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The Banking Shuffle: Barring the Reordering of Consumer Transactions and Other Recommendations

I. INTRODUCTION

Banks have been doing the shuffle. Not on the dance floor, but with consumer transactions. By shuffling transactions and processing them largest to smallest, rather than chronologically, banks increase the number of overdraft fees consumers pay.¹ Imagine a consumer had \$100 in her checking account and made several purchases throughout the day. The consumer started the day off with a \$5 cup of coffee, paid \$50 for a phone bill, \$40 for gas, and, with only \$5 remaining in her account, \$100 for groceries. For the last transaction, the consumer accepted the \$34 overdraft fee² for the single transaction that created a negative balance. However, if instead of processing the transactions in chronological order, the bank were to debit her account for the \$100 transaction first, the consumer must accept three overdraft fees—paying the bank \$105 in overdraft fees instead of \$35. This is the banking shuffle and banks should be barred from this practice.³

Consumer lawsuits against banks for wrongful overdraft charges from overdraft protection programs have prompted the Consumer Financial Protection Bureau (“CFPB”) to consider new regulations aimed at overdraft fees.⁴ Although consumers can benefit from their bank or credit union covering an important payment that may have otherwise

1. Danielle Douglas-Gabriel, *Big Banks Have Been Gaming Your Overdraft Fees to Charge You More Money*, WASH. POST: WONKBLOG (July 17, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/07/17/wells-fargo-to-make-changes-to-protect-customers-from-overdraft-fees/>.

2. *CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges*, CONSUMER FIN. PROT. BUREAU: NEWSROOM (July 31, 2014), <http://www.consumerfinance.gov/newsroom/cfpb-finds-small-debit-purchases-lead-to-expensive-overdraft-charges/> (finding \$34 median overdraft fee).

3. See *id.* (noting nonprofits are “pressing the Consumer Financial Protection Bureau to write rules to require all banks to end high-to-low reordering”).

4. See *Impacts of Overdraft Programs on Consumers*, 77 Fed. Reg. 12031, 12031 (Feb. 28, 2012) (addressing concerns about overdraft protection programs); Douglas-Gabriel, *supra* note 1 (noting consumer lawsuits exposed wrongful overdraft charge practices and the CFPB’s attention to the issue).

bounced, overdraft programs still have “the capacity to inflict serious economic harm on [consumers].”⁵ The economic harm can result from banks shuffling transactions, leading to more overdraft fees, or from banks charging high fees for accessing the overdraft service.⁶

The CFPB’s purpose is “to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”⁷ After analyzing the statutory standards of fairness, transparency, and competition, this Note concludes that the CFPB should prohibit banks from reordering consumer transactions.⁸ In meeting its purpose, the CFPB should promote consumer economic freedom by forcing banks to chronologically order consumer transactions and creating more transparency of overdraft programs.⁹ Assuming that a consumer knows and understands the risk of overdraft protection programs,¹⁰ overly restrictive policies on overdraft fees would negatively affect consumer choice and the banking industry’s bottom lines particularly in small financial institutions.¹¹

5. Gary Stein, *Comment Period on Overdrafts Extended to June 29*, CONSUMER FIN. PROT. BUREAU: BLOG (Apr. 5, 2012), <http://www.consumerfinance.gov/blog/comment-period-on-overdrafts-extended-to-june-29/>.

6. See *id.* (noting the CFPB is monitoring risks posed by overdraft protection programs to make informed decisions for regulation).

7. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1021, 12 U.S.C. § 5511 (2012); see also CONSUMER FIN. PROT. BUREAU, *About Us*, (Aug. 19, 2015) [hereinafter CFPB *About Us*], <http://www.consumerfinance.gov/the-bureau/> (describing CFPB’s functions).

8. See Jeff Bater, *CFPB Flexes Enforcement Power To Attack Bad Practices*, 105 Banking Rep. (BNA) No. 10, at 386 (Sept. 18, 2015) (“[C]oming rules could require better disclosures and bar banks from reordering transactions in a way that triggers overdrafts.”).

9. See, e.g., Eric Grover, *A New Congress, A New Chance To Rein In the CFPB*, AM. BANKER, Jan. 13, 2015 (determining that the CFPB is administrative law on steroids because the agency is creating laws, a power given to Congress).

10. While the CFPB study did not contain consumers directly identifying personal information, the CFPB plans further studies on how overdraft works and how it is affecting consumers. *CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges*, *supra* note 2. Additionally, a 2014 Pew Charitable Trust study found more than half of the people who overdraw their checking accounts at an ATM in the past year didn’t remember consenting to the overdraft service. Heather Long, *Overdraft Fees Top \$1 Billion at the Big 3 Banks*, CNN MONEY (May 27, 2015 12:11 PM), <http://money.cnn.com/2015/05/27/investing/overdraft-fees-over-1-billion-big-banks/>. Pew Charitable Trust is a foundation that conducts research. PEW CHARITABLE TRUST, MISSION & VALUES, <http://www.pewtrusts.org/en/about/mission-and-values>.

11. Smaller banks have become heavily reliant on overdraft fees to make money, such as Woodforest National Bank in Texas. Long, *supra* note 10; *Falling Overdraft Takes a Bite*

This Note proceeds in five parts. Part II presents background information on overdraft protection programs and the corresponding regulation.¹² Part III discusses the pre-CFPB data and current data on overdraft protection programs.¹³ It also contends that the CFPB needs more data to avoid issuing a premature rulemaking.¹⁴ With fairness, transparency, and competition in mind, Part IV examines the overdraft protection program issues likely to be tackled in any rulemaking.¹⁵ Part V identifies the practical implications of proposed regulations and concludes that transaction reordering should be barred.¹⁶

II. OVERDRAFT PROTECTION PROGRAMS AND THEIR REGULATION

Banks offer overdraft programs as a service that imposes a fee on a consumer's account when the consumer spends or withdraws more money than is available.¹⁷ Before automated overdraft systems, banks would manually review a customer's account and, as a courtesy, pay insufficient funds based on the institution's relationship with the customer.¹⁸ This process saved the customer from the embarrassment of having to pay a bounced check fee to the check payee by instead paying an overcharge directly to the bank.¹⁹ The inefficient system of manual review was replaced by automated overdraft systems.²⁰ Banks continued the courtesy payment for bounced checks known as non-sufficient funds ("NSF") until Regulation E was amended in 2010 requiring banks to

Out Of Banks' Bottom Line, CONSUMER BANKERS ASS'N (June 17, 2015), <http://consumerbankers.com/cba-media-center/cba-news/falling-overdraft-takes-bite-out-banks%E2%80%99-bottom-line> ("Overdraft fee revenue accounts for a greater share of revenue at banks with less than \$1 billion in assets."); *see also* Annamaria Andriotis & Peter Rudegeair, *Banks Feel Pinch From Declining Overdraft Fees*, WALL ST. J. (June 16, 2015 6:29 PM), <http://www.wsj.com/articles/banks-feel-pinch-from-declining-overdraft-fees-1434493786> (noting that banks have been forced to find additional revenue or make cuts, such as personnel reductions or bank closures, to make up for the losses of overdraft revenue).

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part V.

17. Dan Rutherford, *Consumer Advisory: You've Got Options When It Comes to Overdraft*, CONSUMER FIN. PROT. BUREAU: BLOG (Apr. 28, 2015), <http://www.consumerfinance.gov/blog/category/overdrafts/>.

18. Impacts of Overdraft Programs on Consumers, 77 Fed. Reg. 12031, 12031 (Feb. 28, 2012).

19. *Id.*

20. *Id.*

receive customer permission before charging a fee.²¹ Thus, the customer had the choice to opt-in to an overdraft protection program.²² In response to the customer opting out, the bank could decline to complete the transaction if the customer did not opt-in or, alternatively, the bank could pay the transaction as a free of charge courtesy.²³ Currently, if a customer opts-in, banks generally charge an overdraft fee when a check is returned, when the overdraft service is used, and when an overdraft is not repaid on time.²⁴

The Federal Reserve Board (“FRB”)²⁵ undertook initial regulation of overdraft protection programs before the CFPB was created.²⁶ No agency had exclusive control over consumer financial protection regulation since it was divided among several government agencies.²⁷ The FRB remained in charge of enforcing Regulation E until the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) transferred the responsibility of consumer issues to the CFPB.²⁸ The CFPB was given the power to “regulate the offering and provision of consumer financial products or services under the federal consumer financial laws.”²⁹

The CFPB’s goals include: (1) “prevent[ing] financial harm to consumers while promoting good practices that benefit them”; (2) “empower[ing] consumers to live better financial lives”; and (3) “inform[ing] the public, policy makers, and the CFPB’s own policy-

21. *Id.* at 12032; Electronic Funds Transfer Act (“Regulation E”), 15 U.S.C. § 1693, 12 C.F.R. § 1005.17(b) (2012).

22. Regulation E, 15 U.S.C. § 1693, 12 C.F.R. § 1005.17(b) (requiring opt-in).

23. *See id.* (requiring that banks customers opt in to overdraft protection programs, not that banks provide overdraft protection).

24. Impacts of Overdraft Programs on Consumers, 77 Fed. Reg. at 12033.

25. The Federal Reserve Board (“FRB”) refers to the Board of the Governors of the Federal Reserve System.

26. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1061(1), 12 U.S.C. § 5581(b) (2012) (creating the CFPB in 2010); TODD BEAUCHAMP & LAWRENCE KAPLAN, PAUL HASTINGS, THE FED. RESERVE BD.’S FINAL RULE ON OVERDRAFT PROGRAMS: THE FINAL WORD? (Dec. 2009), <http://www.paulhastings.com/assets/publications/1474.pdf>. The FRB worked with other agencies to issue guidance for overdraft programs. *Id.*

27. Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 327 (2013).

28. Dodd-Frank § 1061 (b)(1), 12 U.S.C. § 5581(b)(1). Dodd-Frank also transferred the Federal Deposit Insurance Corporation’s (“FDIC”) and the Office of the Comptroller of the Currency’s (“OCC”) authority over consumer issues to the CFPB. Dodd-Frank § 1061(b)(2), (4), 12 U.S.C. § 5581(b)(2), (4).

29. Dodd-Frank § 1011(a), 12 U.S.C. § 5491(a).

making with data-driven analysis of consumer finance markets and consumer behavior.”³⁰ These goals serve as an internal initiative to meet the purpose, objectives, and functions set forth in Dodd-Frank.³¹

The CFPB uses its inherited Regulation E in enforcement actions, specifically the opt-in requirement.³² CFPB’s enforcement on overdraft programs has preceded any formal rulemaking.³³ On December 27, 2011, the CFPB published for comment an interim final rule that revised Regulation E.³⁴ The interim final rule prohibited financial institutions from charging fees for transactions that overdraw an account by use of a debit card at an ATM and point-of-sale, unless the consumer opts-in to an overdraft protection program.³⁵ Essentially, consumers have to opt-in to the overdraft program when the account is opened, and if they choose not to opt-in, the bank will deny the transaction in order to avoid an overdraft.³⁶ Regulation E also outlines the requirements for overdraft protection programs regarding consumer transparency, disclosures on banking practices, and abuse of the program.³⁷

In 2012, the CFPB put out its Notice and Request for Information regarding the impacts of overdraft protection programs on consumers.³⁸ Overdraft protection programs first appeared on the CFPB regulatory agenda in fall 2013 and were anticipated to be under consideration from November 1, 2013 to October 31, 2014.³⁹ Overdraft program research

30. CONSUMER FIN. PROTECT. BUREAU, STRATEGIC PLAN FY 2013 - FY 2017, 8 (2013). While the CFPB has four goals, this Note focuses on the three goals that are geared toward consumers, unlike the fourth goal, which focuses on the CFPB’s internal performance. *Id.*

31. See Dodd-Frank § 1021(a)–(c), 12 U.S.C. § 5511(a)–(c) (describing the purpose, objectives, and functions of the CFPB).

32. Electronic Funds Transfer Act (“Regulation E”), 15 U.S.C. § 1693, 12 C.F.R. § 1005.17(b)(1) (2012); see, e.g., Bob Sullivan, *CFPB: Bank Charged \$50M in Illegal Overdraft Fees*, CREDIT.COM: PERS. FIN. (Apr. 28, 2015), <http://time.com/money/3839951/cfpb-regions-bank-charged-50m-illegal-overdraft-fees/> (noting the enforcement against Regions bank).

33. Bater, *supra* note 8.

34. Regulation E, 15 U.S.C. § 1693, 12 C.F.R. § 1005.17 (2012).

35. 12 C.F.R. § 205.17(b). On November 17, 2009, prior to the CFPB’s amendment, the FRB had published final regulations amending Regulation E to require banks to attain consumer permission before enrolling them in overdraft protection programs. *Id.*

36. Adam Levin, *Banks Still Raking In the Profits from Overdraft Fees*, CREDIT.COM (Oct. 4, 2012), <http://blog.credit.com/2012/10/banks-still-raking-in-the-profits-on-overdraft-fees-62858/>.

37. 12 C.F.R. § 205.17.

38. Impacts of Overdraft Programs on Consumers, 77 Fed. Reg. 39, 12031, 12031 (Feb. 28, 2012).

39. Semiannual Regulatory Agenda, 79 Fed. Reg. 4, 1242, 1242 (Jan. 7, 2014).

continued to stay on the CFPB's semiannual regulatory agenda until the Spring 2015 rulemaking agenda.⁴⁰ In the Spring 2015 rulemaking agenda, the overdraft issue was in the pre-rule stage and focused on research to assess whether rulemaking was warranted.⁴¹ The overdraft issue has remained in the pre-rule stage since fall 2013, and the CFPB has continued to push back the final rule stage.⁴² In fact, the CFPB missed the proposed end date for pre-rule activities originally scheduled for October 2015.⁴³ This could be due to the need for more data.⁴⁴

III. LACK OF DATA

Consumer behavior will influence whether a new rule on overdraft protection programs is needed.⁴⁵ In meeting its goal to inform, the CFPB must first collect data on consumer behavior.⁴⁶ Issues requiring research include recidivism,⁴⁷ the impact of Regulation E's opt-in requirement,⁴⁸ and consumer need for the overdraft protection program.⁴⁹ Furthermore, the Office of the Inspector General ("OIG") has identified inaccuracies in the CFPB's Consumer Complaint Database ("Database").⁵⁰

40. Semiannual Regulatory Agenda, 80 Fed. Reg. 117, 35116, 35117 (June 18, 2015).

41. 80 Fed. Reg. 117, at 35117.

42. 79 Fed. Reg. 4 at 1242 (ending pre-rule activities October 2014); OFFICE OF INFO. & REG. AFF., 3170-AA42, SEMIANNUAL REG. AGENDA (Spring 2014) (ending pre-rule activities Feb. 2015); Semiannual Regulatory Agenda, 79 Fed. Reg. 245, 76808, 76809 (Dec. 22, 2014) (noting continued research on overdraft programs); 80 Fed. Reg. 117 at 35117 (ending pre-rule activities October 2015).

43. Michael Ferullo, *Rules on Payday Loans, Debt Collection, Mortgage Data Expected in Busy 2015 for CFPB*, 104 Banking Rep. (BNA) No. 4, at 167 (Jan. 27, 2015); 80 Fed. Reg. 117 at 35117.

44. Semiannual Regulatory Agenda, 80 Fed. Reg. 117, 35116, 35117 (June 18, 2015).

45. 77 Fed. Reg. 39, 12031, 12032–33 (Feb. 28, 2012) (seeking information on overdraft programs and "costs, benefits, and risks to consumers").

46. *See id.*

47. *See* CONSUMER FIN. PROT. BUREAU, CFPB DATA POINT: CHECKING ACCOUNT OVERDRAFT, 13 (July 2014) [hereinafter DATA POINT] (noting the causal relationship between opting-in, frequent overdrafts and the need for further study).

48. *See infra* Part IV.

49. CONSUMER FIN. PROTECTION BUREAU, CFPB STUDY OF OVERDRAFT PROGRAMS, 58 (2013) [hereinafter WHITE PAPER], http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf (identifying transaction reordering by banks and other issues).

50. OFF. OF INSPECTOR GEN., Audit Report, 2015-FMIC-C-016, OPPORTUNITIES EXIST TO ENHANCE MANAGEMENT CONTROLS OVER THE CFPB'S CONSUMER COMPLAINT DATABASE (Sept. 10, 2015). This is the current approach to data analysis. *Id.*; The CFPB's complaint

A. *Pre-CFPB Data*

A 2008 study published by the Federal Deposit Insurance Corporation (“FDIC Study”) determined that of the 1,171 FDIC-supervised banks surveyed, 86% operated at least one formal overdraft program and 40.5% of all banks offered automated overdraft protection programs.⁵¹ Aligning with Regulation E, in 2010, the FDIC issued a final supervisory guidance providing guiding expectations with respect to overdraft protection programs.⁵²

B. *Current Data*

A 2013 white paper (“White Paper”) and a July 2014 report (“2014 Report”) summarized the CFPB’s current data on overdraft protection services.⁵³ Although the CFPB planned to release the results of further research in October 2015, this data remains undisclosed.⁵⁴

The White Paper was comprised of data collected by the CFPB from a sampling of larger banks under the CFPB’s supervision.⁵⁵ The data revealed that the average overdraft fee was \$34 in 2012 and that most financial institutions provided some form of overdraft protection.⁵⁶ The study also revealed that 44.7% of accounts that had more than ten overdraft items during the first six months of 2010 elected to opt-in by the end of that same year.⁵⁷ Overdraft fees in 2015 were down 4% from 2014, the largest drop since 2011.⁵⁸ The decline in this source of fee income negatively affected banks’ bottom lines.⁵⁹ Smaller banks will

database can be found here: <http://www.consumerfinance.gov/complaintdatabase>.

51. FED. DEPOSIT INS. CORP., FDIC STUDY OF BANK OVERDRAFT PROGRAMS at III, <https://www.fdic.gov/bank/analytical/overdraft/> (last updated Dec. 16, 2008).

52. FED. DEPOSIT INS. CORP., FIL-81-2010, OVERDRAFT PAYMENT PROGRAMS AND CONSUMER PROTECTION FINAL OVERDRAFT PAYMENT SUPERVISORY GUIDANCE (Nov. 24, 2010) [hereinafter GUIDANCE]. The guidance reaffirmed existing expectations and provided specific guidance with respect to automated overdraft payment programs. *Id.*; see also FED. DEPOSIT INS. CORP., FDIC OVERDRAFT PAYMENT PROGRAM SUPERVISORY GUIDANCE FREQUENTLY ASKED QUESTIONS, (Apr. 4, 2012) [hereinafter FAQ] (expanding clarification on potential issues financial institutions may face).

53. WHITE PAPER, *supra* note 49, at 4-7; DATA POINT, *supra* note 49, at 5.

54. Semiannual Regulatory Agenda, 80 Fed. Reg. 117, 35116, 35117 (June 18, 2015).

55. WHITE PAPER, *supra* note 49, at 4.

56. *Id.* at 52-54.

57. *Id.* at 30.

58. Andriotis & Rudegeair, *supra* note 11.

59. *Id.*; *Falling Overdraft Takes a Bite Out Of Banks’ Bottom Line*, *supra* note 11.

likely feel a greater impact from regulations aimed to deter consumers from using overdraft protection programs because the largest percent of their yearly earnings stem from overdraft fees.⁶⁰

Data from the 2014 Report revealed that nearly one in five consumers who opted-in to an overdraft protection program had more than ten overdrafts per year.⁶¹ It noted that consumers who opt-in for overdraft protection services incur the majority of their debit card overdraft fees on transactions of \$24 or less.⁶² For example, small transactions, like a cup of coffee, can lead to expensive overdraft charges.⁶³ With this in mind, the CFPB acknowledged that consumers' personal needs and preferences influence their banking practices and thus, affect why accounts are overdrawn.⁶⁴ Although the CFPB did not specifically disclose what these personal reasons were, the consumer complaint database provides personal examples of why consumers availed themselves of the overdraft service.⁶⁵ For instance, a customer from Bank of America forgot about a written check that overdrawed the account.⁶⁶ Additionally, a SunTrust customer had a bill withdrawn two days earlier than the customer expected causing the overdraft protection service to take care of subsequent purchases.⁶⁷

In regards to transaction ordering, the CFPB found that debit

60. See Neha Dimri & Richa Naidu, *Regional U.S. Banks Face Hit From Looming Overdraft Rules*, REUTERS (June 9, 2015, 1:54 PM), <http://www.reuters.com/article/2015/06/09/usa-banks-overdrafts-idUSL3N0YU3QT20150609> (noting, for example, Louisiana-based South Bancorp Inc. gets about a fifth of its earnings per share from overdraft programs, while SunTrust—a larger bank—gets a tenth from overdraft fees).

61. DATA POINT, *supra* note 47, at 13.

62. DATA POINT, *supra* note 47, at 18; CFPB *Finds Small Debit Purchases Lead to Expensive Overdraft Charges*, *supra* note 2.

63. DATA POINT, *supra* note 47, at 5.

64. WHITE PAPER, *supra* note 49, at 62.

65. E.g., CONSUMER FIN. PROT. BUREAU, COMPLAINT ID 1689631, Comment to *Consumer Complaints with Consumer Complaint Narratives* (Dec. 9, 2015) [hereinafter COMPLAINT ID 1689631], <https://data.consumerfinance.gov/dataset/Consumer-Complaints-with-Consumer-Complaint-Narrat/nsyy-je5y>. The consumer complaint database allows consumers to upload complaints about financial products and services, however, not all the facts alleged in the complaints are verified. CONSUMER FIN. PROT. BUREAU, CONSUMER COMPLAINT DATABASE, <http://www.consumerfinance.gov/complaintdatabase>.

66. COMPLAINT ID 1689631, *supra* note 65.

67. CFPB, COMPLAINT ID 1682528, Comment to *Consumer Complaints with Consumer Complaint Narratives* (Dec. 3, 2015) [hereinafter COMPLAINT ID 1682528], <https://data.consumerfinance.gov/dataset/Consumer-Complaints-with-Consumer-Complaint-Narrat/nsyy-je5y>.

posting orders varied considerably from institution to institution.⁶⁸ No two participants in the study followed the same posting order policies.⁶⁹ The data suggested that reordering transactions was a complex process that depended on the institution's cutoff time for processing transactions, but the CFPB did identify the range of reordering approaches.⁷⁰ If the CFPB can identify and comprehend the reordering approaches, the Agency can formulate a rule that is *fair*, *transparent*, and *competitive*, — thereby helping consumers to understand the process and not be unaware of overdraft charges.⁷¹

C. *Critiques of the CFPB's Data Collection*

Based on current data, the economic harm to consumers enrolled in overdraft protection services does not stem from the banking industry, which has begun to self-police and adhere to regulations.⁷² The economic harm, rather, comes from the recidivism of a small group of consumers—only 8.3% of bank customers incur nearly 73.7% of all overdraft fees.⁷³ CFPB analysts determined that the evidence suggested that overdraft protection programs disproportionately impacted low-income and young consumers.⁷⁴ Both the White Paper and the 2014 Report also show a disproportionate impact on low-income and young consumers but they have yet to identify the causes or determine whether the causes are material to potential regulation.⁷⁵ Additionally, with only 8.3% of bank customers incurring nearly 73.7% of all overdraft fees,⁷⁶ it is difficult for the CFPB to prevent economic harm to this small group of consumers while promoting good practices that benefit everyone.⁷⁷ It would be premature to regulate before data collection and analysis were complete.

68. See WHITE PAPER, *supra* note 49, at 47.

69. *Id.*

70. *Id.*

71. *Id.* at 63; see generally Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1021, 12 U.S.C. § 5511 (2010) (emphasis added).

72. Andriotis & Rudegeair, *supra* note 11. For example, in 2014, Bank of America Corporation launched a checking account that doesn't allow customers to overdraw. *Id.*

73. DATA POINT, *supra* note 47, at 11–12 (finding 8.3% of bank customers incurring nearly 73.7% of all overdraft fees no matter the opt-in status).

74. WHITE PAPER, *supra* note 49, at 18.

75. *Id.*; DATA POINT, *supra* note 47, at 2.

76. DATA POINT, *supra* note 47, at 11–12.

77. *Id.*

Additionally, it is undisputed that data has shown Regulation E's opt-in requirement has had an impact on consumer activity, but the extent of such impact is disagreed upon within the financial industry.⁷⁸ The CFPB took steps to reconcile these differences by requesting information on the impacts of Regulation E and overdraft programs on consumers.⁷⁹ On one hand, a 2011 Consumer Bankers' Association ("CBA") survey of eighteen large banks, representing 40% of the consumer checking accounts at that time, found that only 16% of consumers had opted-in for overdraft protection coverage on ATM and debit card transactions.⁸⁰ In contrast, as of March 2011, a Moebs survey ("Moebs Survey")⁸¹ of one million nationwide checking accounts, indicated, "75[%] of consumers had opted in for such overdraft coverage."⁸² Although the CFPB collected the information after the comment period closed on April 30, 2012, the Agency has yet to reveal its findings on the disagreement.⁸³ Instead, the CFPB's research on overdraft protection services remained on the rulemaking agenda through 2015.⁸⁴

Similarly, disagreements on how consumers view overdraft protection services also exist between the financial industry and the CFPB.⁸⁵ The financial industry views consumers that use overdraft

78. Meredith Fuchs, CFPB No. 2012-CFPB-0007 at 5-6 (Feb. 22, 2012), http://files.consumerfinance.gov/f/2012/02/FR-Notice_Overdraft.pdf (identifying the discrepancy in survey data); *but see* Press Release, Moebs Services, Overdraft Fees Remain Flat (Mar. 8, 2011) [hereinafter Overdraft Fees Remain Flat], <http://moebs.com/PressReleases/tabid/58/ctl/Details/mid/380/ItemID/199/Default.aspx> (studying the rate for overdrafts on debit cards and ATMs).

79. *See* Fuchs, *supra* note 78 at 11-12.

80. *Id.* at 5-6.

81. *Moebs Services – Economic Research and Consulting*, MOEBS SER., <http://moebs.com/>. Collecting "primary, empirical data about financial institutions' services, pricing, operating expenses, and financial condition" since 1983. *Id.*

82. Fuchs, *supra* note 78, at 6; Over Draft Fees Remain Flat, *supra* note 78.

83. Fuchs, *supra* note 78, at 6.

84. Semiannual Regulatory Agenda, 80 Fed. Reg. 35116, 35117 (June 18, 2015).

85. Todd J. Zywicki, *The Economics and Regulation of Bank Overdraft Protection*, 69 WASH. & LEE L. REV. 1141 (2012). Argues that "[t]he case for regulation in this area under traditional safety and soundness is exceedingly weak, and the evidence of harm that would justify action under a consumer protection rationale, such as evidence of a lack of consumer understanding of the product's terms or prices, is nearly nonexistent." Todd J. Zywicki & Nick Tuszynski, *The Economics and Regulation of Bank Overdraft Protection*, 13 ENGAGE 84, 84 (2012) ("[t]he case for regulation in this area under traditional safety and soundness is exceedingly weak, and the evidence of harm that would justify action under a consumer protection rationale, such as evidence of a lack of consumer understanding of the product's terms or prices, is nearly nonexistent."). *But see Live From New York City!*, CONSUMER FIN. PROTECTION BUREAU: BLOG, 18:40-19:10 (Feb. 22, 2012),

services as either careless, or as non-traditional bank customers who know when their financial circumstances warrant using the overdraft protection program.⁸⁶ In contrast, the CFPB believes overdraft users are unaware of the costs they are incurring and, rather than considering other options for dealing with periodic shortfalls, are too easily influenced to opt-in to the overdraft protection program.⁸⁷ The Moebs Survey pointed out that “[t]he consumer views overdrafts as a safety net and not a penalty anymore.”⁸⁸ Conversely, a 2012 Pew Focus Group revealed the belief, “banks depict overdraft policies as a *protection* when they’re actually seen by the consumers more as a way for the bank to collect additional fees.”⁸⁹ Regulation E helped frame consumer behavior as an affirmative choice—either the consumer opts-in or not.⁹⁰ However, because some data exists to support both opposing perspectives, conclusively determining the motivations behind consumer behavior has been, and remains, an extremely arduous task.⁹¹

Furthermore, flaws in the Database, the current data-driven analysis of complaints on financial services and products, have the potential to deal a devastating blow to the CFPB’s credibility and purpose of identifying consumer behavior.⁹² Complaints to the Database come

<http://www.consumerfinance.gov/blog/live-from-new-york-city/>.

86. ALEX SHESHUNOFF MANAGEMENT, OVERDRAFT PROTECTION A GUIDE FOR BANKERS 11 (2003), <http://www.aba.com/aba/documents/Compliance/ABAOVerdraftGuide2003.pdf> (revealing two views of bankers); see Tanaya Macheel, *With CFPB Rules Forthcoming, Banks Make Strides on Overdrafts*, AM. BANKER, Jan. 5, 2016 (“[B]anks now see overdrafts as a way to both develop future customers and serve the greater good.”).

87. See Press Release, Consumer Fin. Protection Bureau, CFPB Launches Inquiry into Overdraft Practice (Feb. 22, 2012), <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/> (researching misleading information on consumers).

88. Overdraft Fees Remain Flat, *supra* note 78.

89. *Live From New York City!*, *supra* note 85. Susan Weinstock of Pew Charitable Trust said this during a roundtable discussion with the CFPB director, industry representatives and consumer advocates. *Id.*

90. Electronic Fund Transfers (“Regulation E”), 12 C.F.R. § 205.17(b) (2010).

91. ALEX SHESHUNOFF MANAGEMENT, *supra* note 86. But see *Live From New York City!*, *supra* note 85.

92. See Jason Oliva, *MBA’s Stevens: Complaint Database Will Be CFPB’s ‘Undoing’*, REVERSE MORTG. DAILY (Sept. 29, 2015),

<http://reversemortgagedaily.com/2015/09/29/mbas-stevens-complaint-database-will-be-cfpbs-undoing/> (calling for a reform of the Database); see also David H. Stevens, *A Complaint Database With Limited Credibility*, MORTG. BANKERS ASS’N (Sept. 25, 2015), <https://davidhstevensblog.wordpress.com/2015/09/25/the-cfpbs-misleading-consumer-database/> (failing to be transparent to consumers); CONSUMER FIN. PROT. BUREAU, CONSUMER COMPLAINT DATABASE, *supra* note 65 (containing information for each complaint, including

from consumers, financial analysts, and bank management.⁹³ The CFPB uses this data “to help supervise companies, enforce federal consumer financial laws, and write rules and regulations.”⁹⁴ Flaws in the database can lead to unsupported regulations and unnecessary supervision when the complaints incorrectly identify consumer behavior because the CFPB does not verify the complaints.⁹⁵ For instance, the OIG found several “noticeable inaccuracies” in the Database and flagged the Database as insufficient.⁹⁶ Similarly, in 2013, critics were wary of the process for verifying consumer complaints in the Database and pointed out the potential for error and sampling bias.⁹⁷ OIG claimed the inaccuracies were relatively small, but several groups have called for a complete audit of the practice because the comments are not filtered for actual regulatory violations but allow consumer frustrations.⁹⁸ Though the CFPB does not verify the facts alleged in the complaints, it does confirm a commercial relationship.⁹⁹

Critics would argue that the Database is different from surveys revealing the percentage of consumers who opt in to overdraft protection programs—practically, however, the CFPB needs both types of data to

the source of the complaint, the date of submission, the company the complaint was sent to, and the actions by the company to resolve the issue).

93. OFF. OF THE INSPECTOR GEN., *supra* note 50, at 3.

94. *Id.* at 2.

95. *Compare id.* (using the Database to create legislation), *with* Oliva, *supra* note 92 (permitting unverified complaints can create misinformed legislation).

96. *Id.* at 13; *see* Letter from Wayne A. Abernathy, Exec. Vice Pres., Am. Bankers Ass’n, to Mark Bialek, Inspector Gen., Off. of the Inspector Gen. (Jan. 12, 2015), <http://www.aba.com/Advocacy/LetterstoCongress/Documents/LTC-ConsCompDatabase2015Jan.pdf> (arguing for an audit that examines the degree to which complaint data that are published relate to a legal or regulatory violations rather than consumer frustration).

97. Daniel Carpenter & Patricia A. McCoy, *Keeping Tabs on Financial Innovation: Product Identifiers in Consumer Financial Regulation*, 18 N.C. BANKING INST. 195, 205 (2013) (pointing out the shortcomings of the Database, Carpenter and McCoy argue that this data has the potential to be of error and bias in reporting without a better system of verification).

98. *See* Abernathy, *supra* note 96 at 2; *see also* Stevens, *supra* note 92. The American Bankers Association (“ABA”) and Mortgage Brokers Association (“MBA”) call for government oversight of the CFPB’s Complaint Database. *Id.*

99. Richard Cordray, *Disclosure of Consumer Complaint Data* 9 (Consumer Fin. Prot. Bureau, CFPB-2012-0023, Mar. 25, 2013), http://files.consumerfinance.gov/f/201303_cfpb_Final-Policy-Statement-Disclosure-of-Consumer-Complaint-Data.pdf; *see Narrative Scrubbing Standard* 2-3 (Consumer Fin. Prot. Bureau, 2015), http://files.consumerfinance.gov/a/assets/201503_cfpb_Narrative-Scrubbing-Standard.pdf (screening and scrubbing complaints to eliminate personal information).

accurately understand consumer behavior.¹⁰⁰ These testimonials highlight individuals' actual experiences with banking services, as opposed to just numbers.¹⁰¹ For such personal testimonials to provide meaningful data for the CFPB, they need to be accurate and complete—the OIG's findings bring this accuracy into question.¹⁰²

IV. OVERDRAFT PROTECTION PROGRAM ISSUES

The CFPB will likely tackle several issues in future rulemaking regarding overdraft protection programs.¹⁰³ Consumer groups advocate that future rulemaking should bar banks from shuffling consumer transactions,¹⁰⁴ require disclosure of alternative overdraft protection,¹⁰⁵ cap the overdraft charge,¹⁰⁶ and limit how frequently fees can be imposed.¹⁰⁷ The CFPB can fulfill its statutory mandate through future rulemaking focused primarily on barring banks from shuffling consumer transactions and making changes to improve Regulation E through better disclosure requirements.¹⁰⁸

A. *Fair*

For an act to be fair, the act or practice should not be deceptive

100. See Letter from Kate Larson, Regulatory Counsel, Consumer Bankers Ass'n, to Monica Jackson, Office of the Exec. Sec'y, Consumer Fin. Protection Bureau (Aug. 31, 2015), <http://consumerbankers.com/sites/default/files/CBA%20Normalization%20RFI%20FINAL%208-31-15.pdf>

(urging the CFPB to publish accurate and verified data by creating an appeals process, eliminating bad faith complaints and eliminating inquiries).

101. See *Consumer Complaint Database*, *supra* note 65.

102. *Id.*

103. See Ferullo, *supra* note 43 (focusing on issues such as transaction reordering and overdraft opt-in disclosures); see also Carter Dougherty, *Banks' Billions in Overdraft Fees Seen Dodging Tough U.S. Rules*, BLOOMBERG BUS. (June 6, 2015 5:00 AM), <http://www.bloomberg.com/news/articles/2015-06-05/banks-billions-in-overdraft-fees-seen-dodging-tough-regulations> (determining the CFPB will likely propose regulations in early 2016).

104. Bater, *supra* note 8; see *infra*, Part IV. A.1.

105. Dougherty, *supra* note 103.

106. See *infra*, Part IV. C.1.

107. See *infra*, Part IV. C.2.

108. See Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1021(a), 12 U.S.C. § 5511(a) (2010) (mandating *fair*, *transparent*, and *competitive* financial services) (emphasis added).

or abusive.¹⁰⁹ Dodd-Frank specified that the CFPB can only declare acts and practices as unfair if, “the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”¹¹⁰ A practice is abusive if the CFPB finds that the act or practice “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or that it takes unreasonable advantage of a consumer’s lack of understanding, inability to avoid the problem, or reasonable reliance.”¹¹¹

Opponents of overdraft protection programs argue that overdraft protection programs are unfair because they disproportionately hurt lower income people¹¹² and the fees are excessive when compared to the annual interest rate of a loan.¹¹³ While these statements are true, according to Richard Cordray, the Director of the CFPB, the question is whether “current overdraft practices are causing the kind of consumer harm that the federal consumer protection laws are designed to prevent.”¹¹⁴ The banking shuffle is that kind of harm. Barring banks from high to low reordering of debit card transactions will slightly change the overdraft program but will still allow consumers access to the service. The CFPB must weigh consumer benefits against potential abuse.¹¹⁵

109. See CFPB *About Us*, *supra* note 7. Under new Regulation E requirements, “[a]ny steering activity with respect to credit products raises potential legal issues, including fair lending, and concerns about unfair or deceptive acts or practices (UDAPs), among others, and will be closely scrutinized.” GUIDANCE, *supra* note 51, at 5.

110. Melissa B. Jacoby, *Dodd-Frank, Regulatory Innovation, and the Safety of Consumer Financial Products*, 15 N.C. BANKING INST. 99, 105 (2011) (quoting Dodd-Frank Act § 1031(c), 12 U.S.C. § 5531(c)).

111. *Id.*; Dodd-Frank Act § 1031(d), 12 U.S.C. § 5531(d).

112. Michael Corkery, *Regulators Still Find Problems in Overdraft Fees*, N.Y. TIMES (July 31, 2014, 3:22 PM), http://dealbook.nytimes.com/2014/07/31/regulators-still-find-problems-in-overdraft-fees/?_r=0; see also FDIC, FDIC STUDY OF BANK OVERDRAFT PROGRAMS, *supra* note 51, at V.

113. “[I]f a consumer borrowed \$24 for three days and paid the median overdraft fee of \$34, such a loan would carry a 17,000 percent annual percentage rate (APR).” CFPB *Finds Small Debit Purchases Lead to Expensive Overdraft Charges*, *supra* note 2; see also Corkery, *supra* note 112 (discussing how overdraft fees can be an expensive form of debt).

114. Corkery, *supra* note 112.

115. See Tiffany S. Lee, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act’s “Abusive Standard”*, J. OF CONSUMER & COM. L., http://www.jtexconsumerlaw.com/V14N3/V14N3_Dodd-Frank.pdf (“[T]he abusive standard itself may be subject to abuse if the Bureau uses it to ban products or practices that would have been helpful to consumers.”).

While opponents might argue that consumers could reasonably avoid overdraft fees by not opting-in to the overdraft protection program, thus making the banking practice fair,¹¹⁶ this is not the case. Reordering consumer transactions causes “substantial injury” because the process manipulates the order of transactions to boost overdraft fees.¹¹⁷ The opt-in requirement only partially mitigates this unfair practice because consumers have to show consent by opting-in.¹¹⁸ However, regardless of whether the consumer intends to overdraft, harm occurs when a consumer is surprised by extra charges on her account.¹¹⁹ The surprise results from the high fees that are added to the account when the bank orders the transactions in complex posting orders instead of simple chronological order.¹²⁰ The element of consent does not outweigh the unfairness to consumers, who are held liable for understanding this complex posting process when even the CFPB is just now beginning to understand the process’s effect on consumers.¹²¹

The CFPB should find that high to low ordering is abusive; and therefore an unfair practice under Dodd-Frank. The CFPB’s data revealed that posting orders varied widely across the financial markets with combinations ranging from comingled high to low,¹²² sub-batched high to low,¹²³ and chronological order.¹²⁴ The process is even more complex with posting orders categorized by debit type, transaction size, and time stamp.¹²⁵ Some consumers may understand this convoluted posting process, but for those who do not, banks have the ability to exploit a consumer’s lack of understanding, inability to avoid the problem, and

116. See Ferullo, *supra* note 43 (“They [consumers] know what they are doing and have every right to get out the product after opting-in.”).

117. Dougherty, *supra* note 103.

118. Electronic Fund Transfers (“Regulation E”), 15 U.S.C. § 1693, 12 C.F.R. § 1005.17(b) (2012).

119. CFPB *Finds Small Debit Purchases Lead to Expensive Overdraft Charges*, *supra* note 2. “Overdraft fees should not be ‘gotchas’ when people use their debit cards.” *Id.*

120. WHITE PAPER, *supra* note 49, at 44–47.

121. *Id.*

122. WHITE PAPER, *supra* note 49, at 45–46. Comingling high to low is the process of combining different types of debits into one single batch and then processing them from the highest amount to the smallest amount. *Id.* Types of debit include check, ACH (automated clearinghouse), ATM and point-of-sale. *Id.* at 45.

123. *Id.* at 46. Sub-batching is the process of combining the debits together, such as comingling, then separating the debits by type before processing them. *Id.* Banks can process one sub-batch high to low and another sub-batch low to high. *Id.*

124. *Id.* at 47.

125. *Id.* at 46.

reliance on the overdraft protection program to increase profitability.¹²⁶ The burden should be on the banks to simplify the process so consumers can truly understand the terms.¹²⁷

For example, Wells Fargo simplified its posting order by posting transactions in the order received, and if any transactions are received at the same time, the bank posts from low to high.¹²⁸ This change in policy occurred shortly after the United States Court of Appeals for the Ninth Circuit found Wells Fargo's high to low processing fraudulent and ordered the bank to pay customers \$203 million in restitution.¹²⁹ Other big players in the financial industry have also changed their practices in the face of public scrutiny: Bank of America eliminated overdrafts at the point-of-sale in 2011 and JPMorgan Chase assesses no overdraft fees for transactions under five dollars.¹³⁰ Bank of America started asking their customers about the bank's current overdraft practices and the study revealed customers disliked being charged for spending money they don't have, thus leading to the elimination of the service at the point-of-sale.¹³¹ As for JPMorgan Chase, the bank changed its posting policy in 2009 following a lawsuit filed in the same year.¹³² The claim in the lawsuit was that the high to low policy was "unfair, deceptive and unconscionable," but the case settled before the court made a ruling.¹³³

Although banks have made changes, the financial industry lacks a uniform policy and many banks still continue to employ unfair overdraft

126. *Id.* (finding it difficult to determine what process the bank is using).

127. *See, e.g.*, Douglas-Gabriel, *supra* note 1 (revealing that Wells Fargo ended its practice of reordering).

128. *Id.*; *see also A Guide to Your Common Checking Account Fees 2*, WELLS FARGO BANK, <https://www08.wellsfargomedia.com/assets/pdf/personal/checking/fees/value-NV.pdf?https://www.wellsfargo.com/assets/pdf/personal/checking/fees/value-NV.pdf> (last visited Feb. 11, 2016) (outlining its banking fees for checking accounts).

129. *Gutierrez v. Wells Fargo Bank*, 704 F.3d 712, 725–726 (9th Cir. 2012), *aff'd*, 589 F. App'x 824 (9th Cir. 2014) (upholding restitution); *see also* Andrew Martin & Ron Lieber, *Wells Fargo Loses Ruling on Overdraft Fees*, N.Y. TIMES (Aug. 10, 2010), http://www.nytimes.com/2010/08/11/business/11wells.html?_r=0 (losing case).

130. Halah Touryalai, *Yes, Banks Are Reordering Your Transactions And Charging Overdraft Fees*, FORBES (June 11, 2013 3:54 PM), <http://www.forbes.com/sites/halahtouryalai/2013/06/11/yes-banks-are-reordering-your-transactions-and-charging-overdraft-fees/>.

131. *Live From New York City!*, *supra* note 85, at 27:30–28:24.

132. David Voreacos & Laurence Viele Davidson, *JPMorgan Agrees to Pay \$110 Million in Overdraft Fee Case*, BLOOMBERG (Feb. 6, 2012, 1:37 PM), <http://www.bloomberg.com/news/articles/2012-02-06/jpmorgan-agrees-to-pay-110-million-to-settle-overdraft-fee-gouging-case>.

133. *Id.*

policies.¹³⁴ According to Pew research, “[o]f the 44 big banks reviewed by researchers, 51[%] did not engage in high-to-low reordering, compared to 46[%] in 2013.”¹³⁵ Banks’ motivation to change their overdraft policies is insufficient, and therefore further regulation is necessary.¹³⁶ Thus far, motivation to change overdraft practices has largely been derived from “legal battles, arm-twisting by consumer advocacy groups[,] and financial penalties from regulators.”¹³⁷ Instead of making consumers wait on long legal battles and regulatory penalties, the CFPB should categorically prohibit the banking shuffle for the good of the consumer and banking industry.¹³⁸

The counter-argument in support of high to low ordering is that it ensures that major bills like mortgage and credit card payments will be paid for the benefit of the consumer.¹³⁹ But this creates the problem of holding banks responsible for understanding the motivations behind each and every transaction made by the customer.¹⁴⁰ The potential abuse by banks controlling the order of transactions outweighs the consumer benefit.¹⁴¹ Instead of imposing this responsibility on the bank, the consumer should be responsible for keeping track of their spending order. Furthermore, by paying the consumer’s highest bill first, the bank is taking away the primary insulation that a person has to prevent them from over drafting multiple times on smaller amounts.¹⁴²

134. See *Checks and Balances: 2014 Update*, THE PEW CHARITABLE TR. (Apr. 9, 2014), <http://www.pewtrusts.org/en/research-and-analysis/reports/2014/04/09/checks-and-balances-2014-update> (charting and examining the overdraft services of different banks in the U.S.).

135. Douglas-Gabriel, *supra* note 1.

136. See *id.* (revealing no uniform practice).

137. Macheel, *supra* note 86; see also Douglas-Gabriel, *supra* note 1.

138. Macheel, *supra* note 86; see Dougherty, *supra* note 104 (“The unfair, deceptive and abusive nature of bank overdrafts calls for deliberate, strong action by the CFPB.”) (internal citation marks omitted).

139. Douglas-Gabriel, *supra* note 1.

140. Sheshunoff, *supra* note 86, at 19 (stating that conclusively determining the motivations behind consumer behavior a difficult task that still has not been determined); *supra* Part III.

141. See Lee, *supra* note 115, at 119 (“[T]he abusive standard itself may be subject to abuse if the Bureau uses it to ban products or practices that would have been helpful to consumers.”).

142. *Id.*

B. Transparent

The opt-in requirement is too lenient on disclosing alternative options for consumers and increasing disclosure requirements will better serve the goal of promoting transparent practices. Transparency concerns arise from banks not revealing alternative options to overdraft services and from the ambiguous way banks promote the opt-in requirement.¹⁴³

To resolve disclosure issues, Congress gave the CFPB the direct authority to conduct a trial disclosure program “if limited in time and scope, subject to specified standards and procedures, and for the purpose of providing trial disclosures to consumers that are designed to improve upon [forms].”¹⁴⁴ The CFPB issued a notice for comment and request to collect public feedback on its proposed model disclosure form associated with overdraft protection programs.¹⁴⁵

One recommendation to further transparency is to change the language of Regulation E’s provision requiring the disclosure of alternative plans for covering overdrafts from permissive to mandatory.¹⁴⁶ Currently, “[a]n institution may, but is not required to, list additional alternatives for the payment of overdrafts.”¹⁴⁷ The CFPB has listed alternatives to the overdraft service, but the goal of promoting good financial practices is only met halfway.¹⁴⁸ Other options for customers include opting out of overdraft protection programs anytime, tracking their balance carefully, signing up for low balance alerts, and shopping around for a different account.¹⁴⁹ These options are also highlighted on the CFPB website and are fair practices that could be implemented by banks, thereby giving consumers a choice to ensure they avoid deceptive and abusive practices.¹⁵⁰ The CFPB needs to ensure banks actually inform consumers of these options to meet the agency’s goal of

143. See e.g., Regions Bank, CONSUMER FIN. PROT. BUREAU No. 2015-CFPB-0009 (Apr. 28, 2015), http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf.

144. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1032(e)(1); 12 U.S.C. § 5332(e)(1) (2010).

145. Comment Request, Web-Based Quantitative Testing of Point of Sale/ATM (POS/ATM) Overdraft Disclosure Forms, CFPB No. 2015-CFPB-0037 (Sept. 4, 2015).

146. Electronic Fund Transfers (“Regulation E”), 15 U.S.C. § 1693, 12 C.F.R. § 1005.17(d)(5) (2012).

147. *Id.*

148. *Id.*

149. Rutherford, *supra* note 17.

150. *Id.*

promoting transparent practices.¹⁵¹

Additionally, the FDIC recommended enhancing periodic statements and employing a targeted outreach approach as two ways of demonstrating the FDIC's guidance on follow-up action.¹⁵² The CFPB should combine both ways to provide important information to frequent users and to dispel the notion that they are misinformed.¹⁵³ Institutions can employ different approaches to meet this recommendation, but the purpose is to target and monitor the recidivists¹⁵⁴ in order to meet the CFPB's goal of educating consumers.¹⁵⁵ An "enhancement" could mean including a message on the periodic statement that describes how the customer could contact the institution to discuss alternative options with a knowledgeable customer service representative.¹⁵⁶

One way to accomplish a targeted outreach approach is through undertaking "meaningful and effective follow-up."¹⁵⁷

Meaningful and effective . . . means that the institution has made reasonable efforts to provide the customer with information on alternatives to overdraft payment programs that may be better-suited to the individual's need for short-term credit, as well as a clear mechanism for the customer to avail himself or herself of those alternatives.¹⁵⁸

Follow-up action includes contacting the customer personally, informing the customer of available alternatives, and financial

151. See CONSUMER FIN. PROT. BUREAU, STRATEGIC PLAN, *supra* note 30 (meeting CFPB goals).

152. GUIDANCE, *supra* note 52, at 1.

153. *Id.*

154. FAQ, *supra* note 52, at 3 ("The institution should be able to demonstrate that it monitors account usage, undertakes programs designed to address excessive or chronic use, and monitors its success in informing frequent users of overdraft payment programs of the high cumulative costs of the program.")

155. CONSUMER FIN. PROTECTION BUREAU, STRATEGIC PLAN, *supra* note 30, at 10–11.

156. FAQ, *supra* note 52, at 6 ("For example, the following statement could be used: 'You have been paying multiple overdraft fees and there may be cheaper alternative products that may be better suited for your needs. Please call [name of employee] at xxx-xxx-xxxx to discuss other options with a customer service representative or visit us at your local branch.'").

157. FAQ, *supra* note 52, at 5; see Guidance, *supra* note 52, at 3.

158. FAQ, *supra* note 52, at 2.

counseling.¹⁵⁹ The 2014 Study determined nearly one in five consumers accessed the overdraft service more than ten times per year.¹⁶⁰ Furthermore, 82.3% of accounts incur three or fewer overdrafts a year, leaving a smaller targeted number of customers.¹⁶¹ Because of this, the CFPB should require banks to personally contact the consumer after the fourth overdraft fee per year. This follow-up requirement will positively affect consumers' choice to opt-in by ensuring consumers know and understand the financial consequences of overdrafts while allowing them the personal choice to overdraft as many times as they please.¹⁶²

"Under this [combined] approach, it would be reasonable for an institution to continue to send enhanced periodic statements to a customer for as long as the customer continues chronic or excessive usage."¹⁶³ This idea complements the recommendation of requiring banks offering overdraft services to reveal all possible options.¹⁶⁴ The goal is to help consumers make informed decisions when faced with many options to manage the need for short-term credit.¹⁶⁵

Transparency concerns also exist about the manner in which some institutions present the opt-in option to their existing checking account customers.¹⁶⁶ The Birmingham, Alabama-based Regions Bank administrative case¹⁶⁷ provides a perfect example of how vigilant

159. GUIDANCE, *supra* note 52, at 4.

160. This does depend on the banks overdraft protection program charging for the number of transactions or the number of overdraft fees incurred by the same transaction. WHITE PAPER, *supra* note 49, at 44 (varying overdraft practices).

161. DATA POINT, *supra* note 47, at 11–12 (finding, additionally, that 8.3% of bank customers incur nearly 73.7% of all overdraft fees no matter the opt-in status).

162. FAQ, *supra* note 52, at 6; GUIDANCE, *supra* note 52, at 3. For example, if a consumer overdraws his or her account on more than six occasions where a fee is charged in a rolling twelve-month period, the bank must undertake meaningful and effective follow-up. *Id.*

163. FAQ, *supra* note 52, at 6.

164. See Electronic Fund Transfers ("Regulation E"), 15 U.S.C. § 1693, 12 C.F.R. § 1005.17(d)(5) (2012) (recommending banks that offer overdraft services to provide alternative options to the consumer).

165. See FAQ, *supra* note 52, at 4 (urging banks to inform excessive users of alternative options other than overdraft services); GUIDANCE, *supra* note 52, at 6 (recommending personally contacting consumers to help inform consumers of all the options to financial services).

166. Fuchs, *supra* note 78, at 5–6; CTR. FOR RESP. LENDING, BANKS COLLECT OVERDRAFT OPT-INS THROUGH MISLEADING MARKETING, 2 (Apr. 2011), <http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/CRL-OD-Survey-Brief-final-2-4-25-11.pdf>.

167. Regions Bank, *supra* note 143.

oversight of Regulation E can help create more transparent markets.¹⁶⁸ The CFPB, in its role as enforcer of Regulation E, realized that Regions continued charging a subset of customers' overdraft fees pursuant to overdraft protection plans without their express consent.¹⁶⁹ After finding that Regions did not follow the opt-in regulation, it was fined \$7.5 million and forced to reimburse all adversely affected customers.¹⁷⁰ The aforementioned recommendations will police banks in their promotion and provide transparency to consumers.

C. *Competitive*

In fulfilling its purpose, the CFPB must also ensure that markets for consumer financial products and services are *competitive*.¹⁷¹ The test is to weigh the substantial injury to consumers against free market access and innovation.¹⁷² If the balance weighs in favor of competition (i.e. free market access and innovation), the consumer financial product or service passes the test.¹⁷³

1. A Cap on the Amount Charged for Overdraft Fees

Capping fees will fail the competitive test and should not be implemented in future regulation. The opt-in requirement mitigates the need for a cap because not only do consumers have to show consent by opting in, but also consumers are informed as to how much they will be charged for each overdraft fee.¹⁷⁴ According to Regulation E, the institution must disclose the maximum fee that may be imposed.¹⁷⁵ Banks must ask consumers if they wish to enroll in an overdraft protection program and they must provide an explanation of the

168. Sullivan, *supra* note 32 (discussing strict enforcement of Regulation E and its effect on banks and consumers).

169. *Id.*

170. *Id.*

171. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1021(a), 12 U.S.C. § 5511(a) (2010) (emphasis added).

172. Dodd-Frank § 1031(c)(1)(B), 12 U.S.C. § 5531(c)(1)(B); § 1021(a), 12 U.S.C. § 5511(a).

173. Dodd-Frank § 1031(c)(1)(B), 12 U.S.C. § 5531(c)(1)(B).

174. Electronic Fund Transfers ("Regulation E"), 15 U.S.C. § 1693, 12 C.F.R. § 1005.17(d) (2012).

175. Regulation E, 15 U.S.C. § 1693, 12 C.F.R. § 1005.17(d)(3).

program.¹⁷⁶ The burden should be on the consumer to read and remember how much the bank charges for overdrafts before opting-in. Capping fees would hurt the free market because the different services banks provide allow consumers to choose the best bank for their particular needs.¹⁷⁷

Some opponents of overdraft protection programs argue for a cap on the maximum fee charged, but others view such an approach as too paternalistic.¹⁷⁸ Consumers have the option to search for a bank that fits their needs and charges a fee they are willing to pay.¹⁷⁹ For those enrolled in an overdraft protection program, the median overdraft fee rose to \$36 in 2015.¹⁸⁰ However, the CFPB study determined per-item fees ranged from a low of \$10 to a high of \$45.¹⁸¹ Without the cap, consumers have the option to switch to banks that have a *de minimis* waiver such as J.P. Morgan, or a lower overdraft fee.¹⁸²

2. Limitations on the How Frequently Fees Can Be Imposed

The CFPB will likely not include a regulation limiting how frequently fees can be imposed.¹⁸³ The CFPB study revealed a broad range of fee frequencies.¹⁸⁴ The lowest number of overdraft and NSF fees that were charged in a day was two and the highest number was twelve.¹⁸⁵ With this in mind, consumers have the option to search around before choosing a bank.¹⁸⁶ Instead of limiting the frequency of fees, the

176. Regulation E, 15 U.S.C. § 1693, 12 C.F.R. § 1005.17(d).

177. Richard Barrington, *Protection Racket: A Wake-Up Call On Overdraft Fees*, FORBES (June 26, 2013, 2:55 PM), <http://www.forbes.com/sites/moneybuilder/2013/06/26/protection-racket-a-wake-up-call-on-overdraft-fees/#2715e4857a0b206a7b0d9581>.

178. Compare Barbara S. Mishkin, *Rep. Maloney Urges CFPB to Limit Overdraft Fees and Expand Opt-in Rules*, BALLARD SPAHR L. FIRM BLOG (Sept. 11, 2014), <http://www.cfpbmonitor.com/2014/09/11/rep-maloney-urges-cfpb-to-limit-overdraft-fees-and-expand-opt-in-rules/> (urging a uniform cap on overdraft fees), with Barrington, *supra* note 177 (capping overdraft fees can cost customers more money as banks raise others fees to make up for lost revenue).

179. Rutherford, *supra* note 17.

180. See Dougherty, *supra* note 103.

181. See WHITE PAPER, *supra* note 49, at 52.

182. The *de minimis* waiver prevents overdrafts on small amounts. See WHITE PAPER, *supra* note 49, at 53 (“In layman’s terms, *de minimis* thresholds prevent instances in which a consumer may be charged a \$35 fee overdrawing his or her account while buying a \$3 cup of coffee.”).

183. Barrington, *supra* note 177 (denying a form of banking service to customers).

184. WHITE PAPER, *supra* note 49, at 54.

185. *Id.* at 53.

186. Rutherford, *supra* note 17.

recommendation of contacting recidivist consumers should be adopted, since it sufficiently addresses this problem.¹⁸⁷ As long as the consumer is informed, which is the goal of the CFPB, then the consumer still has the freedom to choose to overdraft.¹⁸⁸

IV. PRACTICAL IMPLICATIONS & CONCLUSION

Tension exists regarding whether regulation is needed for overdraft protection programs.¹⁸⁹ One on hand, the market can police various issues such as creating competitive fees.¹⁹⁰ If one bank's fee is too high, consumers can go to a competitor offering a lower fee.¹⁹¹ The CFPB is essentially relying on the notion that if "you know better, you do better."¹⁹² On the other hand, the quote "when people show you who they are, believe them"¹⁹³ characterizes the "8.3[%]."¹⁹⁴ These consumers are informed of the consequences of their actions, but continue making poor financial choices.¹⁹⁵ The problem lies between consumer choice and paternalistic regulation.

Barring the banking shuffle and implementing better disclosure requirements will create a better overdraft protection program while recognizing the consumer's right to make informed decision without government interference.¹⁹⁶ People need access to money in case of emergencies, which, for some, may include enjoying their morning coffee.¹⁹⁷ Thus, informed customers can make a rational decision about

187. GUIDANCE, *supra* note 52, at 6.

188. See CONSUMER FIN. PROT. BUREAU, STRATEGIC PLAN, *supra* note 30, at 23.

189. See David Pommerehn, *Consumers Lose If CFPB Overshoots on Overdraft*, AM. BANKER (Nov. 10, 2015).

190. See *Checks and Balances: 2014 Update*, *supra* note 135 (charting and examining the overdraft services of different banks in the U.S.).

191. *Id.*

192. Maya Angelou, American poet (abridging from original quote "Do the best you can until you know better. Then when you know better, do better").

193. *Lesson 13: When People Show You Who They Are, Believe Them* (OWN television broadcast Oct. 26, 2011), <http://www.oprah.com/oprahs-lifeclass/When-People-Show-You-Who-They-Are-Believe-Them-Video>.

194. DATA POINT, *supra* note 47, at 11–12.

195. *Id.*; see also *CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges*, *supra* note 2.

196. Elvina Nawaguna, *U.S. Republicans Oppose Proposed Overdraft Rules for Prepaid Cards*, REUTERS (Mar. 4, 2015, 4:42 PM), <http://www.reuters.com/article/2015/03/04/us-usa-regulations-banking-overdraft-idUSKBN0M008020150304#hI8QVJ2SI5uvTBS.99>.

197. See Gail Hillebrand, *What's Your Status When it Comes to Overdraft Coverage?* Consumer Fin. Prot. Bureau Blog (Feb. 22, 2012),

opting in to the overdraft protection program. In this context, the Federalist Society says it best, “freedom of contract is most likely to be more efficient than regulation when consumer preferences are heterogeneous and knowledge of one’s needs is highly personal.”¹⁹⁸ If people are continuing to choose the opt-in program, the CFPB should respect the consumer’s informed decision. For the consumer’s sake, the banking shuffle stops here.

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<http://www.consumerfinance.gov/blog/whats-your-status-when-it-comes-to-overdraft-coverage/>.

198. Zywicki & Tuszynski, *supra* note 85, at 86.