April 1, 2024

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

Re: Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 13,852 (Feb. 23, 2024), Docket No. CFPB–2024–0002; RIN 3170–AA42

Dear Director Chopra,

The American Bankers Association[1] (ABA) and 52 state bankers associations (collectively, the Associations) appreciate the opportunity to comment on the Consumer Financial Protection Bureau's proposal to impose additional regulation on overdraft services (Proposal).[2]

Although the Bureau professes intent to protect "courtesy" overdraft, the Proposal would do the opposite. It would effectively bring an end to overdraft services for millions of consumers who – following receipt of a consumer-tested disclosure – choose to use to the product to cover emergency expenses and other liquidity shortfalls, all to advance the Administration's political campaign against "junk fees." We call on the Bureau to withdraw the Proposal.

I. Summary of Comment

The Proposal and the accompanying press releases assert that the CFPB "is taking action to close regulatory loopholes that will bring long overdue transparency and competition for overdraft lending."[3] But the market for overdraft services already is transparent and competitive. In recent years, depository institutions have evaluated the existing pro-consumer regulations governing overdraft and the markets they serve, listened to consumers' preferences, and responded by introducing changes to their overdraft programs. The process has yielded a variety of overdraft programs that fairly and transparently respond to consumer needs, promote free choice, and encourage competition, as even Director Chopra has repeatedly acknowledged.[4] These

[1] The American Bankers Association is the voice of the nation's $23.7 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $18.8 trillion in deposits and extend $12.5 trillion in loans.
[2] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 13,852 (Feb. 23, 2024) [hereinafter, Proposal]. Citations in this letter are to the version of the Proposal issued by the Bureau on January 17, 2024.
[3] Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Director Rohit Chopra on Overdraft Lending Press Call (Jan. 16, 2024) [hereinafter, Chopra Press Remarks]; *see also* Proposal at 6.
[4] *See Consumers First: Semi-Annual Report of the Consumer Fin. Prot. Bureau: Hearing Before the H. Comm. on Fin. Svcs.*, 117 Cong. (2022) (testimony of Rohit Chopra, Dir., Consumer Fin. Prot. Bureau) ("Institutions are starting to compete more aggressively on fees."); *The Consumer Fin. Prot. Bureau's Semi-Annual Report to Cong.: Hearing Before the Sen. Comm. on Banking, Hou., & Urban Affairs*, 117 Cong. (2022) (testimony of Rohit Chopra, Dir., Consumer Fin. Prot. Bureau) ("But what we are seeing is actually banks across the board are starting to compete on [overdraft]."); *accord* Remarks, Office of the Comptroller of the Currency, Acting Comptroller of the Currency Michael J. Hsu, Fairness and Effective Compliance Risk Management (Mar. 25, 2024) ("Since [late 2021],

innovations include sending low-balance alerts, linking the customer's checking account to another account, imposing *de minimis* thresholds and caps on total fees that the bank may charge per day, and providing overdraft "grace periods" during which a customer can make a deposit and avoid a fee. Additionally, some banks no longer charge overdraft or NSF fees, and many banks offer overdraft-free accounts that meet the Bank On initiative's National Account Standards.[5] The Bureau's own research confirms that, as a result of banks' innovations, consumers are paying less in overdraft and NSF fees now than they did four years ago.[6]

All of these pro-consumer innovations are put at risk by the Proposal. Yet the Bureau has identified no market failure requiring additional regulation of overdraft services. And its effort to close so-called regulatory "loopholes" relies on a complex and contorted reinterpretation of the Truth in Lending Act (TILA) that finds no support in the statutory language.

The Proposal first states that overdraft is "credit" and an overdraft fee is a "finance charge" despite Congress' determination 50 years ago to the contrary. Financial institutions would be permitted to offer overdraft under the existing, pro-consumer regulatory framework established by the Federal Reserve in 2009 only if their overdraft fee is below a "breakeven" fee or a "benchmark" fee set by the Bureau. Charging a fee that exceeds the breakeven or benchmark fee would subject overdraft services to the requirements of TILA and Regulation Z.

The operational costs and compliance and litigation risks of the proposed framework will drive banks to offer overdraft at the benchmark fee – essentially imposing a government price cap – if banks continue to offer the product at all. Moreover, those banks that continue to offer overdraft services under this framework may reduce or eliminate pro-consumer overdraft features like grace periods and *de minimis* thresholds for charging an overdraft fee.

Consumers will be harmed by the Bureau's price cap. An analysis of transaction data from 11 banks found that the median size of items paid into overdraft is $370.[7] Another analysis of data from 14 financial institutions found that the average size of items paid into overdraft was $198.[8] These analyses demonstrate that many consumers use overdraft strategically to ensure that

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consumer overdraft related fee revenues generally have declined, . . . and overdraft program features have become more pro-consumer.").

[5] *See* Cities for Fin. Empowerment, *Bank On National Account Standards (2023-2024)*, https://joinbankon.org/wp-content/uploads/2020/10/Bank-On-National-Account-Standards-2021-2022.pdf.

[6] *See* Éva Nagypál, Consumer Fin. Prot. Bureau, Blog Post, Banks' Overdraft/NSF Fee Revenues Evolve Along with their Policies (2022) (finding that, on average, banks of all asset sizes experienced declines in their overdraft and NSF fee revenue between 2019 (the pre-pandemic baseline) and 2022); *see also* Curinos, *An Update: Competition Drives Overdraft Disruption* (2022) (on file with the author) (finding that recently instituted and pledged reforms from financial institutions were projected to decrease overdraft fees 82% on a per capita basis by year end 2023, as compared with 2008 figures).

[7] G. Michael Flores, *An Assessment of Usage of Overdraft Protection by American Consumers* 18 (2017) (*included as an attachment to* Am. Bankers Ass'n, *Small Dollar Credit: Millions of Small Needs Add Up to a Big Deal: Banks Should Be Allowed to Offer Customers Multiple Choices* (2017), https://www.aba.com/advocacy/policy-analysis/small-dollar-credit [hereinafter, *Assessment of Overdraft Usage*].

[8] Curinos, *Competition Drives Overdraft Disruption* 8 (2021) (on file with the author). One midsize ABA member bank reported that the average dollar amount of an item paid into overdraft where a fee was charged was $312 in 2023. Other studies, which rely on surveys of consumers, present a wider range of average transaction figures. See footnote 64 for discussion of these surveys.

important expenses – such as rent, utilities, and medical bills – are paid when the consumer experiences a shortfall in funds. Not surprisingly, surveys consistently show that consumers appreciate and value their bank's overdraft program and are glad that their bank covered their overdraft payment, rather than returned or declined the payment. A survey conducted in March 2024 by Morning Consult found that more than two-thirds of consumers (67%) find their bank's overdraft service valuable – as compared with only 16% who do not find it valuable – and 8 in 10 consumers (79%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining payment.[9] While no one likes to pay fees, 64% of consumers think it is reasonable for banks to charge a fee for an overdraft, as opposed to only 23% who think it's unreasonable.[10] Prior surveys by Morning Consult found similar results and demonstrate the enduring reality that consumers value overdraft.[11] Indeed, only a miniscule number of complaints submitted to the Bureau – 0.003% of the total – list "overdraft" as the issue or sub-issue of the complaint.[12]

The Proposal purports to apply only to banks and credit unions with more than $10 billion in assets, but if it is finalized, all depository institutions (and their customers) will be impacted, as institutions will face market pressure to conform their practices to the Bureau's rule. In addition, the Bureau's line-drawing is inconsistent with TILA; nothing in the statute supports defining overdraft as "credit" and the fee a "finance charge" only when offered by an institution with assets greater than $10 billion. And to our knowledge, this is the first time a regulator has suggested that a consumer is not entitled to the same protections based on the asset size of the institution where the consumer chooses to bank.

The Bureau's proposed price cap on overdraft fees is just one of the pressures on fee income that banks face. Proposed changes by the Federal Reserve to Regulation II and the Bureau's final rule capping credit card late fees would significantly reduce interchange and credit card revenue, respectively. These changes—together with others, such as the Bureau's overdraft price cap and potential additional costs of capital under the Basel III Endgame proposal—will put pressure on banks to impose higher minimum balance requirements and to limit the availability of low-cost, full-service deposit accounts.[13] A 2021 Federal Reserve Bank of New York staff report reached a sobering conclusion regarding the impact of price caps on overdraft fees: "Our study finds . . . that overdraft fee caps hinder financial inclusion. When constrained by fee caps, banks reduce

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[9] Press Release, Am. Bankers Ass'n, *ABA Unveils Consumer Survey Data on Debit Cards, Overdraft and Other Banking Issues in Play in Washington* (Mar. 20, 2024), https://www.aba.com/about-us/press-room/press-releases/consumer-survey-data-on-debit-cards-overdraft-and-other-banking-issues.

[10] *Id.*

[11] *See* footnote 70 and accompanying text.

[12] Of the 4,912,269 total complaints displaying in the Bureau's Consumer Complaint Database as of March 27, 2024, only 154 listed "overdraft" as part of the issue or sub-issue of the complaint.

[13] *See* Letter from Rob Nicols, Pres. & CEO, Am. Bankers Ass'n, to Joseph R. Biden, Jr., Pres. (Dec. 19, 2023), https://www.aba.com/advocacy/policy-analysis/letter-to-president-biden-re-impact-of-regulations; Jonathan Thessin, Hallee Morgan, & Avery Weisel, *ABA Viewpoint: From Triple Threat to Total Impact* (Feb. 26, 2024), https://bankingjournal.aba.com/2024/02/from-triple-threat-to-total-impact/; *see also* Nick Bourke, *How Proposed Interchange Caps Will Affect Consumer Costs* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4705853 (concluding that a reduction in the current cap on interchange fees will lead to increased fees to consumers).

overdraft coverage and deposit supply, causing more returned checks and a decline in account ownership among low-income households."[14]

Thus, a proposal with the professed goal of improving the financial health of consumers would achieve the opposite result. Fewer consumers will have access to low-cost, full-service deposit accounts, and those that do will be required to meet higher minimum balance requirements. Some consumers will lose access to their account and ultimately the banking system. This result is directly at odds with the goal of regulators and financial institutions to promote financial inclusion and reduce the number of unbanked and underbanked individuals.[15]

The Proposal upends the disclosure-based framework that, for 50 years, has ensured consumers can make informed choices among the many financial products and services available to them. In 2009, the Federal Reserve established a pro-consumer approach which requires consumers to opt in to overdraft protection after receiving a consumer-tested disclosure, ensures consumers receive disclosures about overdraft and NSF fees incurred, and permits them to opt-out at any time.[16] However, this Proposal jettisons that disclosure-based framework in favor of a government mandate. These developments are antithetical to the free-market principles that drive innovation, promote financial inclusion, and provide consumers with a robust set of choices from which they can select the financial products and services that best meet their needs. All policymakers—and all Americans—should be deeply concerned.

II. Summary of the Proposal

The Proposal applies TILA and Regulation Z requirements to overdraft protection services offered by banks and credit unions with assets in excess of $10 billion (collectively, Large Banks) that charge an overdraft fee above a certain dollar threshold. The Proposal creates a new type of "credit" called "overdraft credit," defined as "any consumer credit" extended by a financial institution to pay a transaction from a deposit account when the consumer has insufficient funds in that account.[17] Overdraft services provided by a Large Bank would be

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[14] Jennifer L. Dlugosz *et al.*, Fed. Reserve Bank of N.Y., Staff Reports, Who Pays the Price? Overdraft Fee Ceilings and the Unbanked 22 (rev. July 2023), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr973.pdf?sc_lang=en.

[15] *See, e.g.*, Speech by Gov. Michelle W. Bowman, Fed. Reserve Bd. of Govs., Building a More Inclusive Financial System through Collaboration and Action (Dec. 5, 2023), https://www.federalreserve.gov/newsevents/speech/bowman20231205a.htm. ("An inclusive financial system offers access and choices that enhance consumers' and businesses' financial well-being. From checking and savings accounts to credit and insurance, consumers benefit from having financial products and services that are affordable, safe, and responsive to their needs. Without them, consumers may turn to alternative financial services, which can often be more costly or may lead to consumer harm."); Acting Comptroller of the Currency Michael J. Hsu, Remarks at the 2023 Bank On National Conference, Financial Inclusion Successes on the Path to Financial Health (May 23, 2023), https://www.occ.gov/news-issuances/speeches/2023/pub-speech-2023-48.pdf ("We are committed to promoting financial inclusion starting with bank account access, as that can be critical to climbing the economic ladder.").

[16] Under the existing regulatory framework, financial institutions are required to provide consumers with multiple and repeated disclosures about overdrafts and the number and amount of overdraft fees the customer has incurred. *See* Reg. E, 12 C.F.R. § 1005.1 *et seq.*; Reg. DD, 12 C.F.R. § 1030.11(a).

[17] 12 C.F.R. § 1026.62(a)(2) (proposed). The term "overdraft credit" also includes "consumer credit extended through a transfer from a credit card account or overdraft line of credit." *Id.*

"overdraft credit" that is subject to Regulation Z unless the bank charges a "true courtesy" overdraft fee using one of the two calculations below:

- A fee that reflects the institution's "breakeven" costs, including charge-off losses, to operate its overdraft program. To use this price point, a bank would need to calculate the pro rata share of the bank's "total direct costs and charge-off losses for providing [overdraft services] in the previous year,"[18] including the institution's cost of funds and operational costs that are "directly attributable" to its overdraft program.[19]

- A fee that conforms to a "benchmark" fee set by the CFPB. The Bureau has proposed $3, $6, $7, or $14 as potential benchmarks and is seeking comment on those figures and differing methodologies.[20]

Banks offering overdraft services priced above either the breakeven or the benchmark fee ("above breakeven overdraft credit") would be deemed to have offered credit subject to a finance charge.[21] As a result, these services would be subject to Regulation Z's requirements. Significantly, Regulation Z's prohibition on offsets would apply.[22] When incoming deposits are made to a customer's account that is overdrawn, the bank would be prohibited from using the deposit to pay off the overdrawn balance.[23]

The Proposal also prohibits banks from treating the overdrawn amount as a negative balance on the customer's deposit account. Instead, each time a customer obtains above breakeven overdraft credit, the bank must create a separate "covered overdraft credit account" from which the bank would extend "covered overdraft credit."[24]

In addition, the Proposal applies the provisions of the Credit Card Accountability Responsibility and Disclosure (CARD) Act implemented by Regulation Z to above breakeven overdraft credit, creating a fictitious new category of a "hybrid debit-credit card" within Regulation Z.[25]

The proposal maintains the existing exemptions from Regulation Z provided to extensions of credit primarily for a business, commercial, or agricultural purpose, such as securities transactions, student loan programs, and employer-sponsored retirement plans. *See* 12 C.F.R. § 1026.3.

[18] 12 C.F.R. § 1026.62(d)(1)(i) (proposed).

[19] Proposal at 69.

[20] 12 C.F.R. § 1026.62(d)(1)(ii) (proposed); *see also* Proposal at 70-76.

[21] 12 C.F.R. §§ 1026.4(c)(3), 1026.62(b)(1) (proposed).

[22] 12 C.F.R. § 1026.12(d)(1).

[23] 12 C.F.R. § 1026.62(c) (proposed); *see also* Proposal at 76-81. The bank would be prohibited from structuring the overdraft "credit" as a negative balance on the customer's transaction account. 12 C.F.R. § 1026.62(c) (proposed).

[24] 12 C.F.R. § 1026.62(b)(4) (proposed). The Proposal lists, as examples of a "covered overdraft credit account," the following: "any line of credit, credit card account, credit feature, credit plan, or credit subaccount through which the financial institution extends or can extend covered overdraft credit." *Id.*

[25] *Id.* § 1026.62(b)(5) (proposed). Although the Bureau states that the CARD Act's requirements apply only to overdraft accessed by a debit card, it appears – though it is not entirely clear from the Proposal – that the bank must comply with Regulation Z credit card provisions regardless of the type of payment that overdraws a consumer's account. The Proposal requires the bank to open a credit account whenever above breakeven overdraft credit is provided. That account has an account number and therefore the account becomes a "hybrid debit-credit card." The Bureau's fact sheet acknowledges that existing protections for credit card holders apply when overdraft is accessed without a debit card: "The protections that apply to traditional credit cards would apply to covered overdraft credit issued by very large financial institutions that is accessed by debit cards or routing/checking account numbers."

Therefore, to offer above breakeven overdraft credit, a lender must conduct an ability-to-pay determination prior to extending credit and comply with other Regulation Z credit card account requirements, including the CARD Act's limitations on first-year fees,[26] finance charges imposed as a result of the loss of a grace period,[27] fees on over-the-limit transactions,[28] and penalty fees.[29] In addition, under the Proposal, the CARD Act's limitation on penalty fees prohibits the assessment of NSF fees on declined ACH and debit card transactions (but does not prohibit NSF fees on returned checks).[30]

The Proposal also subjects above breakeven overdraft credit to Regulation E's compulsory use provision, which prohibits requiring consumers to use preauthorized electronic fund transfers for repayment of credit.[31] While banks may provide customers with the choice to opt into automatic payments, they may not require consumers to use automatic payments to repay above breakeven overdraft credit.

Finally, the Proposal provides that above breakeven overdraft credit is not subject to Regulation E's opt-in requirements for overdraft services.[32] Because above breakeven overdraft credit is not an overdraft service under Regulation E, it is credit subject to Regulation Z, and Regulation E's opt-in requirements do not apply.[33]

Although the Proposal applies only to banks and credit unions with more than $10 billion in assets, the Associations' members report that the Proposal will impact banks of all sizes, which will face market pressure to conform their overdraft practices to the rule's requirements.

III. The Bureau Disregards the Law in Its Zeal to Cap Overdraft Fees.

The Proposal "reinterprets" overdraft as "credit" despite Congress' determination in TILA that overdraft is not credit. The Proposal also subjects some overdrafts—offered by some banks—to Regulation Z's requirements, but not others, even though TILA gives the Bureau no authority to draw these distinctions. And the Proposal imposes a usury cap in contravention of the Dodd-Frank Act's prohibition on usury laws. Finally, the Proposal raises serious questions as to its constitutionality under the Takings Clause.

a. The Proposed Rule Conflicts with the Clear Text of the Truth in Lending Act.

In 1968, Congress passed TILA, which defines credit as the "right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[34] In 1969, the Federal Reserve adopted Regulation Z, which implements TILA, and concluded that overdrafts are not

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Consumer Fin. Prot. Bureau, Fact Sheet: The CFPB's Proposed Rule to Curb Excessive Fees on Overdraft Loans by Very Large Banks and Close a Decades-Old Loophole (published Jan. 17, 2024), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-credit-very-large-financial-institutions_fact-sheet_2024-01.pdf.

[26] 12 C.F.R. § 1026.52(a).

[27] *Id.* § 1026.54.

[28] *Id.* § 1026.56.

[29] *Id.* § 1026.52(b).

[30] Proposal at 102-03.

[31] 12 C.F.R. § 1005.10(e) (proposed).

[32] Proposal at 126-27.

[33] *Id.*

[34] 15 U.S.C. § 1602(f).

credit and therefore, overdraft fees are not finance charges subject to TILA.[35] Over the past 50 years, Congress has amended TILA on several occasions, but it has not changed the definition of credit.[36] The Bureau now seeks to reinterpret TILA, but its proposed amendments to Regulation Z conflict with the clear text of TILA.

The Bureau asserts that the Federal Reserve, when it adopted Regulation Z in 1969, created "non-statutory exceptions," that allow large financial institutions to avoid Regulation Z's requirements when providing overdraft services—the "loophole" the Bureau seeks to close.[37] In fact, the Federal Reserve was compelled by TILA to exclude overdraft services from coverage under Regulation Z. As noted above, TILA defines "credit" to mean the "*right* granted by a creditor to a debtor to *defer* payment of debt or to incur debt and defer its payment."[38] Bank deposit agreements do not give consumers the right to defer payment. Courts have consistently held that a debt is not credit under TILA absent some formal understanding that the person owing the money is entitled to a deferral of payment pursuant to a specific plan.[39]

Overdraft services, in 1969 and still today, are offered by banks as a courtesy to customers, and banks retain the right to approve or deny the transaction, and to insist on immediate repayment. No matter how much the Bureau wishes otherwise, the statutory text – and banks' deposit agreements – could not be clearer. The Bureau has no authority to assert that an overdraft fee is a finance charge subject to Regulation Z.

b. The Bureau Arbitrarily Subjects Some Overdrafts—But Not Others—to Additional Restrictions to Avoid Compliance with the Small Business Regulatory Enforcement Fairness Act.

The Proposal would regulate overdraft offered only by banks and credit unions with more than $10 billion in assets. The Bureau's sole explanation for this line-drawing is that smaller institutions may face "different circumstances . . . in adapting to the proposed regulatory framework . . . ."[40] The Bureau does not state what those circumstances are that would justify differential treatment. Similarly, this line drawing finds no support in TILA's statutory text; if overdraft is credit and an overdraft fee is a finance charge, then TILA and Regulation Z must apply regardless of the size of the institution.

The Bureau's decision to regulate only Large Banks appears driven by timing considerations. Dodd-Frank Act amendments to the Small Business Regulatory Enforcement Fairness Act

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[35] 12 C.F.R. § 1026.4(c)(3); *see also* 34 Fed. Reg. 2002 (Feb. 11, 1969).
[36] *See* Fed. Deposit Ins. Corp., FDIC Consumer Compliance Examination Manual, at V-1.1 (2023), https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/5/v-1-1.pdf (listing and describing amendments to TILA).
[37] Proposal at 4.
[38] 15 U.S.C. § 1602(f) (emphasis added).
[39] *See, e.g.*, *Rogers Mortuary v. White*, 594 P.2d 351 (N.M. 1979) (funeral home did not grant credit when it refused to set up repayment plan for an outstanding debt); *accord Riethman v. Barry*, 287 F.3d 274, 277-78 (3d Cir. 2002) (attorneys did not extend credit to their clients because the clients had no right to defer payment); *Shaumyan v. Sidetex*, 900 F.2d 16, 18 (2d Cir. 1990) (contractor did not extend credit because the contract did not permit clients to defer payment for the work performed); *Legg v. W. Bank*, 873 N.W. 2d 763, 770 (Iowa 2016) (overdraft is not credit under statute defining "credit" as "the right . . . to defer payment of debt" because the customer "Agreement expressly gives West Bank the right to immediately collect payment as soon as a customer deposits sufficient funds to cover the overdraft into their account").
[40] Proposal at 33.

(SBREFA) require the Bureau to consider the impact on small businesses when the agency is considering initiating a rulemaking that will have a "significant economic impact on a substantial number of small entities."[41] This process typically adds six to nine months to the rulemaking process. The close coordination between the Bureau and the Administration's campaign against "junk fees" strongly suggests that the Bureau intends to finalize the Proposal before the election.[42] By directly applying the Proposal's restrictions to Large Banks only, the Bureau impermissibly skirted the SBREFA process and the six-to-nine-month delay that would have resulted.

As noted previously, market forces will lead banks of all sizes to conform their practices to the Bureau's rule. Therefore, the Proposal will have a significant economic impact on a substantial number of community banks and credit unions. The Bureau violated the letter and the spirit of SBREFA by not considering the impact of the proposed changes to overdraft rules prior to issuing the Proposal.[43]

c. The Proposal Constitutes an Unlawful Usury Limit in Contravention of the Dodd-Frank Act.

Dodd-Frank Act section 1027(o) prohibits the Bureau from "establish[ing] a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law."[44] Thus, the Bureau is prohibited from placing a restriction on the extension of credit that is based on the credit's interest rate. By imposing additional – and onerous – requirements on overdrafts priced above the breakeven or benchmark fee, the Proposal impermissibly establishes a usury limit.

First, the Proposal classifies all overdraft as "credit."[45] Next, the Bureau establishes a usury limit applicable to this "credit." The term "usury limit" is defined as a limit on "the lending of money

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[41] Small Business Regulatory Enforcement Fairness Act of 1996, *codified at* 5 U.S.C. § 605(b), *as amended by* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, § 1100G (2010) (adding the Bureau to the list of agencies that must complete the SBREFA review).

[42] *See* Press Statement, Statement from President Joe Biden on the CFPB's Proposed Rule to Curb Overdraft Fees (Jan. 17, 2024) (expressing support for the Proposal).

[43] *See* Letter from Am. Bankers Ass'n *et al.*, to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau (Jan. 3, 2024), https://www.aba.com/advocacy/policy-analysis/projected-rulemakings-on-nsf-fees-and-overdraft-fees (urging the Bureau not to proceed with the Proposal and a separate proposal regarding NSF fees until the Bureau assesses the economic impact of its rulemakings on community banks and credit unions, consistent with the requirements of section 1100G of the Dodd-Frank Act). We also are concerned that the Bureau has predetermined the outcome of this rulemaking. Even though the Bureau has issued a proposal—not a final rule—the White House released two "fact sheets" that state the Administration is "bring[ing] down overdraft fees from $35 to as low as" $3 or $4. Fact Sheet, The White House, FACT SHEET: President Biden Is Taking Action to Lower Costs for Families and Fight Corporate Rip-Offs (Mar. 7, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/07/fact-sheet-president-biden-is-taking-action-to-lower-costs-for-families-and-fight-corporate-rip-offs/; *see also* Fact Sheet, The White House, FACT SHEET: The President's Budget Lowers Costs for the American People (Mar. 11, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/11/fact-sheet-the-presidents-budget-lowers-costs-for-the-american-people/. These statements strongly suggest that, regardless of the comments submitted during the rulemaking process, the Bureau has decided to finalize a rule that is substantially the same as the one proposed. This approach is not consistent with the APA's requirement that the agency "give interested persons an opportunity to participate in the rule making" and give "consideration" to the comments submitted. 5 U.S.C. § 553(c).

[44] 12 U.S.C. § 5517(o).

[45] 12 C.F.R. § 1026.62(a)(2) (proposed).

with an interest charge for its use."[46] The Supreme Court has held that "interest" may include fees charged in connection with the extension of credit, including overdraft fees, because "[a]ny flat charge may, of course, readily be converted to a percentage charge . . . ."[47] The plain text of TILA precludes the Bureau from reclassifying overdraft fees as interest charges and overdraft services as credit. However, since the Bureau purported to reclassify overdraft as credit, then it must abide by the Dodd-Frank Act's prohibition on establishing a usury limit, including precedent defining fees as "interest" that is subject to a usury limit. Even former CFPB Director Richard Cordray stated that he was "leery under our statute [the Dodd-Frank Act] of trying to impose specific pricing mechanisms on institutions," such as price caps.[48]

Of course, the Proposal does not prohibit a financial institution from charging an overdraft fee that is above the benchmark or breakeven fee. But the consequences of charging an overdraft fee above that level—i.e., submitting to Regulation Z's requirements—introduce unworkable operational complexities, compliance costs, and litigation risk such that few, if any, banks will offer overdraft services that are subject to Regulation Z. An agency may not do indirectly that which it is prohibited from doing directly.[49] Here, the Bureau will achieve the exclusion from the market of nearly all overdrafts that are priced above the benchmark fee.

The attempt to segregate—and target for regulation—overdraft fees based on the fee amount is clear from the Bureau's explanation that its goal is to target "[h]igh overdraft fees."[50] In so doing, the Bureau imposes an unlawful usury cap in contravention of the Dodd-Frank Act.

d. The Proposal Raises Significant Constitutional Questions Under the Takings Clause.

The Proposal's cap on overdraft fees may also constitute an unlawful taking prohibited by the Fifth Amendment to the U.S. Constitution. The Fifth Amendment includes the "Just Compensation Clause," otherwise known as the "Takings Clause."[51] The Clause states that "nor shall private property be taken for public use, without just compensation." For 100 years, this Clause has stood for the principle that the government cannot set prices that are "confiscatory"[52]—i.e., the government cannot set rates so low as to be "inadequate to compensate current equity holders for the risk associated with their investments . . . ."[53] Although the government may place some limits on returns, it is "plain that the 'power to regulate is not a

[46] *Usury*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/usury (last visited Mar. 30, 2024).
[47] *Smiley v. Citibank*, 517 U.S. 735, 745 (1996).
[48] Transcript of NCUA Chairman Debbie Matz's Town Hall Webinar with CFPB Director Richard Cordray 13 (Feb. 9, 2016) (on file with the author).
[49] *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996); *see also Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1372 (D.C. Cir. 2007).
[50] Proposal at 19.
[51] U.S. Const. amend. V.
[52] *Bluefield Water Works v. Pub. Serv. Comm'n*, 262 U.S. 679, 690 (1923); *see also Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600-02 (1944).
[53] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312 (1989).

power to destroy.'"[54] Courts have routinely held that price-control regulations that fail to allow a reasonable return are unconstitutional.[55]

The Proposal does not guarantee "the constitutionally required 'fair and reasonable return.'"[56] The Bureau has proposed that, if banks wish to continue offering traditional overdraft services, the bank must reduce its overdraft fee to a breakeven fee or a Bureau-determined benchmark fee, neither of which adequately reimburses banks for the credit risk and costs of providing overdraft services. The Proposal is therefore at odds with the Constitution.

IV. If Finalized as Proposed, Banks Will Stop Offering or Sharply Restrict Access to Overdraft Services, and Consumers Will Lose.

Americans continue to have significant short-term liquidity needs. Only 44 percent of U.S. adults say they would be able to pay an emergency expense of $1,000 or more from their savings.[57] We have long advocated for regulatory policies that ensure consumers have a wide range of options within the regulated banking industry to pay emergency expenses, address timing misalignments between deposits and payments, and meet other short-term liquidity needs. A vibrant market should include credit cards, installment loans, single payment loans, earned wage access products, "buy now, pay later" products—and overdraft.

However, the Proposal would restrict consumer choice. Many of our members state that they will stop offering or sharply restrict overdraft to most, if not all, of their customers. As shown in Part V below, the operational costs and compliance and litigation risk of calculating the "breakeven" fee or applying Regulation Z to an overdraft program would be unsustainable. Even the Bureau recognizes that, if the Proposal is finalized, banks may underwrite overdraft "more conservatively," "reduc[e] credit limits" for customers that are a greater credit risk, and "even . . . eliminat[e] access" to overdraft to those customers who currently have access to the product.[58] And without access to overdraft, many consumers will turn to less regulated non-bank small dollar credit products or simply miss payments altogether.

The elimination of overdraft services would harm consumers and would undermine the Bureau's statutory directive to ensure consumers have "access" to financial products and services.[59] To the extent there is concern about the size of an overdraft fee relative to the size of the underlying

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[54] *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968) (quoting *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886)).

[55] *See, e.g.*, *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 595-596 (6th Cir. 2001) (striking down state statute that "does not guarantee telephone service providers a constitutional rate of return" because "it merely provides for a rate increase to cover the *cost* of providing service in a geographic area") (emphasis in original); *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 515 (9th Cir. 1990) (striking down state statute that "guarantees only that an insurer will break even; it does not guarantee the constitutionally required 'fair and reasonable return'"); *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 819 (Cal. 1989) (striking down state statute that set insurance rates "below a fair and reasonable level"); *Aetna Cas. & Sur. Co. v. Comm'r*, 263 N.E.2d 698, 703 (Mass. 1970) (holding that Commonwealth's rates for automobile property damage liability insurance were "confiscatory and therefore unconstitutional" because they were so low that insurers could only operate their businesses at a loss).

[56] *Michigan Bell Tel. Co.*, 257 F.3d at 594-95.

[57] Bankrate, *Bankrate's 2024 Annual Emergency Savings Report* (Feb. 22, 2024), https://www.bankrate.com/banking/savings/emergency-savings-report/.

[58] Proposal at 141.

[59] 12 U.S.C. § 5511(b)(5).

payment paid into overdraft, analyses of banks' transaction data show that customers receive significant value when they use overdraft services. A 2017 analysis of transaction data from 11 banks found that the median size of items paid into overdraft was $370.[60] A separate analysis of data from 14 financial institutions in 2021 found that the average size of items paid into overdraft was $198.[61] More recent data from one midsize bank confirms these findings; the bank reported that the average dollar amount of items paid into overdraft where a fee was charged was $312 in 2023.[62] Compared to today's industry-wide median overdraft fee of $19,[63] bank customers receive the benefit of transactions that are 10-19 times the amount of the fee charged.[64]

Other overdraft studies – including the Bureau's own reports – confirm this value. The Bureau's findings "suggest[] some consumers use overdraft often and may use overdraft coverage intentionally as a form of credit."[65] In a report released today, researchers with the Federal Reserve Bank of New York found that, of respondents who overdrew their account in the previous year, 84% knew the fee they were charged.[66] The researchers concluded that "people are well aware of how often they overdraw and how much it costs them."[67] Similarly, the Financial Health Network (FHN) found that nearly three-quarters of frequent users of overdraft

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[60] Flores, *Assessment of Overdraft Usage*, *supra* note 7, at 18.
[61] Curinos, *Competition Drives Overdraft Disruption*, *supra* note 8, at 8.
[62] The large value of transactions paid into overdraft, as reflected in these data points, is consistent with the significant increase in the value of noncash transactions over the past six years, as reflected in the Federal Reserve's 2022 triennial payments study. *See* Fed. Reserve Bd. of Govs., Federal Reserve Payments Study: 2022 Triennial Initial Data Release (2022), https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm.
[63] In January 2024, research firm Moebs Services, LLC, using data from 3,628 financial institutions, calculated the median overdraft price across those institutions, weighted by the number of checking accounts at each institution. Press Release, Moebs Services, LLC, *Overdraft List vs. Actual Price: Over Half of Americans Pay Less than $20 Per OD* (Feb. 7, 2024) (on file with the author). By comparison, the Bureau bases its policy analysis underpinning the Proposal on an average fee per overdraft of $32.50. Consumer Fin. Prot. Bureau, Overdraft and NSF Practices at Very Large Financial Institutions 13 (2024), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-practices-very-large-financial-institutions_2024-01.pdf. This figure is based on data from only five financial institutions.
[64] Analyses that rely on transaction data are the most reliable in determining the average transaction amount paid into overdraft. Other analyses, which rely on consumer surveys, present a wider range of figures on the average transaction paid into overdraft. A 2023 analysis, based on a survey of over 2,000 overdraft users, found that the average amount of a transaction paid into overdraft was $369. PYMNTS, *New Report Finds the Average Consumer Is Overdrawn for 9 Days* (Oct. 12, 2023), https://www.pymnts.com/consumer-finance/2023/new-report-finds-the-average-consumer-is-overdrawn-for-9-days/. A separate consumer survey by Moebs Services found the average overdrawn amount is $115. Press Release, Moebs Services, LLC, *Truth in Overdrafting: An Unconstitutional Federal Agency Proposes an Unconstitutional Regulation* (Jan. 21, 2024) (on file with the author).
[65] Consumer Fin. Prot. Bureau, CFPB Office of Research Publication No. 2023-09, Overdraft and Nonsufficient Fund Fees: Insights from the Making Ends Meet Survey and Consumer Credit Panel 13 & 14 fig. 2 (2023), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-report_2023-12.pdf [hereinafter, Making Ends Meet Survey]; *see also* Proposal at 64 (acknowledging that "some consumers have come to rely on the availability of . . . overdraft" to meet short-term liquidity needs). In the Proposal, the Bureau relied on its research from 2017 that found – using 2011-2012 data – that 9% of consumers paid more than 10 overdraft fees over the past year, even though the agency had more recent (2023) data available through the Making Ends Meet Survey, which found that only 3% of consumers paid more than 10 overdrafts over the past year. *Compare* Proposal at 19 (citing 2011-2012 data) *with* Bureau, Making Ends Meet Survey, *supra*, at 12 fig. 1.
[66] Donald P. Morgan & Wilbert van der Klaauw, Fed. Reserve Bank of N.Y., Learning by Bouncing: Overdraft Experience and Salience (Apr. 1, 2024), https://libertystreeteconomics.newyorkfed.org/2024/04/learning-by-bouncing-overdraft-experience-and-salience/.
[67] *Id.*

(73%) intentionally overdrew their accounts or knew their purchase may result in an overdraft but went forward with the transaction anyway.[68] FHN concluded that, "[f]or consumers living paycheck to paycheck with few options to cover immediate liquidity needs," overdraft serves as a "convenient" option to meet these needs.[69]

Year after year, consumer surveys underscore the value that consumers place on access to overdraft.[70] A survey conducted in March 2024 by Morning Consult found that more than two-thirds of consumers (67%) find their bank's overdraft protection valuable – as compared with only 16% who do not find it valuable – and 8 in 10 consumers (79%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining payment.[71] While no one likes to pay fees, 64% of consumers think it is reasonable for banks to charge a fee for an overdraft, as opposed to only 23% who think it's unreasonable.[72] And nearly three-quarters (72%) view overdraft fees as reasonable when considering that large payments like mortgages or rent payments are covered and paid on time or that customers are protected from late or other penalty fees if payments overdraft a customer's account (71%).[73] Moreover, two-thirds (65%) understand that customers can opt out of debit-card overdraft at any time, compared with only 7% who mistakenly believe customers cannot opt out.[74] Of those survey respondents who are currently enrolled in overdraft protection, four in five consumers (78%) have never seriously considered stopping or getting out of the service.[75] And nearly 9 in 10 (88%) acknowledge it is "easy" to check account balances – with 71% stating it is "very easy" – so that consumers can avoid overdrawing their account.[76]

These data all point to the same conclusion: that customers who have opted in to overdraft services value the product and many strategically use overdraft to cover important expenses – such as rent, utilities, and medical bills. These transactions are likely to be declined under the

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[68] Fin. Health Network, *Overdraft Trends Amid Historic Policy Shifts* (2023), https://finhealthnetwork.org/research/overdraft-trends-amid-historic-policy-shifts/.
[69] *Id.*
[70] Past surveys by Morning Consult returned results that are very similar to those from the March 2024 survey cited in the text of this letter. *See, e.g.*, Press Release, Am. Bankers Ass'n, *National Survey: U.S. Consumers Remain Happy with Their Bank, Competitive Financial Services Marketplace*, (Oct. 9, 2023), https://www.aba.com/about-us/press-room/press-releases/consumer-survey-consumers-happy-and-competitive (finding, among other results, that nearly 8 in 10 consumers (77%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining payment); Press Release, Am. Bankers Ass'n, *ABA Unveils New Consumer Polling Data on Major Banking Policy Issues* (Oct. 20, 2022), https://www.aba.com/about-us/press-room/press-releases/consumer-survey-major-banking-policy-issues (finding, among other results, that 8 in 10 consumers (82%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining payment); Press Release, Am. Bankers Ass'n, *ABA Unveils New Consumer Polling Data on Major Bank Policy Issues at 2022 Washington Summit* (Mar. 8, 2022) (on file with the author) (finding, among other results, that 3 in 4 consumers (74%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining payment).
[71] Press Release, Am. Bankers Ass'n, *ABA Unveils Consumer Survey Data on Debit Cards, Overdraft and Other Banking Issues in Play in Washington* (Mar. 20, 2024), https://www.aba.com/about-us/press-room/press-releases/consumer-survey-data-on-debit-cards-overdraft-and-other-banking-issues.
[72] *Id.*
[73] *Id.*
[74] *Id*
[75] *Id.*
[76] *Id.*

Bureau's Proposal. When a transaction is declined, the customer not only loses the value of the transaction, but also may incur penalty or late fees imposed by the payment recipient, negative credit reporting, and embarrassment or other negative consequences caused by a declined transaction. These consequences can vary significantly, from the inability to purchase gas to drive to work or to run a tractor on a farm, to the inability to purchase school uniforms, to utility shut-off for nonpayment of bills. Notably, the Bureau recognizes that more transactions may be declined as a result of its Proposal but chooses not to explore the negative impacts on consumers who will lose access to the liquidity provided by overdraft.[77]

Instead, the Bureau posits that banks may offer overdraft lines of credit in lieu of a traditional overdraft service. But the Bureau also acknowledges that it cannot "confidently predict whether or how such products would develop."[78] The Associations' members report that these products are unlikely to develop given the regulatory uncertainty surrounding small dollar loan products. Moreover, consumers that use overdraft typically do not qualify for unsecured lines of credit.

The Bureau concedes that it lacks the ability to predict how changes to overdraft pricing could affect consumers or how consumers will be harmed if they must delay or forgo certain transactions.[79] Similarly, the Bureau admits it does not know whether banks could offer overdraft services sustainably.[80] "Due to their complexity, the CFPB has not modeled [these questions] in detail."[81] This lack of concern about how its Proposal will impact consumers and the banks that serve them is unacceptable for a government agency charged with considering the potential reduction in consumers' access to a financial product or service when engaging in rulemaking.[82]

V. Banks Will Significantly Restrict Access to Overdraft Under a "Breakeven" or "Benchmark" Fee or Under Regulation Z.

The Proposal purports to provide three options by which banks can offer overdraft—at the bank's "breakeven" fee for providing overdraft, at a "benchmark" fee set by the Bureau, or under Regulation Z. In fact, the Proposal presents a Hobson's choice intended to drive the market to a government-imposed fee cap.

The vast majority of banks, however, cannot sustainably offer overdraft services at the proposed breakeven or benchmark fee, and our members uniformly state that they will not incur the operational costs and compliance and litigation risks to offer an overdraft program subject to

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[77] *See* Proposal at 145 ("In some cases, in response to the proposed rule, . . . more conservative underwriting may lead lenders to reject transactions they would not have rejected under the baseline where consumers do not have other viable options. In such cases, some consumers would no longer have the option to use . . . overdraft as credit, which means transactions would be declined . . . .").

[78] Proposal at 147.

[79] *See* Proposal at 130 ("[T]he CFPB is not aware of evidence that could be used to predict how changes to overdraft pricing would affect negative balance periods or the expected substitution effects . . . between deposit accounts with overdraft coverage and other forms of credit, including the consumer harm from delaying or foregoing some transactions.").

[80] *See* Proposal at 158.

[81] *Id.*

[82] *See* 12 U.S.C. § 5512(b)(2)(A)(i) (requiring the Bureau, in prescribing a rule, to consider the "potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule").

Regulation Z. Instead, banks will significantly reduce customers' access to overdraft services rather than offer an unsustainable product.

a. Banks Are Unlikely to Offer Overdraft Under a "Breakeven" or "Benchmark" Fee.

The Bureau's proposed calculation of a bank's "breakeven" overdraft fee fails to factor in all of the costs associated with offering overdraft protection. According to the Bureau, "call center expenses represent the bulk of the operational costs" with administering an overdraft program.[83] The Bureau estimates that 10% of overdraft transactions would require 10 minutes of a customer service representative's time and that 20% of these customer service contacts would additionally require 10 minutes of a supervisor's time.[84]

The Associations' members report that these cost inputs only scratch the surface of the costs associated with administering an overdraft program. A more comprehensive list of costs includes:

- *Customer inquiries*. These costs are for bank staff to review and respond to customer inquiries related to overdrafts, submitted in person at a branch, over the telephone to a bank representative, or online.
- *Branch servicing*. These costs include the costs of (1) branch personnel who spend time each morning or night to determine if transactions that overdrew customers' accounts over the past day should be paid into overdraft; and (2) branch personnel who communicate with frequent users of overdraft.
- *Mailing overdraft notices*. These costs include the bank's out-of-pocket cost (postage, letter, envelope, etc.) to mail overdraft notices to their customers and their employees' time to process overdraft notices.
- *Collections*. These costs are for bank employees to call customers whose accounts remain overdrawn, and costs to retain a third-party collector to collect on overdrawn amounts.
- *Core provider and other technology costs*. The costs imposed by core providers to manage a bank's overdraft program, as well as other technology costs that are directly related to a bank's overdraft program.
- *Compliance costs*. The cost of bank compliance staff's time to monitor the operation of the overdraft program to ensure it is conducted in compliance with applicable law and regulations.

The proposed calculation of the "benchmark fee" is similarly flawed. First, the Bureau based its cost calculations on data from only *five* large financial institutions,[85] an obviously unrepresentative data set from which to establish a benchmark fee that will impact all nearly 9,000 banks and credit unions operating in the United States.[86] The Bureau's decision not to

[83] Proposal at 72.
[84] *Id.*
[85] *Id.* at 71.
[86] The FDIC reported that, in 2022, 4,136 banks operated in the United States. FDIC, Annual Historical Bank Data, https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%2CNew_Ch

consider data from smaller institutions, which will face competitive pressure to adopt the benchmark fee, is inexcusable.[87] Smaller institutions do not benefit from the same economies of scale in administering an overdraft program as larger institutions.

The calculations of the four proposed benchmark fees ($3, $6, $7, and $14) also are based on incomplete cost inputs. To arrive at these four proposed benchmark fees, the Bureau divided the total charge-offs of the five banks in its sample by the total number of overdrafts at those institutions.[88] The calculation nearly completely omits the costs of administering the program. As described above, a bank incurs costs to process overdraft payments, respond to customer questions, and pay for compliance, core provider, and technology expenses. Contrary to the Bureau's view, the cost of administering an overdraft program involves more than the cost of charge-off losses.[89]

The Bureau's approach also disregards the fact that overdraft fees cover not only the risk that the customer will not repay the overdrawn amount, but also help banks offer low-cost, full-service deposit accounts to a wider range of customers. A decade ago, publicly reported estimates of the yearly cost of maintaining a deposit account fell between $280 and $450.[90] Moreover, banks cannot just "breakeven" in order to support the communities they serve. Banks cannot sustainably offer unprofitable accounts to customers. Allowing the free market—not government price caps—to set overdraft fees promotes innovation and financial inclusion, as demonstrated by the New York Federal Reserve study cited earlier.[91]

b. Banks Will Not Offer Overdraft Under Regulation Z's Requirements.

The final choice the Bureau presents to banks is to offer overdraft at a fee that is above the breakeven or benchmark fee ("above breakeven overdraft credit") in compliance with Regulation

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ar&selectedEndDate=2023&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc (last visited Mar. 31, 2024). The National Credit Union Administration reported 4,604 federally insured credit unions in the United States in the fourth quarter of 2023. NCUA, Quarterly Credit Union Data Summary: 2023 Q4, at i (2024), https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q4.pdf.

[87] In 2015, the Bureau obtained from core processors data on overdraft-related outcomes for 4,091 financial institutions, including the total number of consumer accounts closed during the period studied. Nicole Kelly & Éva Nagypál, Consumer Fin. Prot. Bureau, Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors, Data Point No. 2021-11, at 50 (App. A) (2021), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf. Therefore, the Bureau had access to the number of account charge-offs (the metric by which the Bureau determined the benchmark fee) of a much wider range of banks than the Bureau chose to assess for its Proposal.

[88] Proposal at 72-74.

[89] For two of its proposed benchmark fees ($3 and $7), the Bureau divided institutions' charge-off losses by the total number of overdrafts—including those overdrafts for which the institution did *not* charge a fee. This resulted in a lower cost per overdraft than the calculation that divided total charge-offs by only those overdraft transactions where a fee was paid (which resulted in the $6 and $14 price points). Thus, the Bureau surmised that institutions that choose to pay a transaction into overdraft without charging a fee (i.e., through waiver or refund) have *lower* costs than an institution that charged an overdraft fee each time a transaction was paid into overdraft. This does not reflect a good faith effort by the Bureau to arrive at a credible benchmark fee.

[90] Am. Banker, *Free Checking Isn't Cheap for Banks* (Dec. 11, 2011); Wall Street J., *The End Is Near for Free Checking*, (Jun. 17, 2010). ABA is in the process of gathering current data from our member banks. The initial data we received are consistent with the data cited from 2010 and 2011.

[91] *See* footnote 14 and accompanying text.

Z's credit card requirements.[92] The Bureau asserts that "extend[ing] consumer credit protections that generally apply to other forms of consumer credit to certain overdraft credit . . . would allow consumers to better compare certain overdraft credit to other types of credit" through enhanced disclosures, "and would provide consumers with several substantive protections that already apply to other consumer credit."[93]

In reality, consumers are likely to be confused and inconvenienced by the application of a regulatory framework designed for credit products. In addition, the compliance and operational complexity and costs (as well as litigation risks) of offering overdraft services subject to Regulation Z will discourage banks from offering overdraft services.

For example, Regulation Z prohibits banks from offsetting incoming credits to the customer's account as repayment for the overdrawn amount. Instead, the bank must wait for the customer to repay the outstanding balance, and Regulation Z gives credit card customers at least 21 days to repay the debt.[94] This increases the credit risk of paying an item into overdraft, and customers who use overdraft regularly typically carry higher credit risk. After all, these customers use overdraft because they generally do not qualify for a credit product. Application of Regulation Z will further increase the risk to the bank of offering overdraft to customers who most need this liquidity.

Application of Regulation Z to overdraft will present additional costs and risks to institutions, and it will increase customer inconvenience and confusion. For example, Regulation Z requires institutions to conduct an ability-to-pay determination before extending credit card credit.[95] A bank will need to purchase applicants' credit report, and customers will be required to provide income and other information, which the bank must analyze and document—all for someone who simply wants to open a deposit account with access to overdraft, which some may never use. Consumers do not expect to be asked for this information when opening a deposit account. Pulling a credit report each time the customer opens a deposit account also may lower the customer's credit score and increase the cost of the account, which is likely to be passed along to the customer.

Regulation Z includes a plethora of additional requirements, including disclosure requirements;[96] limitations on first-year fees,[97] finance charges imposed as a result of the loss of a grace period,[98] fees on over-the-limit transactions,[99] and penalty fees;[100] requirements for applications,

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[92] As described in Part II above, although the Bureau states that the CARD Act's requirements apply only to overdraft accessed by a debit card (a "hybrid debit-credit card"), a bank must comply with Regulation Z credit card provisions regardless of the type of payment that overdraws a customer's account because whenever above breakeven overdraft credit is provided, the customer must open a credit account with an account number, which becomes a hybrid debit-credit card.

[93] Proposal at 6.

[94] 12 C.F.R. § 1026.5(b)(2)(ii)(A)(*2*).

[95] *Id.* § 1026.51.

[96] *See id.* §§ 1026.5; 1026.6(b)(2)(i)(F); 1026.7(b)(11)(i), (b)(12)(i), (b)(13); 1026.9(c)(2)(iv)(A)(8), (c)(2)(iv)(B)-(C), (g)(3)(i)(A)(6), (g)(3)(i)(B), (h).

[97] *Id.* § 1026.52(a).

[98] *Id.* § 1026.54.

[99] *Id.* § 1026.56.

[100] *Id.* § 1026.52(b).

solicitations, periodic statements, and payment due dates; and the provision of dispute rights.[101] These will not only add to the costs, complexity, and risk to banks that choose to offer above breakeven overdraft credit, but these requirements will be confusing to consumers. Consumers also will receive two statements each month—one under Regulation Z (for the overdraft "credit" feature on their account) and one under Regulation E (for the deposit account), further adding to consumers' confusion. Customers value overdraft in part because of its convenience, and this process will be anything but convenient.

The requirements described above were designed to apply to loans, not to a product that is an ancillary service to a deposit account. For example, Regulation Z requires a bank, when it solicits a credit card application, to provide (in a form housed in Appendix G-10(A) to Regulation Z) the card's annual percentage rate (APR) for purchases, balance transfers, cash advances; the "penalty" APR and when it applies; and annual, set-up, maintenance, transaction, penalty, and other fees.[102] For traditional overdraft services, these boxes all will be $0, except for the overdraft fee. While the Commentary to Regulation Z states that "disclosures need only be given as applicable,"[103] the Proposal provides no guidance on how banks should adopt the existing forms, which were designed for credit transactions, to fit an overdraft program.

Other applications of Regulation Z create perverse consequences. Regulation Z provides customers with the right to dispute (credit card) transactions. As applied to overdraft, anytime a customer pays for a transaction that overdraws the account, the customer will have the right to dispute the transaction, solely because the transaction led to an overdraft.

Consumers value overdraft in part because of its convenience; there is no need to apply for a loan in order to have access to liquidity. The Proposal, however, would complicate unnecessarily the streamlined process for opening a deposit account. If finalized, the Proposal will create two very different deposit account products. For those products without access to overdraft (governed by Regulations E and DD), the consumer will open the account by providing a minimal amount of information, just as consumers do today. But for deposit products with access to overdraft (governed by Regulation Z), the consumer will receive the disclosures and periodic statements required by Regulation Z, have their credit report pulled, and provide income and other information for the bank's ability-to-pay determination. This process—all to open a deposit account—is one that few consumers will endure and likely even fewer banks will offer, even for those customers who qualify for a line of credit.

c. The Complexity and Unintended Consequences of the Proposal Will Discourage Banks from Offering Overdraft.

The Proposal is needlessly complicated. In order to make overdraft subject to TILA—an effort akin to fitting a square peg into a round hole—the Bureau creates contortions in Regulation Z that would make even the most seasoned regulatory lawyer dizzy. This creates unintended (or perhaps intended) consequences. For example, the Military Lending Act (MLA) and Equal Credit Opportunity Act (ECOA) would apply to overdraft, introducing additional restrictions and

[101] *Id.* § 1026.13.
[102] G-10(A) Applications and Solicitations Model Form (Credit Cards).
[103] 12 C.F.R. § 1026.60 (Cmt. 60(a)(2)-(4)).

compliance risk. These—and other unforeseen consequences—will further discourage banks from offering overdraft to customers.

The new terms and definitions added to Regulation Z underscore the Proposal's complexity. The Proposal creates a new type of "credit" called "overdraft credit"[104] and a new concept of "above breakeven overdraft credit" defined to mean overdraft credit extended by a bank or credit union with above $10 billion in assets whose overdraft fee "exceed[s] the average of its costs and charge-off losses" (breakeven fee).[105] Next—acknowledging that most banks will not want to calculate its breakeven fee—the Bureau proposes that "above breakeven overdraft credit" includes an overdraft fee above a "benchmark fee" that the Bureau proposes will be between $3 and $14.[106] Finally, the Bureau revises the regulatory definition of "finance charge" to include fees for "above breakeven overdraft credit."[107] Therefore, an overdraft fee above a certain level (set by the Bureau) offered by a Large Bank (but not by other banks) is a finance charge and therefore is subject to Regulation Z.

Because of these machinations of the regulatory text, the Bureau creates unintended consequences. Under the Proposal, ECOA would apply to overdraft services offered by a bank of *any* size at *any* fee level.[108] The Associations and our members firmly oppose discrimination in any form and are committed to upholding the nation's civil rights and fair lending laws. But the Bureau gives no consideration to the impact that the application of ECOA to overdraft services would have on banks' costs to provide this service and, therefore, on banks' ability to offer overdraft to their customers. As with subjecting overdraft to TILA, subjecting overdraft to ECOA results in recordkeeping responsibilities, adverse action notices, and other regulatory requirements.

The Proposal also will result in above breakeven overdraft credit being subjected to the MLA's requirements. Consistent with Regulation Z's definition, the MLA defines "[c]onsumer credit" to mean "credit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is . . . [s]ubject to a finance charge."[109] Under the Proposal, overdrafts are "credit," and overdraft fees that are above the breakeven or benchmark fee are finance charges. Consequently, above breakeven overdraft credit would be subject to the MLA's requirements, including the Act's 36% Military Annual Percentage Rate (MAPR) cap for covered credit extended to servicemembers and their dependents.[110] Nearly all overdraft fees will exceed this MAPR cap, given the short time that a customer's account is overdrawn before

[104] 12 C.F.R. § 1026.62(a) & (b)(7) (proposed).
[105] *Id.* § 1026.62(b)(1) (proposed).
[106] *Id.* § 1026.62(d) (proposed).
[107] *Id.* § 1026.4(c)(3) (proposed).
[108] ECOA prohibits discrimination, in any aspect of a credit transaction, based on an enumerated list of protected classes, including race, religion, national origin, marital status, and age. 12 C.F.R. § 1002.1(b). ECOA applies to "all persons who are creditors," *id.* § 1002.1(a), which is defined to mean any person who "regularly participates in a credit decision," *id.* § 1002.2(l). The Proposal defines all overdrafts as "credit," even though the Proposal applies Regulation Z's requirements only to "above breakeven overdraft credit." Consequently, all banks that provide overdraft services at any fee amount are "creditors" and are subject to ECOA in extending overdraft "credit."
[109] 32 C.F.R. § 232.3(f)(1).
[110] 10 U.S.C. § 987(b).

repayment occurs and the relatively small amount involved.[111] Banks that do not adopt either breakeven or benchmark overdraft fees will have to determine servicemember status at account opening and comply with the MLA's MAPR cap as well as its other provisions. Given the costs of compliance and the MAPR cap, banks will not be able to sustainably provide overdraft services to these individuals. This pressure on fee income will lead banks to further narrow their risk tolerance when determining which individuals, if any, will qualify for overdraft.

VI. The Proposed Repayment Restrictions Will Further Restrict Access to Credit.

In addition to the costs and risk to banks of complying with Regulation Z, the Bureau proposes revisions to Regulation E that increase the risk of nonpayment. Currently, when a customer opens an "overdraft credit plan" – such as an overdraft line of credit[112] – a bank may require the customer to repay the overdraft through a preauthorized electronic funds transfer (EFT). This allows the bank to minimize the credit risk of providing the line of credit and expands the pool of customers eligible for a line. It also can reduce the finance charge assessed to the customer because payment is made immediately when the customer has funds available to repay the line.

The Proposal would amend this provision to prohibit banks from requiring the customer to make repayment on a line of overdraft credit through an EFT when the overdraft fee exceeds the breakeven or benchmark fee.[113] Instead, banks must provide customers with the choice to use automatic payments or to pay through other means. Bankers report that this change will make them less likely to offer overdraft lines of credit. Thus, on the one hand, the Proposal would eliminate traditional overdraft services, prodding banks to offer overdraft lines of credit as a replacement, while also making it more difficult for banks to offer these lines of credit.

Conclusion

Given the harm to consumers and legal deficiencies, the Bureau should withdraw the Proposal. It would impose a price cap on overdraft services, leading banks to stop offering, or significantly reduce access to, a valued and needed form of short-term liquidity. And the Bureau would achieve this end by unlawfully redefining overdraft as "credit" under TILA and by engaging in arbitrary line-drawing as to which overdrafts are subject to additional regulation and which ones are not.

Sincerely,

American Bankers Association
Alabama Bankers Association
Alaska Bankers Association

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[111] For example, an account that is overdrawn for nine days (the average duration of an overdrawn account) in the amount of $370 (the amount of the average transaction paid into overdraft in the 2017 study cited earlier), the MAPR will exceed 36% at even the proposed benchmark fees of $6, 7, or $14. The following shows the MAPR for an extension of overdraft "credit" of $370 for nine days, at the Bureau's proposed benchmark fees: $3 fee = 32.88% MAPR; $6 fee = 65.77% MAPR; $7 fee = 76.73% MAPR; and $14 fee = 153.45% MAPR.

[112] 12 C.F.R. § 1005.10(e)(1). The term "overdraft credit plan" is not defined in the regulations or the commentary, but the commentary suggests that it includes an overdraft line of credit. *See id.* (Cmt. 10(e)(1)-2(i)) ("A financial institution may . . . require the automatic repayment of an overdraft credit plan, . . . even if the overdraft extension is charged to an open-end account that may be accessed by the consumer in ways other than by overdrafts.").

[113] 12 C.F.R. § 1005.10(e)(1) (proposed).

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