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July 1, 2019

VIA ELECTRONIC SUBMISSION

Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

**Re: Request for Comment on the Economic Impact of the Overdraft Rule
(Docket No. CFPB-2019-0023)**

Dear Director Kraninger:

On behalf of the 25 undersigned State Attorneys General,¹ we write in response to the Consumer Financial Protection Bureau's (the "CFPB") Notice of Section 610 Review and Request for Comment² ("Request for Comment") as to whether the Overdraft Rule³ should be continued without change, amended or rescinded, including whether to minimize any significant economic impact of the Overdraft Rule on a substantial number of small institutions pursuant to Section 610 of the Regulatory Flexibility Act.⁴

¹ Hawaii joins this letter by its Attorney General and by its Office of Consumer Protection, an agency which is not part of the Attorney General's Office, but which is statutorily authorized to undertake consumer protection functions, including legal representation of the State of Hawaii.

² *Overdraft Rule Review Pursuant to the Regulatory Flexibility Act*, Consumer Financial Protection Bureau (May 13, 2019) (hereinafter "*Request for Comment*"), available at https://files.consumerfinance.gov/f/documents/cfpb_rfi_overdraft-rule.pdf.

³ 12 C.F.R. § 1005.17.

⁴ Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 *et seq.*).

As currently structured, the Overdraft Rule ensures that consumers have an opportunity to make an informed decision about whether to opt in to overdraft services for ATM and signature debit transactions. This narrowly crafted intervention sensibly focuses on the type of transactions where the benefits of overdraft services to consumers are smaller relative to the costs and where the risk of inadvertent overdrafts is the highest.

As the chief consumer protection officers of our states, we understand the importance of encouraging and facilitating fully-informed consumer choice about the costs, benefits and risks of financial products. And as the data summarized herein shows, the Overdraft Rule has enabled consumers to make more and better-informed choices about overdraft services for the limited set of transactions covered, while reducing the overall number of and aggregate amount of overdraft fees substantially for those who have chosen not to opt in to overdraft services pursuant to the Rule. Consumers with frequent overdrafts, who on average tend to live under more economically and financially precarious circumstances, have benefited in particular from the Rule.

Additionally, there is no basis to believe that the Overdraft Rule has economically harmed small financial institutions – a focus and concern of the CFPB in its Request for Comment. Given the enormous success of the Rule in reducing overdrafts and overdraft fees for consumers, the fact that the Overdraft Rule appears to have marginally reduced the revenues and profits of many large and small banks because millions of consumers individually chose not to opt in to costly overdraft services is no argument against the Rule. Indeed, the undersigned would support expanding the Overdraft Rule to cover other transactions such as checks and automated clearinghouse (“ACH”) transactions,⁵ and to require that all overdraft fees be proportional to the amount paid by a bank to cover the overdrawn transaction (*i.e.*, fees of no more than a certain percentage of the covered amount), capping what are essentially high rates of interest on short-term, low-risk loans.⁶ But most importantly, on behalf of the millions of American consumers we collectively represent, we believe that any decision to rescind or roll back the requirements of the Overdraft Rule would be a serious and harmful mistake and urge the CFPB not to do so.

⁵ While, as explained below, there may be reasons to think that more consumers would opt in to overdraft services for check and ACH transactions, which are more likely to be used for larger payments and for essentials like rent, consumers should nevertheless be given information and an opportunity to choose whether opting into such services makes sense for them individually. *See infra* note 12 and accompanying text.

⁶ Indeed, overdraft fees were excepted from the disclosure requirements of the Truth In Lending Act’s Regulation Z due to the view that overdraft services are traditionally and typically provided on an *ad hoc*, discretionary basis along with the resulting fees, rather than based on express written terms. Truth in Savings, 69 Fed. Reg. 31760, 31760-61 (proposed June 7, 2004). *See also* Center for Responsible Lending, *et al.*, Comment Letter on Impacts of Overdraft Programs on Consumers, 28-30 (Jun. 29, 2012), available at <http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/Overdraft-Comment-by-CRL-CFA-and-NCLC-Docket-No-CFPB-2012-0007.pdf>. In light of the widespread automation of overdraft services and fees by financial institutions in recent years, the basis for this exception has become questionable. *See CFPB Study of Overdraft Programs, A White Paper of Initial Data Findings*, Consumer Financial Protection Bureau, 10-14 (June 2013) (hereinafter “June 2013 White Paper”), available at https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.

I. The History of the Overdraft Rule

In May 2008, the Board of Governors of the Federal Reserve System (the “Board”) proposed regulations requiring that banks provide disclosures to consumers about their overdraft coverage and their right to decide whether to opt into certain forms of that coverage.⁷ The proposed regulations were in response to the growing concerns of government agencies, Congress, consumer groups and others about the increased use of and financial risk surrounding overdraft services, and were intended to ensure that consumers (i) understand overdraft services and (ii) have the choice to avoid the associated costs if such services do not meet their needs.

In addition to citing the concerns of consumer advocates about the costs of overdraft services for low and middle-income consumers and the fact that overdraft fees may sometimes exceed the cost of the underlying debit transactions to which they apply, the Board raised a number of other concerns in its proposal. These included the growth of automated overdraft payment processes, the fact that many consumers are automatically enrolled in overdraft services without an adequate opportunity to opt in, and the inadequacy of many disclosures provided to consumers regarding the cost of overdraft services.⁸

The Board chose to make the rule opt-in rather than opt-out for a number of reasons. It pointed to studies suggesting that consumers are likely to adhere to the established default option that would apply if no action is taken.⁹ It also found that the opt-in approach was consistent with the Board’s consumer testing.¹⁰ The Board also engaged a contractor to assist in developing and testing model disclosures for the proposed regulations, including by holding multiple rounds of interviews with consumers to test the clarity of the model notices.¹¹ Consumer feedback indicating that overdraft services and fees were more likely to be useful for larger, important payments that are typically made by check or ACH, such as rent, and less likely to be useful for smaller discretionary expenditures based on debit and ATM transactions, was a key factor in the Board’s decision to remove check and ACH overdraft services from the Rule.¹² Consumer testing also helped inform the formatting of the final model disclosure, which relies on simple statements, no tables, and limited boldface for only particular information, including the fee amount.¹³

In late 2009 the Board published the final Overdraft Rule (amending Regulation E,¹⁴ which implements the Electronic Fund Transfer Act¹⁵). The final Rule mandated that beginning in 2010 consumers be given the express choice of whether or not to opt in to overdraft services

⁷ Unfair or Deceptive Acts or Practices, 73 Fed. Reg. 28904, 28906-07, 28910 (proposed May 19, 2008).

⁸ *Id.* at 28927-28.

⁹ Electronic Fund Transfers, 74 Fed. Reg. 59033, 59038 (Nov. 17, 2009).

¹⁰ *Id.* at 59039.

¹¹ ICF Macro, *Design and Testing of Overdraft Disclosures: Phase Two*, at i (Oct. 12, 2009), available at <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20091112a4.pdf>.

¹² Philip Keitel, *Consumer Testing Informs Policy: Overdraft Regulation as a Case Study*, Federal Reserve Bank of Philadelphia Discussion Paper, 7 (June 2010), available at <https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2010/d-2010-june-overdrafts.pdf?la=en>.

¹³ *Id.* at 9-10.

¹⁴ 12 C.F.R. §1005 *et seq.*

¹⁵ 15 U.S.C. § 1693 *et seq.*

and fees for ATM and one-time debit card transactions, as well as the most critical information about that choice through the use of a model disclosure form.¹⁶

II. The Overdraft Rule Has Had an Overwhelmingly Positive Impact on Consumers

The Overdraft Rule has greatly benefited countless consumers, almost certainly saving them billions of dollars in fees on ATM and debit card transactions each year.¹⁷ The Rule also provides consumers with peace of mind that they will not be unexpectedly charged a substantial fee on a small discretionary ATM withdrawal or debit transaction because, for instance, their paycheck took an extra day to clear or a spouse made a small, unexpected purchase from a joint account. The Overdraft Rule has allowed consumers to avoid just these types of circumstances – in which the size of an overdraft fee can be nearly as large as (and at times larger than) the size of the transaction that triggered it. In fact, the CFPB found that during the period of January 2011 through June 2012, the median transaction amount that led to an overdraft fee was \$50 for all transactions (including overdraft fees for check, teller and ACH transactions in addition to ATM and debit transactions) and just \$24 for debit transactions.¹⁸ In contrast, the CFPB found that in 2012 the median overdraft fee for all transactions at 33 of the largest 50 U.S. institutions was \$34.¹⁹

The CFPB’s own research has shown that the Overdraft Rule permits consumers who otherwise would have been opted in to overdraft services by default to make meaningful choices about whether they want such services for a discrete set of what are typically small ATM and debit transactions.²⁰ Indeed, most consumers, when given the choice to avoid overdraft services and resulting fees for such transactions by the Overdraft Rule, did so. While banks have reported opt-in rates that vary significantly from the single digits to over 40%, the CFPB found that at the end of 2011 (shortly after the Rule became effective), the opt-in rate across all checking accounts in its sample among banks that permitted opt-in to overdraft services was a mere 16.1%.²¹ The

¹⁶ See Model Form (A-9), available at https://files.consumerfinance.gov/f/documents/201708_cfpb_A-9-form-ficus.pdf.

¹⁷ An industry analyst cited by the CFPB found that after annual industrywide overdraft fees increased by more than \$17 billion during the period from 1990 to 2009, annual industrywide overdraft fees declined by approximately \$5.5 billion per from 2009 to 2011 during the period when the Overdraft Rule was implemented. The analyst estimated that overdraft fees then rebounded slightly, increasing by \$0.4 billion in 2012. *June 2013 White Paper*, *supra* note 6, at 17 (citing Moebs Services, *2012 The Year of the Overdraft Coming Bank* (Mar. 25, 2013), available at <https://nativefinance.org/wp-content/uploads/2013/04/Moebs-Press-Release-Over-Draft.pdf>).

¹⁸ *Data Point: Checking Account Overdraft*, Consumer Financial Protection Bureau, 16-18 (July 2014) (hereinafter “*July 2014 Data Point*”), available at https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf.

¹⁹ *June 2013 White Paper*, *supra* note 6 at 52.

²⁰ While most of the data that the CFPB has utilized to analyze overdraft fees and the effects of the Overdraft Rule come from accounts and transactions at several large banks from the January 2010 through June 2012 period, see *July 2014 Data Point*, *supra* note 18, at 6-7, and thus “cannot be considered fully representative of the checking account market as a whole,” the CFPB itself found, based on its market observations, that it is “likely to be similar to what one would observe at any institution that offers similar checking account and overdraft products.” *Data Point: Frequent Overdrafters*, Consumer Financial Protection Bureau, 11 (August 2017) (hereinafter “*August 2017 Data Point*”), available at https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf.

²¹ *June 2013 White Paper*, *supra* note 6, at 29, 31-32. Significant variation in the rate of consumer opt-in across financial institutions may arise from banks marketing their overdraft services and the Overdraft Rule options in

preference of the majority of consumers not to opt in to overdraft services and any resulting overdraft fees is consistent with the Board’s finding in the Final Rule that consumer testing indicated most consumers would prefer to have ATM and debit card transactions declined if they had insufficient funds.²² It also supports the Board’s decision to set the default option as no overdraft coverage with the requirement of an affirmative opt-in to obtain coverage for ATM and debit transactions, rather than setting the default option as coverage with the requirement of an affirmative opt-out. Prior to the Overdraft Rule mandating that financial institutions provide consumers with this choice, many of these consumers were or would have been *de facto* opted in to overdraft services by their financial institution, frequently without even realizing it.

If anything, this data may underestimate the percentage of consumers who prefer to avoid these forms of overdraft coverage, given that some banks have used unfair and deceptive marketing practices to mislead consumers into opting in. Indeed, the CFPB has brought a number of investigations and enforcement actions in recent years against banks that have engaged in such practices, including TCF Bank,²³ Santander Bank,²⁴ and Regions Bank.²⁵

The CFPB’s research also suggests that many consumers take into account their own financial situation and history of overdraft transactions when deciding whether or not to opt in to overdraft services. Notably, 44.7% of checking accounts that had more than 10 overdraft items (*i.e.*, instances of overdraft or nonsufficient funds (“NSF”))²⁶ during the first six months of 2010 (hereinafter “high-frequency overdrafters”) elected to opt in to overdraft services by the end of 2010.²⁷ In contrast, only 11% of checking accounts with no NSF or overdraft instances during that time period chose to opt in.²⁸ This suggests that even among such high-frequency overdrafters, some consumers would prefer to maintain the liquidity that overdraft services

different or even deceptive ways, and/or from the fact that consumers at different institutions under different financial and personal circumstances have different preferences for trading off the risks and costs of overdraft fees versus the risk of illiquidity in the event that the consumer’s checking account is overdrawn. But significant differences in consumers’ circumstances and preferences only provide further support for the Overdraft Rule, given that the rule facilitates consumers making individualized, informed choices depending on those circumstances and preferences rather than being funneled into potentially expensive overdraft services without full knowledge or consent.

²² Electronic Fund Transfers, *supra* note 9, at 59034-35.

²³ *Consumer Financial Protection Bureau v. TCF National Bank*, 17-cv-00166-PAM-DTS (D. MN), Proposed Stipulated Final Judgment and Order, filed July 20, 2018, *available at* https://files.consumerfinance.gov/f/documents/bcftp_tcf-national-bank_proposed-stipulated-final-judgment-order_2018-07.pdf.

²⁴ *Santander Bank, N.A.*, CFPB No. 2016-CFPB-0012, Stipulated Consent Order, filed July 14, 2016, *available at* https://files.consumerfinance.gov/f/documents/20160714_cfpb_Consent_Order.pdf.

²⁵ *Regions Bank*, CFPB No. 2015-CFPB-0009, Stipulated Consent Order, filed April 28, 2015, *available at* https://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf.

²⁶ Unlike an overdraft fee, which is charged by a bank when it makes up the deficit in a checking account so that a consumer can cover a requested transaction, an NSF fee is charged when a consumer attempts a transaction for which he or she has insufficient funds, and the bank does *not* make up the deficit – *e.g.*, when a consumer “bounces” a check. While much of the CFPB study data covers both overdraft and NSF items, it is important to note that checking accounts typically do not charge NSF fees for ATM or one-time debit card transactions with non-sufficient funds. *August 2017 Data Point*, *supra* note 20, at 3.

²⁷ *June 2013 White Paper*, *supra* note 6, at 30.

²⁸ *Id.*

provide, despite the fees, while others value the liquidity less than the fees they would likely otherwise incur.

Moreover, while these high-frequency overdrafters experienced a reduction in overdraft and NSF fees during the six months following implementation of the Overdraft Rule regardless of whether or not they opted in to overdraft services, the reduction in aggregate fees was \$347 greater for those who did not opt in.²⁹ For consumers who did not opt in to overdraft services, this constituted a 63% reduction in their overdraft fees.³⁰ Similarly, while high-frequency overdrafters who opted in to overdraft services also experienced an average reduction in instances of overdraft and NSF transactions from the first half of 2010 to the second half of 2010 following the implementation of the Overdraft Rule – perhaps because the mandatory notice made them more cognizant of the fees, leading to better budgeting and account balance awareness – those who did not opt in to overdraft services saw an even more significant reduction. The average reduction in overdrafts for high-frequency overdrafters who opted in was 2.9 compared to 13.1 for those who did not opt in during the same period.³¹ Although less pronounced, those consumers with between 4 and 10 overdraft and NSF items during the first half of 2010 who did not opt into overdraft services also saw noticeable declines in both the average number of overdraft and NSF items and the average size of aggregate fees.³²

The substantial reduction in overdraft items and average aggregate fees among high-frequency overdrafters who did not opt in to overdraft services in 2010 is particularly significant for economically strapped consumers who are struggling to make ends meet. Accounts that overdrafted more than 10 times a year (“moderate frequent overdrafters”) and more than 20 times a year (“very frequent overdrafters”) make up only 8.3% of accountholders but pay approximately 74% of overdraft and NSF fees.³³ Moderate frequent and very frequent overdrafters tend to be more economically distressed than infrequent and non-overdrafters. For example, they have significantly lower median and average end-of-day balances, significantly lower credit scores, less credit available via credit card, are less likely to have a credit card and have lower neighborhood incomes.³⁴ The significant reduction of overdraft fees among moderate frequent and very frequent overdrafters who did not opt in means the Overdraft Rule is benefitting many consumers who are among the least well off economically and financially.

III. There is No Basis to Believe the Overdraft Rule Has Negative Economic Impacts on Small Financial Institutions

We are aware of no evidence or other basis to believe that the Overdraft Rule places any economic burdens or costs on smaller financial institutions, or indeed on financial institutions

²⁹ *Id.* at 6, 38.

³⁰ *Id.* at 60. Consumers who did not opt in to overdraft services after the Overdraft Rule was implemented in 2010 might still experience some overdraft fees related to checks, ACHs or other transaction types, because an opt-out under the Overdraft Rule only applies to ATM and one-time debit card transactions.

³¹ *Id.* at 36-38.

³² *Id.* These consumers saw declines of 3.4 overdraft/NSF items and \$114 in overdraft fees on average during the following six months in the latter half of 2010. *Id.*

³³ *July 2014 Data Point, supra* note 18, at 11-12.

³⁴ *August 2017 Data Point, supra* note 20, at 14-16, 37-38.

generally.³⁵ Indeed, the Rule is limited and applies only to what are typically small ATM or one-time debit card transactions. Compliance with the Rule is straightforward and merely requires all financial institutions that charge for overdraft services on ATM or one-time debit card transactions to disclose that fact clearly to customers in advance by presenting a one-page model disclosure form, minimizing the cost of compliance. The Board designed the model forms and also created a safe harbor specifically to reduce the burden on small financial institutions.³⁶ Further, even these relatively small costs of the Rule are largely one-time implementation costs that financial institutions have already incurred. Given the billions of dollars in revenues overdraft fees have generated for many banks, this is hardly a costly regulatory burden for financial institutions.³⁷ For the same reason, any marginal reduction in earnings resulting from the imposition of fewer overdraft fees is not a basis for modifying a Rule. When revenue and profits rely on consumers' inability to make informed choices, they are ill gotten.

Finally, we note that the CFPB is asking for public comment without releasing any of the data, or its analysis of the data, that it collected in 2015 from accounts of more than 4,000 mostly small financial institutions (having assets less than \$550 million) related to overdraft practices and related consumer outcomes.³⁸ This omission is surprising given the focus of the Request for Comment on the potential economic impacts of the Overdraft Rule on small institutions. Had this data showed results that diverged significantly from the CFPB's earlier research on larger banks summarized above, or suggested negative economic impacts on small financial institutions, the CFPB presumably would have included or at least cited to those results in its Request for Comment so that the public could meaningfully comment on it. Given that the CFPB

³⁵ To the extent that certain financial institutions might use deceptive or abusive marketing techniques and tactics to circumvent and undermine the Overdraft Rule in a way that might give them a competitive advantage over other companies, the appropriate response is to investigate and bring enforcement proceedings against them as the CFPB successfully did in a number of cases discussed above. *See supra* notes 23, 24, 25 and accompanying text.

³⁶ Electronic Fund Transfers, *supra* note 9, at 59051 ("The Board has sought to reduce the burden on small entities, where possible, by adopting a model form that can be used to ease compliance with the final rule, which has been revised and simplified from the proposed model form. The Board has also sought to reduce the burden on small entities, where possible, by providing a safe harbor to institutions permitting them to rely upon a merchant, other institution, or other third party's coding of a transaction as a one-time debit card transaction or a recurring debit card transaction, to the extent that the institution complies with the rule by maintaining reasonable procedures to identify transactions as either one-time or recurring debit card transactions. The Board believes that these modifications from the proposal minimize the significant economic impact on small entities while still meeting the stated objectives of Regulation E.").

³⁷ The CFPB cited an industry analyst that conducted surveys of a large number of financial institutions and estimated that such fees totaled \$32 billion in 2012 for all clients. *June 2013 White Paper, supra* note 6, at 15 (citing Moebs Services, *Overdrafts Rebound Sharply in 2012* (Sept. 24, 2012), available at <https://www.businesswire.com/news/home/20120924005431/en/Overdrafts-Rebound-Sharply-2012>). More recently, an analysis of Federal Deposit Insurance Corporation data by the Center for Responsible Lending found that just large banks with over \$1 billion in assets collected more than \$11.45 billion in overdraft and NSF fees in 2017. Peter Smith, *Unfair Market: The State of High-Cost Overdraft Practices in 2017*, Center for Responsible Lending, 1 (August 2018), available at <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-unfair-market-overdraft-1-aug2018.pdf>. While there seem to be fewer if any reports of the profits earned on overdraft fees, banks collect these enormous overdraft fee revenues despite the fact that the largest cost to them of providing overdraft services – charge offs of negative account balances for consumers who fail to repay their overdraft coverage – represent the equivalent of only 14.4% of the overdraft fees charged by those banks. *June 2013 White Paper, supra* note 6, at 17. This strongly suggests that banks have earned enormous profits from overdraft fees despite taking on little economic risk in return.

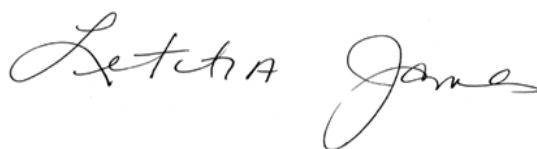
³⁸ *Request for Comment, supra* note 2, at 8.

has not released or discussed any such results or conclusions, we assume that any analysis that the CFPB has completed of this data is generally consistent with its earlier findings on overdraft services and the Overdraft Rule.

Conclusion

While we appreciate that unnecessary economic burdens should not be imposed on small banks and other businesses, we do not believe that protecting the earnings and profits of financial institutions, whether large or small, should come at the expense of consumers or the stability of the U.S. financial system. The CFPB's own research on the Overdraft Rule and the changes in consumer use of overdraft services following implementation of the Rule demonstrates that the Rule has been an overwhelming success. We are aware of no support for any claim that the Overdraft Rule has placed substantial economic burdens on small financial institutions that would justify modifications to the Rule. Accordingly, the undersigned urge the CFPB to keep the Overdraft Rule and to continue to vigorously enforce the Rule. We also recommend that the CFPB consider expanding the Rule to checking and ACH transactions and to require that fees be proportionate to the amounts banks pay to cover overdraft transactions.

Respectfully submitted,



LETITIA JAMES
New York Attorney General



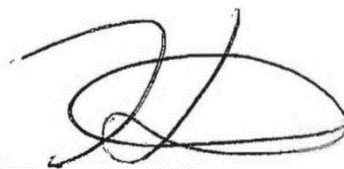
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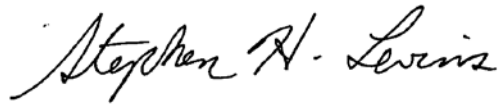
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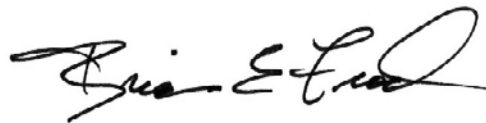
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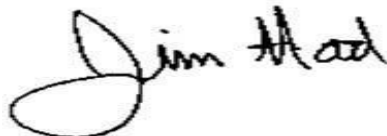
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