

BOUNCE PROTECTION PLANS: CONSUMER CONVENIENCE OR DISGUISED DECEPTION?

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I. INTRODUCTION

LL, a member of a class action suit, has a bank account at a large bank with locations across the United States. LL is mentally disabled and suffers from bipolar disorder. When LL is in a manic phase, he spends compulsively. His sole income is \$752 in Social Security Disability benefits which are direct deposited into his bank account each month. One of the features of LL's bank account is a bounce protection limit of \$900, a feature that is triggered if LL overdraws his account. When LL overdraws, the bank pays the entity to whom the money is owed and LL is assessed an \$18 fee for each overdrawn transaction. LL overdrawed his account twenty times in one week and was assessed an \$18 fee each time. Although LL's account supposedly had a bounce protection limit of \$900, he overdrawed his account by \$1,600. LL's spending stopped only when he was admitted to a psychiatric facility. His bank never questioned the erratic activity; instead, it used his Social Security benefits for the next several months to cover the overdrawn amount. When LL was released from the psychiatric facility, he was impoverished.¹

In a related case, SJ, an elderly woman, receives Social Security benefits of \$565 each month. She, too, maintains a checking account with a bounce protection limit feature. SJ forgot to record one check and inadvertently overdrawed her account by \$35.79. Her bank assessed an overdraft fee of \$30 on the transaction but paid the balance to the payee. The following day, the bank began charging SJ a \$5 per day fee

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¹ See Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, *Lopez v. Wash. Mut. Bank*, 2002 U.S. App. LEXIS 24344 (9th Cir. Aug. 6, 2002) (holding that Washington Mutual's practice of applying directly deposited Social Security benefits to overdraft charges does not violate the law because there was sufficient consent by the plaintiffs to such practice); see also *In re Wash. Mut. Overdraft Prot. Litigation*, 2006 WL 2570957 (9th Cir. 2006).

for her overdrawn account. Eleven days later, SJ received a letter from her bank about the overdrawn account, at which time she immediately deposited enough cash to account for the overage and fees. Overall, SJ was charged \$75 for a \$35.79 loan that was outstanding for two weeks.²

In each case, consumers were adversely affected by a feature of their accounts they may not have known existed. Had they known about the bounce protection plans in which they had been automatically enrolled, they might have opted out and avoided usurious penalties. Each year, consumers pay \$17.5 billion in overdraft fees when banks allow consumers to overdraw their accounts through various payment methods including checks, automated clearinghouse (ACH) transactions, automated teller machine (ATM) withdrawals and debit card purchases.³ This amount is more than the \$15.8 billion combined amount of overdraft loans extended to consumers annually.⁴ As federal regulators have become increasingly aware of the growing problem bounce protection plans pose, they have begun the process of drafting regulations to protect consumers from this harmful scheme.

II. BOUNCE PROTECTION PLANS – AN OVERVIEW

Bounce protection plans (also sometimes referred to as abusive overdraft loans) represent a relatively new form of high-cost credit offered to banking clients.⁵ These plans are marketed as tools to help consumers avoid embarrassment and merchant overdraft fees imposed when banks refuse transactions due to insufficient funds.⁶ Banking

² See Facts reported by SJ's attorney, Mountain State Justice in West Virginia, included in The Consumer Federation of America and the National Consumer Law Center, *Bounce Protection: How Banks Turn Rubber into Gold by Enticing Consumers to Write Bad Checks – An Examination of Bounce Protection Plans* app. at 7, available at http://www.consumerlaw.org/issues/bounce_loans/appendix.shtml (last visited Mar. 29, 2009) [hereinafter Bounce Protection].

³ Press Release, The Consumer Federation of America, the Center for Responsible Lending, The Consumers Union, The U.S. PIRG, and The National Consumer Law Center, *Jury's Out on Regulators' New Proposal to Address Abusive Overdraft Loans*, December 22, 2008, available at http://www.consumersunion.org/pub/core_financial_services/006478.html. Most plans also do not set controls on how often a consumer can overdraw the account or a cooling off periods between overdrafts, and do not set a limit on the number of overdrafts used in a month as long as the bounce protection limit is not exceeded [hereinafter Jury's Out].

⁴ *Id.*

⁵ Press Release, Bd. of Governors of the Fed. Reserve Sys., Electronic Fund Transfers, Proposed Rule and Request for Public Comment at 23, (proposed December 18, 2008) (to be codified at 12 C.F.R. § 205), available at www.federalreserve.gov/newsevents/press/bcreg/20081218a.htm (last visited Mar. 29, 2009) (stating that the term overdraft service "is intended to cover circumstances when an institution assesses a fee for paying an overdraft pursuant to any automated program or service, whether promoted or not, or as a non-automated, ad hoc accommodation") [hereinafter Electronic Fund Transfers].

⁶ Press Release, The Consumer Federation of America and The National Consumer Law Center, Inc., *Consumer Groups Urge Federal Reserve Board to Stop Abusive Bank Overdraft Charges* (Jan. 28, 2003) (noting that banks aggressively market bounce protection plans with ads such as: "Access your paycheck before you have it! Sound too good to be true? Well it isn't, you can now start writing checks before you get paid without the worry of returned checks" and "Have you ever been shopping on the weekend and find a must-have item, but don't have the money in your checking account to cover your check? Have you ever had unplanned expenses between paydays? There is no need to worry! With [bounce protection], you will be covered without the

clients are usually automatically enrolled in bounce protection plans as a routine part of opening a bank account. However, these plans often catch consumers unaware and operate as a high-cost loan when accessed unexpectedly. Studies show the loans boost a bank's fee income while negatively impacting its most vulnerable clients.⁷

In December 2008, the Federal Reserve Board issued Regulation E⁸, a proposed rule related to electronic fund transfers and request for public comment, and Regulation DD⁹, a final rule and official staff commentary under the Truth in Savings Act (TISA).¹⁰ Regulation E is designed to limit a bank's ability to impose an overdraft fee on ATM withdrawals and one-time debit card transactions where the transaction results in an overdraft.¹¹ Regulation DD is designed to assist consumers in comparing banking options by mandating that banks disclose fees, annual percentage yields, interest rates, and other account terms.¹²

This paper will discuss the impact of bounce protection plans on consumers, alternative arrangements to avoid the high interest rates these plans impose, and the proposed and final legislation promulgated by the Federal Reserve Board to curb abusive practices related to these plans.

III. BOUNCE PROTECTION PLANS – HOW THEY OPERATE

Bounce protection plans operate as a relatively simple loan arrangement that prevents consumers from bouncing checks and showing non-sufficient fund balances when their account balance is too low to fully fund a transaction. Instead, the bank pays the check to the payee and charges the consumer a fee for the overdraft, which it adds to the amount deducted from the consumer's next deposit into his account.¹³ Banks advertise these loans to consumers by stating that the bank will cover overdrafts up to certain limits for accounts in good standing and will charge the standard non-sufficient funds fee on the overdrafts.¹⁴ However, consumers do not realize at the time that they are using these high-rate loans and they do not know that there are

embarrassment of a returned check"), available at http://www.consumerlaw.org/initiatives/test_and_comm/content/press_release.pdf.

⁷ FDIC Study of Bank Overdraft Programs, Nov. 2008, Executive Summary at V, available at http://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf.

⁸ Electronic Fund Transfers, *supra* note 5.

⁹ Truth in Savings Act, 12 C.F.R. § 230 (2009).

¹⁰ 12 U.S.C. § 4301 *et seq.* (2000).

¹¹ Jury's Out, *supra* note 3.

¹² 12 C.F.R. § 230.

¹³ 12 C.F.R. § 230, (describing how multiple overdrafts may incur significant fee amounts, even when each overdraft might represent a relatively small dollar amount); *see also* Eric Halperin, Lisa James and Peter Smith, *Debit Card Danger*, Center For Responsible Lending, at 25, Jan. 25, 2007, available at <http://www.responsiblelending.org/pdfs/Debit-Card-Danger-report.pdf>, (stating that consumers pay \$1.94 in fees for every \$1 borrowed to cover a debit card overdraft).

¹⁴ Bounce Protection, *supra* note 2, at 71.

other, lower-cost options available. In addition, bounce protection loans encountered at ATMs and through debit card purchases are especially deceptive to consumers because consumers are not expecting to be able to access funds in excess of what is in their accounts.¹⁵

Not all bounce protection plans are alike, but there are common features shared by many plans. First, consumers usually do not affirmatively agree to coverage under bounce protection plans.¹⁶ Instead, banks include this feature as a “courtesy” to its customers, and opting out of the plan requires explicit action on the part of the consumer.¹⁷ Next, all plans charge some type of fee when this feature is used. This fee may range anywhere from a \$20-\$34 NSF or overdraft fee, and some banks charge an additional daily \$2-\$5 fee effective for the period when a customer’s account is overdrawn.¹⁸ When money is deposited into a customer’s overdrawn account, banks deduct the amount they covered on the overdraft in addition to their fee from the new deposit. This arrangement occurs even when protected income such as welfare or Social Security is deposited into the account.

For example, a \$100 overdraft usually incurs a \$34 fee. If the consumer pays the overdrawn amount back in 30 days, the Annual Percentage Rate (if calculated as finance charges) would be 414%. Typically, however, consumers pay the overdraft off within 14 days (at the end of the next pay period). When the overdraft is paid off in two weeks, the APR is 884%.

Banks are not required to give Truth in Lending disclosures, which include effective interest rates on the overdrafts, to customers who use bounce protection plans.¹⁹ Moreover, bounce protection may be triggered not only for transactions initiated by check, but also on payment methods such as ATM withdrawals, debit card transactions, online or voice banking lines, and ACH debit transactions.²⁰ Often

¹⁵ Press Release, The Consumer Federation of America, The Center for Responsible Lending, The Consumers Union, The U.S. PIRG, and The National Consumer Law Center, *Regulators’ Overdraft Proposal Falls Short: Fails to Protect Consumers from Unwanted Credit*, May 2, 2008, available at http://www.nclc.org/issues/bounce_loans/content/OD_statement_coalition0508.pdf; see also CRL Policy Brief, Center for Responsible Lending, *Support Opt-In Requirement for Overdraft Fees*, June 2008, available at <http://www.responsiblelending.org/pdfs/require-opt-in-for-overdraft.pdf>, (noting that debit card overdrafts are now the single largest cause of overdraft fees. In addition, most debit overdrafts are small, usually less than half of the average \$34 overdraft fee).

¹⁶ 12 C.F.R. 230.

¹⁷ *Id.*

¹⁸ Regulators’ Overdraft Proposal Falls Short, *supra* note 14; see also U.S. GOV. ACCOUNTABILITY OFFICE, GAO BANK FEES REPORTS, at 16, Jan. 2008, available at <http://www.gao.gov/new.items/d08281.pdf>, (noting that large institutions on average charged between \$4 and \$5 more for overdraft and NSF fees compared to smaller institutions) and Press Release, Moebis Services, *Disparities in Checking Overdraft Fees by Geography and Size*, October 25, 2008, available at <http://moebis.com/AboutUs/pressreleases/tabid/58/ctl/Details/mid/380/ItemID/29/Default.aspx>.

¹⁹ Eric Halperin and Peter Smith, *Out of Balance – Consumers Pay \$17.5 Billion Per Year in Fees For Abusive Overdraft Loans*, Center for Responsible Lending, July 11, 2007, at 5, available at <http://www.responsiblelending.org/pdfs/out-of-balance-report-7-10-final.pdf>.

²⁰ See Regulators’ Overdraft Proposal Falls Short, *supra* note 15.

banks include the amount of the bounce protection limit it offers to a consumer as part of that consumer's available amount when information is accessed about the account balance. For example, if a consumer had a bank account with a \$1,000 bounce protection limit and the consumer had \$52 in his account, his account would show a \$1,052 available balance if checked at an ATM. Often banks allow consumers to exceed their bounce protection limits and only require that consumers bring their accounts to a positive balance within a set period of time, generally ranging from a few days to a month.

Banks offer bounce protection plans to a broad range of customers with little oversight. For example, the Indiana Department of Financial Institutions stated that certain banks only require an account to be brought to a positive balance at least once per month.²¹ Because of this and automatic enrollment features, bounce protection plans cover a larger proportion of bank customers than traditional overdraft lines of credit.

IV. BEHIND THE SCENES: SELLING AND PROMOTING BOUNCE PROTECTION PLANS TO BANKS

A few bank consultants are largely responsible for the creation of bounce protection plans. These consultants market the plans to thousands of banks nationwide through software and marketing packages designed to allow banks to easily implement bounce protection plans. The consultants encourage banks to stop thinking of overdrafts as a negative situation and instead, think of the potential for increased fee income.²² Often, these plans are packaged with "free checking" programs.²³ Even if bank accounts are structured purposefully to charge high fees, federal regulation permits banks to call checking accounts "free" as long as there is no regular maintenance fee.²⁴

In addition, banks do not hide the fact that they target their bounce protection products to low to moderate-income consumers, including those on a fixed income.²⁵ One banker even admitted, "[bounce protection is] for the person who accidentally overdrafts the account – the blue collar, workaday folk that live from paycheck to paycheck and cannot afford the hassle of bouncing a check."²⁶ One

²¹ Ind. Dep't. of Fin. Inst., Newsletter, Winter 2002 Edition, Nov. 2002, at 2, available at http://www.in.gov/dfi/Fall_Newsletter_12-02-02.pdf.

²² Laura K. Thompson, *Overdraft Play Looks Better to Small Banks*, AMERICAN BANKER, April 2, 2001, at 1.

²³ Allan Sloan, *No Such Thing As a Free Check*, NEWSWEEK, Nov. 18, 2002, at 56. According to consultant Struck & Associates, L.P., banks that use its programs in conjunction with free checking accounts average \$150 in overdraft fees each year.

²⁴ Regulation DD, 12 C.F.R. § 230.8(a).

²⁵ Alex Berenson, *Some Banks Encourage Overdrafts, Reaping Profit*, N.Y. TIMES, Jan. 22, 2003, at A1.

²⁶ Thompson, *supra* note 22, at 6.

bank consultant was even quoted as saying, “areas of high unemployment, higher unemployment, you typically have more activity. . . If you happen to be a bank that’s on a military post, you’re probably doing twice as much activity as any other bank.”²⁷

When consultants promote their plans to banks, they often promise increased fee income as the main benefit of these plans, and the plans often perform as promised. For instance, First Commerce Bank in Corpus Christi, Texas, doubled its NSF fee income after just a year of implementing a bounce protection plan.²⁸ The rise in fee income is directly traceable to an increased number of overdrawn accounts.²⁹ By marketing bounce protection plans to consumers, banks not only encourage irresponsible behavior and bad financial habits, but they also arguably promote criminal behavior.

Generally, a small percentage of banks’ customers account for a large percentage of overdrafts that occur. A recent survey conducted by the Center for Responsible Lending found that 16% of respondents pay 71% of overdraft fees.³⁰ The survey also found that banks enroll consumers making less than \$50,000 annually in bounce protection plans more frequently than consumers with higher incomes.³¹ Furthermore, in another consultant’s experience, about 4% of the bank’s customers pay about half the overdraft fees, up to \$2,000 per customer each year.³²

The following example highlights how a consumer is treated by his bank after repeated overdrafts. Suppose X opens an account that includes bounce protection of \$750. X overdraws his account by \$100, and the bank sends a letter that he is overdrawn. X continues to overdraw his account until he reaches his bounce protection limit. At this time, X receives more letters with increasingly firm language telling him that he needs to repay the overdrawn amount. X repays the amount a week later and pays the assessed overdraft fees. When X receives his bank statement for the next month, he notices that his bounce protection limit has been increased to \$1,500.³³

Bounce protection plans are mainly a product offered by smaller regional banks. However, Washington Mutual Bank, TCF Bank, and Fifth Third Bank all offer bounce protection products.³⁴ In addition, all types of bank charters use bounce protection plans

²⁷ *Id.* (Quoting Dick Gowdy, executive vice president of Strunk & Associates).

²⁸ Halperin, *supra* note 13.

²⁹ *Id.*

³⁰ Regulators’ Overdraft Proposal Falls Short, *supra* note 14; *see, e.g.*, Jacqueline Duby, Eric Halperin and Lisa James, *High Cost and Hidden from View: The \$10 Billion Overdraft Loan Market*, Center for Responsible Lending, May 26, 2005, available at http://www.responsiblelending.org/pdfs/ip009-High_Cost_Overdraft-0505.pdf.

³¹ Regulators’ Overdraft Proposal Falls Short, *supra* note 15.

³² Berenson, *supra* note 25.

³³ *See* Bounce Protection, *supra* note 2.

³⁴ Berenson, *supra* note 25. Washington Mutual earned \$1 billion from overdraft fees in 2002; Sloan, *supra* note 21.

including FDIC regulated banks, Federal Reserve regulated banks, national banks, thrifts, and credit unions. Consultants aggressively market bounce protection plans with the promise of increased revenue and customer retention. One sample advertisement for bounce protection products being sold to banks stated, “revenue improves in direct proportion to customer satisfaction.”³⁵ A bank trade group representative once touted bounce protection by stating, “You can view it as an insurance policy.”³⁶

V. OVERDRAFT PROCEDURE PRIOR TO BOUNCE PROTECTION PLANS

Before the advent of bounce protection plans, if a customer overdrew his bank account, the bank would charge a NSF fee as a penalty and return the consumer’s check unpaid to the merchant. Then, the merchant might assess an additional fee. Bank managers usually were given discretion to cover the overdraft on behalf of the overdrawn consumer, thus reducing the consumer’s charge to just one fee. However, bankers could decide against extending this courtesy, in which case the check was returned to the merchant to be assessed the usual fee in addition to the overdraft. In cases where the bank chose to cover the overdraft, the bank also retained the discretion to waive the overdraft fee itself.

NSF and overdraft fees are both heavy penalties to pay, and these amounts have been rising steadily.³⁷ These fees continually increase at a rate much greater than the increase in the Consumer Price Index (CPI) over the same period.³⁸ Moreover, these fees routinely exceed the cost banks incur when checks bounce. A Consumer Federation of America report in 1998 determined that it costs banks just \$1.50 to process a bounced check.³⁹ In addition, the report described how some banks use a variety of devices to increase income from NSF checks, including changing the order in which checks clear the bank.⁴⁰

Bounce protection plans were first marketed in the mid-1990’s, at about the same time payday loans became popular. When selling

³⁵ Pinnacle Financial Strategies, <http://www.pinnaclefinancialstrategies.com/products/odp/odp.asp> (last visited Mar. 29, 2009).

³⁶ Berenson, *supra* note 25 (quoting Diane Casey, president of Americans Community Bankers).

³⁷ Bd. of Governors of the Fed. Reserve Sys., *Annual Report to the Congress on Retail Fees and Services of Depository Institutions*, July 2001, at 5, available at <http://www.federalreserve.gov/boarddocs/rptcongress/2003fees.pdf>. In 2001, the average NSF fee was \$20.75, up from \$17 in 1997, and the average overdraft fee was \$20.50, up from \$16.50 in 1997.

³⁸ Timothy H. Hannan, *Retail Fees of Depository Institutions, 1997-2001*, Federal Reserve Bulletin, Sep. 2002, at 409, available at <http://www.federalreserve.gov/pubs/bulletin/2002/0902lead.pdf>.

³⁹ Janice C. Shields, *Bounced Checks: Billion Dollar Profits II*, Consumer Federation of America, June 1998. Based on 1997 charges, bounced check fees ranged from 11 to 32 times the cost of actually handling NSF checks.

⁴⁰ Berenson, *supra* note 25.

bounce protection plans to banks, consultants routinely refer to their plans as the banking industry's answer to payday loans. Jean Ann Fox, a consumer advocate with the Consumer Federation of America stated "Banks are encouraging consumers to overdraw their accounts, then charging penalty fees when they do. Bounce Protection is payday lending without the middleman."⁴¹ However, bounce protection plans, until recently, have escaped most of the criticism that has been directed at payday loans.⁴² This reality hurts consumers because in some respects, bounce protection plans are more dangerous than payday loans since the effective APRs for bounce protection plans often exceed the rates for payday loans. In addition, at least payday lenders are required to make Truth in Lending disclosures mandated by U.S. law, a disclosure not currently required for bounce protection plans.

VI. ALTERNATIVE ARRANGEMENTS TO BOUNCE PROTECTION PLANS

Overdraft lines of credit are routinely offered by banks and represent a more reasonably-priced credit product that enables consumers to avoid the high fees associated with bounce protection plans. Banks may also allow overdrafts to be paid by transferring money from a customer's savings account held at the same bank or by charging the overdraft to the customer's credit card. Not only do these alternatives offer a better interest rate to consumers, but they also include Annual Percentage Rate (APR) disclosures and are subject to Truth in Lending reporting requirements.⁴³ However, rates on overdraft lines of credit are relatively high and banks often charge monthly fees of around \$15 for these loans.⁴⁴ Moreover, not everyone who applies for an overdraft line of credit will be approved, so this is not a viable option for many consumers.⁴⁵ For those who are approved, however, these loans offer much lower interest rates than those imposed by bounce protection plans.

VII. FEDERAL RESERVE BOARD PROPOSALS

In May 2008, the Federal Reserve Board ("Fed") issued a proposal for new rules on overdraft practices designed to address the

⁴¹ Regulators' Overdraft Proposal Falls Short, *supra* note 15.

⁴² Jean Ann Fox, *The Growth of Legal Loan Sharking: A Report on the Payday Loan Industry*, Consumer Federation of America, Nov. 10, 1998, available at http://www.consumerfed.org/pdfs/The_Growth_of_Legal_Loan_Sharking_1998.pdf.

⁴³ FDIC Study of Bank Overdraft Programs, *supra* note 7, at 2.

⁴⁴ The Federal Reserve Board, *Protecting Yourself From Overdraft and Bounced-Check Fees*, available at <http://www.federalreserve.gov/pubs/bounce/>.

⁴⁵ See, for example, Call Federal Credit Union, *The "Peace of Mind" Loan*, "The Overdraft Line of Credit approval, limit, and interest rate is based on the member's credit worthiness. Your rate may vary depending on individual credit history and the Credit Union's underwriting standards," available at http://www.callfcu.org/asp/products/product_1_5.asp.

negative impact bounce protection plans have on consumers.⁴⁶ The proposal failed in an area consumer groups have long considered the most crucial – maintaining the standard that allows banks to automatically enroll consumers in bounce protection plans.⁴⁷ Jean Ann Fox, director of financial services for the Consumer Federation of America stated that “bank overdraft loans are payday loans without consumer consent or a contract. Consumers should be asked for their consent first before being required to pay triple-digit interest rates for cash advances that must be repaid out of their next deposit.”⁴⁸ In a study conducted by the Center for Responsible Lending, consumers cited a desire to choose whether or not they would be enrolled in a bank protection plan.⁴⁹ Moreover, most respondents said that they would rather have their debit transactions denied at checkout if the alternative was to pay as much as \$34 in overdraft fees.⁵⁰ After much criticism from consumer groups such as the Consumer Federation of America, the Center for Responsible Lending, the Consumers Union, U.S. PIRG, and the National Consumer Law Center, the Fed withdrew the proposed rules on December 21, 2008.⁵¹

However, that same day, the Fed issued a new rule affecting bounce protection plans under the Truth in Savings Act (“TISA”).⁵² As part of the TISA, the new rule is designed to “assist consumers in comparing deposit accounts offered by depository institutions, principally through the disclosure of fees, the annual percentage yield, the interest rate, and other account terms.”⁵³ The new (final) rule amends Regulation DD by addressing the disclosure practice of banks as they relate to overdrafts.⁵⁴ Before this rule became effective, only banks that actively promoted or advertised bounce protection plans were required to disclose aggregate fee amounts.⁵⁵ Now, the rule requires banks to periodically disclose both aggregate amounts charged for overdraft fees and for returned item fees as of the statement period and the current year-to-date.⁵⁶ The rule also requires that available balance amounts exclude any amount over the customer’s current balance, namely the exclusion of amounts made available through bounce protection plans.⁵⁷ In a statement, Chairman of the Federal Reserve Board Ben Bernanke said, “The rules dealing with overdrafts

⁴⁶ Regulators’ Overdraft Proposal Falls Short, *supra* note 15.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Jury’s Out, *supra* note 3.

⁵² *Id.* (stating that the Board received over 6,000 comments on the Regulation DD proposal).

⁵³ Truth in Savings Act, *supra* note 9.

⁵⁴ Press Release, Bd. of Governors of the Fed. Reserve Sys., *Highlights of Rules Regarding Overdraft Services*, available at www.federalreserve.gov/newsevents/press/bcreg/20081218a.htm (last visited Mar. 29, 2009).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

under the Truth in Savings Act are intended to ensure that consumers have clear and timely information about their account balances, so that they can properly manage their accounts and avoid unexpected overdraft charges.”⁵⁸

On December 21, 2008, the Fed also issued a proposed rule amendment to Regulation E, popularly known as the Electronic Fund Transfers Act.⁵⁹ The proposed rule affects the assessment of fees on bounce protection plans and asks for comment on two alternative approaches.⁶⁰ Under the first approach, banks must provide notice to consumers prior to assessing any fees or charges to a consumer’s account for the bank’s payment of overdrafts.⁶¹ The notice would give the consumer the opportunity to opt out of the bounce protection plan and would typically be discussed when an account is opened.⁶² This approach is similar to the current system of automatic enrollment, but under this approach, consumers would be given notice about the bounce protection plan feature.⁶³ Moreover, the new rule would not cover check transactions and preauthorized EFTs, so even if a consumer opts out of a bounce protection plan, the bank still may cover the amount of a check debit in addition to an overdraft fee.⁶⁴ Under the second approach, consumers would be given notice to opt-in to a bounce protection plan.⁶⁵ If a consumer opted in to a bounce protection plan, no further notice would be required when fees or overdraft charges are assessed on the account.⁶⁶ In addition to the proposal itself, the Fed also provides model forms that institutions can use to satisfy their reporting obligations to customers.⁶⁷

The Fed’s two approaches highlight the balancing test between consumer rights and banks’ operational constraints.⁶⁸ The Fed’s

⁵⁸ Board of Governors of the Federal Reserve System, Statement by Chairman Ben S. Bernanke, Dec. 18, 2008, www.federalreserve.gov/newsevents/press/bcreg/bernanke20081218a.htm. (last visited Jan. 23, 2009).

⁵⁹ Highlights of Rules Regarding Overdraft Services, www.federalreserve.gov/newsevents/press/bcreg/20081218a.htm (last visited Mar. 26, 2009). See also Electronic Fund Transfers, Board of Governors of the Federal Reserve System, Proposed Rule and Request for Public Comment at 23 (proposed December 18, 2008) (to be codified at 12 C.F.R. pt. 205), www.federalreserve.gov/newsevents/press/bcreg/20081218a.htm (last visited Mar. 29, 2009) (noting that the Electronic Fund Transfer Act (15 U.S.C. 1603 *et seq.* (2000) “provides a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems”).

⁶⁰ *Id.*

⁶¹ Electronic Fund Transfers, Board of Governors of the Federal Reserve System, Proposed Rule and Request for Public Comment at 23 (proposed December 18, 2008) (to be codified at 12 C.F.R. pt. 205), www.federalreserve.gov/newsevents/press/bcreg/20081218a.htm (last visited Mar. 29, 2009).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 24. (noting that consumers are more likely to pay for significant household expenses such as utilities and rent by using checks, so this rule would enable consumers to avoid possible adverse consequences when these checks bounce).

⁶⁵ *Id.* at 14.

⁶⁶ *Id.*

⁶⁷ *Id.* at 15.

⁶⁸ *Id.* at 25. (noting that “industry commenters stated that many processors do not currently

proposal recognizes that any effective proposal must not unduly burden a bank's operating system or else banks will be forced to cut down on services now offered as a convenience to consumers.⁶⁹ In addressing this concern, the Fed has listed limited exceptions to its rule, primarily for smaller institutions where the cost burden of individually monitoring small batches of transactions would be excessive.⁷⁰ On the other side, the Fed must establish notice requirements that will enable consumers to understand the fees and interest rates associated with choosing to make certain transactions and will allow them to easily opt out of any unwanted services.⁷¹ The Fed commentary specifically notes the benefit bounce protection plans provide to consumers in certain situations, such as when payments are made by check.⁷² In these situations, consumers avoid the merchant fee in addition to the bank's imposition of an NSF fee when they are enrolled in a bounce protection plan.⁷³ However, when bounce protection plans cover debit and ATM transactions, the benefit to consumers is eliminated.⁷⁴ With these types of transactions, it is more beneficial to a consumer to simply have his request declined rather than to be charged a fee for a relatively small overdraft.⁷⁵

In addition, the proposed rule would prevent institutions from imposing a fee when consumers overdraw their accounts because there is a hold on the consumer's account that exceeds the actual transaction amount.⁷⁶ The main problem with this system occurs when a consumer uses a debit card to pay for a purchase, the amount of which is not known at the time the transaction is authorized.⁷⁷ For example, if a consumer uses a debit card to pay for gas, the debit hold may be placed for an estimated amount that exceeds the actual amount of the transaction.⁷⁸ The consumer might continue with normal transactions, assuming that the amount withdrawn from his account equals the

have systems set up to distinguish paying overdrafts for some, but not all, payment channels, and that the reprogramming costs would be significant").

⁶⁹ Electronic Fund Transfers, *supra* note 5.

⁷⁰ *Id.* at 34.

⁷¹ *Id.* at 17.

⁷² *Id.* at 21.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Electronic Fund Transfers, *supra* note 5, at 22.

⁷⁶ *Id.* at 15, 68-69. This occurs when, for example, a consumer uses a debit card to make a purchase and a block, or hold, is imposed on funds in the consumer's account to ensure that the consumer has sufficient funds in the account when the transaction is presented for settlement. When debit holds are placed on a consumer's account, they may last for up to 3 days, during which time the funds are not available for the consumer's use in other transactions.

⁷⁷ *Id.* at 69.

⁷⁸ *Id.* An example is given where a consumer with \$100 in his account swipes his debit card at a pay-at-the-pump card reader at a gas station. The card issuer may place a hold on the maximum amount guaranteed to the merchant (currently \$75 under most card network rules). If the consumer spends only \$25, the excess \$50 hold may stay on his account for up to 3 days, thus potentially causing him to overdraft since the account would show the \$50 as unavailable even though his gas bill was only \$25.

actual transaction amount.⁷⁹ When this happens, consumers may accidentally overdraft because of the excess hold amount itself, or because prior transactions may be presented for settlement while the hold is still in place.⁸⁰ Under the proposed rule, institutions would not be required to apply this provision as long as they independently establish procedures to release the hold within a reasonable period of time.⁸¹ The proposed rule is designed to directly address one of the primary goals of the EFTA by ensuring that consumers would not be assessed fees for overdrafts that would not have occurred but for the presence of the hold.⁸²

VIII. REFORMING BOUNCE PROTECTION PLANS

The Federal Reserve Board's proposed amendment to Regulation E, the Electronic Funds Transfer Act, is a meaningful step forward in its efforts to curb abusive lending practices and the arbitrary imposition of fees on consumer bank accounts. However, the proposed amendment does not go far enough to address the many concerns consumers have and potential solutions advocated by consumer groups. The following is a brief discussion of reforms that should be enacted to protect consumers from unnecessary charges and usurious interest rates.

Banks should be required to obtain customers' informed consent before enrolling customers in bounce protection plans.

A requirement that banks gain consumers' informed consent before covering them under bounce protection plans is a baseline reform desperately needed to address consumer rights.⁸³ This consent requirement should be widely-applied and should have few exceptions so that consumers can accurately gauge the benefit they receive against any fees imposed. Data from studies have consistently shown that most bank customers are automatically enrolled in bounce protection plans, but would rather have their transactions declined if there are

⁷⁹ *Id.* at 69.

⁸⁰ *Id.*

⁸¹ Electronic Fund Transfers, *supra* note 5, at 15, 75. A reasonable period of time is proposed at 2 hours.

⁸² *Id.* at 17. However, the Fed proposal fails to address check holds, which occur when a bank intentionally delays the availability of deposits. The Fed proposal also does not address the consequences of banks' manipulation of the order in which transactions are cleared in order to maximize overdrafts; Letter to Alan Greenspan, Chairman of the Federal Reserve Board, by the consumer advocacy groups The Consumer Federation of America, The Center for Responsible Lending, The Consumers Union, The National Consumer Law Center, and The U.S. Public Interest Research Group, June 8, 2005 (stating that one third of big banks "disclose that they use high to low debit clearing which causes more fees to be levied when the largest check processed causes other transactions to bounce").

⁸³ Comments to the Federal Reserve Board's Solicitation for Comments on Bounce Protection Products, Docket No. R-1136, April 28, 2003, (suggesting, in part, that initial disclosures as part of the account-opening process include a sample actual APR disclosure chart to alert consumers to the high rates charged through bounce protection plans).

insufficient funds in their accounts.⁸⁴ Moreover, consumers want to know about alternative short term credit options such as linked savings accounts and overdraft lines of credit.⁸⁵ Consumer advocate groups also note that unless opt-in requirements alone are instituted, consumers would bear the burden of unsubscribing from bounce protection plans even when they never subscribed to begin with.⁸⁶ In addition, instead of operating as a helpful convenience to consumers, as they are advertised, the bounce protection plans actually tend to drive consumers further into debt.⁸⁷ This is especially unfair to low-income families, the primary users of bounce protection plans and the demographic who can least afford to use these plans.⁸⁸

When bounce protection plans are properly viewed as a product being sold to consumers, analysis further reveals the exploitative approach of these products. Requiring consumers to opt out is analogous to asking consumers to request not to be charged for products and services they never ordered. In addition, in the general lending environment, it is unimaginable that credit would be extended unless a consumer asked *not* to have it extended. While marketing a vast array of products, marketers routinely and successfully employ techniques requiring opt-outs at some point in the future.⁸⁹ These plans are successful because consumers are unlikely to opt out at a later date. Similarly, bounce protection plans operate such that consumers do not know when they are originally enrolled in the plan and if and when they ever find out about their enrollment, they are unlikely to take proactive steps to opt out of the plan.

Truth in Lending Act disclosure requirements should be extended to bounce protection plans, including at ATMs where customers make withdrawals. These disclosures should include per item and per day fees.

Section 1602(e) of the Truth in Lending Act defines the term “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.”⁹⁰ Bounce protection plans operate as credit arrangements between banks and their customers by allowing the customer to incur debt while deferring its payment. The Office of Comptroller of Currency has even stated that bounce protection plans represent credit under the TILA definition.⁹¹

⁸⁴ Center for Responsible Lending, *Support Opt-In Requirement for Overdraft Fees*, Policy Brief, June 2008, www.responsiblelending.org. (last visited Mar. 29, 2009).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Center for Responsible Lending, *supra* note 83. For example, offers promising 30-day money-back guarantees and music-of-the-month clubs rely on consumers receiving products and forgetting to opt out at a later date.

⁹⁰ 15 U.S.C. §1602(e) (2000).

⁹¹ Daniel P. Stipano, Deputy Chief Counsel, Office of Comptroller of Currency, Interpretive Letter #914, Sept. 2001., www.occ.treas.gov/interp/sep01/int914.pdf.

State regulators have agreed with this conclusion.⁹² In addition, banks themselves market bounce protection plans as credit by highlighting their deferral of repayment provisions.

Disclosures are mandatory under TILA only if bounce protection is considered credit and if the bank meets the statutory definition of a creditor.⁹³ A creditor is defined as a person who extends credit that is payable by agreement in more than four installments or for which a finance charge is or may be required.⁹⁴ The applicable part of this definition to bounce protection plans is the portion dealing with finance charges. Therefore, it is necessary to look to the definition of “finance charge” which is said to be “any charge payable directly or indirectly by the consumer, and imposed by the creditor as an incident to the extension of credit.”⁹⁵ Since bounce protection plans operate in concert with this definition (they are paid by the consumer, imposed by the bank/creditor, and are incident to the extension of credit), they may properly be considered finance charges.

The TILA does exempt from the definition of finance charges any fee which is also paid in a comparable cash transaction.⁹⁶ However, there is no comparable cash transaction to the operation of a bounce protection plan. In addition, the daily finance charges are excellent examples of finance charges, even if a comparable cash transaction could be found to invalidate the NSF fee as a finance charge.⁹⁷

Furthermore, disclosures under the TILA are of utmost importance to consumers. Under the TILA, creditors are required to disclose interest rates, such as annual percentage rates, on credit extended to consumers.⁹⁸ If consumers knew that the rates they were paying through fees assessed due to bounce protection plans, they could make an informed decision to access funds through alternate means. However, the current situation lulls consumers into a false sense of contentment when they do not realize just how usurious the charges become when they are levied on overdrafts.

Banks should be forbidden from advertising or promoting plans that potentially encourage criminal financial conduct, such as purposefully writing checks without requisite funds in the account.

Bounce protection plans may, in certain situations, encourage

⁹² Indiana Department of Financial Institutions, Newsletter, Winter 2002 Edition (Nov. 2002) at 2; Letter from Assistant Attorney General Paul Chessin, Colorado Department of Law, Consumer Credit Unit, Mar. 21, 2001, in response to referral from the Administrator for the Colorado Uniform Consumer Credit Code.

⁹³ 15 U.S.C. §1602 (2000).

⁹⁴ 15 U.S.C. §1602(f) (2000).

⁹⁵ 15 U.S.C. §1602(a) (2000).

⁹⁶ *Id.*

⁹⁷ Iowa Consumer Credit Code Administrator, Informal Advisory #88, *Per Diem Charge on Honored NSF Checks As A Finance Charge Under the ICCA and Iowa Common Law*, issued August 12, 1999; Alex Sheshunoff, *A New Approach to Covering Overdrafts*, Bank Director, April 1, 2002, at 56.

⁹⁸ 15 U.S.C. §1601 (2000).

consumers to engage in risky and arguably criminal financial behavior that they would not normally consider in the absence of these plans. The Indiana Department of Financial Institutions issued a letter to bankers that, “Under [Indiana Law], it is a Class A misdemeanor when a person knowingly or intentionally issues or delivers a check knowing there are insufficient funds in the bank. Since the [bounce protection plan] gives no assurance of coverage in the event of an overdraft, but leaves that to the discretion of the bank, a customer will never be certain that a bad check will be covered. This could make both the customer and the bank accountable under the criminal statute.”⁹⁹ The letter also stated that bounce protection plans are against public policy when they foster irresponsible banking practices with consumers.¹⁰⁰

State statutes define when civil and criminal penalties will be assessed on consumers who bounce checks.¹⁰¹ Generally, civil penalties include the payment of an amount exceeding the amount of the check to the merchant to whom the NSF check was tendered.¹⁰² However, if intent to defraud can be proven, criminal penalties may be assessed.¹⁰³ Bounce protection plans are just one more vehicle through which a fraud can be perpetuated. As such, banks should not be allowed to advertise or promote plans that in any way promote this destructive and fiscally irresponsible behavior.

Moreover, state statutes may also apply strict fee and interest rate limits on bounce protection plans, causing unintended effects. For example, in Indiana, if rates or fees of bounce protection plans exceed 36%, they will be deemed refundable violations of state interest rate limits.¹⁰⁴ If the rates exceed 72%, they are considered a felony under Indiana law and the credit offered under the plan will be considered void.¹⁰⁵

Banks should be required to inform customers of less expensive alternatives to bounce protection plans.

Several alternatives to bounce protection plans are available for consumers who are at risk of overdrawing on their accounts.

⁹⁹ Letter from Philip Goddard, Deputy Director and General Counsel, Indiana Department of Financial Institutions, February 21, 2002, available at <http://www.in.gov/dfi/PhilsLetter.pdf> (last visited Mar. 29, 2009).

¹⁰⁰ *Id.* (stating that NSF fees “should be punitive in nature and serve as a deterrent to the writing of insufficient fund checks. If a bank feels compelled to increase fees because of the soaring costs and expenses involved in handling insufficient fund checks, then it has the option of raising its NSF fees”).

¹⁰¹ <http://www.ckfraud.org/penalties.html> (last visited Jan. 30, 2009).

¹⁰² *Id.*

¹⁰³ http://www.credit.com/credit_information/money_management/What-You-Need-to-Know-About-Bounced-Checks.jsp; <http://www.ckfraud.org/penalties.html> (last visited Jan. 30, 2009).

¹⁰⁴ Letter from Philip Goddard, *supra* note 99.

¹⁰⁵ *Id.* (stating that “even though the documents to be provided to customers regarding the Program repeatedly point out that this service is a “non-contractual courtesy” and the bank is “not obligated to pay any item presented for payment,” the Department would look beyond these statements to the actual operation of the plan, a matter of examining the substance of the agreement rather than the form”).

Alternatives include overdraft lines of credit, linking the account to a credit card, and transfers from savings. Additionally, home equity lines of credit are available to many homeowner bank customers and would allow the customer more freedom to pay for necessary expenses while avoiding the high effective interest rates imposed by bounce protection plans. Banks should be required to alert customers to their more favorable and straightforward credit products before automatically enrolling customers in bounce protection plans.

Banks should not be allowed to seize protected funds, including Social Security, Veterans Assistance, and Welfare income directly deposited into a customer's account.

One of the most egregious situations in which bounce protection plans play a role is when they operate to remove protected funds from customers' accounts to pay overdraft fees and daily penalty fees of which many consumers are not even aware. In 1996, Congress passed a law enabling all federal payments to be electronically deposited into recipients' bank accounts rather than being mailed as paper checks.¹⁰⁶ However, this law has inadvertently led to more consumers being threatened by the consequences of bounce protection plans.¹⁰⁷ The checking accounts into which protected income is deposited are often accounts to which automatic bounce protection plans apply.¹⁰⁸

As the example at the beginning of the paper showed, this practice should be halted because consumers receiving protected income are usually not in a position to be able to afford these fees or to assess other options. The very purpose of social security income is to aid the elderly, disabled, and poor. If these consumers are not automatically enrolled in bounce protection plans, they would have more control over the vital source of income these funds represent. The Social Security Anti-Assignment Act does not allow these funds to be accessed by attachment or garnishment because the intention is that older Americans will be able to avoid poverty and retain this subsistence income if it is kept out of the hands of creditors.¹⁰⁹ Currently the only creditors who can access this income are the U.S. Government and now banks that take protected funds from consumers' accounts.¹¹⁰ Bounce protection plans should not be given a higher priority than almost all other creditors by being able to deduct fees and penalties from this income.

In addition, consumers, including those receiving protected income, are not in a position to negotiate the individual terms of their bounce protection plans. Instead, they are automatically enrolled with

¹⁰⁶ 31 U.S.C. §3332 (2000).

¹⁰⁷ Overdraft Protection: Fair Practices for Consumers: Testimony before the U.S. House Committee on Financial Services Subcommittee on Financial Institutions and Consumer Credit (July 11, 2007) (statement of Chi Chi Wu, Staff Attorney, The National Consumer Law Center).

¹⁰⁸ *Id.*

¹⁰⁹ 42 U.S.C. §407(a) (2000); Overdraft Protection, *supra* note 107.

¹¹⁰ Overdraft Protection, *supra* note 107.

or without their knowledge of the product and its fee structure. Under bounce protection plans, it is likely that many consumers will fall prey to bounce protection plans, thus incurring high levels of fees and possibly preventing them from being able to afford basic necessities.

IX. CONCLUSION

In conclusion, the December 2008 amendment to Regulation DD and the proposed rule amendments to Regulation E are an overdue response by the Federal Reserve Board to a growing consumer concern regarding fees and charges assessed through bounce protection plans. In many cases, consumers do not affirmatively agree to be covered under overdraft plans, nor do they want banks to allow transactions such as ATM withdrawals when there is not enough money in the account to cover the transaction. The proposed rules address the most egregious charges assessed against consumers for overdrafts. However, much more must be done to ensure that consumers are getting a transparent picture of their account features and other options outside their banks so that they can make meaningful choices regarding their personal finances. The reforms advocated in this paper, if adopted, would go a long way toward accomplishing these objectives.