassment of having a returned item.<sup>15</sup> A community banker in Indiana stated,

Our customers have been very pleased with our [ODP] program. In fact, we occasionally get thank you notes from them. They really appreciate the fact that their [NSF] check doesn't get returned to a retailer they frequent, embarrassing them and putting them on a bad check list. They feel it saves their reputation. It also means they don't pay a hefty fee to that retailer.<sup>16</sup>

In addition, because many Americans live paycheck-to-paycheck, they could use this program as a safety net.<sup>17</sup> For instance, if

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6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. JOINT GUIDANCE ON OVERDRAFT PROTECTIONS, *supra* note 5, at 2.

12. *Id.*

13. John M. Floyd, *Overdraft Privilege: Service or Burden To Account Holders?*, BANKERSONLINE, (Feb. 2, 2002), [http://www.bankersonline.com/vendor\\_guru/jmf/jmf\\_acctholder.html](http://www.bankersonline.com/vendor_guru/jmf/jmf_acctholder.html).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

someone had an unexpected auto repair, she could use the overdraft program to cover the expense until she could make a deposit. In addition, ODP reduces the cost of handling returned items for the financial institution, and the NSF fee income can be increased by 50 - 200%.<sup>18</sup>

In the past, many consumers were not aware of the overdraft program that the institution used and did not come to rely on it for covering their transactions.<sup>19</sup> However, recently some financial institutions have begun to aggressively promote their overdraft programs.<sup>20</sup> Each overdraft incurs an NSF fee.<sup>21</sup> Normally, the fee is from \$20 - \$35, and banks will deduct the amount from the account.<sup>22</sup> For banks who have ODP programs, the consumer is automatically signed up for the service as a courtesy, and the consumer is required to opt out if he does not want the service.<sup>23</sup>

Consumer advocates consider overdraft services to be an extension of credit that should be subject to TILA and Regulation Z.<sup>24</sup> This regulating regime requires disclosures about the cost of credit.<sup>25</sup> For example, Regulation Z and TILA require more disclosures, including the annual percentage rates (APR)<sup>26</sup> disclosures.<sup>27</sup> The intent of Congress was for TILA to inform consumers of the cost of different loans.<sup>28</sup> Consumer advocates argue that TILA disclosures would give

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18. *Id.*

19. See Truth in Savings, 70 Fed. Reg. 29,582, 29,582 (May 24, 2005) (to be codified at 12 C.F.R. pt. 230).

20. See Barkley Clark & Barbara Clark, *Nobody's Happy About New Overdraft Disclosure Rules*, 14 CLARK'S BANK DEPOSITS AND PAYMENTS MONTHLY 1, 1 (June, 2005).

21. CONSUMER FEDERATION OF AMERICA & NATIONAL CONSUMER LAW CENTER, *Bounce Protection: How Banks Turn Rubber Into Gold By Enticing Consumers To Write Bad Checks*, <http://www.consumerfed.org/bounceappendix012803.pdf> (last visited Sept. 10, 2005).

22. See *id.*

23. See *id.*

24. See Clark & Clark, *supra* note 20, at 1.

25. See Owen B. Asphundh, Note, *Bounce Protection: Payday Lending In Sheep's Clothing?*, 8 N.C. BANKING INST. 349, 359 (2004).

26. Center for Responsible Lending, <http://www.responsiblelending.org/glossary.cfm> (last visited Nov. 23, 2005) (This article states that APR is "the percentage of a loan's principal that would be paid in finance charges if the loan were carried for one year. APR includes both interest costs and fees charged on a loan. When lenders disclose the APR of loans, borrowers can better understand the cost of the credit.").

27. See Clark & Clark, *supra* note 20, at 1.

28. See Asphundh, *supra* note 25, at 359.

the consumer the ability to compare the cost of overdraft programs to the cost of other types of credit products.<sup>29</sup> Instead of applying TILA, however, the new rule amended Regulation DD, and falls under the Truth in Savings Act (TISA).<sup>30</sup> Under TISA and Regulation DD, financial institutions are not subject to the same level of disclosures as those required by TILA and do not have to disclose APRs.<sup>31</sup>

This Note will examine whether the new rule provides sufficient information to consumers regarding overdraft programs. Part II of the note will review actions of the FRB and the proposed rule.<sup>32</sup> Part III will address the new rule and the consumer advocates' and industry's perception of the new rule.<sup>33</sup> Part IV will examine the impact of the rule on a pending case and the future of the rule.<sup>34</sup>

## II. PROPOSED AMENDMENTS TO REGULATION DD

### A. *Federal Reserve Actions*

The FRB began to solicit public and industry comments in late 2002.<sup>35</sup> The industry provided a list of Best Practices for the FRB to consider.<sup>36</sup> As expected, consumer groups wanted overdraft services to be addressed under Regulation Z, while industry representatives felt current disclosures under Regulation DD were adequate and that making ODPs subject to Regulation Z would be costly.<sup>37</sup> Another concern for consumer advocates was that consumers were not being informed that ATM, debit card, and other electronic transactions could be authorized under ODP programs triggering the ODP fees.<sup>38</sup> In addition, advertising overdraft services as lines of credit was also a concern.<sup>39</sup> Another problem was marketing that encouraged consumers

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29. See Clark & Clark, *supra* note 20, at 1.

30. *Id.*

31. *Id.*

32. See *infra* notes 35-55 and accompanying text.

33. See *infra* notes 56-99 and accompanying text.

34. See *infra* notes 100-20 and accompanying text.

35. Truth in Savings, *supra* note 19, at 29,583.

36. Joint Guidance on Overdraft Protection Programs, *supra* note 5, at 9-11.

37. Truth in Savings, *supra* note 19, at 29,583.

38. See *id.*

39. *Id.*

to use the service to meet short-term credit needs, rather than just for protection from an inadvertent overdraft.<sup>40</sup>

An additional concern was that ODP fees are flat fees.<sup>41</sup> For instance, the ODP fee of \$25 will occur, whether the account is overdrawn by \$2 or \$200. Finally, some banks include the overdraft limit in the account balance of consumers, misleading consumers about the true balances of their accounts.<sup>42</sup>

### B. *The Proposed Rule*

As a result of the public and industry comments, the FRB proposed amendments to Regulation DD to address the uniformity and adequacy of disclosures of ODP fees and the advertising of overdraft services.<sup>43</sup>

The proposed rule recommended the following:

1. Expand the prohibition against misleading advertisements to cover communications with current customers about existing accounts.<sup>44</sup>
2. Require additional fee and other disclosures about overdraft services, including disclosure on periodic statements of the total dollar amount for all overdraft fees and for all returned-item fees for the statement and for the calendar year to date.<sup>45</sup>
3. Require institutions that market overdraft services to include in their advertisements the fee for each overdraft item and the circumstances under which the institution would not pay an overdraft.<sup>46</sup>

The proposed rule was greeted with both approval and dissatisfaction.<sup>47</sup> Consumer advocates opposed the proposed rule

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40. *Id.*

41. See Clark & Clark, *supra* note 20, at 1.

42. See Floyd, *supra* note 13.

43. Truth in Savings, *supra* note 19, at 29,583.

44. *Id.*

45. *Id.*

46. *Id.*

47. See Truth in Savings, *supra* note 19, at 29,584.

because they felt ODP fees should be addressed under Regulation Z rather than as an amendment to Regulation DD.<sup>48</sup> Regulation Z requires more disclosures than Regulation DD, such as APRs.<sup>49</sup> Industry representatives favored coverage under Regulation DD, although there was opposition to the disclosing of total fees for overdrafts and returned items on periodic statements.<sup>50</sup> The industry contended that current statements provided sufficient information.<sup>51</sup> In addition, many industry respondents opposed the requirement of disclosure in advertisements of the situations in which an overdraft would not be paid.<sup>52</sup> The industry felt that such a requirement would take away the discretionary nature of the service.<sup>53</sup> Written disclosures would close a loophole that ODPs had used so as not to be considered credit transactions regulated under Regulation Z.<sup>54</sup> After considering the comments it received on the proposed rule, the FRB published its final rule that will become effective on July 1, 2006.<sup>55</sup>

### III. THE FINAL RULE

#### A. *Different Disclosures On Periodic Statements For Institutions that "Promote" Overdraft Programs*

The final rule for ODPs was published by the FRB in May 2005.<sup>56</sup> The new rule requires institutions that "promote" overdraft services to disclose total overdraft and returned-item fees on periodic statements.<sup>57</sup> The totals must be for the statement period and for the calendar year to date.<sup>58</sup> While included in the proposed rule, periodic statement disclosures are not required by institutions that do not promote overdraft services.<sup>59</sup>

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48. *Id.* at 29,583.

49. *See* Clark & Clark, *supra* note 20, at 1.

50. Truth in Savings, *supra* note 19, at 29,584.

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* Clark & Clark, *supra* note 20, at 1.

55. Truth in Savings, *supra* note 19, at 29,584.

56. Clark & Clark, *supra* note 20, at 1.

57. Truth in Savings, *supra* note 19, at 29,584.

58. *Id.*

59. *Id.*

In the past, the ad hoc overdraft protection was not marketed.<sup>60</sup> Recently, many financial institutions have begun to aggressively promote their overdraft programs.<sup>61</sup> For instance, an advertisement that states, “With our worry free overdraft pay service, you won’t have to worry if you find yourself a little short of cash a few days before pay day,”<sup>62</sup> could encourage the consumer to use the service as a line of credit rather than overdraft protection.<sup>63</sup> Therefore, a distinction is made between financial institutions that “promote” the overdraft and those that do not promote the service.<sup>64</sup> To help a financial institution determine what is considered “promoting,” the FRB has listed the communications that are not considered promoting:<sup>65</sup>

- 1) Communicating information about the payment of overdrafts in response to a consumer-initiated inquiry about overdrafts or deposit accounts generally. Providing information about the payment of overdrafts in response to a balance inquiry made through an automated system, such as telephone response machine, an ATM, or an institution’s Internet site, is not a response to a consumer initiated inquiry for purposes of this provision, and would trigger periodic statement disclosure requirements;
- 2) Providing educational materials that do not specifically describe the institution’s overdraft service;
- 3) Promoting in an advertisement a traditional line of credit that is subject to the Board’s Regulation Z (Truth in Lending);
- 4) Engaging in an in-person discussion with a consumer;
- 5) Making a disclosure required by federal or other applicable law;

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60. See Clark, & Clark, *supra* note 20, at 1.

61. *Id.*

62. Lockheed Georgia Employees’ Federal Credit Union, <http://www.lgefcu.org/prod/WorryFree.cfm#101> (last visited Nov. 22, 2005).

63. See Clark & Clark, *supra* note 20, at 2.

64. See Truth in Savings, *supra* note 19, at 29,582.

65. *Id.* at 29,584.

- 6) Including information on a periodic statement or providing a notice informing a consumer about a specific overdrawn item or the amount the account is overdrawn;
- 7) Including in a deposit account agreement a discussion of the institution's right to pay overdrafts; or
- 8) Notifying a consumer that completing a requested transaction, such as an ATM withdrawal, may trigger an overdraft fee, or providing a general notice that items overdrawing an account may trigger an overdraft fee.<sup>66</sup>

The industry believes that the new disclosures are unnecessary and costly.<sup>67</sup> “Most industry commentators stated that the typical industry practice of providing a notice after each overdraft is a more effective and timely means of alerting consumers about the cost of overdrafts.”<sup>68</sup> The Assistant General Counsel for Bank of America stated that the “notice is more informative, consumer friendly, and timely and enables consumers to better understand the costs of overdrawing their account than aggregation of fees on an account statement.”<sup>69</sup> In addition, system changes will be necessary and costly.<sup>70</sup> Industry representatives have indicated the cost of compliance to be anywhere from \$20,000 to \$1,000,000 per financial institution.<sup>71</sup> Furthermore, many banks believe that including the year to date fee “is unnecessary since consumers could easily add up the fees reflected on the periodic statement to determine the total for the statement period or the calendar year.”<sup>72</sup>

Consumer advocates do not believe that the periodic disclosures go far enough.<sup>73</sup> The Center for Responsible Lending (CRL) “does not

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66. *Id.*

67. Truth in Savings, *supra* note 19, at 29,588.

68. *Id.*

69. Letter from Paul DeKoster, Assistant General Counsel, Bank of America to Jennifer J. Johnson, Board of Governors of the Federal Reserve System (July 19, 2004) (on file with Banking Journal).

70. Truth in Savings, *supra* note 19, at 29,588.

71. Damian Paletta, *No One Happy About Overdraft Disclosure Rules*, AM. BANKER, May 26, 2005, at 3.

72. Memorandum from The Financial Services Roundtable to Federal Reserve Board of Governors 2 (Aug. 6, 2004).

73. See DUBY et al., *High Cost & Hidden From View: The \$10 Billion Overdraft Loan*

believe that disclosure of the fee on the periodic statement without an APR provides meaningful information to the consumer.”<sup>74</sup>

Because periodic disclosures are only required for financial institutions that promote the service, many may stop promoting the service.<sup>75</sup> This may result in the consumer not receiving the additional disclosures outlined under the final rule.

### B. *New Rules for Advertising Overdraft Services*

Institutions that promote overdraft services must disclose in their advertisements the “applicable fees, the categories of transactions covered, the time period consumers have to repay or cover any overdraft, and the circumstances under which the institutions would not pay an overdraft.”<sup>76</sup>

Disclosure requirements on advertisements do not apply when banks “provide educational materials, respond to consumer-initiated inquiry about overdraft, or notify a consumer about a specific overdraft in their account.”<sup>77</sup> However, “stating the overdraft limit for an account on a periodic statement or stating an account balance that includes available overdraft funds on an ATM receipt would be considered an advertisement triggering the required disclosures.”<sup>78</sup> While the rule requires disclosure, it does not require that the consumer be alerted to the potential overdraft at the time a debit card transaction would take place. One of the CRL’s major problems with ODPs is that “borrowers can take out overdraft loans at an ATM or through debit card transactions without receiving warnings that they are overdrawing their accounts and being charged fees for doing so.”<sup>79</sup>

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*Maker*, CRL ISSUE PAPER NO. 9, May 26, 2005, available at ([http://www.responsiblelending.org/pdfs/ip009-High\\_Cost\\_Overdraft0505.pdf#xml=http://predatorylending.org.master.com/texis/master/search/mysite.txt?q=overdraft&order=r&id=00000000b07982535c6caea2&cmd=xml](http://www.responsiblelending.org/pdfs/ip009-High_Cost_Overdraft0505.pdf#xml=http://predatorylending.org.master.com/texis/master/search/mysite.txt?q=overdraft&order=r&id=00000000b07982535c6caea2&cmd=xml)).

74. Memorandum from Center for Responsible Lending on Overdraft Loan Programs to Board of Governors 13 (August 6, 2004) (on file with *Banking Journal*).

75. Laura Thompson Osuri, *Assessing Overdraft Rules’ Impact on Revenues*, AM. BANKER, June 7, 2005, at 7.

76. Clark & Clark, *supra* note 20, at 2.

77. *See id.*

78. *Id.*

79. DUBY et al., *supra* note 73, at 2.

Misleading advertising was also a major concern for regulators.<sup>80</sup> The new rule addressed this concern, and the commentary to the rule included five examples of misleading advertising:<sup>81</sup>

- 1) Representing an overdraft service as a line of credit;
- 2) Representing that the bank will honor all checks or transactions, when it retains discretion at any time to dishonor;
- 3) Representing those consumers with an overdrawn account are allowed to maintain a negative balance, when the terms of the account's overdraft service require consumers to promptly return the deposit account to a positive balance;
- 4) Describing an overdraft service solely as protection against bounced checks, when the institution also permits overdrafts for a fee in connection with ATM withdrawals and other electronic fund transfers that permit consumers to overdraw their account;
- 5) Describing an overdraft service as 'free' in an ad that also promotes a service for which there is a fee (including an overdraft service), unless the ad clearly and conspicuously indicates there is a cost associated with the service.<sup>82</sup>

The industry does not believe the extra disclosures on advertisements are necessary and might "confuse the consumer, especially if the institution and the consumer have different understandings of the terms and conditions."<sup>83</sup> Consumer advocates believe more information should be required, and that the FRB does not address advertisements that encourage people to intentionally overdraw their accounts.<sup>84</sup>

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80. Truth in Savings, *supra* note 19, at 29,583.

81. See Clark & Clark, *supra* note 20, at 2.

82. *Id.*

83. The Financial Services Roundtable, *supra* note 72, at 3.

84. See Center for Responsible Lending, *supra* note 74.

C. *Account Opening Disclosures*

Account opening disclosures are required.<sup>85</sup> All institutions, whether they promote the service or not, must include in their account opening disclosures the categories of transactions for which an overdraft fee may be charged.<sup>86</sup> Under the rule, it is sufficient to state that “the fee applies to overdrafts created by checks, in-person withdrawals, ATM withdrawals, or other electronic means, as applicable.”<sup>87</sup>

CRL lists as a major problem of ODPs that “borrowers can be enrolled in an overdraft loan program without their affirmative consent.”<sup>88</sup> Consumer advocates believe affirmative written consent would be the best method.<sup>89</sup> They do not consider ODP disclosures within general account opening disclosures as adequate.<sup>90</sup>

D. *Coverage under Truth In Lending Act Still Possible*

Although the ODPs are covered by Regulation DD under TISA, the FRB stated that this “does not preclude a future determination that TILA disclosures would also benefit consumers.”<sup>91</sup> The CRL found the major problem with the amended regulation is that overdraft programs do not fall under the TILA.<sup>92</sup> They believe “TILA would provide basic information to consumers about the cost of loans, as well as other consumer protections.”<sup>93</sup>

Consumer advocates also believe overdraft services should fall under Regulation Z and TILA.<sup>94</sup> They argued that “overdraft services compete with traditional credit products—open-end lines of credit, credit cards, and short term closed-end loans.”<sup>95</sup> All of the services that overdraft programs compete against are covered under Regulation Z and

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85. Truth in Savings, *supra* note 19, at 29,584.

86. *Id.*

87. *Id.*

88. Duby et al., *supra* note 73, at 2.

89. Center for Responsible Lending, *supra* note 84, at 15.

90. *Id.* at 15-16.

91. See Clark & Clark, *supra* note 20, at 3.

92. Duby et al., *supra* note 73, at 2.

93. *Id.*

94. Truth in Savings, *supra* note 19, at 29,583.

95. *Id.* at 29,585.

TILA.<sup>96</sup> In 2004, the Board's Consumer Advisory Council wanted a way to distinguish between aggressively marketed ODPs and the traditional ad hoc program.<sup>97</sup> Some of the counsel believed that Regulation Z should apply to ODPs that were similar to lines of credit, but should not apply to the occasional ad hoc coverage.<sup>98</sup> In the final rule, it is stated that the FRB may deem it necessary to require disclosures under TILA if it is determined it would be helpful to the consumer.<sup>99</sup>

#### IV. NEW RULE—FUTURE IMPACT

##### A. *The Final Rule—Pending Case*

Currently, a case in the Ninth Circuit may consider the new rule. *Sola v. Washington Mutual* is a class action lawsuit that was brought in California against Washington Mutual (WAMU), a federal savings association, over its ODPs.<sup>100</sup> The plaintiffs asserted that they were given credit disguised as an ODP.<sup>101</sup> They argued that the program should be subject to TILA, and WAMU should have disclosed the APR.<sup>102</sup> The plaintiffs sought damages under TILA.<sup>103</sup> WAMU filed a motion to dismiss.<sup>104</sup> The court dismissed the case and found that the charges were not finance charges, and therefore there was no requirement for disclosure.<sup>105</sup>

The plaintiffs appealed, arguing that "Regulation Z states that overdraft fees are finance charges if the payment of such items and the imposition of the charge were previously agreed upon in writing."<sup>106</sup> The appellants contend that the traditional ad hoc courtesy overdraft is different from an overdraft which is marketed, establishes a certain

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Plaintiffs'-Appellants' Opening Brief at 2, *Sola v. Washington Mutual Bank*, No. 04-5585 (9th Cir. Sept. 14, 2004).

101. *Id.*

102. *See id.* at 3.

103. *Id.*

104. *Id.*

105. *Id.* at 4.

106. *Id.* at 20.

amount that can be overdrawn, and promises to do so in promotional materials.<sup>107</sup> For example, the promotional materials stated, “Up to your limit, we’ll pay your checks—saving you time, money and embarrassment,” and “Don’t worry, we’ll cover you”<sup>108</sup> The district court decided this did not amount to an agreement in writing.<sup>109</sup>

The defendants do not believe the overdraft charges fall under TILA or Regulation Z.<sup>110</sup> They also do not believe the overdraft charges are finance charges because the “plaintiff was charged the same amount for NSF processing fees or overdraft processing fees regardless of whether the check was honored (creating an overdraft) or returned (a non-sufficient fund status).”<sup>111</sup>

The Office of Thrift Supervision (OTS), which regulates federally chartered savings associations such as WAMU, submitted a brief on behalf of WAMU.<sup>112</sup> The OTS agreed that honoring overdrafts does not constitute an extension of credit because WAMU was not required to honor every check or item that was overdrawn.<sup>113</sup> The fee is imposed regardless of whether the overdraft is paid, and TILA does not apply to credit-neutral charges.<sup>114</sup> In addition, the OTS states that unless the OTS’s interpretation is unreasonable the court must defer to the OTS’s interpretation and its interpretation that interest “applies only to payments that compensate a creditor for an extension of credit, and not to credit-neutral charges.”<sup>115</sup>

Now that a final rule has been issued under Regulation DD and the TISA, the Ninth Circuit may consider the new rule as it reviews the District Court’s analysis. Since the new rule falls under Regulation DD rather than subject to TILA and Regulation Z, the Ninth Circuit will most likely uphold the District Court’s ruling.

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107. *Id.*

108. *Id.* at 21.

109. *Id.* at 22.

110. Answering Brief of Defendant-Appellee Washington Mutual Bank at 11, *Sola v. Washington Mutual Bank*, No. 04-5585 (9th Cir. November 18, 2004).

111. *Id.* at 18.

112. Brief of Amicus Curiae for the Office of Thrift Supervision, in Support of Defendant-Appellee Washington Mutual Bank, Fa and in Support of Affirmance at 1, *Sola v. Washington Mutual Bank*, No. 04-5585 (9th Cir. Nov. 22, 2005).

113. *Id.* at 4.

114. *Id.* at 5.

115. *Id.* at 6.

B. *Is This the Final Rule? Legislation Could Force a Change*

The new rule does not include many of the proposals that were presented in the Best Practices Guidelines published by the FRB, OCC, FDIC, and OTS in 2004.<sup>116</sup> New legislation, called the “Consumer Overdraft Protection Fair Practices Act,” has been proposed by three members of the House Financial Services Committee; Maloney, Frank, and Lee.<sup>117</sup> The purpose of the Act is to inform and educate consumers regarding overdraft programs.<sup>118</sup> The new act would:

- 1) Include overdraft protection as a “finance charge” subject to all relevant consumer disclosures and protections required by the Truth in Lending Act.
- 2) Prohibit financial institutions from imposing overdraft protection fees without the prior written consent of the consumer.
- 3) Prohibit a depository institution from engaging in any pattern or practice of delaying the posting of deposits, or manipulating the posting of any check against an account, for the purpose of creating overdrafts that required overdraft protection fees.
- 4) Prohibit depository institutions from claiming it will cover all overdrafts on accounts when it reserves the ability to pay overdrafts on a discretionary basis.
- 5) Require factual disclosure of the actual dollar balance of a consumer’s account when it reserves the ability to pay overdrafts on a discretionary basis.
- 6) Require factual disclosure of the actual dollar balance of a consumer’s account in response to a balance inquiry at ATM machines.
- 7) Require ATM machines to alert consumers when requested transactions are likely to trigger overdraft

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116. Joint Guidance on Overdraft Protection Programs, *supra* note 5, at 9-11.

117. Press Release, House of Representative Committee on Financial Services, Reps. Maloney, Frank, and Lee Announce New Overdraft Protections for Consumers, (July 27, 2005) (on file with Banking Journal).

118. *Id.*

protection fees and permit the consumer to cancel the transaction to avoid the fee.<sup>119</sup>

The new rule does not prohibit the use of TILA in the future.<sup>120</sup> If the new legislation is successful, the loopholes would be closed that have been used to exempt overdraft services from the TILA.

## V. CONCLUSION

With the new rule, would you have known that the use of your debit card that Saturday could result in \$180.00 in overdraft charges?<sup>121</sup> Under the final rule, if your bank promotes overdraft services, then you would have been receiving periodic statements that indicated the total fees that you were paying for such service.<sup>122</sup> Your bank would have also disclosed additional information in any advertisement promoting the service.<sup>123</sup> On the other hand, if your account was with a bank that does not promote its ODP, the only disclosure you would have received would have been during the account opening process and later in individual charges on your periodic statement.<sup>124</sup>

While the current rule provides the consumer additional disclosures from financial institutions that promote their overdraft services, the rules do not require significant additional disclosures from financial institutions that do not promote ODPs.<sup>125</sup> In addition, the new rule does not require financial institutions to provide information about alternatives to ODPs, such as lines of credit.<sup>126</sup> The new rule fails to address other “Best Practices” as outlined in the Joint Guidance on Overdraft Programs.<sup>127</sup> For example, it does not address opt-out provisions, and does not exclude ATM and debit card transactions from ODPs.<sup>128</sup> It appears that the new rule under Regulation DD was

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119. *Id.*

120. *See Clark & Clark, supra* note 20, at 3.

121. *See supra* notes 56-99 and accompanying text.

122. *See supra* notes 57-75 and accompanying text.

123. *See supra* notes 76-84 and accompanying text.

124. *See supra* notes 85-90 and accompanying text.

125. *See supra* notes 56-120 and accompanying text.

126. *See JOINT GUIDANCE ON OVERDRAFT PROTECTIONS, supra* note 5, at 9.

127. *Id.* at 9-11.

128. *See id.* at 10.

designed to place some new requirements on ODPs at institutions that “promote” the service; however, it does little to address the concerns of consumer advocate groups that argue that ODPs are extensions of credit that should be subject to disclosure under TILA and Regulation Z.<sup>129</sup> Therefore, the new rule still leaves many customers in the dark about the use and cost of overdraft services.

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129. *See supra* notes 56-120 and accompanying text.