By Fax (202-874-4950) and First Class Mail

March 25, 2010

The Honorable John C. Dugan
Comptroller
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219-0001

Dear Comptroller Dugan:

The federally-chartered banks under your supervision will soon implement changes to their overdraft programs to comply with the new Federal Reserve Regulation E rules that require affirmative consent from consumers before banks charge an overdraft fee for debit card purchases and ATM withdrawals. We write to urge the Office of Comptroller of the Currency to closely supervise bank implementation of overdraft opt-in rules. We also write to complain specifically about a marketing letter used by JPMorgan Chase.

OCC Policies Needed on Soliciting Opt-Ins for Overdraft Programs

Specifically, we request that the OCC:

- Require national banks to submit their training manuals, scripts provided to bank employees, communications to customers, and advertising materials and promotions used to solicit opt-in for fee-based overdraft coverage, in order to monitor whether bank practices and messages are deceptive or inconsistent with the Federal Reserve's rule.
- Prohibit national banks from using scare tactics or deceptive or misleading statements in materials and messages soliciting consumer opt-in.
- Closely examine overdraft opt-in programs for disparate impact and take action against any bank that targets vulnerable consumers who are heavy users of overdrafts.

- Consider sustained overdraft fees, i.e. multiple fees for a single violation, to be an unfair practice because the fee is not reasonable or proportional to the overdraft.
- Urge banks to deny overdrafts when funds are not sufficient to cover debit card purchases and ATM withdrawals. Bank of America has announced that it will deny unfunded debit card purchases while Citibank denies both debit purchases and ATM withdrawals on insufficient funds. Rather than solicit customers to pay $35 for small overdrafts, responsible banks should simply deny these transactions.

Given that consumers spent almost $24 billion on overdraft fees in 2008 and knowing that overdrafts triggered by debit cards are the leading form of payments that trigger overdrafts, banks have a strong incentive to persuade consumers to opt-in to fee-based overdraft coverage for one-time debit card purchases and ATM withdrawals. We are already seeing aggressive marketing campaigns promoted by the consultants who design and sell overdraft programs to financial institutions.

JPMorgan Chase Solicitation is Unfair and Deceptive

JPMorgan Chase has designed a cover letter to solicit its existing customers to opt-in for fee-based overdraft which states in bold print:

"YOUR DEBIT CARD
MAY NOT WORK THE SAME WAY ANYMORE
EVEN IF YOU JUST MADE A DEPOSIT
unless we hear from you."

The letter later says, "**To keep your debit card working as it currently does, please call**…" and "Remember your debit card transactions <u>will be denied in the future</u> if you do not have sufficient funds in your account" (emphasis in original). The letter posted by the New York Times is attached to this letter.

We believe that the statements in Chase's letter soliciting the consumer's opt in are deceptive. They create the impression that the consumer's debit card will simply stop working or experience significant problems in everyday usage. While we understand that the institution is referencing its apparent intention not to allow customers who do not opt in to take advantage of the "intraday float" it will afford customers who do opt in, this is by no means clear. The letter misleadingly suggests that the relatively narrow intraday float issue should be a customer's primary concern and greatly overshadows all the other disclosures required by the Federal Reserve on its Model Form for overdraft disclosures.

According to a news account, a consumer who got the sales pitch from Chase said she signed up. "The letter appeared to be an urgency situation to me. The word protection was used."[1]

The statement in Chase's solicitation that debit card transactions will be denied if the customer lacks funds completely disregards less-expensive overdraft protection options offered by Chase in the form of a linked credit card, savings account, or home equity line of credit. Solicitations should not allow banks to give the erroneous impression that no other alternatives exist to avoid

[1] "Bank's Unusual Pitch: Higher Overdraft Fees," WSBTV, March 10, 2010.

debit card denials. This is a material non-disclosure that should be considered an unfair trade practice pursuant to the Federal Trade Commission Act.

The Federal Reserve Regulation E rule on overdraft opt-in requires banks to provide consumers who do not opt in with the same account terms, conditions and features as provided to consumers who do opt in. We urge the OCC to consider whether Chase is violating that requirement by offering intraday float to opt in customers but not to customers who refuse to opt in. As Chase has announced, starting March 29, the bank will modify its posting order so that debit card, ATM and other real-time transactions will be recognized as they occur. Deposits will post before any withdrawals. Checks and ACH debits will continue to post at the end of the day in the order of largest to smallest. As a result, Chase customers who do **not** opt in do not get intra-day float. They would expect their debit card purchases and ATM withdrawals to be denied whether or not deposits processed later in the day covered the payments. Checks and ACH payments that exceed a total of $5 will be paid on insufficient funds for a $34 fee per overdraft.

Chase also charges twice for a single overdraft. Chase will soon charge a standard $15 sustained overdraft fee if the overdraft and fee is not repaid within five days. As a result a single short-term overdraft will cost $49 at Chase. A sustained, or "extended" overdraft fee is an additional fee for a transaction, or a series of transactions, that has already incurred overdraft fees. The fee should be prohibited because no more than one overdraft fee should be permitted per overdraft transaction. The Federal Reserve Board recently proposed prohibiting charging more than one credit card penalty fee based on a single event or transaction, noting "imposing multiple fees in these circumstances could be unreasonable and disproportionate to the conduct of the consumers." Notice of Proposed Rulemaking re Regulation Z, Docket No. R-1384, 75 Fed. Reg. 12,334 (Mar.15, 2010). The OCC should view sustained overdraft fees as "unreasonable and disproportionate."

The fine print in Chase's "Helpful Answers to Your Questions" reveals what a bad deal overdraft coverage is. The mailer concedes that overdraft coverage is still discretionary on the part of the bank. Even when consumers sign up to pay $34 for each overdraft, they get no guarantee that the bank will in fact cover each overdraft up to a preset limit. Repayment terms are glossed over as well. The mailer notes that "Once an overdraft has occurred, you are obligated to bring your account to a positive balance promptly." The FAQ does not clearly state that the bank will use set-off to unilaterally take payment of the overdraft and fees out of the next deposit into the bank account, even if those funds are federally-protected Social Security, SSI, or Veterans benefit payments. Since banks are asking consumers to sign up for an extremely expensive and one-sided product, all the facts should be clearly revealed.

We urge the OCC to examine Chase Bank's overdraft solicitations and to correct misleading and deceptive terms, require disclosure of all options to cover overdrafts, prohibit sustained overdraft fees, and make sure account features are the same for consumers who refuse to opt in to the bank's most expensive form of overdraft coverage.

Overdraft Opt-In Marketing Targeted at Vulnerable Consumers

We are especially concerned that banks are targeting the most frequent overdrafters and steering them to opt into fee-based overdraft, the most expensive overdraft option. A New York Times columnist quotes the head of Chase's consumer banking as describing the sort of person who would best benefit from overdraft coverage as a person who runs low on funds the weekend before payday and needs money to pay for groceries or a prescription or to take a pet to the vet.[2] In other words, consumers who use overdrafts are cash-strapped families, struggling to make ends meet who can least afford to pay $34 for a $20 "cash advance" on a debit card.

Indeed, third party consultants who market overdraft programs have already begun urging banks to target their opt-in solicitations to frequent overdrafters. For example:

- A consultant urged his clients to "target abusers for opt-in." (Rory Rowland, Rowland Consulting, January 29, 2010)
- "Identify 'frequent fliers,'" – citing the FDIC survey's finding that the most frequent overdrafters spend over $1600 annually in fees – and to "focus attention on those customers first." (Webinar, i7Stategies, March 4, 2010)
- ACTON's "5 Step Mail Program" that targets customers with four or more overdrafts in a year. "This group gets a gift or cash offer if they respond…After all, this is your most profitable fee group." Step 5 is to again contact any customers in the 4+ group who have not responded. (www.actonfs.com/Optin.aspx)
- "With the SoundBite Debit Card Enrollment solution, your business can…Segment and prioritize outreach based on customers/ overdraft usage history…" (www.soundbit.com/solutions/sales-marketing/debit-card-overdraft-opt-in)
- One consultant asks "What can you do to protect or even increase your overdraft fees?" While not explicitly stating they target heavy overdrafters, one of their selling points is "Privilege Manager CRM Software that automates and segments account holder communications for greater efficiency and effectiveness." (www.jmfa.com/pageContent.aspx?id=126)

Targeting the most vulnerable segment of bank customers – the small minority with repeated overdrafts per year -- raises safety and soundness concerns for the institution, since it encourages high levels of unsustainable debt among these accountholders. Research[3] has repeatedly found that overdraft fees have a disparate impact on lower income consumers and communities of color, raising fair lending concerns under the Equal Credit Opportunity Act (ECOA).[4]

We urge you to work with the other bank regulators such as the OTS and the Federal Reserve Board, to closely monitor institutions' efforts to entice customers to opt in. The OCC should

[2] Ron Lieber, "Overdraft Protection: Why Bother?" New York Times, March 12, 2010.
[3] Consumer Federation of America's 2004 survey found that 45% of African Americans had experienced overdrafts, compared to only 28% of consumers overall. CFA conducted another ORCI poll in July 2009, finding that African Americans were twice as likely to have experienced overdrafts as consumers overall. In 2006 and 2008, the Center for Responsible Lending found that only 16% of people who overdraft pay 71% of all overdraft fees, and those individuals are more likely than the general population to be lower income and non-white. See Leslie Parrish, *Consumers Want Informed Choice on overdraft Fees and Banking Options*, CRL Research Brief (Apr. 16, 2008) at www.responsiblelending.org/overdraft-loans/research-analysis/consumers-want-informed-choice-on-overdraft-fees-and-banking-options.html
[4] "Reverse redlining" – tarteting unfair, predatory, or abusive products with a disparate impact on protected classes – has been recognized as a fair lending violation in both the housing and auto lending contexts. Overdrafts were recognized by banking regulators as extensions of credit in the 2005 Interagency Guidelines on Overdrafts, even though the associated fee has been excluded from Truth in Lending Act's definition of a "finance charge" by Board rule.

take appropriate swift and clear action to ensure that any opt-in efforts are in compliance with Regulations E and DD and the Equal Credit Opportunity Act and are not otherwise deceptive.

Please let us know if you have any questions or if we can provide further information.

Sincerely,

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(On behalf of its low income clients)

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