American Bankers Association
Building Success. Together.

Richard Riese
Senior Vice President
Center for Regulatory Compliance
Phone: 202-663-5051
rriese@aba.com

October 7, 2013

By electronic delivery to:
David.silberman@cfpb.gov

Mr. David M. Silberman
Associate Director Research, Markets and Regulations
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Re: CFPB Study of Overdraft Programs: A Whitepaper of Initial Data Findings

Dear David:

In August 2011, the American Bankers Association (ABA)[1] wrote to the then Treasury Special Assistant Raj Date and the heads of the prudential regulators urging all agencies to avoid imposing additional regulatory complications to overdraft protection and to evaluate the effects of the then recent Federal Reserve rules on overdraft. We appreciate the Consumer Financial Protections Bureau's (Bureau's) subsequent initiative to undertake an evidence-based study of overdraft protection practices prior to making any judgment about the need for further regulatory action.

Accordingly, ABA submits this letter in response to the *CFPB Study of Overdraft Programs: A Whitepaper of Initial Data Findings* (Whitepaper).[2] We recognize that the Whitepaper is an interim report and that over the course of the next several months, the Bureau will be engaged in the second phase of its overdraft study, analyzing account and transaction-level data obtained from random consumer account samples of nine large banks subject to the Bureau's supervisory jurisdiction (Study Banks).[3] ABA appreciates the Bureau's commitment to studying bank overdraft practices and consumer experiences with those practices in order to provide a "shared set of facts" to inform future policy discussions. As the Bureau proceeds with its study, ABA wants to take the opportunity to contribute to the Bureau's efforts by commenting on the Whitepaper's preliminary findings and by making suggestions for additional data development

[1] ABA represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $185 million in assets.
[2] CFPB Study of Overdraft Programs: A Whitepaper of Initial Data Findings (June 11, 2013) available at http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.
[3] Id. (The samples comprise approximately 1.5 million accounts and one billion transactions that "will enable [the Bureau] to apply a consistent methodology in measuring overdraft incidence, overdraft costs, and other metrics reported here... and may result in adjustments to some of the findings derived from the aggregate-level data set forth in this report.")

and analysis. Where relevant, we will share information and data on overdraft practices that we have gathered from ABA surveys and discussions with member banks.[4]

Summary of Comment

Throughout the decade-long policy debate over overdraft practices, the banking industry has consistently urged policy makers to recognize three enduring realities: (1) consumers value overdraft protection services; (2) the banking industry has responded by designing sustainable and transparent overdraft protection options; and (3) consumers are empowered to make informed choices and manage their accounts responsibly. ABA believes that the preliminary findings reported in the Whitepaper demonstrate that the existing regulatory framework creates a strong, pro-consumer baseline that empowers consumers to make informed and responsible account management choices when seeking or declining overdraft coverage that best fits their individual needs and life-styles. Unnecessarily complicating the process will only result in increased confusion and add unnecessary regulatory costs which, in turn, will limit the availability of overdraft services for those who value them the most and may ultimately push more consumers out of the banking system.

An Enduring Reality: Customers Value Overdraft Protection

Competition in the banking industry has driven innovation and enabled consumers to access banking services at lower and lower costs and with increasing convenience. Americans enjoy the most affordable, efficient, and accessible banking system of any country in the world. Today, customers can open a checking account with a minimal deposit and have access to the entire menu of payment services- including checks, debit cards, ACH transactions, online, and mobile banking- at any time, day or night, from virtually anywhere in the world. Significantly, more than 65% of depositors pay less than $3 a month for these account features, far less than the $280 a year that an account costs a typical bank to operate.[5]

Access to personal checking accounts, as with any financial product, is a matter of consumer choice exercised with corresponding consumer responsibility. Whether customers elect a minimum balance account or a "free" checking account they must still be careful not to spend more than they have available or otherwise incur the related costs of doing so. Because some customers find it challenging to manage their accounts, banks have responded with a variety of

[4] This letter will include data from two ABA-sponsored surveys: (1) the ABA Bank Overdraft Practices Survey in which 123 ABA member institutions (93 percent of which reported having assets of less than $10 billion; 66 percent with assets of less than $1 billion) responded online to questions about their overdraft protection services and other alternatives available for covering overdraft transactions; methods used to inform consumers about their overdraft options; and experience with overdraft service usage and outreach to frequent users. Questions about consumer usage of debit card overdraft protection services asked respondents to report on bank records and transaction data between 7-1-2011 and 6- 30-2012. This survey underrepresents consumers served by the 100 largest banks and should not be considered an industry-wide description of practices. ABA sought to capture information from bankers predominantly outside the Bureau’s supervisory jurisdiction. (2) The ABA-Ipsos Survey, a consumer survey that is conducted annually for ABA by Ipsos Public Affairs, an independent market research firm, to understand consumer experience with and response to a variety of bank products and fees. Questions about overdraft and NSF transactions make up only a small portion of the ABA- Ipsos survey. For the ABA- Ipsos Survey, a national sample of 1,000 adults aged 18 and older are interviewed by telephone; this year the survey was conducted on July 11 – 17, 2013.

[5] See ABA Survey: Most Bank Customers Pay Little or No Fees, available at http://www.aba.com/Press/Pages/ConsumerSurvey2013.aspx.

bank overdraft accommodation options that help ensure that a customer's transaction is completed as intended. ABA's Bank Overdraft Practices Survey shows that in addition to overdraft protection services, many banks permit customers to link a checking account with a savings account (88.5%); a money market account (70.5%); a credit card (3.3%), or another option such as a link to a checking account (9.0); banks also offer an overdraft line of credit (77.9%) or another unsecured advance program (0.8%).

Bank overdraft protection services, however, have emerged as the means most popular to customers for covering insufficient funds transactions. For most consumers there are few more attractive substitutes for overdraft protection. It offers a unique combination of protection, discipline, and convenience. Unlike an advance from an overdraft line of credit or a credit card or a payday loan, an overdraft transaction must be repaid within a few days and does not present the temptation of longer-term indebtedness. It does, however, provide a convenient and welcome cushion when needed. Similarly, many customers choose overdraft protection and reject linking their checking account with a savings or money market account because it keeps them from depleting their savings.

There are rational reasons customers value having a payment made, even it if means incurring an overdraft fee. Customers value the ability to avoid the embarrassment, hassle, costs, and other adverse consequences of having a check or automatic electronic payment returned. Whether made by check or electronically, returning a payment to a merchant, mortgage company, landlord, or utility means the customer pays additional fees charged by the entity receiving the payment and suffers other adverse consequences. In addition to avoiding returned check fees, with overdraft protection, customers avoid the inconvenience of having to resolve the issue and arrange a second payment. They also minimize the risk that their landlord, merchant, or other payment recipient will in the future refuse their checks or electronic payments and insist on a cashier's check or cash. Finally, customers avoid having adverse information reported to a "bad check" database. Check and ACH overdraft protection remains important to consumers and is very relevant to the policy debate; some suggest as many as two thirds of all overdrafts are caused by check or ACH transactions.

Refusing to cover point-of-sale (POS) transactions has similar implications for the consumer at the check-out counter. A merchant is unlikely to accept a check from a customer who has just been refused for a debit card purchase. The consequences of a failed payment transaction, together with the impact of the embarrassment of having an item returned or denied, should not be underestimated-especially when an increasing percentage of customers use debit cards as their primary payment method, often carrying no other payment means.

However "irrational" the choice to use overdraft protection may be characterized by some, there is little evidence that consumers regret their choice or the bank's decision to pay. Indeed, all the evidence demonstrates the opposite. A January 2007 consumer advocacy survey, contained in report raising objections to overdraft programs and not inclined to place them in a favorable light, found that when asked over 92 percent of consumer respondents said they would like the bank to pay an item even though there were insufficient funds, and they were willing to pay something for it.[6] Similarly, the 2012 ABA-Ipsos Consumer Survey found that 94% of consumers were glad that the bank paid the check, debit card, or other payment even though there were insufficient funds.[7]

The Whitepaper's finding of a correlation between prior usage of overdraft protection and decisions to opt-in is additional compelling evidence that consumers value overdraft protection. The Bureau reports that the holders of 44.7% of accounts with 10 or more NSF or overdraft items opted-in; in contrast only 11% of accounts with no NSF or overdraft activity opted-in.[8] Regular users are those who are most likely to be aware of its costs and convenience compared to the alternative forms of short-term credit available to them. Their willingness to opt-in clearly demonstrates that they value access to overdraft protection.

As consumer Bureau Director Richard Cordray has observed, "People can make their own decisions, and nobody can or should try to do that for them."[9]

Customer Choice Comes with Responsibility

Consumers have a responsibility for conducting transactions within their means and an obligation to stay informed about account balances. They are in the best position to know what their "actual" balance is, and may easily avoid overdrafts - as 85% of accountholders do - by keeping track of account balances, maintaining a cushion in an account, linking to another account such as a savings account or overdraft line of credit, or requesting low balance alerts. Bankers, regulators, and consumer advocacy organizations alike urge customers to spend within their means, effectively manage their accounts, stay informed about their balances, and pay off overdrafts quickly. Today, consumers have more opportunities than ever before to determine their account balance, including mobile and online banking, voice or automated phone services, and ATM inquiries. A recent survey conducted by the Pew Internet and American Life Project reports that 51% of U.S. adults, or 61% of Internet users, bank online, and 32% of U.S. adults, or 35% of cell phone owners, bank using their mobile phones. The Pew study also reports that both types of digital banking are on the rise.[10]

Thus, a growing number of consumers have ready access to their account balances twenty-four hours a day by logging on to their computer, tablet or smart phone. Bankers are doing their part to adopt technology to make account balances and alerts available on home computers, cell phones and other mobile devices. ABA's Bank Overdraft Practices survey showed that 59% of sampled banks offer low balance email alerts; 43.4% offer low balance text alerts; and 34.4% provide an alert on the ATM screen that proceeding with the transaction will overdraw the account.

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[6] See Center for Responsible Lending "Debit Card Danger" (January 25, 2007).
[7] This has been a consistent finding of the ABA-Ipsos Survey.
[8] Whitepaper, *supra* at 30.
[9] Prepared Remarks of CFPB Director Richard Cordray before the House Financial Services Committee (March 29, 2012).
[10] Pew Internet and American Life Project Survey (August 7, 2013) available at http://www.pewinternet.org/Reports/2013/Online-banking.aspx.

These data reinforce the already robust conclusion that overdraft fees are reasonably avoidable by a customer acting responsibly. After all, not only are customers able to manage their accounts to avoid incurring overdraft fees; the tools to do so are at their fingertips.

Existing Regulations Empower and Protect Consumer Choice

The existing regulatory framework clearly acknowledges the role of informed individual choice and responsibility. Amended Regulation E provides that depository institutions may not impose an overdraft fee for ATM and one-time, point-of-sale debit card transactions unless the customer expressly consents or "opts-in" to the overdraft program. In order to ensure meaningful consumer consent, the regulation establishes a notice and consent regime, including a consumer-tested model opt-in form that institutions have been cautioned against modifying significantly.

The pricing of overdraft protection is simple and transparent. The Model A-9 requires the disclosure of the fee charged for each overdraft transaction; any additional fees imposed if an account remains in overdraft status, if applicable; and whether there are any limits on the number of over draft fees assessed. In addition, it requires the disclosure of other alternatives the bank offers for covering overdraft transactions, including the statement that "they may be less expensive than our standard overdraft practices."

ABA's Bank Overdraft Practices Survey shows that banks disclose the terms and conditions of their overdraft payment services and inform their customers of available alternatives for covering overdraft transactions at multiple contact points - at account opening, following an overdraft transaction, and in follow-up with frequent users - and through a variety of communication channels, including information on the bank website, statement stuffers or other statement notices, deposit account agreements, the Model A-9 opt-in form, a letter or special mailing, or a branch promotion such as a poster or brochure.

Perhaps even more noteworthy than the opt-in provision is the freedom guaranteed by Regulation E for customers to revoke their opt-in at any time. In other words, customer options are further protected by permitting customers to change their minds about participation in an overdraft program at any time, without consequence. ABA's Bank Overdraft Practices Survey shows that respondent banks are informing their customers of the right to opt-out of debit card overdraft protection services at multiple contact points and through a variety of communication channels: 81.6% of banks advise customers of their on-going right to opt-out of overdraft coverage when customers opt-in to debit card overdraft protection; 34.7% include a reminder about the opt-out right as part of follow-up with frequent users; 16.3% include the reminder with the periodic statement's notice of NSF and overdraft charges (i.e., the Regulation DD notice); finally 14.3% include it in the paper or electronic notice issued when each overdraft fee is charged. Significantly, sampled banks reported that only 3.1% of customers who used overdraft protection services more than six times between July 1, 2011, and June 30, 2012, opted-out of their bank's overdraft protection service.

Finally, the requirements of amended Regulation DD augment Regulation E's consumer flexibility by providing consumers with clear disclosures on periodic statements of all NSF and overdraft fees. In addition, Regulation DD requires that institutions only disclose funds available for immediate use - excluding funds available through linked accounts, an overdraft line of credit, or an overdraft program - when disclosing automated account balances to a consumer.

In other words, no one has overdraft protection for debit card purchases or ATM withdrawals unless the customer (1) expressly elects that coverage; (2) receives regular notice of the fees being incurred for overdraft and NSF transactions; and (3) can opt out of the program at any time and still keep the debit account and debit card.

Data reported in the Whitepaper confirm the success of the existing regulatory framework.

The Whitepaper reluctantly acknowledges the success of the existing regulatory framework by stating, "To begin with, it appears that the Board's 'opt-in' amendments to Regulation E have made a material difference in the experience of some consumers."[11] This grudging admission, however, belies the strength of the statistical evidence that shows that consumers are using the information provided to them to make the choice that they consider right for them. The Whitepaper reports a weighted-average opt-in rate of 16.1% for Study Bank accountholders. *Thus, an overwhelming majority of accountholders - 83.9 % - are exercising their choice not to opt-in to debit card overdraft services.* Unsurprisingly, the study also found that accounts of customers that did not opt-in experienced a 45% decrease in fees paid in the six-months following their election.[12]

ABA surveys report higher opt-in rates, but they too show that the Board's rules promote consumer choice. For all respondents to ABA's Bank Overdraft Practices Survey, the opt-in rate among consumer accounts was 34.4%.[13] Similarly, the 2012 ABA-Ipsos Survey reports opt-in rates of 31% for respondents age 35-54 and 23% for respondents over age 55. In addition, the 2013 ABA-Ipsos Survey shows that 85% of consumers have not paid an overdraft fee in the past 12 months.

Thus, today's regulatory framework creates a strong pro-consumer baseline that preserves and promotes consumers' ability to make an informed choice when seeking or declining overdraft coverage and managing their financial affairs. Unnecessarily complicating this straightforward process will confuse customers, increase costs, and reduce consumer choice for managing funds availability.

Competition and responsible risk management practices promote consumer choice.

Section 5 of the Whitepaper describes the diversity of bank practices and policies affecting consumer overdraft experience, including funds availability, available balance calculations, transaction processing, and posting order. Rather than accepting the diversity of practices as a positive result of competition within the banking industry, the Whitepaper characterizes it as

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[11] Whitepaper, *supra* at 60.
[12] *Id*. at 38.
[13] Breaking down these results by asset size, the survey shows: for institutions with assets below $500 million, the opt-in rate was 45.1%, and for institutions with assets between $500 million and $9.9 billion, the opt-in rate was 29.5%. As noted in footnote 4 supra., the survey does not seek to represent the experience of banks over $10 billion in assets.

complex and difficult to understand. Curiously, the Whitepaper concludes, "All of this raises questions about the degree to which even the most sophisticated consumer could readily anticipate and manage the cost of engaging in a series of transactions at one institution or compare the cost of overdrafting at different institutions."[14] Similarly, the conclusion casts doubt on whether it would be realistic to adopt a regulatory policy requiring detailed comparison shopping.

ABA believes that this statement underscores a critical point - the strength and efficacy of the current regulatory framework for placing before consumers the information that they need for making the choices that matter to them. Consumers need not be expected to understand the complexities of the payment system or bank back office operations in order to decide whether they want or do not want overdraft protection services---services that deal with the consequences of how they manage their account balance. The choice presented today by the current rule is clear and compatible with actionable advice.

In other words, disclosures should correspond to the accepted simple educational message that promotes sensible account management by individuals: be careful not to spend money you do not already have. The interagency brochure published in 2005 remains relevant today and instructs accountholders to strive to spend only available funds, to track their account balance, to be attentive to electronic transactions, to review statements regularly, and when they choose to make an overdraft to repay the overdraft advance as soon as possible.[15]

After all, one thing no one should encourage consumers to do is to try to guess how and when merchants will present check or electronic items for settlement and how technology will route or deliver those items to the bank. Because banks cannot control when transactions are presented by merchants for settlement, neither banks nor customers can reliably predict what day or time of day transactions will clear or impact funds availability. Payment order regulation will not cure this. Detailed disclosures that describe the complexity of presentment and settlement would only mislead some customers into thinking they can game the process or spend more than they have in hopes that payments from their purchases will take longer to reach the bank than will future account credits. Imposing such a disclosure would create burden without practical consumer benefit.

Finally, ABA believes that regulatory efforts to plunge consumers into the details of bank operational policies on funds availability systems, available balance calculations, and transaction processing and posting order will have the unintended consequence of confusing customers while at the same time limiting payment system and bank operating options, reducing the range of choices available to consumers, and discouraging the development of new options as technology and consumer preferences change.

[14] *Id* at 63
[15] See http://www.federalreserve.gov/pubs/bounce/default.htm

ABA suggestions for additional data development and analysis.

1. **Survey consumers who have regular experience choosing and using overdraft services so that policymakers can hear from consumers - not consumer groups - about why they choose and use overdraft protection services.**

The Whitepaper reflects concern with the fact that "there remains a small but significant segment of customers at the banks participating in this study who continue to incur a large number of overdraft and NSF fees."[16] In fact these so-called "heavy" users, accountholders who in 2011 incurred 10 or more overdraft or NSF transactions, make up just 7.7% of consumer accountholders at Study Banks. This number is consistent with that reported by the ABA Bank Overdraft Practices Survey in which a similar sized sample of community bank respondents reported that 9.5 % of consumer accounts incurred at least twelve overdraft transactions between July 1, 2011, and June 30, 2012. In addition, we note that the percentage of consumers who regularly overdraw has been constant over time; in 2006 the FDIC found that 9 percent of accounts had at least 10 NSF transactions.[17]

Another constant throughout the debate over overdraft services has been the lack of information about those consumers who regularly use overdraft services. ABA believes that before considering any form of additional regulation of overdraft, the Bureau should conduct a survey of frequent or heavy users in order to understand their decision to opt-in and regularly use the service to meet short-term credit needs.

The decision to impose any new regulatory obligations that may impair access to overdraft services should not be based on selective anecdotes or unsupported assumptions about consumer behavior but by seeking to understand the regular user of overdraft protection - why they use the product, what they understand about their ability to opt-in and out at, and what their preferences are relative to available alternatives. ABA believes that the data will show that regular users are aware of the product's trade-offs and use the product rationally in light of their assessment of available alternatives.

Previous consumer opinion polls have surveyed the general population. Because consumers who use overdraft services regularly make up such a small percentage of the population, the representation of frequent users in survey data is always very limited. As a result, such surveys reflect consumer opinion about overdraft services from consumers with little or no experience with the product. It would be like interviewing the general public about passenger rail service, when only a relatively small segment of the population rides the train. ABA urges the Bureau to survey a substantial number of frequent users of overdraft services to develop data about regular users. Presumably, these would be the people most affected by changes in the regulatory treatment of overdrafts. The survey should investigate questions such as:

- Why these consumers elect to opt-in to debit card overdraft protection;

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[16] *Id.* at 61(emphasis added).

[17] FDIC Study of Bank Overdraft Programs (November 2008) at 81, *available at* http://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf.

- What they understand about their ability to opt-out and whether they have ever exercised that right;
- What occasions or needs typically prompt overdraft use;
- Whether overdraft protection has helped the consumer avoid a late or other penalty fee or has met another emergency need, such as avoiding a utility shut-off or responding to a dental emergency;
- Whether these consumers are aware of available alternatives for covering overdraft transactions;
- Whether the consumer has prior experience using available alternatives for covering short-term liquidity needs;
- Reasons for choosing overdraft protection over available alternatives; and
- Options for meeting short-term liquidity needs if access to overdraft protection is restricted or cut-off entirely.

By conducting such a survey, the Bureau will hear directly from consumers - not consumer groups - about their decision to use overdraft protection. Absent compelling evidence of knowledge gaps or that consumers are using the product irrationally - i.e., evidence that regular users of overdraft protection do not understand the product and its costs relative to available alternatives - people should be assumed to be the best judges of what is in their best interests and should remain free to choose.

2. Consider the unintended consequences that further restriction of overdraft program access will have on all consumers.

Future policy decisions about overdraft regulation also must consider the impact upon *all* bank customers resulting from imposing additional restrictions on overdraft programs. Overdraft protection services are one component of the democratization of deposit account access. Movement from minimum balance accounts with maintenance fees to broader availability of so-called "free," no or low minimum balance accounts, has expanded access to deposit accounts for many consumers.

At the same time, overdraft protection offers to all customers the ability to address the hazards of inadvertent errors or temporary liquidity shortfalls. In other words, overdraft protection assures that transaction account access and functionality are not suspended due to curable, short-term funding shortfalls. The value of such access, convenience, and functionality for customers across the board must not be underestimated in the Bureau's calculation of the costs and benefits of overdraft programs.

The Whitepaper reports that fee income from overdraft and NSF transactions constitute a "substantial share of total revenues generated by consumer checking accounts and contribute significantly to overall revenue, especially for institutions that rely most heavily on consumer lines of business."[18] This, coupled with the study's finding that only 7.7% of consumer checking accounts are heavy users, suggests that the Bureau, like some critics of overdraft protection

[18] Whitepaper, *supra* at 14.

programs, is concerned about the "fairness" of a small number of checking account customers subsidizing free checking for all.

ABA challenges the assertion that overdraft and NSF fees from vulnerable customers overwhelmingly (and unfairly) subsidize free checking. The evidence does not support such a finding. Publicly reported estimates of the yearly cost of maintaining a checking account fall between $280 and $450.[19] Estimating that there are 174 million consumer checking accounts in the United States,[20] and using the lower cost estimate of $280 per account, we estimate that it costs the banking industry $48.7 billion per year to maintain "free" consumer checking accounts (i.e., 174 million checking accounts x $280). Using a recent consumer advocacy group's estimate that consumers paid $16.7 billion in overdraft fees in 2011, overdraft fee revenue can account for just 30% of what it costs the banking industry to provide checking accounts for consumers.[21]

Caps, thresholds, or other price controls imposed on overdraft programs will change the business case for deposit accounts and may affect minimum balance requirements and the restriction or even elimination of many free services. This, in turn, is likely to drive some consumers from the banking system, requiring them to rely on less convenient and generally more expensive nonbank providers such as check cashers, prepaid card issuers, money transmitters, and payday lenders. In addition, those who remain in the banking system will face increased costs and/or reduced services.

Should the Bureau consider shifting the incidence of overdraft protection pricing from those that voluntarily use it to the population of accountholders at large, its continued study must seek to measure and weigh all of these costs so the public policy debate about overdraft regulation considers the full range of unintended consequences that further restriction of overdraft program access will have on *all* consumers.

3. Understand the demographic profile of consumers who use overdraft protection regularly.

Noticeably absent from the Whitepaper is any demographic information about the accountholders who regularly use overdraft protection. The only relevant discussion refers to the 2006 FDIC study which concluded that accountholders in low-income areas and young adults were somewhat more likely than other account holders to incur overdrafts or NSFs. Without offering any new data to support these statements, the Whitepaper suggests that "consumers from potentially vulnerable groups may shoulder a disproportionate share of NSF and overdraft fees and checking accounts."[22]

ABA has consistently questioned the reliability of FDIC's use of census track income designations as a proxy for income. The banking industry believes from our experience that there

[19] *American Banker*, "Free Checking isn't Cheap for Banks," December 11, 2011; *Wall Street Journal*, "The End is Near for Free Checking," June 17, 2010.
[20] This estimate is based on a Federal Reserve estimate using data from the 2010 Survey of Consumer Finances.
[21] *See* Center for Responsible Lending, "The State of Lending in America: High Cost Overdraft Practices," (July, 2013) at 14.
[22] *Id. at* 18.

is little correlation between income and overdraft usage. Nevertheless, the debate about who uses overdraft protection rages on. Many assert - based only on the 2006 FDIC study and anecdotal evidence - that overdraft protection is used predominantly by low to moderate income consumers while others insist that the only predictor of overdraft propensity is a consumer's credit score.[23]

As important as it will be to have more accurate data on user income characteristics; data on educational achievement is also worth developing for what it may say about the stereotypical perception of regular overdraft users.

Finally, it is imperative not to overlook the important role of consumer responsibility in avoiding overdraft fees. Those who are financially responsible can and do manage their accounts-including low balance accounts-without incurring an overdraft. As discussed above, ABA believes that the role of individual responsibility cannot and should not be disregarded. Indeed, as the Bureau proceeds with its account level study, we encourage the Bureau to investigate and report on the number of consumer checking accounts with average balances of $250 or less that incurred no overdraft transactions.

4. **Test whether alerts and account monitoring tools affect overdraft behavior.**

As discussed previously, alerts and other account monitoring tools hold promise for helping consumers avoid overdraft transactions, but they depend on consumers using the information. The Whitepaper acknowledges that this may not always be the case, "Multiple study banks and RFI respondents assert that provision of alerts and online banking does not always lead to significant changes in overdraft behavior and that many consumers overdraft despite monitoring their accounts frequently."[24]

ABA encourages the Bureau to investigate the incidence of consumer decisions to proceed with a transaction when aware that doing so will result in an overdraft and the imposition of a fee. One ABA member bank reports that for a 30-day period in 2011, the bank provided an alert at the ATM that proceeding with the transaction would overdraw the account and result in an overdraft fee. Despite this alert, only 8% of customers chose to cancel the transaction. Moreover, of those that cancelled, 44% returned within 24 hours to proceed with the transaction still in overdraft status. A recent consumer survey reports that on average people who overdraw at ATMs where balance information is readily available generally overdraft more per transaction than in those instances where an overdraft may occur more inadvertently.[25]

These data clearly show informed, intentional use of overdraft protection. We believe that policy discussions must openly address the propriety of imposing additional rules or access limits that override consumers' assessment of what is in their best interest.

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[23] *See* Moebs $ervices, Inc. press release, Who Uses Overdrafts? (September 29, 2009) *available at* http://www.moebs.com/Home.aspx.
[24] Whitepaper, *supra at* 58.
[25] *See* Center for Responsible Lending, "The State of Lending in America: High Cost Overdraft Practices," *supra* at 3.

5. **Investigate whether differences in opt-in rates are in fact the result of marketing strategies.**

As previously mentioned, the Whitepaper reports much higher opt-in rates for heavy users than for the general population of consumer accountholders. According to the Whitepaper, 44.7% of heavy users opted in to overdraft protection when given the opportunity to do so in 2010. In February of 2012, as the Bureau announced its overdraft study, it promised that it would be "looking into reports that consumers are receiving misleading marketing materials about overdrafts."[26]

The data reported in the Whitepaper show that opt-in rates among accounts opened at Study Banks in 2011 varied from single digit percentages to over 40%, and among existing customers who were heavy users and were asked to opt-in in 2010, opt-in rates varied by over 50%.[27] Without offering any additional evidence or explanation in support, the Whitepaper asserts, "This suggests that institutions are describing or selling overdraft options differently to new customers. Similarly, the remarkable variation in opt-in rates among existing customers in 2010 who had been heavy overdrafters may reflect known differences in marketing approaches."[28]

Rather than rely on unsupported speculation, the Bureau should investigate whether differences in opt-in rates are in fact the result of differences in marketing strategies. As part of the supervisory process, Bureau examiners have access to all materials used by Study Banks to notify consumers about the bank's overdraft services and their opportunity to opt-in, including the letters, brochures, statement stuffers, and scripts used by front line staff. In addition, examiners review consumer complaints related to overdraft services. Presumably, any communication strategies that the Bureau deems too aggressive, or potentially unfair or deceptive, would have surfaced through the examination process. Thus, ABA cautions the Bureau to avoid such speculation in the final report unless that report bases its finding on careful study of a substantial body of evidence about practices considered to raise concern.

In addition, we urge the Bureau to consider whether marketing correlates with regular use of overdraft protection services, particularly considering consumers' freedom to change their minds and revoke their opt-in at any time. Those consumers who might have felt pressured to opt-in or who might have misunderstood their election of debit card overdraft protection have the opportunity to opt-out after they are notified of the first overdraft transaction and fee. We urge the Bureau to examine the incidence of opt-out requests by consumers and particularly by those who use overdraft protection services regularly.

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[26] Consumer Financial Protection Bureau launches inquiry into overdraft practices (February 22, 2012) *available at* http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/.
[27] Whitepaper, *supra at* 31.
[28] *Id. at* 62.

6. **Publish a final report on the research and invite public comment and peer review before proposing policy recommendations.**

Finally, we offer a process recommendation to advance the Bureau's effort to provide a shared set of facts from which stakeholders can engage in policy discussions. After the study of the account level data has been completed, we urge the Bureau to publish a final report on its research *before* proposing policy recommendations and to invite the public - including interested academics - to comment on its research methodologies, hypotheses tested (and those not tested), statistical findings, and conclusions.

The Whitepaper draws primarily upon data provided by nine unidentified banks subject to the Bureau's supervisory jurisdiction that were required to provide "institution-level information about their overdraft programs and accounts during 2010 and 2011".[29] The use of the supervisory process to gather data undermines the transparency and utility of the information available for public analysis and debate. Not only are the identities of the nine banks unknown, confidentiality concerns have limited the data that can be reported. As the Whitepaper acknowledges, the Bureau has been forced "to present our analysis in a manner that preserves the confidentiality of the supervisory information upon which these analyses rely."[30] Thus, the data reported consist largely of summary, descriptive statistics that seriously limit opportunities for peer review and debate.

The Bureau's own Draft Information Quality Guidelines, issued in accordance with section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (the Information Quality Act) and implementing Office of Management and Budget Guidelines,[31] promise -

> The Bureau strives to ensure and maximize the quality, objectivity, utility, andintegrity of the information that it disseminates to the public... The Bureau will strive to ensure that statistical and financial data disseminated by the Bureau is capable of being substantially reproduced by an independent evaluator, subject to some degree of imprecision. The Bureau will also provide the sources, methods, procedures, references, and assumptions employed to create information disseminated by the Bureau.[32]

Limited by confidentiality concerns resulting from the use of the supervisory process to gather data, the summary statistics provided in the Whitepaper fail to meet these standards. While the Bureau's reliance on supervisory data will inform its policy deliberations, it must be tempered as a foundation for policy action since its objectivity is compromised by its selectivity.

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[29] *Id. at* 4.
[30] *Id. at* 9.
[31] *See* 44 U.S.C. §3516; 67 Fed. Reg. 8452 (Feb. 22, 2002), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/fedreg/reproducible2.pdf.
[32] Draft Information Quality Guidelines, *available at* http://www.consumerfinance.gov/informationquality/.

Therefore, ABA believes the Bureau should publish at the conclusion of its study a final report that describes its research methodologies and findings in as transparent, objective, and well-documented manner as its collection constraints permit and to conduct a peer review to help surface the impacts of those constraints on the reliability of the results for policy purposes. In addition, the Bureau should provide notice and adequate time for the public to evaluate and comment on the research before proposing any policy recommendations. By doing so, the Bureau will clearly demonstrate its commitment to the rigorous, fact-based analysis that the Dodd-Frank Act requires.

Conclusion

ABA appreciates the opportunity to comment on the Whitepaper and to provide suggestions for the Bureau's ongoing study of overdraft practices. We support the Bureau's effort to inform the public policy debate with "actual facts and data about the marketplace," and we look forward to the publication of the final report. If you have any questions about these comments or would like to discuss anything further, please contact me at 202-663-5051 or rriese@aba.com.

Sincerely,

Richard R. Riese
Senior Vice President
ABA Center for Regulatory Compliance

Cc: Corey Stone, Assistant Director Credit Information, Collection and Deposit Markets
Gary Stein, Deposits Market Program Manager