April 11, 2022

Comment Intake—Fee Assessment
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services; Docket No. CFPB-2022-0003

Dear Director Chopra,

The Michigan Credit Union League (MCUL), on behalf of our member credit unions, appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau's (CFPB) request for information on fees imposed by financial service institutions. The MCUL is a statewide trade association representing 100% of the 208 credit unions located in Michigan and their nearly 5.8 million members.

General Comment

Credit unions operate as cooperatively owned not-for-profits, in an industry that has long held to the philosophy of "people helping people." Credit unions do not share the same incentive structure as for-profit institutions, who generate fee income to maximize profits for their shareholders. Instead, credit union profits are returned to the cooperate ownership – the members – in the form of dividends, of reduced loan rates, of increased deposit rates, on acquiring tools that increase member service, and more. A credit union's incentive structure is a direct reflection of the will of the membership through their democratic involvement in the cooperative. As such, the business operations of a given credit union is a direct reflection of the needs of the communities in which they are located: credit unions exist to serve their membership and, by extension, the community.

Given that, the CFPB's messaging on "junk fees" does not match the reality of the credit union system. The background provided in the Request for Information describes these so-called "junk fees" as "excessive and exploitative;" however, this is far from the operational objectives of our community credit unions. Since their inception, the credit union mission has been to encourage thrift, savings and the wise use of credit and to increase the knowledge and ability of credit union members to manage and control their financial well-being. This mission (and the underlying philosophy that drives it) has not changed. More, the credit union industry has long been held as the standard of positive consumer protection models in the industry. In the context of overdraft, credit unions largely advertise the "courtesy pay" model as a last resort, offering a number of alternative services to counteract an overdrawn account, from linked savings accounts to lines of credit and more. More still, credit unions have been adopting more complex courtesy pay regimes, with de minimus policies, tiered fee structures and capping the number of fees assessed, all in the name of maximizing both member protection and member service.

Additionally, credit unions continue to offer enhanced member support, a wealth of financial education, and strive for the success of each and every one of their members. The Michigan Credit Union League, in recognition of this fact, collects stories of credit unions who make positive impacts on their communities on a daily basis.[1] During the beginning stages of the coronavirus pandemic, for instance, the states' credit unions rallied together to assist their members' financial well-being by offering hardship loans, terminating skip pay fees, waiving late, overdraft and NSF fees, lowering credit card interest rates to 0%, offering mortgage forbearance, and more.[2]

Finally, the CFPB's messaging on "junk fees" is seemingly contradictory. On the one hand, the consumer-facing messaging seems to suggest that "junk fees" are hidden, back-end charges that are intentionally obfuscated to mask the true cost of a good or service. On the other hand, the RFI explicitly targets overdraft fees, NSF fees, wire transfer fees, and so on which, as the CFPB is well-aware, exist in a heavily regulated space. More interesting still is the CFPB's description of these fees as "hidden" when it was the CFPB who promulgated the very regulations requiring disclosure. No fee listed in the RFI is hidden – in fact, each fee has been disclosed, even opted-in to, prior to ever being assessed. What's more, overdraft fees, specifically, are subject to affirmative opt-in – yet another requirement of CFPB regulation. Given these facts, we find that the CFPB's position on the matter is a very curious position to take. This disparity in presentation is amplified further when the CFPB uses descriptions such as "excessive" and "exploitative," while also leaving those terms undefined. At what point does the CFPB believe a fee is exploitative? At what point is a fee excessive? The answers, here, are unclear.

What is clear, though, is that – while the CFPB is seeking input on many different types of fees – the greatest focus is given to overdraft fees. As such, the focus of this letter will be the same. While this letter will address several key points, it is worth noting that the growing use of overdraft services among consumers did not grow out of a vacuum. There is seemingly a need for such a product in the marketplace, given the ubiquity of its use and, as such, there is a need to understand the causation of this dependency. In fact, there is 70+ years of history to account for, including deregulatory waves, growth and change in market forces, economic forces such as inflation and wage stagnation, and more. While not the primary focus of this letter, the context is, at least, important enough to document and an overview of this context can be found in this letter's appendix.

Credit Unions are Highly Regulated

Per CFPB and NCUA, the credit union industry is heavily regulated and subject to robust consumer disclosure requirements. Whether it be Truth in Savings, Truth in Lending, or Regulation E, it is not the case that consumers are unaware of any particular fees' existence prior to receiving one. Not only are consumers informed of the fee regime at the time of account opening, for overdraft fees specifically, they are required to affirmatively opt-in to the service, often times after reviewing the very model disclosure and opt-in form provided by the CFPB,[3] which many credit unions have adopted verbatim. This comprehensive disclosure provides information so that the consumer can make meaningful comparisons among the financial service providers in their market, after which, many consumers choose a credit union. Our Michigan credit unions, for instance, prove time and again that consumers value their services. This can be evidenced by the fact that, even during a period of state population decline, Michigan credit unions continued to see increases in membership.[4]

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[1] https://www.mcul.org/stories
[2] https://www.mcul.org/cu-difference/covid-19-support
[3] https://www.consumerfinance.gov/rules-policy/regulations/1005/a/#ImageA9
[4] https://www.cutimes.com/2021/04/27/despite-states-population-decline-michigan-credit-unions-tout-membership-gains/

Credit Unions are Well-Positioned in the Market

It is true that overdraft fees account for a large financial burden for many American consumers.[5] As the CFPB has published, market revenue for these fees is estimated to be at least $15.47 billion. Comparing that total to the number of Americans with bank accounts,[6] this equates to approximately $125 in fees per banked American. Surely, on their face, these figures are cause for concern; yet, the estimates provided fail to effectively disaggregate between the large, national banks and smaller, regional institutions – particularly credit unions – a distinction that holds a degree of importance when evaluating possible regulatory action. For example, in the CFPB's own reporting, it is noted that the existence of such programs are much less common at credit unions, at roughly 61% adoption.[7] Further, while this reporting states that average fees per account collected at credit unions are "…just … 11% less than large banks…" it must be noted that this phrasing, "just," is contestable: not only are credit unions less apt to adopt overdraft services in general, they are also charging over 10% less on average than their large-bank competitors. As member-owned institutions driven by the longstanding philosophy previously noted, it cannot be overlooked that credit unions have positioned themselves to be choice institutions in the consumer marketplace.

Further, the CFPB's reporting commented on the reliance on this income by large banks, noting that overdraft and NSF fees accounted for as much as two thirds of their reported fee income. By contrast, while most credit unions do not report explicitly on their overdraft fee income, according to recent Call Report data for the states' credit unions, average total fee income accounts for just 46% of average net income. Given that this fee income line item includes much more than just overdraft fees (ATM fees, wire fees, account research fees, late fees, statement production fees, dormant account fees, etc.), a "reliance" on overdraft fees by credit unions is hardly the case.

More, the externalities leading to seemingly excessive overdraft use require proper identification and assessment: due to historical economic and market conditions, consumer access to overdraft is, by and large, a necessity (these historical conditions are discussed further in the appendix). The consequences of not having access certainly outweigh the fees generated by having access. For example, a bounced rent check produces greater consumer harm than the processing fee to allow the transaction to overdraw the account. While credit unions have multiple programs in place to provide consumer protection against overdrafts, these "last-resort" services have their place, and credit unions have long been the consumer choice when evaluating last-resort options. Also necessary of consideration is the use of overdraft as a convenience service. The CFPB's reporting, for instance, fails to disaggregate between different consumer classes. For instance, the CFPB's focus is largely on consumers who live on the relative margins (Director Chopra, for example, gave an interview recently[8] where it was noted that consumers are making choices between accepting an overdraft fee or skipping meals). Of course, this is worthy of exploration; however, these are not the only users of overdraft services. It's not just consumers on the margin – it's also consumers who are relatively well-off, but who don't want to be bothered with a credit product or the like, instead using the service as a product of convenience. Regardless of financial condition, overdraft products are products people not only need, but want to exist in the marketplace.

[5] https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/
[6] https://www.fdic.gov/analysis/household-survey/index.html
[7] https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/
[8] https://www.youtube.com/watch?v=rvr5HsMOCHM

Regulatory Action is Misguided

As outlined in the appendix, there are numerous reasons for the prevalence of overdraft services within the current market. From changes in economic philosophy and policy, to deregulatory action, to legislative ambivalence; this panoply of factors and conditions created numerous external market pressures, which slowly and eventually led to a large number of consumers necessarily reliant on accessing funds they do not have on deposit. While it is certainly true that this reliance requires redress, such reliance must be understood in the proper historical context and, once understood, it must be acknowledged that such dependencies cannot simply be regulated away: the root causes resulting in overdraft dependency are causes which require legislative action. Reviewing and understanding root causes should not be an activity foreign to the CFPB. In fact, under the current administration, the CFPB has done great work, for instance, defining and understanding the root causes of discrimination within the financial system. The work done on this current topic should be no less rigorous. Consumer reliance on overdraft exists in a much broader context than is reasonably solved by regulatory action. This requires a full economic assessment by the legislature, one that addresses wage stagnation, housing costs, inflated costs of foodstuffs, and more.

Within the CFPB's assessment, it is pertinent that the actions taken include appropriate legislative lobbying to affect proper and necessary socioeconomic change. For example, you will read in the letter from the Credit Union National Association a call to join in support of H.R. 7003, the *Expanding Financial Access for Underserved Communities Act* which, among other things, would allow for federally chartered credit unions to include local underserved areas and communities to their field of membership, thereby combatting the proliferation of banking deserts. The Michigan Credit Union League also supports this bill and likewise encourages the CFPB to do the same.

Moreover, due to changing market forces resultant from the coronavirus pandemic and the subsequent economic fallout have led to an industry-wide review and revision of overdraft programs. While ensuring we distinguish between "overdraft as a convenience" users and those users on the economic margins, of the latter, it is clear that economic forces have led to an even greater consumer dependence on overdraft access. It is equally clear that, what was once assumed to be a consumer behavioral choice is now better understood to be a consumer financial condition brought about by economic externalities far outside of any individuals' control. This shift in understanding has resulted in the market undergoing a wave of self-corrective measures. As noted previously, in the early stages of the pandemic, many Michigan credit unions enacted policy changes to protect the financial well-being of their membership. Now, these same credit unions are reviewing their policies and working with their core providers to add much needed complexity to their overdraft programs. Our Michigan credit unions recognized the need for additional change and have created a task force that is currently developing a series of best practices and working through the necessary processes to effect such change. In short, the capitalistic process is running its course and the market is changing its direction. Regulatory action, then, is largely unnecessary.

Conclusion

On behalf of Michigan's credit unions, thank you for your consideration. If you have questions or require additional information related to our comments, you may contact me at Bradley.Willett@mcul.org or (734)793-3410.

In cooperation,

Patty Corkery	Bradley Willett
President/CEO	Director of Compliance and Regulatory Affairs

MICHIGAN CREDIT UNION LEAGUE & AFFILIATES

Appendix: A brief overview of the rise of overdraft services

In an effort to understand the current realities, it is important to understand the past and the series of events that result in our current conditions. In many ways, overdraft services have been around for well over a century. In fact, the ability for a bank to allow an account to overdraw was addressed explicitly by the Supreme Court in 1828 (*Minor et al. vs. The Mechanics Bank of Alexandria*).[9] In those days, overdrafting an account was seen as a moral failing of the overdrawer and allowing such practices was seen as a deviation of duty by bank managers.[10] This continued to be the majority view until well after World War II; however, this slowly began to change as post-war recovery efforts led to near-boundless innovation by retail banking outfits, largely driven by competition with retail department stores who, during the war, had begun to introduce in-store credit options to their wealthier clients.

The first major innovation offered by the financial industry was the Charg-It program, designed in 1946 for implementation in small retail stores as a means of competing with the in-house credit being offered at larger department store competitors.[11] Soon after, the similarly named Charge-It program was introduced for the general populous, made possible through credit chit, marking a notable shift of the banking industry from simple depository services towards retail credit. Over the next 10 years, the risks of such an innovation were studied and understood, and the first semblance of deposit account overdraft protection programs as we know it today started in 1955 by the First National Bank of Boston as a "check-credit plan."[12] A 1968 report by the Federal Reserve outlined the growth of check-credit plans over the preceding decade, noting that, in September 1967, 599 banks reported offering overdraft plans consisting of a prearranged line of credit, provided as separate checking accounts with specially designed checks. Notably, these products "…were for respectable people; they were not the installment credit of the working class."[13]

Although the move within the industry was swift, this was not yet "overdraft protection" as we now understand it. Public sentiment regarding overdrawn accounts was still largely negative, equating an overdraft as akin to theft. Fast forward to 1977 and there was a public outcry after then-director of the Office of Management and Budget Bert Lance was ousted for flagrantly overdrawing his personal account held by the bank that he, himself, managed.[14,15] Jump ahead 14 more years to 1991, when the public was yet again enflamed as the House of Representatives were the subject of a similar scandal, 'Rubbergate.'[16] Still, while public sentiment was slow to change, public behavior, on the other hand, was not.

It is well-documented in the literature that the Reagan-era economic policies of the 1980's led to marked increases in the productivity-pay gap.[17] Income inequality drastically increased,[18] a result of the sweeping

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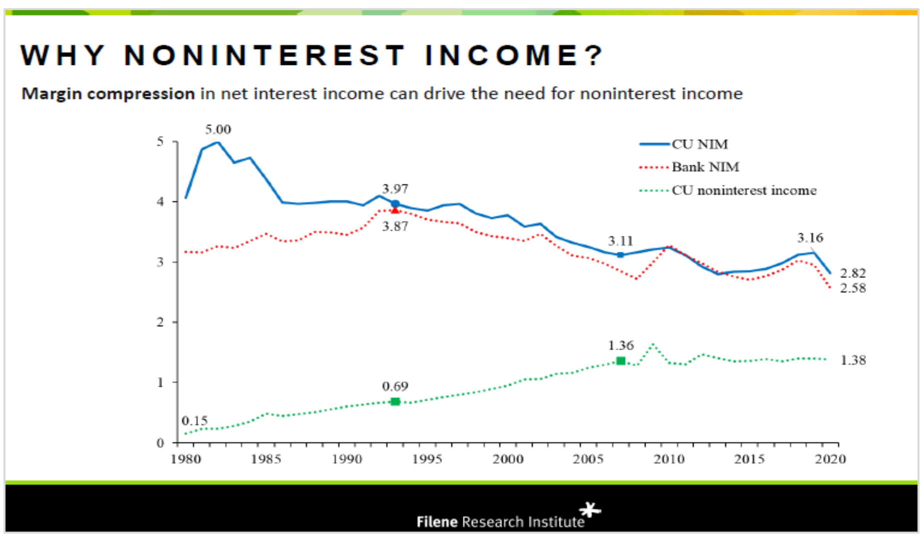
[9] https://www.loc.gov/item/usrep026046/
[10] https://archive.org/details/jstor-1805687/
[11] https://time.com/4512375/first-credit-card/
[12] https://www.cambridge.org/core/journals/enterprise-and-society/article/abs/charge-account-banking-a-study-of-financial-innovation-in-the-1950s/32031AB063A5B16EA1FC8CBA1B21BA7E
[13] https://fraser.stlouisfed.org/files/docs/historical/frbdal/circulars/frbdallas_circ_19680924_no68-172.pdf (p.21)
[14] https://www.jimmycarterlibrary.gov/digital_library/cos/142099/35/cos_142099_35_17-Lance_Bert.pdf
[15] https://www.nytimes.com/1977/09/02/archives/bankers-denounce-some-lance-moves-overdrafts-among-acts-held-not.html
[16] https://www.washingtonpost.com/archive/politics/1991/10/04/38-admit-to-bouncing-checks/da3874e0-ac43-4e4d-997c-31448a34af16/
[17] https://www.epi.org/blog/growing-inequalities-reflecting-growing-employer-power-have-generated-a-productivity-pay-gap-since-1979-productivity-has-grown-3-5-times-as-much-as-pay-for-the-typical-worker/
[18] https://www.epi.org/publication/top-charts-of-2018-twelve-charts-that-show-how-policy-could-reduce-inequality-but-is-making-it-worse-instead/

changes brought about by the administration's economic policies, which was bolstered further by stagnation in minimum wage increases, a wave of state and federal banking deregulation,[19] thousands of bank failures,[20] and let us not forget Black Monday.[21] Complicating things further, the 1980's created a rise in rent and average housing prices that has continued to increase even today.[22] Long gone were the days of economic boom and stability. The economic anxieties which grew out of the Reagan era were not without merit – by 1990, median family incomes had been stagnant for a decade,[23] housing prices were the highest they'd ever been, and national wealth accumulation continued only for the highest earners as the era's policy programs allowed for wealth to trickle upwards.[24] What's more, these policy changes also resulted in a decreasing rate environment. One contemporaneous study noted that, by 1989, nominal Treasury rates had plunged below their sustained average value over the previous quarter century.[25] Of the small banks and credit unions that were able to survive the onslaught of consolidation and rate squeeze, many were struggling to remain afloat – the economic conditions affected more than just consumers. As such, the early 1990's brought about a new era of revenue generation: non-interest income. Supporting this observation, a recent NCUA webinar on this topic[26] included a presentation by Filene, who provided commentary on this slow march towards non-interest income, providing the following graphic:



By the mid 1990's, this tumultuous set of conditions created soil ripe for industrious capitalization. Banking consultants keen to the changing tides wrote books detailing how to manage fee income, noting that maximizing revenues required a strict 'no refund' policy.[27] Media outlets noticed the steep rise in bank

[19] https://www.nber.org/books-and-chapters/economic-regulation-and-its-reform-what-have-we-learned/regulation-and-deregulation-us-banking-industry-causes-consequences-and-implications-future
[20] https://www.fdic.gov/bank/historical/history/3_85.pdf
[21] https://www.federalreservehistory.org/essays/stock-market-crash-of-1987
[22] https://fred.stlouisfed.org/series/CUUR0000SEHA
[23] https://www.latimes.com/archives/la-xpm-1994-05-08-tm-55258-story.html
[24] https://www.epi.org/blog/wages-for-the-top-1-skyrocketed-160-since-1979-while-the-share-of-wages-for-the-bottom-90-shrunk-time-to-remake-wage-pattern-with-economic-policies-that-generate-robust-wage-growth-for-vast-majority/
[25] https://www.nber.org/system/files/working_papers/w3037/w3037.pdf
[26] https://youtu.be/nbnVb-vDiwc
[27] https://archive.org/details/improvingbankpro0000jann

fees.[28,29] Consumer advocacy groups began suggesting lawmakers should place caps on fees.[30] Notably, these suggestions were met with legislative ambivalence. Fees were running rampant: it was standard bank practice to reorder deposits to maximize revenues, and opt-in/disclosure requirements had yet to be mandated.

Credit unions at this point did not have the regulatory authority to allow an account to overdraw; however, aware of the market forces surrounding them and the growing need for depositor access to quick credit, they requested regulatory parity with the bankers. Their request was granted in 2000, when the NCUA issued a final rule to Part 701 permitting credit unions to advance money to members to cover account deficits without prior need of a credit check.[31] This now meant that the service had been adopted across the entire financial service industry, marking the turning point in overdraft services as we now know them today.

At the same time, the legislature was addressing the need for modernization of the payment systems. In 2004, for example, the passing of Check21 was met with consternation. While the technological advances were more than welcomed, consumer advocacy groups noted that an unintended consequence of faster check processing would be an increase in overdrafts.[32] Even still, as often is the case, legislation lagged far behind the market trends. Regulatorily, it was not until 2005 that joint guidance on overdraft services was issued.[33] In May of that year, the Federal Reserve amended Reg DD[34] to address overdraft disclosure requirements and, by that point, overdraft revenues were estimated to be over $5.6 billion annually.[35] The final rule commented on the growing trend, stating,

> "*Historically, depository institutions have used their discretion on an ad hoc basis to pay overdrafts for consumers on transaction accounts, usually imposing a fee. … More recently, third-party vendors have developed and sold overdraft programs to institutions, particularly to smaller institutions. These programs generally build upon or add to the institution's existing internal reporting systems to enable the institution to automate its payment of overdrafts. What generally distinguishes the vendor programs from institutions' in-house automated processes is the addition of marketing plans that appear designed to promote the generation of fee income by disclosing to account-holders the dollar amount that the consumer typically will be allowed to overdraw their accounts. Some institutions also encourage consumers to use the service to meet short-term borrowing needs.*"

The following month, the Consumer Federation of America published a report with wide circulation, noting that 3,000 financial institutions were offering these services.[36] The following year, the FDIC began a 2-year study on overdraft programs, the results of which were published in 2008.[37] This report identified that most banks were automatically enrolling customers in overdraft protection programs, allowing for affirmative

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28 https://www.nytimes.com/1991/10/06/nyregion/service-charges-by-banks-scrutinized.html
29 https://www.chicagotribune.com/news/ct-xpm-1998-07-08-9807080296-story.html
30 https://consumerfed.org/pdfs/bounceckpr.pdf
31 https://www.govinfo.gov/content/pkg/FR-2000-03-22/pdf/00-7039.pdf
32 https://advocacy.consumerreports.org/press_release/new-law-will-mean-more-bounced-checks-and-fees-for-consumers/
33 https://www.ncua.gov/files/letters-credit-unions/LCU2005-03.pdf
34 https://www.federalreserve.gov/boarddocs/press/bcreg/2005/20050519/attachment.pdf
35 https://www.nclc.org/images/pdf/overdraft_loans/bounce-protection-appendix-2003.pdf
36 https://consumerfed.org/pdfs/CFAOverdraftStudyJune2005.pdf
37 https://web.archive.org/web/20090117221348/http:/www.fdic.gov/bank/analytical/overdraft/fdic138_Report_Final_v508.pdf

opt-out, while simultaneously requiring affirmative opt-in for linked account programs; thus, continuing the trend towards consumer overdraft dependence.

That same year, the same economic and deregulatory framework that created the conditions addressed thus far likewise created the 2008 financial crisis, leading to yet further consumer dependency on overdraft services. By 2009, the constant reporting[38,39] and the financial pressures were too much to be left unaddressed. Dodd-Frank passed, Truth-In-Savings was amended yet again, this time mandating overdraft service opt-in requirements, and the CFPB was created. At this time, estimated revenue generation for overdraft services was nearly $38 billion.[40] This new opt-in requirement, contrary to what one might have assumed, was not enough to change consumer behavior. Because the necessity for such a service had been slowly growing over the previous 3 decades, consumer opt-in did not make much of a dent in overall fee revenue. Nearly a decade later, MarketWatch reported $34 billion in overdraft fees[41] as dependency became entrenched.

All of these economic pressures were amplified yet again with our newest recession period, brought about by the coronavirus. The global economic slowdown resulted in waves of layoffs, a rise in costs of many consumer goods, and three different stock market crashes in just one month.[42] Prior to legislative relief, the early days of the pandemic resulted in an economic fallout that caused significant hardships, particularly for the already economically disadvantaged. Millions lost their jobs, resulting in a decreased ability to access proper food and nutrition, an increased inability to pay rents and mortgages, and an overall difficulty in being able to afford normal household expenses.[43] Banks and credit unions struggled to maintain appropriate levels of branch staffing.[44] The Federal Reserve identified a record number of bank and credit union branch closures during the pandemic, in some instances leading to the creation of new banking deserts.[45] CBS News reported that bank overdraft fees hit record highs during this time.[46]

In all this, it is clear that there is no single, determinant factor that led to the proliferate adoption of overdraft services and their subsequent use among consumers. Instead, it was a combination of multiple factors – some recognizable, some not – slowly accumulating over time. As such, any true remedy of the situation will not result from a single factor, such as regulatory action. Instead, a true remedy requires a careful assessment of the root causes, untangling the web of overlapping factors, and crafting appropriate and effective legislation that addresses each identified factor, a result of which will be a market shift towards greater economic equity and stability.

[38] https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1087&context=lclr
[39] https://www.nytimes.com/2009/08/20/opinion/20thu1.html
[40] https://www.nytimes.com/2009/11/13/business/13regulate.html
[41] https://www.marketwatch.com/story/overdraft-fees-havent-been-this-bad-since-the-great-recession-2018-03-27
[42] https://en.wikipedia.org/wiki/COVID-19_recession#Financial_crisis
[43] https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and
[44] https://www.americanbanker.com/creditunions/news/banks-credit-unions-struggle-with-branch-staffing-amid-covid-surge
[45] https://www.federalreserve.gov/econres/notes/feds-notes/bank-branches-and-covid-19-where-are-banks-closing-branches-during-the-pandemic-20211217.htm
[46] https://www.cbsnews.com/news/bank-overdraft-atm-fees-bankrate-record-high-covid-19-pandemic/