

August 22, 2017

By electronic delivery to:
[Cfpb overdraft forms@cfpb.gov](mailto:Cfpb_overdraft_forms@cfpb.gov)

The Honorable Richard Cordray
Director
Bureau of Consumer Financial Protection
1275 First Street, N.E.
Washington, DC 20002

Re: Potential Prototype Overdraft Opt-in Model Forms and “Data Point: Frequent Overdrafters”

Dear Director Cordray:

The American Bankers Association¹ (ABA) writes in response to the Bureau of Consumer Financial Protection’s (Bureau) publication on August 4, 2017, of the overdraft research report, “Data Point: Frequent Overdrafters”² (Data Point), and its release of four prototype overdraft disclosure forms (Prototype Disclosures or Prototypes).³ ABA appreciates the Bureau’s recognition of the need for adequate study of consumer experiences with overdraft protection as central to its consideration of the consumer value of any particular regulatory action. As we have done in the past, we offer in this instance comments on the Data Point and the Prototype Disclosures and make suggestions for additional data development and analysis, with the shared goal of promoting the use of constructive and representative information that fairly represents consumer experience with debit overdraft products.

The Data Point relies on old data from a small number of large banks

Unfortunately, the Bureau’s study falls short of that goal. The data reported in the Data Point reflect transactions conducted five to six years ago under a different set of bank practices and consumer experiences; the data also reflect the overdraft programs offered by a small number of large “study” banks, whose practices may not be representative of the entire banking industry. As the Bureau continues its work on overdraft, we urge the Bureau to address these shortcomings to

¹ The American Bankers Association is the voice of the nation’s \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

² BUREAU OF CONSUMER FIN. PROT., DATA POINT: FREQUENT OVERDRAFTERS (Aug. 2017), *available at* http://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf?utm_campaign=ABA-Newsbytes-080717-HTML&utm_medium=email&utm_source=Eloqua (hereinafter BUREAU, DATA POINT).

³ Bureau of Consumer Fin. Prot., Potential Redesigns of Model Overdraft Disclosure Form (released Aug. 4, 2017), *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201708_cfpb_overdraft-model-forms-prototypes.pdf.

ensure policy decisions are informed by current and adequate information and that Bureau research reports provide a current, accurate, and fair depiction of consumers' experience with overdraft protection services across the industry. Designing regulatory programs for the thousands of banks of all sizes that offer debit overdraft programs, based upon the experiences involving a handful of very large banks, runs the high risk of missing important elements of the overdraft market on which millions of customers rely.

The Data Point reports on transactions that occurred between January 2011 and June 2012—five to six years ago.⁴ Today, there are more opportunities for consumers to use alternative products should they so choose, avoid overdrafts, or be sure to have an overdraft product whose features they have selected. Options to manage accounts to avoid overdrafts include signing up for low-balance alerts and monitoring balances online and using mobile applications. A 2016 report by the Federal Reserve found that 62 percent of users of mobile banking services with smartphones reported using their phone to check account balances or available credit before making a large purchase.⁵ Of those who checked their balance or available credit, 50 percent reported that they decided not to buy an item because of the amount of money in their bank account or the amount of their available credit.⁶ Consumers can—and do—use the information available to them to make informed financial decisions, including the decision to rely upon overdraft protection.

Bank practices also have changed, some significantly, since the data used in the Data Point were generated. As predicted in a 2010 ABA Overdraft Task Force Report, in the years since implementation of the opt-in rule, banks have evaluated their legal obligations and the markets they serve and have used this information to design or redesign their own overdraft programs. The process has yielded a variety of overdraft protection programs that fairly and transparently respond to consumer needs, promote free choice, and encourage competition.⁷ A 2013 ABA survey of bank overdraft practices found that 73% of responding banks waive fees when a transaction results in a negative balance that is within a *de minimis* threshold, and 68% impose a cap on total overdraft fees per day, which limit the number of fees incurred.⁸ However, the Data Point's analysis of transaction data from 2011-2012 does not seem to reflect these changes and their impact on consumers.

Additionally, all of the few banks in the Bureau's study (during the time that information was gathered for the study) posted transactions in high-to-low or chronological order, according to the Data Point.⁹ Over the past several years, many banks have adopted policies to post

⁴ BUREAU, DATA POINT, *supra* note 2, at 7.

⁵ BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMERS AND MOBILE FINANCIAL SERVICES 2016, at 25 (Mar. 2016), available at <https://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201603.pdf>.

⁶ *Id.*

⁷ Am. Bankers Ass'n, *A New Framework for Overdraft Program Compliance* (Aug. 2010), available at http://www.aba.com/archive/Regulatory_Proposal_Archive/Documents/NewFrameworkforOverdraftCompliance2010.pdf.

⁸ Am. Bankers Ass'n, *Bank Overdraft Practices Survey: Summary of Survey Results* 10 (Oct. 2013), available at <http://www.aba.com/Compliance/Mem/Documents/ABABankODSurvey2013Oct.pdf>.

⁹ BUREAU, DATA POINT, *supra* note 2, at 7 n.10.

transactions in low-to-high order or otherwise changed their posting order. These changes in bank overdraft practices have reduced the number of overdrafts incurred by customers, the number of frequent users of overdraft, and other data relevant to the Bureau's examination of overdraft.

It is again worth emphasizing—since it is a major analytical shortcoming—the Data Point also reports only about the consumer transaction activity and overdraft programs of “several large banks” that are under the Bureau's supervisory authority—as we understand it, perhaps no more than *eight* banks, and each with over \$10 billion in assets.¹⁰ Moreover, it appears that the Bureau relied upon the supervisory process to gather these data. As we have commented previously, the use of the supervisory process to gather data undermines the transparency and utility of the information available for public analysis and deliberation. Not only are the identities of the banks unknown, the Bureau has relied upon supervisory confidentiality to limit the data that can be reported. Thus, the data reported consist largely of an unverified non-publicly exposed summary with descriptions of unexamined statistics, seriously limiting opportunities for peer review and public corroboration.

Surprisingly, the data do not reflect transaction and overdraft activity in consumer checking accounts held by community banks or credit unions, a serious departure from the perspective of regulatory practice that we would all hope to be relevant to the entire industry and its customers. We do understand that in November 2014, the Bureau ordered three core processors, Fiserv, FIS Global, and Jack Henry, to provide anonymized transaction data as well as information about the overdraft program services each core processor provides to its depository institution customers. The Data Point, however, fails to mention these data or the Bureau's plans to report on them.

As we have also noted on other occasions,¹¹ policy decisions concerning overdraft should reflect the diversity of overdraft programs – and the range of consumer experiences with them – offered by institutions of all sizes and types. To the extent that the Bureau intends to engage in a more ample and constructive review of overdraft products, we urge the Bureau to publish at the conclusion of its study a final report that makes available for public engagement *all* of the data collected and describes its research methodologies and findings in a transparent, objective, and well documented manner.

¹⁰ *Id.* at 7.

¹¹ See Letter from Richard Riese, Am. Bankers Ass'n, to David Silberman, Bureau of Consumer Fin. Prot. 13 (Oct. 7, 2013), available at <http://www.aba.com/Advocacy/commentletters/Documents/cl-Overdraft-CFPB-Whitepaper-10713.pdf> (hereinafter ABA Oct. 7, 2013 Letter); Letter from Richard Riese, Am. Bankers Ass'n, to David Silberman, Bureau of Consumer Fin. Prot. 3 (Apr. 10, 2012), available at http://www.aba.com/Compliance/Regulatory/Documents/1f1bf4f997d849f59195f4e0237bcea7c1ExtRequestOverdraftImpacts_April2012.pdf.

Additional restrictions on overdraft could push consumers out of banking system

In 2013, ABA asked the Bureau to study the demographics of regular users of overdraft,¹² the people who are most familiar with the product. We appreciate that the Bureau has taken some initial steps in that regard, and we urge the Bureau to study the current attitudes and activities of those users more fully. Unsurprisingly, the Data Point found in its initial work that many frequent users of overdraft have lower credit scores, are more likely to be “credit constrained,” and are less likely to have a general purpose credit card than infrequent or non-users of overdraft.¹³ The Data Point, however, refutes the notion that frequent users are from vulnerable groups. The data show that frequent users of overdraft are not young (median age is approximately 37) and are not limited to residing in low-income neighborhoods (median neighborhood income is approximately \$54,000).¹⁴

These findings are consistent with the findings of recent ABA-sponsored research. A paper issued in April 2017 found that middle-income consumers (those with greater than \$60,000 in annual deposits) use overdraft protection at higher rates than do lower-income consumers (below \$24,000 in annual deposits).¹⁵ Similarly, a 2013 ABA-sponsored survey by public opinion researcher Mark Mellman (2013 Consumer Survey) found that over half of frequent users of overdraft have income of at least \$50,000 per year and that regular users are well educated. The survey found that 74% of frequent users have had at least “some college” and nearly half, or 47%, are college graduates.¹⁶ We have been happy to share this research with the Bureau, to add to the important information gathering in which the Bureau has been engaged.¹⁷

Inadequately studied—though again we appreciate the beginning of the effort—by the Data Point (and largely overlooked by the overdraft research reports issued by the Bureau to date) is information about why *frequent users* use the product, what they understand about their ability to opt in and out (and whether they have ever sought to exercise their opt out right), their reasons for choosing overdraft protection over available alternatives, and their options for covering short-term liquidity needs if access to overdraft is restricted. Too many studies examine attitudes of people who never or rarely use overdraft services. What are the attitudes of those customers who know overdraft products the best? We urge the Bureau to conduct this survey research, which we believe will be consistent with the data generated by the ABA 2013 Consumer Survey. That survey shows that nearly half of frequent users opted in to the product to ensure that important

¹² ABA Oct. 7, 2013 Letter, *supra* note 11, at 8-9.

¹³ BUREAU, DATA POINT, *supra* note 2, at 5.

¹⁴ *Id.* at 16.

¹⁵ G. MICHAEL FLORES, AN ASSESSMENT OF OVERDRAFT PROTECTION BY AMERICAN CONSUMERS 13 (Apr. 2017), available at <http://www.aba.com/Advocacy/Documents/SmallDollarWhitePaper2017Apr.pdf>.

¹⁶ The Mellman Group, *Presentation of Findings from a Survey of 501 Frequent Users of Overdraft Services* 6 (Oct. 2013), available at <https://www.aba.com/Compliance/Mem/Documents/MellmanStudyUsersofOverdraft2013October.pdf> (hereinafter 2013 Consumer Survey).

¹⁷ See Letter from Richard Riese, Am. Bankers Ass’n, to David Silberman, Bureau of Consumer Fin. Prot. (Oct. 17, 2013), available at <https://www.aba.com/Advocacy/LetterstoCongress/Documents/LetterCFPBCConsumerSurveyOct2013.pdf>.

bills were paid, a third opted in to avoid the embarrassment or frustration of having charges declined on their debit card, and a third opted in to avoid fees charged by businesses for bounced checks.¹⁸ The survey also found that a majority of frequent users know they can opt out at any time, but 77% had not considered opting out.¹⁹ These results demonstrate that consumers receive significant value from access to overdraft services.

An important question to be answered by the Bureau is where regular users will turn for emergency funds if they no longer have access to overdraft protection. The Data Point’s demographic findings show that available options would be limited: the frequent users identified in the Data Point have lower credit scores, are more likely to be “credit constrained,” and are less likely to have a general purpose credit card than infrequent or non-users of overdraft.²⁰ These findings are consistent with the 2013 Consumer Survey which asked respondents to review a list of possible alternatives and to indicate whether they would be likely to use each one. Their responses underscored the fact that by restricting access to overdraft protection, consumers would have significantly fewer viable options. Only 21% of regular users stated they might rely on a home equity loan, and 18% might use a credit card advance. Moreover, frequent users report few acceptable choices outside the banking system; fewer than 10% expressed willingness to go to nonbanking lenders. The alternative identified by a majority, or 56%, of frequent users was turning to borrowing from family or friends, a challenging solution for a variety of reasons.²¹

The demand for short-term, small dollar credit is significant, real, and cannot be wished or regulated away. According to a study by the Federal Reserve, nearly half of Americans—46%—could not cover an emergency expense that costs \$400 without selling a possession or borrowing money.²² People of all walks of life rely upon overdraft and other short-term credit products to meet small dollar account shortfalls. Reducing access to overdraft protection will force people to make greater use of other, less preferred alternatives. Absent compelling evidence of knowledge gaps or that consumers tend to use the product irrationally – neither of which has been demonstrated during the Bureau’s five-year study of overdraft – ABA believes that people should be assumed to be the best judges of what is in their best interests and should remain free to choose.

We also recommend that the Bureau examine the impact that additional restrictions on overdraft services would have on the availability of “free” checking accounts and no-minimum balance requirements. The availability of such accounts has opened access to the banking system to millions of new customers. However, these “free” accounts, under pressure from the application

¹⁸ 2013 Consumer Survey, *supra* note 16, at 24. Aggregate percentages exceed 100% because respondents were asked for their most important and second-most important reason for having overdraft protection.

¹⁹ *Id.* at 18 & 23.

²⁰ BUREAU, DATA POINT, *supra* note 2, at 5.

²¹ 2013 Consumer Survey, *supra* note 16, at 27.

²² BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015, at 22 (May 2016), available at <http://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf>.

of the Durbin Amendment to interchange revenue, declined from 76 percent of checking accounts in 2009 to 39 percent of checking accounts in 2012, according to a survey by Bankrate,²³ demonstrating that their availability is sensitive to regulatory restrictions on related deposit account costs. Additional regulation of overdraft services could reduce availability of such accounts even further. As fewer consumers can access free and no-minimum checking accounts, many may consider dropping out of the banking system and relying instead on more expensive and less convenient non-bank check cashers and money transmitters.

The Bureau must use rulemaking and the Paperwork Reduction Act’s standard clearance process as it considers the Prototype disclosures

Banks are committed to ensuring that customers are able to understand and make informed choices about overdraft protection. Financial institutions conduct extensive research on when and how people want to receive information. Therefore, we support the Bureau’s initiative of suggesting four new prototype opt-in forms, and look forward to working with the Bureau as it tests customer reaction to the new forms, particularly with regard to how they may improve customer understanding of the opt-in decision.

In the blog post introducing the Prototypes, the Bureau invited the public to “take a look for yourself and tell us what you think” in an email.²⁴ This appears to sidestep the purposes and requirements of the Paperwork Reduction Act’s procedures.²⁵ Those procedures are designed to enhance public disclosure and agency transparency through a consistent program of public interaction. While we appreciate and support the Bureau’s interest in feedback on the Prototype Disclosures, it is clear that the Bureau must engage in regular statutory process to adopt any of the new Prototypes—a process supported by ample public disclosure of data showing how the new disclosure improves consumer understanding when compared to the existing opt-in disclosure, the Model Form A-9 (Model Form). Simply soliciting emailed comments on the Prototypes does not suffice, since it provides inadequate information to the public and does not provide for the full disclosure of public input that would foster an appropriate public deliberation.

The Board of Governors of the Federal Reserve System (Federal Reserve) adopted the Model Form through Administrative Procedure Act (APA) rulemaking and only after conducting extensive consumer testing.²⁶ Use of this form has helped ensure that the pricing of overdraft

²³ Claes Bell, *Checking Account Fees Rise But Less Steeply*, BANKRATE.COM, <http://www.bankrate.com/finance/checking/checking-account-fees-rise-but-less-steeply-1.aspx> (last visited Aug. 22, 2017).

²⁴ Blog Post, Gregory Evans & Gary Stein, Bureau of Consumer Fin. Prot., *Know Before You Owe: We Are Designing New Overdraft Disclosure Forms*, <https://www.consumerfinance.gov/about-us/blog/know-you-owe-we-are-designing-new-overdraft-disclosure-forms/> (Aug. 4, 2017).

²⁵ Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 et seq.

²⁶ See 15 U.S.C. § 1693b(b) (“model clauses shall be adopted after notice duly given in the Federal Register and opportunity for public comment in accordance with [the Administrative Procedure Act]”); Final Rule, Electronic Fund Transfers, 74 Fed. Reg. 59,033 (Nov. 17, 2009) (hereinafter *Overdraft Opt-in Final Rule*).

protection remains simple and transparent to consumers. The Model Form 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 overdraft fees assessed. In addition, it requires the disclosure of other alternatives the bank offers for covering overdraft transactions, including the statement that these alternatives “may be less expensive than our standard overdraft practices.”

Moreover, Regulation E establishes a safe harbor from liability for institutions that use model disclosures adopted by notice and comment rulemaking,²⁷ and Regulation E and its commentary significantly limit a bank’s ability to deviate from the model form in its own disclosure. Regulation E states that the overdraft disclosure “*shall* be substantially similar to Model Form A-9 . . . and *may not contain* any information not specified in or otherwise permitted by this paragraph.”²⁸ Therefore, until the Bureau amends Regulation E and adopts one of the Prototype Disclosures as the new model disclosure, no bank can use one of the redesigned forms without foregoing the safe harbor.

As noted above, the rulemaking to amend Regulation E in order to adopt a new opt-in disclosure would require the development of a substantial record demonstrating that the new disclosure improves consumer understanding when compared to the existing Model Form. Building this record would require the Bureau to test the effectiveness of the Prototype disclosures, which, in turn, will require compliance with the Paperwork Reduction Act’s (PRA) standard clearance process. Use of a “generic” clearance would be inappropriate, as Office of Management and Budget rules limit use of a generic clearance to collections relating to issues that do not concern “substantive or policy issues.”²⁹ Clearly, any change to the Model Form would be substantive and policy-related and thus must be considered through use of the PRA’s *standard* clearance process.

Initial feedback on the Prototype Disclosures

A critical threshold question is whether, under the existing Model Form, consumers lack information necessary to make informed decisions regarding use of overdraft protection. It is far from evident that consumers lack such information. To the contrary, the available evidence strongly suggests that consumers make informed decisions relating to overdraft through use of the existing disclosure form.

²⁷ See Official Staff Interpretations, Regulation E, 12 C.F.R. § 205, app. A(1) (“The use of appropriate [model disclosure] clauses in making disclosures will protect a financial institution from liability under sections 915 and 916 of the [Electronic Fund Transfers Act] provided the clauses accurately reflect the institution's EFT services.”).

²⁸ Regulation E, 12 C.F.R. § 205.17(d) (emphasis added).

²⁹ CASS R. SUNSTEIN, ADMIN., OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, INFO. COLLECTION UNDER THE PAPERWORK REDUCTION ACT 5 (Apr. 7, 2010), available at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf; JOHN D. GRAHAM, ADMIN., OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, QUESTIONS & ANSWERS WHEN DESIGNING SURVEYS FOR INFO. COLLECTIONS 6 (Jan. 2006), available at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/pmc_survey_guidance_2006.pdf.

ABA surveys have shown that frequent overdraft users are well aware of the fees involved, the monthly and year-to-date fee information that is provided on their bank statements, and the fact that they may opt out of overdraft protection at any time. The 2013 Consumer Survey found that 82% of frequent overdraft users know they will be charged a fee for overdrawing their account, 77% were aware that information about the amount of overdraft fees they have incurred is included on their bank statement, and as noted previously, 63% were aware that they are able to opt out of receiving overdraft protection at any time.³⁰ These findings strongly suggest that the current model disclosure is providing information necessary for bank customers to make informed decisions regarding their use of overdraft protection.

In addition, we have two initial concerns with the text of the Prototypes. First, the Prototypes do not clearly state that, if the customer has opted in to overdraft protection, then the bank pays the overdraft *at its discretion*. Banks do not guarantee that they will always authorize and pay any type of transaction that has resulted in a negative balance. If the bank does not authorize and pay the overdraft, the transaction is declined. The existing Model Form makes the discretionary nature of overdraft clear; the form states that the bank “pay[s] overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction.”³¹ The Prototypes do not state that the bank pays an overdraft in its discretion and could leave consumers with the inaccurate belief that, if the consumer has opted in to overdraft protection, the bank will always pay the overdraft.

Second, the Prototype Disclosures do not make clear that, if the consumer has *not* opted in to overdraft protection for ATM and debit transactions, then those transactions will, in nearly all instances, be declined if the consumer has insufficient funds to cover them. The Prototypes have removed the statement in the Model Form A-9 that, “We do not authorize and pay overdrafts for the following types of transactions unless you ask us to . . . ATM transactions [; and] Everyday debit card transactions.”³² In its place, the Prototypes provide text that suggests that a consumer who has not opted in will have ATM and debit card transactions paid into overdraft without incurring a fee. Specifically, the Prototypes describe how ATM and debit card transactions are handled under opt-in and opt-out scenarios by contrasting the overdraft fee (which is bolded) that will be charged if the consumer opts in to overdraft with a statement of “No Fee” if the consumer has not opted in, without clearly stating that these transactions will not be paid into overdraft. This contrast may leave the impression that the choice for the consumer is whether to incur a fee, but that in either case the overdraft will be honored. This would be misleading.

Conclusion

ABA appreciates the Bureau’s continuing efforts to understand banks’ practices relating to overdraft services and consumers’ use of these services prior to considering whether additional

³⁰ 2013 Consumer Survey, *supra* note 16, at 18.

³¹ Overdraft Opt-in Final Rule, 74 Fed. Reg. at 59,054 (app. A) (emphasis in original).

³² *Id.* (emphasis in original).

regulatory action is warranted. We welcome the opportunity to contribute to the Bureau's examination of this product that is valued by millions of bank customers.

We are concerned that the findings in the Data Point reflect transactions that occurred up to six years ago—when bank overdraft practices differed significantly from today's practices—and transactions from only large banks. We urge the Bureau to correct these deficiencies in its continuing analysis to ensure that policy decisions are based on recent data reflecting current bank practices and consumer attitudes and preferences, and that the data are representative of all banks in the United States.

We also urge the Bureau to study key questions regarding why *frequent users* use overdraft protection, what they understand about their ability to opt in and out, and what their other options are for covering short-term liquidity needs if access to overdraft is restricted. The Bureau should also determine how further restrictions on overdraft services could reduce availability of free and no-minimum checking accounts, potentially pushing certain consumers out of the banking system. Any testing of the Prototype Disclosures must be done in an open and transparent process using APA rulemaking and the PRA's standard clearance process.

Ultimately, as the Bureau tests the Prototypes, it is critical that the Bureau demonstrate, with publicly-revealed data, that any new disclosure is superior to the existing Model Form disclosure, in that it improves customers' understanding and informed decision making regarding use of overdraft. In this regard, we have two initial concerns with the Prototype Disclosures. First, the Prototypes do not clearly state that, if a customer has opted in to overdraft protection, the bank pays the overdraft at its discretion. Second, the Prototypes do not make clear that the bank will decline a debit or ATM transaction that results in insufficient funds if the customer has not opted in.

We look forward to discussing these issues further with the Bureau as you continue your work on overdraft.

Sincerely,



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