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April 1, 2024

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

**RE: ICBA Comments in Response to CFPB’s Notice of Proposed Rule on Overdraft Lending:
Very Large Financial Institutions Docket No. CFPB–2024–0002 or RIN 3170–AA42**

Dear Director Chopra:

The Independent Community Bankers of America (“ICBA”)¹ appreciates the opportunity to respond to the Bureau of Consumer Financial Protection’s (“CFPB” or “Bureau” or “Agency”) proposed rule (or “proposal”) on overdraft protection services provided by very large financial institutions (“very large FIs”).² The proposal would amend Regulation Z to apply to overdraft services offered by very large FIs except where such services are offered at or below cost as a “true courtesy” to consumers. A covered provider under the proposal may determine its “cost” either through its own calculation of costs and losses, or by relying on benchmarks set by the CFPB and based on data from five financial institutions.³ Overdraft protection services offered by covered FIs above cost or breakeven would be subject to Regulation Z requirements. Though the proposal is currently limited to very large FIs, the CFPB notes it will monitor the market in coordination with state and federal supervisors to determine whether to alter the regulatory framework for financial institutions under \$10 billion.⁴

ICBA opposes the CFPB’s proposed regulation. As drafted, this proposal will lead to market standards that require community banks to cease offering overdraft protections services - such services that have become the financial lifeline for millions of consumers across the nation. We, therefore, urge the Agency to withdraw this proposed rule.

¹ The Independent Community Bankers of America® has one mission: to create and promote an environment where community banks flourish. We power the potential of the nation’s community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America’s community banks leverage their relationship-based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers’ financial goals and dreams. For more information, visit ICBA’s website at www.icba.org.

² The Consumer Financial Protection Bureau, “Overdraft Lending: Very Large Financial Institutions (Proposed Rule and Request for Public Comment),” (February 23, 2024), pg. 1, [Notice of Proposed Rulemaking - Overdraft](https://www.consumerfinance.gov/notice-of-proposed-rulemaking-overdraft/) (consumerfinance.gov).

³ *Id.* at 70.

⁴ *Id.* at 7.

ICBA Comments

Overdraft protection services are typically utilized to address financial gaps of all levels of severity throughout a consumer's life. Such challenges may occur weekly, monthly, randomly, they may be predictable or a result of how a consumer manages their individual financial affairs. Overdraft protection services offer consumers peace of mind that when funds are low, their financial gap will be bridged, and they will be able to provide for their families, pay bills, or other necessities.

Community banks strive to serve customers on an individual basis and encourage sound financial management to prevent recurring overdrafts. Increased regulatory scrutiny of legitimate overdraft protection services has affected many aspects of how community banks and other financial institutions offer these services to consumers, as well as how they monitor and manage these services. Yet, many community banks continue to offer the service to fulfill customer's demand for overdraft coverage and, ultimately, for their peace of mind.

Federal regulations, laws, and compliance guidance issued by state and federal prudential regulators specify the manner in which financial institutions offer overdraft protection services to those consumers who so elect to opt-in to the coverage provided by the service. The services are clearly and conspicuously disclosed⁵ and closely scrutinized during supervisory examinations for compliance.

While there has been increased public attention on overdraft protection services as a result of heightened political rhetoric, community banks have continued to provide safeguards and encourage positive behaviors to help prevent customers from overdrawing their accounts and/or incurring any fee through the following:

- Alerting customers by phone call, text messages, or emails of low balances, large purchases, single transactions, large ATM withdrawals, unusual activity, debit card use, and all other transaction activity;
- Providing clear and detailed notices and disclosures of overdraft program coverage limits, so that the customer is aware of potential liability and can make informed spending choices;

⁵ Regulation DD (12 CFR 230); Fees (§ 230.4(b)(4)) An institution must disclose the amount of any fee that may be imposed in connection with the account (or an explanation of how the fee will be determined) and the conditions under which the fee may be imposed. An institution must specify the categories of transactions for which an overdraft fee may be imposed.

The Truth in Savings Act (12 U.S.C. § 4301 et seq.), as implemented by Regulation DD, 12 C.F.R. § 1030.6, requires a financial institution to provide certain periodic statement disclosures. Section 1030.6(a) requires a financial institution that mails or delivers a periodic statement to include total overdraft and returned item fees as required by § 1030.11(a).

The Electronic Fund Transfers Act (15 U.S.C. § 1693 et seq.), as implemented by Regulation E, 12 C.F.R. § 1005.17(b)(1), prohibits a financial institution from assessing a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction under the institution's overdraft service unless the financial institution: provides the consumer with a written notice (or if the consumer agrees, electronically) that is segregated from other information and describes the institution's overdraft service; provides the consumer a reasonable opportunity to affirmatively consent or opt-in; obtains the consumer's affirmative consent or opt-in; and provides the consumer with a confirmation of the consumer's consent in writing (or if the consumer agrees, electronically) informing the consumer of the right to revoke such consent.

- Requiring customers to affirmatively opt-in for overdraft services and allowing them to opt-out, as they choose;
- Allowing account transfers from designated accounts and deposit advances;
- Offering small-dollar loans, lines of credit, and deposit advances;
- Allowing customers' generous grace periods before charging an overdraft fee;
- Linking a consumer's checking account to another account for overdraft protection; and,
- Waiving overdraft fees altogether.

As relationship bankers, community banks rely on positive and trusted relationships with their customers. Keeping customers informed of overdraft protection services, and all other options, is in the customers' and community banks' best interest.

Restricts to Overdraft Protection Will Harm Consumers

Overdraft protection services serve to provide a lifeline for large portions of the population, particularly those who are most vulnerable and subject to consequences by nonpayment of bills. Consequently, the impact of the proposed rule will be significant for millions of consumers who knowingly opt-in and rely on this service to meet their essential needs during financial shortfalls. Rejected mortgage or rent payments, life and auto insurance payments, medical procedure payments and co-pays, childcare payments, child support payments, utility payments, groceries, and fuel are just a few real situations that are covered by overdraft services.

The proposed rule reflects a lack of understanding for consumer choice and consumer agency. While the CFPB believes it is helping consumers by pursuing this rule, the agency should consider the following data that demonstrate consumer's understanding:

- Consumers, especially overdraft users, continue to demonstrate a deep understanding of overdraft and available alternatives.⁶
- 81% of frequent overdraft users indicated that they would have preferred to incur a fee on their most recent overdraft transaction rather than have the purchase or payment declined. This finding suggests that those who overdraft frequently experience a recurring and urgent need for additional cash to cover expenses.⁷
- The overwhelming majority of people who over drafted intentionally (92%) indicated that they would prefer to incur the fee rather than have the most recent transaction that incurred an overdraft declined.⁸
- Over 60% of overdrafts come from consumers who intend to use the service.⁹

⁶ Curinos, "Competition Drives Overdraft Disruption," (December 1, 2021), pg. 3, [Curinos 2021-Competition-Drives-Overdraft-Disruption-web.pdf \(hubspotusercontent-na1.net\)](#).

⁷ Financial Health Network, "Overdraft Trends Amid Historic Policy Shifts," (June 1, 2023), [Overdraft Trends Amid Historic Policy Shifts – Financial Health Network \(finhealthnetwork.org\)](#).Id.

⁸ Id.

⁹ Id.

- Over 80% of overdraft transactions come from consumers who opted-in to debit card overdraft programs with the clear intention of using it to cover their payments. And two-thirds of consumers indicate they do not want to see reductions in their access to the service.¹⁰
- 28% reported that their most recent overdraft was effectively a gamble, where they knew their balance was low, but thought there was a chance it could cover the purchase.¹¹
- Only 16% of respondents reported that they knew their balance was insufficient when overdrafting. However, 35% of those with more than 10 overdrafts said their last overdraft was intentional.¹²

As the data reflects, overdraft protection is a legitimate service option that help customers when they need it most, and those who knowingly choose to avail themselves of the service. Our members have shared that if this proposal becomes final, it will cause some to stop providing overdraft protection services; will cause some to cease offering free deposit offerings at their banks; will cause some to close accounts of frequent over-drafters; will exacerbate the number of underbanked and unbanked consumers; will force consumers into payday and other unscrupulous funding sources; will result in more rejected items from merchants and creditors, among other consequences. Such harm will further result in negative credit reporting; and could result in job losses and increased consolidation in the banking industry if banks are not able to compete in a free market or offer services customers demand, thus reducing safe options for consumers. Furthermore, the CFPB's focus on all financial institutions that offer this protection completely ignores some consumer behaviors that result in overdraft situations and minimizes consumer accountability. Prior to engaging in rulemaking of this magnitude, we urge the CFPB to determine the full consequences of this proposal by conducting an assessment of all data across all segments of the population, particularly those that the Bureau is purporting to help herein.

Only Congress Can Change the Law

In 1968, Congress enacted the Truth in Lending Act ("TILA").¹³ In 1969, the Federal Reserve Board ("FRB") wrote rules to implement the law, which required lenders to disclose the cost of credit to a borrower.¹⁴ Under TILA, credit is defined as "the right granted by a creditor to a debtor to defer payment of a debt or to incur a debt and defer its payment."¹⁵ The CFPB reimagines the statutory definition of "credit," by declaring overdrafts, through this proposal, as an extension of credit which is in direct conflict of the law. Overdraft services do not fit into TILA's definition of credit because customers do not have a "right" to overdraw their account, nor a right to defer bringing their deposits to a positive balance. In fact, customers are required to make immediate repayment of overdrawn accounts by virtue of deposit account agreements.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ 15 U.S.C. 1601 et seq

¹⁴ 12 CFR 226

¹⁵ 15 U.S.C. 1601(f) and see also 12 CFR 1026.2(a)(10)

The proposed rule also asserts that an overdraft fee is a finance charge unless the FI charges overdraft at a breakeven amount.¹⁶ The CFPB's assertion is also in direct conflict of the FRB's determination, established by Regulation Z that overdrafts are not extensions of credit, and overdraft fees are not finance charges because they are not agreed upon, in writing, between the customer and the financial institution to pay, for a fee, overdraft amounts.¹⁷

Given the statutory and regulatory definitional parameters, the CFPB cannot assert power that it does not have in order to reclassify a law set by Congress.

Conclusion

In light of the concerns raised in our response, we strongly urge the CFPB to fully consider the proposed rule's dire consequences on consumers and withdraw this proposal. We appreciate the opportunity to provide comments in response to this request. If you have any questions, please do not hesitate to contact me at 202-821-4451 or Rhonda.Thomas-Whitley@icba.org.

Sincerely,

/s/

Rhonda Thomas-Whitley
Senior Vice President, Senior Regulatory Counsel

¹⁶ The Consumer Financial Protection Bureau, "Overdraft Lending: Very Large Financial Institutions (Proposed Rule and Request for Public Comment)," (February 23, 2024), pg. 7, Notice of Proposed Rulemaking - Overdraft (consumerfinance.gov).

¹⁷ 12 CFR 1026.4(c)(3).