

111TH CONGRESS
1ST SESSION

S. 1799

To amend the Truth in Lending Act, to establish fair and transparent practices related to the marketing and provision of overdraft coverage programs at depository institutions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 19, 2009

Mr. DODD (for himself, Mr. SCHUMER, Mr. REED, Mr. BROWN, Mr. LEVIN, Mr. MERKLEY, Mr. MENENDEZ, and Mr. REID) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To amend the Truth in Lending Act, to establish fair and transparent practices related to the marketing and provision of overdraft coverage programs at depository institutions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fairness and Account-
5 ability in Receiving Overdraft Coverage Act of 2009” or
6 the “FAIR Overdraft Coverage Act”.

1 **SEC. 2. FINDINGS AND PURPOSE.**

2 Section 102 of the Truth in Lending Act (15 U.S.C.
3 1601) is amended by adding at the end the following:

4 “(c) FAIRNESS AND ACCOUNTABILITY IN OVER-
5 DRAFT COVERAGE.—

6 “(1) FINDINGS.—The Congress also finds
7 that—

8 “(A) overdraft coverage is a form of short-
9 term credit that depository institutions provide
10 for consumer transaction accounts. Historically,
11 depository institutions covered overdrafts for a
12 fee on an ad hoc basis;

13 “(B) with the growth in specially designed
14 software programs and in consumer use of debit
15 cards, overdraft coverage for a fee has become
16 more prevalent;

17 “(C) most depository institutions do not
18 notify consumers when adding this feature to
19 their transaction accounts, and some do not
20 permit consumers to eliminate this feature from
21 such accounts;

22 “(D) most depository institutions collect a
23 high flat fee, including for small dollar trans-
24 actions, each time the institution covers an
25 overdraft, in some cases impose multiple over-
26 draft coverage fees within a single day, and

1 many charge additional fees for each day dur-
 2 ing which the account remains overdrawn; and

3 “(E) such abusive and misleading practices
 4 in connection with overdraft coverage fees have
 5 deprived consumers of meaningful choices about
 6 their accounts and placed significant financial
 7 burdens on low- and moderate-income con-
 8 sumers.

9 “(2) PURPOSE.—It is the purpose of this title
 10 to protect consumers by limiting abusive and mis-
 11 leading overdraft coverage fees and practices, and by
 12 providing meaningful disclosures and consumer
 13 choice in connection with overdraft coverage fees.”.

14 **SEC. 3. DEFINITIONS.**

15 (a) ADDITIONAL DEFINITIONS.—Section 103 of the
 16 Truth in Lending Act (15 U.S.C. 1602) is amended by
 17 adding at the end the following:

18 “(cc) DEFINITIONS RELATING TO OVERDRAFT COV-
 19 ERAGE.—

20 “(1) CHECK.—The term ‘check’ has the same
 21 meaning as in section 3(6) of the Check Clearing for
 22 the 21st Century Act (12 U.S.C. 5001 et seq.),
 23 other than a travelers check.

24 “(2) DEPOSITORY INSTITUTION.—The term ‘de-
 25 pository institution’ has the same meaning as in

1 clauses (i) through (vi) of section 19(b)(1)(A) of the
2 Federal Reserve Act (12 U.S.C. 461(b)(1)(A)).

3 “(3) NONSUFFICIENT FUND FEE.—The term
4 ‘nonsufficient fund fee’ means a fee or charge as-
5 sessed in connection with an overdraft for which a
6 depository institution declines payment.

7 “(4) OVERDRAFT.—The term ‘overdraft’ means
8 the amount of a withdrawal by check or other debit
9 from a transaction account in which there are insuf-
10 ficient or unavailable funds in the account to cover
11 such check or debit.

12 “(5) OVERDRAFT COVERAGE.—The term ‘over-
13 draft coverage’ means the payment of a check pre-
14 sented or other debit posted against a transaction
15 account by the depository institution in which such
16 account is held, even though there are insufficient or
17 unavailable funds in the account to cover such
18 checks or other debits.

19 “(6) OVERDRAFT COVERAGE FEE.—The term
20 ‘overdraft coverage fee’ means any fee or charge as-
21 sessed in connection with overdraft coverage, or in
22 connection with any negative account balance that
23 results from overdraft coverage, excluding fees or
24 charges relating to overdraft lines of credit or trans-
25 fers from an account linked to another transaction

1 account or line of credit. Such fee shall be consid-
2 ered a ‘finance charge’ for purposes of section
3 106(a), but shall not be included in the calculation
4 of the rate of interest for purposes of section
5 107(5)(A)(vi) of the Federal Credit Union Act (12
6 U.S.C. 1757(5)(A)(vi)).

7 “(7) OVERDRAFT COVERAGE PROGRAM.—The
8 term ‘overdraft coverage program’ means a service
9 under which a depository institution assesses an
10 overdraft coverage fee for overdraft coverage.

11 “(8) TRANSACTION ACCOUNT.—The term
12 ‘transaction account’ has the same meaning as in
13 section 19(b)(1)(C) of the Federal Reserve Act (12
14 U.S.C. 461(b)(1)(C)).”.

15 (b) CONFORMING AMENDMENT.—Section
16 107(5)(A)(vi) of the Federal Credit Union Act (12 U.S.C.
17 1757(5)(A)(vi)) is amended by inserting “, other than an
18 overdraft coverage fee, as defined in section 103(cc) of the
19 Truth in Lending Act (12 U.S.C. 1602(cc))” after “inclu-
20 sive of all finance charges”.

21 **SEC. 4. FAIR MARKETING AND PROVISION OF OVERDRAFT**
22 **COVERAGE PROGRAMS.**

23 Chapter 2 of the Truth in Lending Act (15 U.S.C.
24 1631 et seq.) is amended by adding at the end the fol-
25 lowing new section:

1 **“SEC. 140B. OVERDRAFT COVERAGE PROGRAM DISCLO-**
2 **SURES AND CONSUMER PROTECTION.**

3 “(a) PROHIBITIONS.—No depository institution may
4 engage in acts or practices in connection with the mar-
5 keting of or the provision of overdraft coverage that are
6 unfair, deceptive, or designed to evade the provisions of
7 this section.

8 “(b) MARKETING DISCLOSURES.—Each depository
9 institution that provides or offers to provide overdraft cov-
10 erage with respect to transaction accounts held at that de-
11 pository institution shall clearly and conspicuously disclose
12 in all marketing materials for such overdraft coverage any
13 overdraft coverage fees.

14 “(c) CONSUMER CONSENT OPT-IN.—A depository in-
15 stitution may charge overdraft coverage fees with respect
16 to withdrawals from automated teller machines or debit
17 card transfers only if the consumer has consented in writ-
18 ing, in electronic form, or in such other form as is per-
19 mitted under regulations of the Board.

20 “(d) CONSUMER DISCLOSURES.—Each depository in-
21 stitution shall clearly disclose to each consumer covered
22 by an overdraft protection program of that depository in-
23 stitution—

24 “(1) that—

25 “(A) the consumer may be charged for not
26 more than one overdraft coverage fee in any

1 single calendar month and not more than 6
2 overdraft coverage fees in any single calendar
3 year, per transaction account; and

4 “(B) the depository institution retains the
5 discretion to pay (without assessing an over-
6 draft coverage fee) or reject overdrafts incurred
7 by the consumer beyond the numbers described
8 in subparagraph (A);

9 “(2) information about any alternative over-
10 draft products that are available, including a clear
11 explanation of how the terms and fees for such alter-
12 native services and products differ; and

13 “(3) such other information as the Board may
14 require, by rule.

15 “(e) PERIODIC STATEMENTS.—Each depository insti-
16 tution that offers an overdraft coverage program shall, in
17 each periodic statement for any transaction account that
18 has an overdraft coverage program feature, clearly disclose
19 to the consumer the dollar amount of all overdraft cov-
20 erage fees charged to the consumer for the relevant period
21 and year to date.

22 “(f) EXCLUSION FROM ACCOUNT BALANCE INFOR-
23 MATION.—No depository institution may include the
24 amount available under the overdraft coverage program of

1 a consumer as part of the transaction account balance of
2 that consumer.

3 “(g) PROMPT NOTIFICATION.—Each depository insti-
4 tution shall promptly notify consumers, through a reason-
5 able means selected by the consumer, when overdraft cov-
6 erage has been accessed with respect to the account of
7 the consumer, not later than on the day on which such
8 access occurs, including—

9 “(1) the date of the transaction;

10 “(2) the type of transaction;

11 “(3) the overdraft amount;

12 “(4) the overdraft coverage fee;

13 “(5) the amount necessary to return the ac-
14 count to a positive balance; and

15 “(6) whether the participation of a consumer in
16 an overdraft coverage program will be terminated if
17 the account is not returned to a positive balance
18 within a given time period.

19 “(h) TERMINATED OR SUSPENDED COVERAGE.—
20 Each depository institution shall provide prompt notice to
21 the consumer, using a reasonable means selected by the
22 consumer, if the institution terminates or suspends access
23 to an overdraft coverage program with respect to an ac-
24 count of the consumer, including a clear rationale for the
25 action.

1 “(i) NOTICE AND OPPORTUNITY TO CANCEL.—Each
2 depository institution shall—

3 “(1) warn any consumer covered by an over-
4 draft coverage program who engages in a trans-
5 action through an automated teller machine or a
6 branch teller if completing the transaction would
7 trigger overdraft coverage fees, including the amount
8 of the fees; and

9 “(2) provide to the consumer the opportunity to
10 cancel the transaction before it is completed.

11 “(j) OVERDRAFT COVERAGE FEE LIMITS.—

12 “(1) FREQUENCY.—A depository institution
13 may charge not more than one overdraft coverage
14 fee in any single calendar month, and not more than
15 6 overdraft coverage fees in any single calendar
16 year, per transaction account.

17 “(2) REASONABLE AND PROPORTIONAL OVER-
18 DRAFT COVERAGE FEES.—

19 “(A) IN GENERAL.—The amount of any
20 overdraft coverage fee that a depository institu-
21 tion may assess for paying a transaction (in-
22 cluding a check or other debit) shall be reason-
23 able and proportional to the cost of processing
24 the transaction.

1 “(B) SAFE HARBOR RULE AUTHORIZED.—
2 The Board, in consultation with the Comp-
3 troller of the Currency, the Board of Directors
4 of the Federal Deposit Insurance Corporation,
5 the Director of the Office of Thrift Supervision,
6 and the National Credit Union Administration
7 Board, may issue rules to provide an amount
8 for any overdraft coverage fee that is presumed
9 to be reasonable and proportional to the actual
10 cost of processing the transaction.

11 “(3) POSTING ORDER.—In order to minimize
12 overdraft coverage fees charged to consumers, each
13 depository institution shall post transactions with re-
14 spect to transaction accounts in such a manner that
15 the consumer does not incur avoidable overdraft cov-
16 erage fees.

17 “(k) DEBIT HOLDS.—No depository institution may
18 charge an overdraft coverage fee on any category of trans-
19 action, if the overdraft results solely from a debit hold
20 amount placed on a transaction account that exceeds the
21 actual dollar amount of the transaction.

22 “(l) NONDISCRIMINATION FOR NOT OPTING IN.—In
23 implementing the requirements of this section, each depos-
24 itory institution shall provide to consumers who have not
25 consented to participate in an overdraft coverage program,

1 transaction accounts having the same terms, conditions,
2 or other features as those that are provided to consumers
3 who have consented to participate in such overdraft cov-
4 erage program, except for features of such overdraft cov-
5 erage.

6 “(m) NON-SUFFICIENT FUND FEE LIMITS.—No de-
7 pository institution may charge any non-sufficient fund fee
8 with respect to—

9 “(1) any transaction at an automated teller ma-
10 chine; or

11 “(2) any debit card transaction.

12 “(n) REPORTS TO CONSUMER REPORTING AGEN-
13 CIES.—No depository institution may report negative in-
14 formation regarding the use of overdraft coverage by a
15 consumer to any consumer reporting agency (as that term
16 is defined in section 603 of the Fair Credit Reporting Act
17 (15 U.S.C. 1681a)) when the overdraft amounts and over-
18 draft coverage fees are paid under the terms of an over-
19 draft coverage program.

20 “(o) RULE OF CONSTRUCTION.—No provision of this
21 section may be construed as prohibiting a depository insti-
22 tution from retaining the discretion to pay, without assess-
23 ing an overdraft coverage fee or charge, an overdraft in-
24 curred by a consumer.”.

1 **SEC. 5. REGULATORY AUTHORITY OF THE BOARD.**

2 (a) IN GENERAL.—Not later than 9 months after the
3 date of enactment of this Act (except as provided in sub-
4 section (b)), the Board of Governors of the Federal Re-
5 serve System (in this Act referred to as the “Board”), in
6 consultation with the Comptroller of the Currency, the
7 Board of Directors of the Federal Deposit Insurance Cor-
8 poration, the Director of the Office of Thrift Supervision,
9 and the National Credit Union Administration Board,
10 shall issue such final rules and publish such model forms
11 as necessary to carry out section 140B of the Truth in
12 Lending Act, as added by this Act.

13 (b) BOARD AUTHORITY REGARDING ADDITIONAL
14 WARNINGS.—The Board may, by rule, after taking into
15 account the findings of the Comptroller General of the
16 United States under section 6, require warnings at loca-
17 tions such as point-of-sale transfer terminals or other loca-
18 tions, that are similar to those required under section
19 140B(i) of the Truth in Lending Act, as added by this
20 Act, where feasible, and if the cost of providing such warn-
21 ings does not outweigh the benefit to consumers.

22 **SEC. 6. STUDY AND REPORT BY THE GAO.**

23 (a) STUDY.—

24 (1) IN GENERAL.—The Comptroller General of
25 the United States shall conduct a study regarding
26 whether it is feasible for a depository institution—

1 (A) to provide a warning to a consumer at
2 a point-of-sale transfer terminal that com-
3 pleting a transfer may trigger overdraft cov-
4 erage fees; and

5 (B) to provide the consumer with the op-
6 portunity to cancel the point-of-sale transfer be-
7 fore the transaction is completed.

8 (2) CONSIDERATIONS.—In conducting the study
9 under this subsection, the Comptroller General shall
10 evaluate—

11 (A) the benefits to consumers of a point-
12 of-sale transfer overdraft warning and oppor-
13 tunity to cancel;

14 (B) the availability of technology to pro-
15 vide such a warning and opportunity; and

16 (C) the cost of providing such warning and
17 opportunity.

18 (b) REPORT TO CONGRESS.—Not later than 1 year
19 after the date of enactment of this Act, the Comptroller
20 General shall submit a report to Congress on the results
21 of the study conducted under subsection (a).

22 (c) DEFINITIONS.—As used in this section, the terms
23 “overdraft coverage program”, “overdraft coverage fee”,
24 and “depository institution” have the same meanings as

1 in section 103(cc) of the Truth in Lending Act, as added
2 by this Act.

3 **SEC. 7. EFFECTIVE DATE.**

4 (a) IN GENERAL.—This Act and the amendments
5 made by this Act shall become effective 1 year after the
6 date of enactment of this Act, whether or not the rules
7 of the Board under this Act or such amendments are
8 issued in final form.

9 (b) MORATORIUM ON FEE INCREASES.—

10 (1) IN GENERAL.—During the 1-year period be-
11 ginning on the date of enactment of this Act, no de-
12 pository institution may increase the overdraft cov-
13 erage fees or charges assessed on transaction ac-
14 counts for paying a transaction (including a check or
15 other debit) in connection with an overdraft or for
16 non-sufficient funds.

17 (2) DEFINITIONS.—As used in this section, the
18 terms “depository institution”, “overdraft”, “over-
19 draft coverage fee”, “transaction account” and
20 “nonsufficient fund fee” have the same meanings as
21 in section 103(cc) of the Truth in Lending Act, as
22 added by this Act.

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