The Honorable Rohit Chopra
1700 G Street, NW
Washington, DC 20552

Re: Overdraft Lending: Very Large Financial Institutions
Notice of Proposed Rulemaking – Docket No. CFPB-2024-0002

To Whom It May Concern:

The Consumer Bankers Association ("CBA")[1] greatly appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (the "CFPB's" or "Bureau's") notice of proposed rulemaking for Overdraft Lending: Very Large Financial Institutions (the "Proposal").[2] The Proposal would fundamentally restructure and restrict consumer overdraft services offered by banks that exceed $10 billion in assets, referred to in the Proposal as Very Large Financial Institutions.[3] CBA believes overdraft services offered by banks with assets of less than or equal to $10 billion would also likely suffer significant indirect effects from the Proposal.

On its face, the Proposal would deem overdraft services provided by banks subject to the Proposal to be credit subject to Regulation Z.[4] The Proposal purports to offer two exemptions: (1) if the services are provided at cost, under a CFPB proposed "proposed breakeven" calculation; or (2) if the services are provided at a CFPB-mandated price.

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[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

[2] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 13,852 (Feb. 23, 2024) (to be codified at 12 C.F.R. pts. 1005, 1026), https://www.govinfo.gov/content/pkg/FR-2024-02-23/pdf/2024-01095.pdf.

[3] CBA notes that characterizing institutions of $10 billion or more in assets as "Very Large Financial Institutions" is a unique and aggressive communications strategy by the CFPB. The CFPB's "Very Large Financial Institutions," for instance, would include banks whose assets would not qualify them for any of the Category I through IV designations of the Federal Reserve Board's tailoring efforts – or even the framework's "Other Firms" designation. *See, e.g.*, *Requirements for Domestic and Foreign Banking Organizations*, FED. RSRV. BD. (Oct. 10, 2019), https://www.federalreserve.gov/aboutthefed/boardmeetings/files/tailoring-rule-visual-20191010.pdf.

[4] This would include the rules applicable to credit cards if a debit card can access the overdraft service.

It is not clear, however, if many banks will be able to implement any version of the Proposal other than the CFPB-mandated price.

Regulation Z contains a number of requirements that were clearly not intended for a short-term liquidity product like overdraft services. And once overdraft services are deemed credit products under Regulation Z, they would then need to be subject to a range of other regulatory requirements that similarly were not intended for a short-term liquidity product like overdraft services. The CFPB notes some of these intersections but stops short of providing clarity or analysis about these compliance issues.

The Proposal's calculations of costs of overdraft services are similarly flawed, underdeveloped, and would not allow for a reasonable return for services rendered.

At its core, the fundamental premise of the Proposal misunderstands the consumers it presumes to protect and the market it seeks to regulate. In that regard, the Proposal would require banks to underwrite a customer population that is largely "credit invisible," meaning that they lack sufficient credit history to underwrite. Other consumers that rely heavily on overdraft services may have damaged credit, rendering them similarly difficult to underwrite using conventional credit models. Accordingly, despite the concerning range of unanswered questions regarding the Proposal, CBA members are clear on one thing: The Proposal will result in fewer consumers having access to overdraft services. Particularly given consumers' lack of other credit alternatives, this means that the Proposal risks creating harms to consumer financial well-being that may take years to unfold – and even longer to remediate.

Accordingly, CBA encourages the CFPB to rescind the Proposal and to undertake further comprehensive review of the overdraft market before promulgating changes that may have negative effects for consumers, impeding their ability to access tools necessary to address a wide variety of financial needs.

BACKGROUND AND OVERVIEW

When writing rules, the CFPB is required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to take into account "the purpose of ensuring that all consumers have access to markets for consumer financial products and services."[5] The Dodd Frank Act similarly requires that the Bureau's rulemaking proposals appropriately consider "the potential benefits and costs to consumers . . . including the potential reduction of access by consumers to consumer financial products or services."[6] The CFPB's Proposal fails to meet these important mandates as it does not appropriately address the likelihood of a widespread reduction of overdraft services and the negative impact the Proposal would have on U.S. consumers who need it most.

Recognizing overdraft service's utility and the intent to protect financially vulnerable Americans, Acting Comptroller of the Office of the Comptroller of the Currency (OCC) Michael

[5] 12 U.S.C. § 5511(a).

[6] 12 U.S.C. § 5512(b)(2)(A)(i).

Hsu commented that the elimination of overdraft services may harm the very consumer's the CFPB claims to protect:

> For those living paycheck to paycheck, the flexibility offered by low- to no-cost overdrafts can empower them to pay their bills on time, avoid high-cost alternatives, and improve their credit profile. [...] Limiting overdrafts may limit the financial capacity for those who need it most.[7]

Consumers make strategic decisions about overdraft services and how they seek to use them. By incurring a fee in exchange for using overdraft services, consumers are able to access critical liquidity when no other depository-offered alternative is available. Banks meet these needs and provide access to safe, well-regulated, high-quality consumer products and services. Further, as the CFPB has well-documented, banks in recent years have invested significant resources toward innovating overdraft services for consumers' long-term benefit.[8]

Separately, CBA has concerns that the CFPB has predetermined the outcome of this rulemaking. In preparation for the 2024 State of the Union, the White House claimed that the CFPB's proposed rules, including the overdraft rule, would save consumers "approximately $19.5 billion annually,"[9] signaling the Biden Administration's determination to finalize the rule notwithstanding the ongoing notice-and-commend process and thereby subverting the principles enshrined in the Administrative Procedure Act.

Specifically, we ask the CFPB to consider that:

1. The Proposal's harm to consumers outweighs its purported benefits.
    a. Treating overdraft services as credit under the Truth in Lending Act ("TILA") will result in fewer consumers having access to overdraft services.
    b. The Proposal's calculations of costs of overdraft services are flawed and would not allow for a reasonable return for services rendered.
    c. The Proposal would have unintended consequences for the consumers the CFPB purports to protect.

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[7] Michael J. Hsu, Acting Comptroller, Off. of the Comptroller of the Currency, Remarks before the Consumer Federation of America's 34th Annual Financial Services Conference: "Reforming Overdraft Programs to Empower and Promote Financial Health" (Dec. 8, 2021) [hereinafter Acting Comptroller Michael Hsu Remarks 2021], https://www.occ.gov/news-issuances/speeches/2021/pub-speech-2021-129.pdf.

[8] *See, e.g.*, CONSUMER FIN. PROT. BUREAU, OVERDRAFT/NSF REVENUE DOWN NEARLY 50% VERSUS PRE-PANDEMIC LEVELS (2023), https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-q4-2022-down-nearly-50-versus-pre-pandemic-levels/full-report/.

[9] Press Release, White House, The Price Isn't Right: How Junk Fees Cost Consumers and Undermine Competition (Mar. 5, 2024), https://www.whitehouse.gov/cea/written-materials/2024/03/05/the-price-isnt-right-how-junk-fees-cost-consumers-and-undermine-competition/.

   d. The Proposal's 1022(b) cost-benefit analysis fails to properly consider or estimate the impact of the rule on consumers.

   e. Consumers need overdraft services.

   f. Consumers can choose bank products that do not offer (or allow consumers to avoid) overdraft services.

   g. The Proposal fails to account for important innovations and competition in the overdraft services market.

   h. Consumers make well-informed choices to rely on overdraft services.

   i. Overdraft fees have a deterrent effect that encourages responsible behavior.

   j. There is a cumulative impact on the cost of checking accounts, particularly low-balance checking accounts, from multiple rulemakings.

   k. The effective date of the proposed rule is too short and does not provide for adequate time to make adjustments.

2. The Proposal exceeds the CFPB's statutory authority and fails to meet the requirements of the Administrative Procedure Act.

   a. The CFPB has no authority to change the statutory definition of credit.

   b. The Federal Reserve Board correctly determined that discretionary overdraft services are not covered by TILA.

   c. Congress has acquiesced to Regulation Z's exclusion of discretionary overdraft.

   d. Whether overdraft services are "courtesies" or "accommodations" has no legal significance.

   e. Proposed exemption for break-even overdraft credit lacks legal authority.

   f. The arbitrary designation and application of a rule only to "Very Large Financial Institutions" lacks legal authority.

   g. The Proposal ignores prudential guidance related to overdraft services.

   h. The Proposal fails to conduct a Regulatory Flexibility Act analysis.

DISCUSSION

I. The Proposal's harm to consumers outweighs its purported benefits

A. Treating overdraft services as credit under the Truth in Lending Act ("TILA") will result in fewer consumers having access to overdraft services

Setting aside important questions about the CFPB's authority to promulgate the Proposal, discussed in Section II, the Proposal fails to appropriately consider numerous regulatory and compliance questions and will ultimately result in fewer consumers having access to overdraft services.

If a consumer could access "covered overdraft credit" from a debit card or account number, the Proposal would require the card issuer to comply with multiple provisions of Regulation Z that were designed by Congress to apply to credit cards.

These include:

- *Ability to Pay*. Under the Proposal, a large bank would be required to determine a consumer's "ability to repay" before opening a "covered overdraft account." These issuers would use assessment tools they also use with traditional credit card customers. Those who could not get approval for a credit card presumably would not be able to access covered overdraft credit.

  In a recent nationwide survey, however, CBA found that approximately two-thirds of consumers that report having overdrafted four or more times in the past twelve months report that they previously had a credit card application rejected.[10] This is approximately twice the rate of consumers that report having not overdrafted over the last twelve months. Indeed, consumers that self-identified as having overdrafted four or more times in the last twelve months reported that, absent overdraft services, they would have been as likely to use a credit card to complete the transaction as having to pawn or sell their household goods.

- *First Year Fee Cap*. Under the Proposal, Section 1026.52(a) of Regulation Z would restrict the amount of certain fees, such as overdraft fees, an issuer could charge during the first year after opening of a credit account, such as a covered overdraft credit account, to 25 percent of the consumer's credit limit.

  This provision, designed for low-limit high-fee credit cards, was never intended to apply to overdraft services. Its application here would render most banks unable to offer

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[10] *CBA Releases National Empirical Survey Results Showing Consumer Value and Need for Bank Overdraft Products,* CONSUMER BANKERS ASS'N (Mar. 21, 2024), https://www.consumerbankers.com/cba-media-center/media-releases/cba-releases-national-empirical-survey-results-showing-consumer.

overdraft services to customers who could not qualify for a high limit given their inability to charge fees for the service.

- *Offsets*. A key and well-understood benefit of overdraft services is that they are immediately repaid by a customer's next deposit. Under the Proposal, covered financial institutions would be prohibited from automating this process for their customers. Specifically, financial institutions would not be able to offset the amounts due on the covered overdraft credit account with funds next available in a consumer's deposit accounts.

  This would all-but-destroy modern day overdraft as consumers would no longer be able to automate repayment of overdrafts so that the service is always available. Instead, they would repay the advance only after receiving a periodic statement. Notwithstanding what they might want to do (*i.e.,* have overdraft available when they need it), the Proposal would necessarily result in consumers stunted in their ability to use overdraft services with the same frequency.

- *Other federal laws, such as the Military Lending Act and the Servicemembers Civil Relief Act, would also apply to covered overdraft credit.*

  Like the substantive impact of the above Regulation Z provisions, the Proposal also ignores the impact of these laws on issuers and consumers. For example, compliance with the Military Lending Act would be particularly difficult. Among other things, the Military Lending Act limits the amount a creditor may charge to a covered borrower, including interest and fees, to 36 percent on an annualized basis. As a result, the Military Lending Act makes it virtually impossible to impose a reasonable fee on a line of credit if that line must be repaid in a short period. Even the CFPB's proposed benchmark fee of $8 would exceed the Military Lending Act's 36 percent APR limit on a $100 advance payable in thirty days.

The Proposal never explains in any detail what product a covered financial institution might actually be able to offer if it complied with these and other credit rules and how consumers might use those products. The Proposal similarly never explains who would actually be able to use this product, its cost, or the amount of credit that would be made available to consumers if they were offered and repayment terms– all critical questions relevant to "ensuring that all consumers have access to markets for consumer financial products and services," as well as "the potential benefits and costs to consumers . . . including the potential reduction of access by consumers to consumer financial products or services."[11]

This failure to provide clarity on these crucial issues may be indicative that the CFPB does not strongly anticipate that providers will actually attempt to navigate the compliance issues involved with offering overdraft services as a credit product under the TILA. Indeed, the CFPB offered a similar "overdraft-as-credit" framework in its prior rulemaking relating to

[11] 12 U.S.C. § 5511(a) and 12 U.S.C. § 5512(b)(2)(A)(i).

prepaid accounts. That rule, adopted in 2017, requires financial institutions that want to offer overdraft in connection with a prepaid account to comply with rules established for hybrid prepaid-credit cards, including the provisions of the CARD Act and MLA discussed above. A review of the CFPB's public prepaid account database indicates that not a single financial institution offers a hybrid prepaid-credit card.

Despite this knowledge, the CFPB advances the same framework in the current Proposal.

B. The Proposal's calculations of costs of overdraft services are flawed and would not allow for a reasonable return for services rendered

The Proposal provides an exception that would exclude from the definition of covered overdraft credit: courtesy overdrafts provided by covered financial institutions, or what the Proposal determines is not "above breakeven overdraft credit."[12]

Under the Proposal a fee would be above breakeven overdraft credit if the fee exceeds the greater of: (1) pro rata share of the covered financial institution's total direct costs and charge-off losses for providing non-covered overdraft credit in the previous year or (2) the fee cap set by the CFPB.[13] The Proposal, however, cites no authority that allows the CFPB to set specific price caps on those fees.

Under the first method, the "breakeven" calculation, the CFPB instructs that a covered financial institution would be able to consider only limited direct costs: costs and charge-off losses specifically traceable to its provision of non-covered overdraft credit in the previous year. Such costs and charge-off losses include, but are not limited to, the financial institution's cost of funds, its net charge-offs, and operating expenses for its non-covered overdraft credit program.[14] The CFPB proposes to exclude from this determination general overhead costs or charge-off losses due to unauthorized use, EFT errors, billing errors, returned deposit items, or rescinded provisional credit.[15]

This calculation leaves open important questions about operational implementation. While the Proposal allows for recovery of "direct" costs, it's not clear what methodology banks should use when identifying such direct costs. Critically, the Proposal provides no clarity regarding the frequency or process by which issuers could change their pricing when their costs change. Banks would be relegated to having case-by-case discussions with examiners for each product or product change, with the understanding that any change in supervisory staffing may require discussions to begin entirely anew. It is not clear that any rational actor would seek to undergo the downside risks and compliance investment of such an ambiguous, risk-fraught process solely to "break even" on their products.

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[12] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,899 (to be codified at 12 C.F.R. § 1026.62(b)(1)).

[13] *Id.* (to be codified at 12 C.F.R. § 1026.62(d)(1)).

[14] *Id.*

[15] *Id.* (to be codified at 12 C.F.R. § 1026.62(d)(2)).

Under the second method, the CFPB has proposed four alternative fee caps for comment, one of which it asserts will be included in the final rule ($3, $6, $7, and $14). Each method is based on separate reasoning based on data gathered from only eight financial institutions.[16] While the proposed figures are based on the same general formula, they rely on different data points. To calculate these fees, the CFPB first determined the total charge-off losses (excluding losses attributable to unauthorized use, billing errors, rescinded provisional credit, returned deposit items, and other sources not attributable to overdraft transactions) for the eight financial institutions and then divided that figure by the total number of noncovered overdraft transactions (i.e., overdraft transactions currently exempted from Regulation Z) in the relevant dataset for each estimate. Next, the CFPB adjusted this charge-off loss per transaction figure by adding $1 per transaction to account for the CFPB's estimate of a financial institution's cost of funds and operational costs, which the CFPB estimates does not exceed $0.50 per transaction each.[17]

Calculations under either method do not account for the actual costs associated with providing overdraft services and fall short of representing a reasonable return for the services. In particular, the Proposal fails to consider factors that are directly attributable to the cost of overdraft services. Beyond those considered in the Proposal, direct costs include:

- Consumer Contact (e.g., call centers)
  - Agent time spent on phone or via chat with customers fielding questions and performing servicing tasks; and
  - Escalation that requires higher-level approvals and potentially follow-ups and call backs;

- Branch Servicing
  - Branch employee time reviewing account details, answering questions, having broader financial conversations;

- Other Consumer Communications
  - Generating overdraft notices and servicing letters;
  - Physical mail and postage cost; and
  - Digital communication – emails, alerts, push notifications;

- Complaints
  - Agent time required to address issues relating to consumer complaints, including but not limited to reviewing account information, preparing the customer response, analyzing the root cause of the consumers' issues;

- Collections;

[16] *Id.* at 13,870-71.

[17] *Id.* at 13,871. CFPB estimates cost of funds and operational costs at $0.50 each. *Id.*

- Calling customers, offset processing; and
- Automated charge-off and debt bureau reporting.

Additionally, there are several indirect expenses associated with the operation of overdraft services that should be given proper consideration. These include:

- Vendor Services
  - Creating and maintaining overdraft limits;
  - External tech/ systems (*e.g.*, API, licensing, support services); and
  - Offshore support for manual tasks and research;
- Compliance Testing
  - Call monitoring, periodic sample testing;
- Technology (internal)
  - Development and maintenance of internal systems;
- Checking Cost to Serve Allocation
  - An overdraft service cannot exist without a checking account, which themselves involve costs including but not limited to handling fraud, operational expenses, and other overhead expenses.

A low benchmark or breakeven fee is likely to cause banks to limit or even stop offering overdraft services. By not allowing for recoupment of these substantial costs and expenses, the Proposal greatly underestimates the value proposition of overdraft services and undermines the ability of banks to offer the services under either the Proposal's "breakeven" calculation or possible benchmarks. Banks may not want to risk delinquency, non-payment, or compliance and operational risk if the final rule makes it too difficult to recoup costs or expected losses.

C. The Proposal would have unintended consequences for the consumers the CFPB purports to protect

The Proposal fails to appropriately consider its potential costs to consumers, particularly including how it may reduce access by consumers to a critical safety net that they rely on to make ends meet. This means that the Proposal does not grapple with its most glaring deficiency: because of the rule, many consumers are likely to lose access to overdraft services and would have to turn to more costly, less safe non-bank alternatives to meet their liquidity needs.[18] Yet the Proposal makes no effort to quantify its detrimental impacts to consumers, such as the

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[18] These non-bank services have been previously found by the CFPB to be harmful to consumers. For example, the CFPB found that the payday lending industry harms consumers by trapping them in extended loan sequences of unaffordable loans. *See, e.g.*, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,472 (Nov. 17, 2017) (to be codified at 12 C.F.R. pt. 1041), https://www.govinfo.gov/content/pkg/FR-2017-11-17/pdf/2017-21808.pdf.

likelihood consumers will have less liquidity to pay for rent, utilities, or groceries, potentially leading to late fees and other adverse outcomes.

The CFPB has consistently overlooked the fact that overdraft services serve consumers that may lack access to well-regulated credit products. In laying the groundwork for the Proposal, the CFPB released a research report purporting to show that many consumers that use overdraft services have cheaper credit options available.[19] CFPB Director Chopra introduced the report by asserting "[o]ur research finds that American families are paying fees they do not expect, even when they have access to cheaper forms of credit."[20] However, the CFPB's report solely drew from its "Making Ends Meet" survey.[21] The "Making Ends Meet" survey is an important and valuable source of information – but it is not a complete picture as the survey is limited to consumers that have credit histories. That means that as many as 10 percent – or 26 million – Americans who are "credit invisible" are excluded from the CFPB's analysis, leading to the false conclusion that they have other available forms of credit.[22] These consumers, due to their lack of credit scores, generally have limited access to credit products in the well-regulated bank sector, like credit cards. Accordingly, the CFPB's conclusions drawn from the limited survey are inaccurate and misleading because it specifically excluded consumers that lack credit reports from its analysis.

Indeed, according to the Federal Reserve Board's Survey of Household Economics and Decision Making, 37 percent of consumers that used overdraft services at least once in 2022 indicated that they were "not confident" they would be approved if they applied for credit.[23] Further, 54 percent of consumers who used overdraft services at least once in the last year indicated they could not obtain credit when they applied.[24]

Similarly, a recent nationwide survey by the Consumer Bankers Association fielded in February 2023 found that 60 percent of consumers that self-reported having overdrafted one to

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[19] Press Release, Consumer Fin. Prot. Bureau, CFPB Issues Report Showing Many Americans Are Surprised by Overdraft Fees (Dec. 19, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-report-showing-many-americans-are-surprised-by-overdraft-fees/.

[20] *Id.* According to the Report, "[m]ost households incurring overdraft fees had available credit on a credit card: Among households charged 1-3 overdraft fees in the past year, 68% had credit available on a credit card, while 62% of households charged 3-10 overdraft fees had credit available on a credit card. In households charged more than 10 fees in the past year, 51% still had credit available on a credit card." *Id.*

[21] *CBA Statement on CFPB's Misleading Overdraft Press Release*, CONSUMER BANKER'S ASS'N (Dec. 19, 2023), https://www.consumerbankers.com/cba-media-center/media-releases/cba-statement-cfpb%E2%80%99s-misleading-overdraft-press-release.

[22] *Id.*

[23] *By the Numbers: How Consumers May be Harmed by CFPB Regulatory Action Limiting Access to Overdraft*, CONSUMER BANKER'S ASS'N (Dec. 20, 2023), https://www.consumerbankers.com/cba-media-center/media-releases/numbers-how-consumers-may-be-harmed-cfpb-regulatory-action-limiting, (analyzing data underlying the Federal Reserve Board Survey of Household Economics and Decisionmaking).

[24] *Survey of Household Economics and Decisionmaking*, FED. RSRV. BD. (Aug. 23, 2023), https://www.federalreserve.gov/consumerscommunities/shed_data.htm.

three times in the last 12 months also reported that they had been denied a credit card application.[25] The percentage of consumers reporting credit card application denials increased to 67 percent for consumers that self-reported that they overdrafted four or more times in the last 12 months. The CBA survey also found that, among consumers that report having overdrafted four or more times in the last year, only 10 percent of them can use a credit card to meet their short-term liquidity needs if they no longer had access to overdraft services. The same proportion of consumers reported that they would need to pawn or sell their belongings in order to fulfil the transaction if they had not been able to use overdraft services for the transaction.

These consumers will likely lose access to bank-offered short-term liquidity provided through overdraft services. Indeed, the Federal Reserve Bank of New York recently demonstrated the impact of overdraft fee caps on access to financial products and services.[26] Noting that national banks are, unlike state-chartered banks, exempted from state overdraft fee caps, the report found:

- In the absence of fee caps national banks raised overdraft fees but also expanded overdraft credit. Relative to state banks, national banks increased their fees by 10 percent and their provision of overdraft credit by 20 percent.

- The rate at which checks were returned due to insufficient funds declined by 15 percent in affected states. Since a check is returned when overdraft credit is denied, the decline in returned checks provides confirmation of increased overdraft credit provision and implies savings to depositors on bounced check fees.

- National banks exempted from overdraft fee caps expanded deposit account supply by lowering minimum balance requirements 30 percent or more relative to state banks. High minimum balance requirements rank first among reasons unbanked households are without an account.

- The share of low-income households with a checking account rose by 10 percent following preemption. This increase in account ownership corresponds with the expansion in deposit supply and may also reflect increased demand from households who value overdraft coverage.

Collectively, the findings suggest that overdraft fee caps cause rationing of overdraft services and inhibit financial inclusion, revealing a policy trade-off not previously considered: benefits of fee limits come at the cost of more unbanked, low-income households.

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[25] CBA Releases National Empirical Survey Results Showing Consumer Value and Need for Bank Overdraft Products, CONSUMER BANKERS ASS'N (Mar. 21, 2024), https://www.consumerbankers.com/cba-media-center/media-releases/cba-releases-national-empirical-survey-results-showing-consumer.

[26] JENNIFER L. DLUGOSZ ET AL., WHO PAYS THE PRICE? OVERDRAFT FEE CEILINGS AND THE UNBANKED (2023), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr973.pdf?sc_lang=en.

Indeed, prior CFPB leadership had been cautious about putting forth overdraft regulation that could negatively affect consumers. At a townhall meeting on February 9, 2016, former CFPB Director Richard Cordray remarked, "I think that we recognize that if institutions don't pay checks and the ACH into overdraft, they get returned." Director Cordray further remarked:

> If at the end of the day, all that happened was consumers were charged the exact same fees they are charged today and had the same level of awareness they have of when those fees are going to hit and they had less items covered than they do right now, I don't think we'd be successful. I think we have to consider those implications.[27]

D. The Proposal's 1022(b) cost-benefit analysis fails to properly consider or estimate the impact of the rule on consumers

In its discussion of limitations to quantify the benefits, costs, and impacts of the Proposal, the CFPB states that they are not aware of evidence that could be used to predict how changes to overdraft pricing could result in "consumer harm from delaying or forgoing some transactions."[28] However, data from CBA shows that, among frequent overdrafters, 37 percent would turn to paying late on an essential purchase if they lost access to overdraft.[29] Considering that changes in overdraft pricing and availability of overdraft as a result of this Proposal would impact frequent users most, and considering there is publicly available information on the cost to consumers of paying late on items listed both in the Making Ends Meet survey and the CBA survey such as utilities, food, and transportation, we strongly urge the CFPB to estimate the enumerated dollar value of these costs to impacted consumers.

Additionally, the CFPB discusses the gains to consumers who use newly available covered overdraft services (*i.e.,* overdraft lines of credit) through the making of minimum payments and paying down overdrawn balances over time.[30] However, the CFPB leaves out estimates that would calculate the incidence of late payments on these lines and the incidence of frequent revolvers. Accordingly, the CFPB fails to account for consumers who, switching from non-covered, fee-based overdraft to covered overdraft lines of credit, end up in a cycle of debt that produces larger losses than any gains. The CFPB itself seems to acknowledge this possible outcome, noting that consumers may benefit from revolving balances for longer periods of time, past the typical 60 days that fee-based overdrafted accounts are charged off. However, in this discussion, the CFPB does not account for the previously stated concerns regarding consumers

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[27] *NCUA Chairman Matz Town Hall Webinar with CFPB Director Cordray Now Online*, NAT'L CREDIT UNION ADMIN. (Mar. 16, 2016), https://web.archive.org/web/20160412163218/https://www.ncua.gov/newsroom/Pages/news-2016-march-matz-cordray-webinar.aspx (transcript no longer available online).

[28] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,886.

[29] CBA Releases National Empirical Survey Results Showing Consumer Value and Need for Bank Overdraft Products, CONSUMER BANKERS ASS'N (Mar. 21, 2024), https://www.consumerbankers.com/cba-media-center/media-releases/cba-releases-national-empirical-survey-results-showing-consumer.

[30] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,892.

revolving credit balances for longer as a substitute for fee-based overdraft and acquiring additional debt, late fees, and other charges which could produce greater costs than benefits, especially for those who are frequent users of overdraft services.

While the CFPB does acknowledge the harmful impacts of consumers going delinquent on new covered overdraft credit accounts, it fails to quantify these costs so that they can be measured against the consumer benefits. Additionally, the CFPB claims that these costs may not be as or more dire than a consumer experiencing "a negative report to checking account reporting companies."[31]

E. Consumers need overdraft services

With ongoing financial difficulties, including sticky inflation and high interest rates, the average American is struggling to ensure they have access to the necessities their families need. From gas for commute to work, to groceries to feed their children, people need access to emergency liquidity when there is more month at the end of their paycheck. In the Federal Reserve Board's most recent Report on the Economic Well-Being of U.S. Households (covering the year 2022), 63 percent of adults said they could cover a hypothetical $400 expense shock with cash, savings, or a credit card – down five percent from 2021. The remainder said they would have paid by borrowing or selling something, or said they would not have been able to cover the expense.[32] Similarly, only 44 percent of U.S. adults say they could pay an emergency expense of $1,000 or more from their savings, according to a Bankrate survey results published last month.[33] The Financial Health Network (formerly the Center for Financial Services Innovation) study found that more than one-third of all households say they frequently or occasionally run out of money before the end of the month.[34] Banks are aware of these financial challenges for many people across the country and work diligently to provide access to safe and affordable products to U.S. consumers.

Overdraft services remain one of the best time-tested, safe, and viable sources of short-term liquidity for many U.S. consumers. The provision of overdraft services is based on clear disclosures that allow consumers to make informed choices. The decision to utilize overdraft services is solely up to the customer, based on their unique financial needs. The possible monetary and non-monetary consequences of restricting overdraft services would be broad and complex.

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[31] *Id.*

[32] *Report on the Economic Well-Being of U.S. Households in 2022*, FED. RSRV. BD. (May 2023), https://www.federalreserve.gov/publications/2023-economic-well-being-of-us-households-in-2022-expenses.htm.

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

[34] *Economic Well-Being of U.S. Households in 2020*, FED. RSRV. BD. (May 2021), https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-dealing-with-unexpected-expenses.htm.

The U.S. has the largest, most diverse financial services marketplace in the world and is home to nearly 10,000 banks and credit unions. Consumers enjoy a wide range of choices when it comes to financial products and services, from completely fee-free checking accounts to those that offer greater flexibility, such as those that provide overdraft services. Indeed, 90 percent of U.S. adults find their bank's overdraft service valuable, and 75 percent were happy their payment was covered when overdraft services were used.[35]

As previously discussed, the proposed restrictions on overdraft will likely lead to reduce consumer access to overdraft services. This will result in significantly more returned checks and declined transactions, leading to unnecessary credit rating harm, returned item fees charged by the merchant, fees from landlords and others, or requirements to pay using potentially costly alternative methods such as a money order.[36] Indeed, CBA's survey of consumers found that 37 percent of frequent users of overdraft services would choose paying late if not provided the option to overdraw their accounts.[37]

The Proposal may also cause many consumers to switch to more costly non-bank lenders who are less equipped to provide them with a suite of suitable financial products or services, such as a significantly less regulated and under or unsupervised payday lender, auto title lender, pawn shop, or other. It should be no surprise that 62 percent of consumers would reconsider their support for new regulation of overdraft if it limited access to the service.[38]

Any policy action that may impair access to overdraft services should not be based on selective anecdotes or unsupported assumptions about consumer behavior but instead by seeking to understand the regular user of overdraft services—including why they use the product, what they understand about their ability to opt in and out, and what their preferences are relative to available alternatives. CBA's survey of consumers is intended to better understand consumer overdraft behavior including what consumers use overdraft for and what alternatives

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[35] 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.

[36] Restrictions on consumer overdraft services will also impact merchants and the overall economy. The loss of liquidity could be related to overnight posting and account receivables benefiting from consumer overdraft services. Based on data regarding market share, daily overdraft balances, and duration of overdraft, CBA estimates that overdraft services cover in excess of $60 billion dollars of payments yearly. A reduction in the availability of overdraft services would consequently have an on not only customers but businesses relying on the receivables. Businesses will also have to develop costly collection practices and would likely have to put restrictions on payment options for consumers, further reducing their access to essential goods and services.

[37] CONSUMER BANKERS ASS'N, NATIONWIDE SURVEY OF CONSUMER OVERDRAFT SERVICES USE AND SENTIMENT: POST COVID-19 PANDEMIC (2024) [hereinafter *CBA Empirical Survey*], *https://www.consumerbankers.com/sites/default/files/2024.03.21%20CBA%20Overdraft%20Survey.pdf*.

[38] CURINOS, COMPETITION DRIVES OVERDRAFT DISRUPTION 12 (2021), https://curinos.com/insights/competition-drives-overdraft-disruption/. This study was initiated at the request of the CBA to fill a research gap in better understanding consumer sentiment, and CBA provided funding for the market research survey. Curinos independently designed, analyzed, and documented the research results.

they would have without overdraft.[39] This study revealed that most consumers use overdraft for day-to-day staples such as paying for food, utilities, and transportation. This research also found that, absent overdraft services, many frequent overdrafters (37 percent) would have to pay late on these items incurring additional costs such as late fees, the termination of utility services, and delayed access to food or medications.

Before the CFPB takes further action, we urge the Bureau to collect the relevant data to assess consumer impact and conduct a comprehensive study of consumers' preferences regarding overdraft services. In particular, CBA recommends that the CFPB collect, analyze, and update data on the use of overdraft services, with particular attention paid to frequent users of overdraft services and those who struggle to access other alternative forms of credit such as credit cards. The Proposal cites a 2017 CFPB report for the proposition that the majority of overdraft fees are paid by frequent overdraft users (10+ overdrafts a year), who constitute approximately 9 percent of all checking accounts. This data, however, is more than a decade old and importantly does not reflect the current state of the market—including the *significant* consumer-friendly innovations introduced into the market by the largest institutions—or consumer financial health.[40] More recent surveys of consumers from the Financial Health Network estimate frequent overdrafters comprise 9 percent of all overdrafters (as opposed to overall checking accounts, per the Proposal).[41] The CBA's survey found that only 3 percent of respondents who reported overdrafting in the last 12 months did so 10 or more times (or less than two percent of all consumers in the study).

Importantly, the Proposal's reliance on this decade-old data means that Proposal fails to account for major shifts in market practices. Separate CFPB research, which is concerningly not included in the Proposal, has acknowledged that overdraft revenue has been reduced to half of pre-pandemic levels.[42] This is solely due to industry innovation—largely driven by institutions greater than $10 billion in assets—offering consumers a wide range of options that help ensure that overdraft services provide critical liquidity, while limiting the financial impact to consumers.

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[39] CBA Empirical Survey, *supra* note **Error! Bookmark not defined.**.

[40] CONSUMER FIN. PROT. BUREAU, DATA POINT: FREQUENT OVERDRAFTERS 13 (2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf.

[41] *Overdraft Trends Amid Historic Policy Shifts*, FIN. HEALTH NETWORK (June 1, 2023), https://finhealthnetwork.org/research/overdraft-trends-amid-historic-policy-shifts/.

[42] CFPB, Overdraft/NSF Revenue down nearly 50% versus pre-pandemic levels (May 23, 2023), https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-q4-2022-down-nearly-50-versus-pre-pandemic-levels/.

F. Consumers can choose bank products that do not offer (or allow consumers to avoid) overdraft services

Banks are committed to providing consumers with a wide variety of safe and affordable products and services governed by existing disclosure laws and regulations.[43]

Banks of all sizes carry products such as accounts with no overdraft availability, accounts that help consumers avoid overdraft even when they do go over their available balance and products that help cover overdrafted amounts (*e.g.*, linked credit or savings accounts and overdraft lines of credit). Even when an account provides the option of overdraft services, consumers have the ultimate control over the use of the service and must affirmatively opt-in for one-time debit and automatic-teller-machine ("ATM") transactions. Further, many banks offer consumers the ability to opt out of overdraft services for other checking account transactions (*e.g.*, check and automated clearing house ("ACH") transactions).

Large Bank Innovation

Today, checking accounts come in many different varieties and consumers have a lot of choices concerning the features and fees of the checking products they utilize. For example, some have monthly maintenance fees, and some do not; some offer overdraft services, and others do not; some offer rewards and some do not. Accordingly, consumers can exercise individual choice when selecting an account—and have ample ability to accounts if their bank is not innovating to keep pace with competitors.

Banks subject to the Proposal have implemented a range of products and policies designed to provide consumers greater transparency, choice, and control relating to overdraft services. For more than a decade, and particularly over the last several years, banks have innovated and competed to create a range of highly tailored, consumer-friendly products that aim to support each bank's customers best– all without regulation or legislation. Some of these new features that better enable consumers to make informed financial decisions include real-time payment updates, grace periods, payment control, low balance alerts, low-cost small dollar loans, and no-fee overdraft accounts.

Bank On

Banks are committed to increasing access for all U.S. consumers and have worked to provide low- or no-cost products to help accomplish this goal. The commitment to bringing the unbanked into the banking sector is corroborated by the most recent Bank On data, which demonstrates that the number of Bank On accounts continues to grow and have the most significant take-up in low- and moderate-income and minority communities.

Bank On aims to expand consumer access to a safe and affordable bank or credit union account. Accordingly, Bank On accounts have been carefully crafted by participating financial

[43] *See, e.g.*, Electronic Fund Transfers (Regulation E), 12 C.F.R. pt. 1005; Truth in Savings (Regulation DD), 12 C.F.R. pt. 1030.

institutions to help consumers succeed. The Bank On Standards require that accounts have limited monthly fees and opening deposit amounts reflecting the costs of account maintenance, while also prohibiting overdraft or nonsufficient fund fees.[44] The Bank On Standards also do not permit penalty fees for low balances or account dormancy. Additionally, Bank On accounts allow for negative balances without charge to consumers.[45]

Bank On accounts that have no overdraft fees are widely available for consumers who prefer this option. According to the most recent Bank On data, over 425 nationally certified Bank On accounts are offered by banks and credit unions that represent over 60 percent of the domestic deposit market, and more than half of all U.S. branches of banks.[46] As of 2021, more than 14 million Bank On certified accounts had been opened across 28 reporting institutions, a 67 percent increase from the previous reporting year. Of those, over 5.8 million accounts were open and active as of 2021.[47] As of 2021, Bank On accounts had been opened in 85 percent of all U.S. ZIP codes.[48] Based on 2021 data, neighborhoods with over 50 percent minority representation, which make up 13 percent of all neighborhoods, accounted for 32 percent of ever-opened accounts, underscoring the positive effect of Bank On accounts on minority communities.[49] Similarly, the 2021 data shows that neighborhoods with over 50 percent low-to-moderate ("LMI") households, which make up 20 percent of all neighborhoods, represented 40 percent of ever-opened accounts.[50]

Overdraft Protection Products

If a consumer wants assurance that a transaction will be covered if there is an overage, banks offer other options to consumers in order for them to spend their own money first, including linked accounts and overdraft lines of credit – commonly referred to as overdraft protection products. The CFPB's Proposal does not assess how many covered financial

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[44] For instance, the Bank On Standards include a minimum opening deposit of $25 or less, and no or low ($5 or less) monthly maintenance fees.

[45] *See* BANK ON, BANK ON NATIONAL ACCOUNT STANDARDS (2023 – 2024), https://joinbankon.org/wp-content/uploads/2020/10/Bank-On-National-Account-Standards-2021-2022.pdf.

[46] Press Release, Bank On & Cities for Financial Empowerment Fund, Country's Top Banking Regulators Celebrate Growth of National Safe Banking Partnership (May 23, 2023), https://bankon.wpenginepowered.com/wp-content/uploads/2023/05/CFE-Fund_Bank-On-Conference-Press-Release-2023.pdf.

[47] Matuschka Lindo Briggs et al., *The Bank On National Data Hub: Findings from 2021*, FED. RSRV. BANK OF ST. LOUIS (Dec. 13, 2022), https://www.stlouisfed.org/community-development/bank-on-national-data-hub/bank-on-report-2021.

[48] *Id.*

[49] Paul Calem & Yasmeen Abdul-Razeq, BPI, "Bank On" Transaction Accounts and Financial Inclusion: New Data Shows Continuing Success 3 (2023), https://bpi.com/wp-content/uploads/2023/07/Bank-On-Transaction-Accounts-and-Financial-Inclusion-New-Data-Shows-Continuing-Success.pdf.

[50] *Id.*

institutions provide overdraft protection products today and fails to assess the costs associated with these services or business models and who qualifies for them.

Additionally, as previously discussed, CBA is concerned that the proposed restrictions to compulsory-use of preauthorized transfers will create unnecessary risk to existing overdraft protections products and will ultimately constrict the number of options in the market.[51] Not only does the change impact current line of credit offerings, but it will also prevent other institutions from providing similar products in the future. Overall, the Proposal will not only restrict traditional overdraft services but will also eliminate any viable path to provide affordable options, forcing consumers to use alternative credit products like payday lenders.

Regulation E Opt-In

In 2009 the Federal Reserve Board published a final rule amending Regulation E. Today, the rule is generally known colloquially as the Reg E overdraft opt-in rule.[52] The rule became effective July 1, 2010. Since then, the Dodd-Frank Act transferred rulemaking authority of Reg E to the CFPB, and while Reg E has undergone some changes under the CFPB's jurisdiction, the overdraft opt-in rule has not.[53] Since the implementation of the amended Regulation E, consumers must affirmatively opt-in to overdraft services for one-time debit transactions and ATM withdrawals.

G. The Proposal fails to account for important innovations and competition in the overdraft services market

The Proposal is unnecessary. A growing number of America's leading large banks have unveiled new innovations designed to help consumers avoid overdraft fees or offer overdraft services with features selected by the consumer. Competition is the primary driver of these changes to bank overdraft service programs and the market has rewarded organizations that overhaul their existing overdraft programs or developed alternative products. Institutions that are slow to act are losing customers to more agile competitors.[54]

Large banks have proactively implemented new overdraft polices that benefit consumers' use of overdraft services including the reduction or elimination of overdraft fees altogether, the elimination of account transfer fees to cover overages, de minimis exceptions to cover small overages, grace periods for customers to make accounts whole before an overdraft fee is assessed, access to small dollar loans, eliminating extended overdraft fees, eliminating returned items fees, real-time account updates and low balance notices, limits to the amount of overdraft

[51] Overdraft Lending; Very Large Financial Institutions, 89 Fed. Reg. at 13,882.

[52] *See* 12 C.F.R. § 1005.17.

[53] The Electronic Fund Transfer Act, 15 U.S.C. §§ 1693, et seq., and its implementing regulation, Regulation E, 12 C.F.R. Part 1005, administered by the Bureau, regulates mandatory overdraft service opt-in for checking accounts. The Truth in Savings Act, 12 U.S.C. § 4301 and its implementing regulation, Regulation DD, 12 C.F.R. Part 1030, requires banks to provide to consumers disclosures about terms and costs of deposit accounts fee disclosures in checking accounts.

[54] CURINOS, COMPETITION DRIVES OVERDRAFT DISRUPTION 12 (2021), https://curinos.com/insights/competition-drives-overdraft-disruption/.

fees assessed in a single day, and customer control over which payments that would result in an overdraft are paid or returned. We believe these and other changes, in conjunction with clear disclosures, add valuable benefit to consumers who rely on overdraft services to cover short-term gaps in finances by continuing to provide a viable service at minimal or no cost.

This competition has also led to innovation in how consumers access their funds. For example, early direct deposit innovations allow consumers to access funds that normally would not yet be available for use. Faster payments networks such as Real Time Payments increase the likelihood the funds will be readily available when needed. Check imaging and remote deposit capture enable consumers to deposit funds without having to go to a branch or ATM. All these bank-led innovations provide consumers with greater funds availability, helping them anticipate and avoid overages and providing them with more control to better meet their financial needs.

Findings from a 2021 study conducted by Curinos support trends in consumer demand and intense competition within financial services are driving recent changes in overdraft policies and programs.[55] Specifically, the study found:

- Consumers, especially overdraft users, continue to demonstrate a deep understanding of overdraft and available alternatives. More than 60 percent of overdrafts come from consumers who intend to use the service. More than 80 percent of overdraft transactions come from consumers who opted into debit card overdraft programs with the clear intention of using it to cover their payments and two-thirds of consumers indicate they will incur the cost to ensure no reduction in their access to service.

- The percentage of regular overdraft users (those with 10 or more transactions annually) fell by 40 percent to 4.9 percent of the population between 2010 and 2020.

- Bank-led initiatives aimed to help consumers avoid an unintended fee have dramatically reduced the number of small purchases tied to overdraft. Since 2008, overdraft fees per U.S. adult have declined by 77 percent.

- Deposit issuers compete by offering consumers innovations relating to overdraft services. Consumers seek convenient and relevant alternatives to overdraft. And financial institutions that have created solutions for consumers to better manage or reduce the cost of overdraft have experienced a 40 percent increase in account acquisition since 2017. Financial institutions that haven't adopted overdraft innovation

[55] CURINOS, COMPETITION DRIVES OVERDRAFT DISRUPTION 12 (2021), https://curinos.com/insights/competition-drives-overdraft-disruption/. The Curinos' report methodology encompasses both consumers on the demand side and financial institutions on the supply side. On the demand side, Curinos leveraged an annual online consumer research study on checking account purchase behavior of approximately 12,000 respondents, and a targeted online consumer research study on overdraft behaviors. On the supply side, Curinos utilized a review of disclosures and offers from 38 financial institution websites, matching a 2015 Pew Study where possible, along with an anonymized survey of behavioral data from 14 financial institutions with $2 billion to $50 billion in total assets, representing $637 billion of total U.S. consumer deposits.

have experienced a nearly 30 percent reduction in consumer acquisition.

- U.S. overdraft revenue fell approximately 57 percent from $40 billion in 2008 to $17 billion in 2019.

As an addendum to its original study, in September of 2022, Curinos updated key findings that reflect the continued impact of implemented and pledged reforms of overdraft services.[56] These findings show:

- Including only disclosed voluntary reforms as of August 25, 2022, overdraft fees are expected to fall by 68 percent from 2008 to the end of 2023. If the market trend continues, driven by competition, fees will fall to 20 percent of the 2008 total by 2025.

- On a per capita basis, overdraft fees were projected to decline by 82 percent through year-end 2023, or $167 in annual savings per U.S. adult. This decline was driven primarily by reforms around posting order, de-minimis limits and overdraft opt in. This trend has been accelerated recently by the growing adoption of early direct deposit, expanded de-minimis limits, removal of continuous overdraft fees and the reduction or removal of overdraft and NSF fees. If this trend continues, per capita overdraft fees will have fallen 88 percent by 2024.

  As of August 2022, at least twenty-nine financial institutions with more than $10 billion in assets have announced significant reforms to overdraft policy. Half of the financial institutions above $100 billion in assets, including nine of the thirteen financial institutions above $250 billion in assets, have announced or implemented overdraft reforms.

- Overdraft revenue comprises less than 2 percent of annual industry revenue and less than 4 percent of industry net income.

These continued findings underscore the fact that overdraft services remain a practical and viable choice for consumers to meet their liquidity needs within the well-regulated, well-supervised banking system.

In fact, the CFPB's own data shows that there has been a $5 billion reduction of overdraft fees from 2019 to 2022 because of these bank-led innovations and the CFPB has agreed that "changes in overdraft program settings and in other checking account policies are making

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[56] CURINOS, AN UPDATE: COMPETITION DRIVES OVERDRAFT DISRUPTION 2 (2022), https://curinos.com/our-insights/update-competition-drives-overdraft-disruption/.

meaningful difference in the amount consumers incur in various fees while using their checking accounts at their banks."[57]

According to the CFPB:

- 17 of the top 20 banks based on overdraft revenue have either eliminated overdraft fees or included a cushion of at least $5 before an overdraft fee is charged.

- Each of the top 20 banks based on overdraft revenue have instituted a daily cap on the number of overdraft fees.

- 16 of the top 20 banks based on overdraft revenue have eliminated "extended" or "sustained" overdraft fees, charged when the account is not brought back to a positive balance after a certain period of time.

- And as of June 2023, 14 of the CFPB's top 20 banks based on overdraft revenue have introduced "Next Day Grace" or eliminated overdraft fees.[58]

CFPB Director Rohit Chopra has even commended banks on their progress, stating that "I do want to commend a lot of the banks in the industry for really starting to compete now on overdraft. Many of them are showing their lower fees or the buffers they are provided."[59] Director Chopra also stated, "We are very gratified that this industry seems like it's competing again on [overdraft]…This has been a healthy move."[60] Also, while commending the efforts from banks to curb overdraft fees, OCC Acting Comptroller Hsu commented on the impact competition is having on the broader market, stating that "several banks decided, on their own, to reform their overdraft programs to make them more pro-consumer.[…] A race to the top for the most pro-consumer overdraft program could help make it less expensive to be poor and demonstrate to consumers that the banking system has their backs."[61]

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[57] Éva Nagypál, *Banks' overdraft/NSF fee revenues evolve along with their policies*, CONSUMER FIN. PROT. BUREAU (July 20, 2022), https://www.consumerfinance.gov/about-us/blog/banks-overdraft-nsf-fee-revenues-evolve-along-with-their-policies/.

[58] Consumer Fin. Prot. Bureau, Overdraft/NSF metrics for Top 20 banks based on overdraft/NSF revenue reported during 2021 (2023), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-table_2023-05.pdf.

[59] The Consumer Financial Protection Bureau's Semi-Annual Report to Congress Before the S. Comm. on Banking, Housing, and Urban Affairs, 118th Cong. (2023), https://www.banking.senate.gov/hearings/11/20/2023/the-consumer-financial-protection-CFPBs-semi-annual-report-to-congress.

[60] Kate Berry, *4Q overdraft revenue fell 50% in three years, CFPB says*, AM. BANKER (May 30, 2023, 4:44 PM), https://www.americanbanker.com/news/4q-overdraft-revenue-fell-50-in-three-years-cfpb-says.

[61] Acting Comptroller Michael Hsu Remarks 2021, *supra*..

Unfortunately, the CFPB has not taken these changes into account in drafting the Proposal, which has the potential to undo the years of progress banks have made by instead forcing a one-size-fits-all government-imposed price to this overdraft service. Despite his earlier statements to the contrary, Director Chopra introduced the Proposal by insisting that "the market is not working" for consumers who are charged overdraft fees. Accordingly, the Proposal would hinder innovation, limit competition, limit consumer choice, and hamper banks' ability to provide this essential product to millions of consumers who rely on it.

The CFPB asserts that its Proposal will not impact consumers negatively, however restricting how banks can price and underwrite overdraft services will require banks to reduce access. Further restricting access to overdraft services will drive many families to predatory payday lenders and other expensive venues. Accordingly, we again urge the CFPB to focus on the consumer need and complete a robust market analysis, including the many overdraft program innovations already in place, recognizing our shared commitment to provide every consumer safe access to the products and services which best provide for their daily financial needs.

H. Consumers make well-informed choices to rely on overdraft services

CFPB Director Chopra has described overdraft fees as "often surprising fees" that are foisted on presumably unwitting consumers.[62] However, the regulatory framework clearly prioritizes the role of the consumer to make informed, individual choices about what is best for their personal financial well-being.

Statements that overdraft fees are hidden and that consumers do not choose to use them present an inaccurate and misleading depiction of the product. To the contrary, as early as 2008, the Federal Reserve Board conducted intensive consumer testing of the overdraft opt-in form and found that consumers understood how overdraft coverage works— "that is, they understood what would happen if they overdrew their account through an ATM, debit card, recurring debit, or check transaction"—and understood that they "had the right to opt out of overdraft coverage."[63] The CFPB has presented no data contradicting the Federal Reserve Board's finding that consumers make informed choices regarding overdraft.

Consumers receive numerous written and electronic disclosures concerning their right to revoke the decision to opt-in at any time, including an account statement disclosure whenever they incur an overdraft fee. Consumer choice is central to the functionality of the overdraft product, allowing for maximum transparency. Indeed, well-informed consumers drove recent changes to overdraft services and make highly informed choices about who they bank with and when to use overdraft services.[64] However, in the Proposal, the CFPB contends that the application of Regulation Z disclosure requirements will give consumers a better understanding

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[62] *See, e.g.*, *Prepared Remarks of CFPB Director Rohit Chopra on Overdraft Lending Press Call*, CONSUMER FIN. PROT. BUREAU (Jan. 16, 2024), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-overdraft-lending-press-call/.

[63] Bd. of Govs. of the Fed. Reserve Sys., Review and Testing of Overdraft Notices iii-iv (2008).

[64] *Id.*

of overdraft, and therefore, will help them make more informed decisions when using the product.[65]

These assertions are seemingly based on the assumption that the current overdraft services disclosures required under Regulation DD (implementing the Truth in Savings Act) and Regulation E (implementing the Electronic Funds Transfer Act) are insufficient for consumers to clearly understand and use the service, but offers no support for this assumption.

Regulation DD requires clear disclosures regarding the fees a depository institution charges for honoring an overdraft in advertisements, account opening disclosures and periodic statements. It also requires overdraft fee totals be included in periodic statements.[66]

In addition to required disclosures, most banks have adopted simplified checking account disclosures utilizing a disclosure format based on "Pew's Model Disclosure Box for Checking Accounts."[67] That format uses terminology associated with checking accounts and highlights fees and features that are most common, including any fees associated with overdraft services. This model disclosure box is designed to provide consumers with clear and consolidated information about the checking account information most important to consumers. Banks have invested significant resources developing these simplified disclosures to give customers clarity of terms when shopping for checking accounts and to allow them to make their own informed decision about their overdraft service needs.

Banks have also dedicated considerable resources to providing consumers with educational tools to navigate overdraft, how it works and how to avoid it. These include dedicated financial education websites, seminars, community meetings, school-focused programs. Banks also regularly partner with consumer groups to enhance awareness of the products and services being offered and incorporate helpful feedback to further ensure what is released is in the best interest of the consumers they serve.

Finally, the proposed exemption for small banks undercuts the CFPB's own position regarding the suitability of existing disclosures and ability for consumers to make informed choices. If the CFPB actually believes existing disclosure regimes do not foster consumer understanding of overdraft, then it would not allow most banks to continue those purportedly subpar disclosures by exempting them from the proposed rule. Exempting some but not all banks will only increase consumers' confusion because it would lead different banks to describe overdraft programs in materially different ways. Consumers who see a large bank overdraft disclosure based on Regulation Z but no analogous Regulation Z disclosure from an exempt bank will naturally assume the exempt bank has no overdraft program at all, and certainly not

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[65] Overdraft Lending; Very Large Financial Institutions, 89 Fed. Reg. at 13,868.

[66] See 12 CFR §§ 1030.4, 1030.6, 1030.11.

[67] PEW CHARITABLE TRS., PEW'S MODEL DISCLOSURE BOX FOR CHECKING ACCOUNTS, http://www.pewtrusts.org/~/media/assets/2014/08/pews_updated-model_disclosure_box.pdf?la=en.

that the exempt bank can charge far higher overdraft fees. Here, too, the effect of the proposed rule will be the exact opposite of what the CFPB intends.

I. Overdraft fees have a deterrent effect that encourages responsible behavior

Overdraft fees set at these low benchmarks would not provide a meaningful incentive for consumers to manage their account responsibly and spend within their means. This is likely to result in an increase in consumers overdrawing their accounts, negative credit reporting, lower credit scores, increased merchant fees and other adverse consequences that flow from denied payments and unpaid bills.

If banks were to charge very artificially low fees for overdraft services, the result is likely to be that more consumers would rely on overdrafts and banks would experience larger charge offs. Fees are often assessed in part to encourage consumer responsibility. The purpose of fees designed to deter certain behaviors is widely accepted and used in an array of instances across both private industry and the federal government. In the context of credit card late fees, the Federal Reserve Board acknowledged that "as a general matter, the imposition of a fee for particular behavior (such as paying late) can reduce the frequency of that behavior."

The current Proposal does not address this issue, ignoring the deterrent effect of overdraft fees. At the proposed levels of safe harbor, the benchmark fees will most certainly fail to provide an effective deterrent for overdrafting one's account. Fees at a deterrent level ensure that consumers only access overdraft for expenses they deem important to justify overdrawing an account. If fees are too low, customers will overdraft often, which will force banks under safety and soundness requirements to cut off access to overdraft.[68] As a result, the customers who need overdraft services most will not have it precisely when they most need it.

J. There is a cumulative impact on the cost of checking accounts, particularly low-balance checking accounts, from multiple rulemakings

The restrictions outlined in the Proposal are compounded by additional rules being proposed by the prudential banking regulators, which collectively will have a tremendously harmful impact.

For example, the Federal Reserve Board is in the process of revisiting Regulation II, the implementing regulation for the Durbin Amendment to the Dodd-Frank Act, which sets a maximum interchange fee that a debit card issuer may receive for a debit card transaction.[69] The existing fee cap already severely restricts debit interchange charges, and the new rule would further restrict those charges by one third. The results of the original fee cap have been both

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[68] *See* 12 C.F.R. § 7.4002(b)(2)(ii). OCC regulations for establishing deposit fees explicitly require banks to consider the deterrent effect of the fee when pricing a service.

[69] Debit Card Interchange Fees and Routing, 88 Fed. Reg. 78,100 (Nov. 14, 2023) (to be codified at 12 C.F.R. pt. 235), https://www.federalregister.gov/documents/2023/11/14/2023-24034/debit-card-interchange-fees-and-routing.

predictable and detrimental for consumers: The cost of checking accounts, minimum balances, direct deposit requirements, and debit card fraud have increased significantly, while free checking, debit rewards programs, and interest-bearing checking accounts have declined significantly.[70] Consumers also experienced almost no savings on retail prices.[71] CBA worked with Nick Bourke, the former creator and director of the consumer finance and housing program at the Pew Charitable Trusts, to explore "How [the Federal Reserve Board's] Proposed Interchange Caps Will Affect Consumer Costs."[72] By drawing from existing research by Federal Reserve Board economists and other academics, Bourke estimates that the Federal Reserve's current proposal would raise the cost of free and low-balance checking accounts by $1.3 to $2 billion a year – primarily shouldered by low- and moderate-income consumers.

When taken together, multiple restrictions on checking account revenue will continue to chip away at banks' already limited revenue sources available for checking accounts. Beyond that, by treating overdraft as credit, the Proposal will force banks to hold capital against overdraft under the proposed Basel III Endgame rule.[73] This will put even more pressure on banks' ability to offer cost-effective checking accounts. The inevitable result will be that the cost of checking will continue to go up and access will further go down, particularly for consumers on the margins with low or moderate income.

Federal Reserve Governor Michelle Bowman raised this concern in her dissent to the proposed revisions to Regulation II: "While the banking system remains strong and resilient, I am concerned that the cumulative effect of regulatory changes– including a lower interchange fee cap, higher capital requirements, new debt-funding requirements, increasing data collection requirements, and many others– could pose ongoing risks to the health of certain financial institutions and the overall U.S. banking system."[74] Unfortunately, neither the CFPB nor the prudential banking regulators have attempted to analyze the cumulative impacts of these rules.

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[70] *See, e.g.*, *id.*; Government Accountability Office, Regulators Have Taken Actions to Increase Access, but Measurement of Actions' Effectiveness Could Be Improved (2022), https://www.gao.gov/assets/gao-22-104468.pdf.

[71] Renee Haltom & Zhu Wang, Fed. Rsrv. Bank of Richmond, Did the Durbin Amendment Reduce Merchant Costs? Evidence from Survey Results 3 (2015), https://www.richmondfed.org/-/media/richmondfedorg/publications/research/economic_brief/2015/pdf/eb_15-12.pdf.

[72] NICK BOURKE, HOW PROPOSED INTERCHANGE CAPS WILL AFFECT CONSUMER COSTS (2024), http://dx.doi.org/10.2139/ssrn.4705853.

[73] Capital requirements are regulatory standards for banks that determine how much liquid capital (easily sold assets) they must keep on hand, concerning their overall holdings. Expressed as ratios, the capital requirements are based on the weighted risk of the banks' different assets and are set to ensure bank and depository institution holdings are not dominated by investments that increase the risk of default. These requirements are often tightened after an economic recession, stock market crash, or another type of financial crisis. These requirements are set to ensure bank and depository institution holdings are not dominated by investments that increase the risk of default.

[74] Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Statement on Proposed Revisions to Regulation II's Interchange Fee Cap by Governor Michelle W. Bowman (Oct. 25, 2023), https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20231025.htm.

K. The effective date of the proposed rule is too short and does not provide for adequate time to make adjustments

Finally, even if the Proposal were otherwise adequate, it is slated to go into effect too quickly. If issued as proposed, the Rule would go into effect six months after *Federal Register* publication.[75] The Proposal offers a single conclusory sentence that this would be enough time to implement the operational changes needed to make disclosures for overdraft services under Regulation Z. The CFPB offers no explanation or data to support this assertion. This is unacceptable, because the CFPB can only require disclosures under TILA; it cannot substantively regulate financial transactions. Thus, the CFPB has to ensure that it gives covered institutions enough lead time to implement the required disclosure proceedings. Otherwise, the CFPB could essentially prohibit disfavored transactions under the guise of requiring disclosures that are unreasonable to implement.

As discussed above, it is clear the goal of the Proposal is not to promote disclosure but to enact an indirect cap on overdraft fees that the CFPB has no authority to impose. Hence, rather than ensure that compliance within six months is in fact feasible, the CFPB simply notes that a covered institution can "comply with the rule by delaying, for as long as it wishes, the point in time at which it began to offer above-breakeven overdraft credit to consumers."[76] That is the result the CFPB is clearly trying to force.

If the CFPB plans to move forward with this or other future rulemakings, it is critical that industry is given appropriate time to comply. In recent cases, the CFPB has not provided enough time for compliance (*e.g.*, credit card late fees), which creates operational and compliance risk, as well as potential customer confusion. Any rulemaking of this magnitude should have a minimum of one year implementation to ensure technology, systems, and notices are appropriately modified.

[75] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13886.

[76] *Id.*

II. The Proposal exceeds the CFPB's statutory authority and fails to meet the requirements of the Administrative Procedure Act

A. The CFPB has no authority to change the statutory definition of credit

Overdraft simply is not TILA credit. Overdraft fees are *service* charges imposed for keeping an account open if the account holder overdraws.[77] In this way, overdraft is just a feature of another product—a checking or savings account—and overdraft fees are imposed by a bank as an alternative to closing an account in the event of an overdraw and in exchange for that service. This understanding of overdraft fees is supported by several practical realities, including that discretionary overdraft lacks several hallmarks of credit. The customer does not reach out to the bank to borrow money. There is no underwriting because the same terms and fees apply to all comers. (The Proposed Rule would change this and make overdraft look more like credit by requiring covered institutions to underwrite for these services.) And overdraft fees, which are fixed, are not like interest, which involves the application of a specific rate to varying principal balances.

The CFPB does not have the authority to change the statutory definition of "credit" to include discretionary overdraft services to which the consumer does not have the "right to incur debt." In TILA, Congress determined that "credit" is "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[78] A right is "a legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong."[79] If consumers want the legally enforceable right to overdraft their accounts, they can obtain that right by establishing an overdraft line of credit. Such arrangements are TILA credit precisely because the financial institution and the consumer "previously agreed in writing"[80] that the consumer has the right to incur that debt.[81] The Proposal, however, asserts that "because the consumer is obligated to repay [overdraft] funds, the financial institution is allowing the consumer to incur debt and defer its payment consistent with the TILA and Regulation Z definitions of "credit."[82] Indeed, the Proposal would create new comment 2(a)(14)-4 to provide that overdrafts are credit "whenever the consumer has a contractual obligation to repay the funds." But the consumer's contractual obligation to repay a

[77] *See Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 139 (1st Cir. 2019) (observing that overdraft fees "may compensate a bank for the service of continuing to hold open an overdrawn checking account").

[78] 15 U.S.C. § 1602(f).

[79] Right, Black's Law Dictionary (11th ed. 2019).

[80] 12 C.F.R. § 226.4(c)(3).

[81] This is more than a semantical difference. The CFPB's own research notes that consumers "value more control over which transactions would be approved or denied" and, as a result, some choose to use "more formal" credit products instead of overdraft services. *Consumer experiences with overdraft programs*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-consumer-experiences-with-overdraft-programs/full-report/ (last visited Mar. 30, 2024).

[82] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,861.

discretionary overdraft has no bearing on whether the consumer had a "right" to incur that overdraft in the first instance.

The Proposal conflates discretionary and contractual overdrafts because the CFPB has made a policy decision that discretionary overdraft services should be credit covered by TILA. Regardless of the merits of that policy decision, the CFPB has no authority to disrupt 50 years of settled law by amending TILA's definition of credit from "the right to incur debt" to "an amount the consumer is obligated to repay."

The Proposal further suggests (without support) that overdraft services provided without the financial institution's prior written agreement to pay the overdraft are no longer discretionary because institutions have automated their processes for determining whether to grant an overdraft. But automation has nothing to do with whether the institution has discretion to permit or refuse an overdraft. If the overdraft process is automated, that at most means that the institution has adopted internal rules for how it will exercise its discretion. Even if as a matter of institutional policy, a bank always honors overdrafts, it remains the case that the customer cannot legally *compel* the bank to do so and thus has no *right* to overdraw her account, which is the key consideration under TILA. Even if automation were somehow relevant, banks' automated systems still embody case-by-case discretionary judgments. The systems decline overdraft transactions for many reasons, including whether the account is already overdrawn, whether the individual customer has had excessive overdrafts, the type of deposits made, and the characteristics of the particular transaction that would result in an overdraft. Indeed, the Proposal recognizes that many banks have overdraft limits that are "dynamic, *i.e.*, the financial institution changes the limit for each account periodically based on account usage patterns, market conditions, or account and accountholder characteristics . . . ."[83]

Notably, while the Proposal asserts that financial institutions "operating automated overdraft programs exercise limited if any discretion in authorizing particular transactions," it does not cite any data about the prevalence or frequency with which financial institutions exercise their discretion to decline overdrafts. In fact, the CFPB's own data confirms "at all observed institutions using automated overdraft, some or all decisions were reviewed and could be overturned manually."[84] Banks can and do decline transactions that would overdraw a consumer's account, meaning that the consumer cannot rely on an overdraft transaction being approved. As a result, the consumer has no "right to incur debt" and for that reason, the overdraft is not TILA credit. The CFPB cannot depart from this statutory definition.

[83] *Id.* at 13,855.

[84] CONSUMER FIN. PROT. BUREAU, DATA POINT: CHECKING ACCOUNT OVERDRAFT AT FINANCIAL INSTITUTIONS SERVED BY CORE PROCESSORS 15 (2021) [hereinafter CFPB, Data Point: Checking Account Overdraft], https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf.

B. The Federal Reserve Board correctly determined that discretionary overdraft services are not covered by TILA

The Proposal asserts that "Congress did not exempt any category of overdraft credit from TILA."[85] It further asserts that the Federal Reserve Board nevertheless created an exception for overdraft services in the original adoption of Regulation Z by "using its exception (not its interpretive) authority…"[86] However, the Federal Reserve Board's 1968 proposed rule makes only general reference in the third paragraph of the Proposal to its authority under TILA to adopt regulations generally and that those regulations may provide for adjustments and exceptions in order to effectuate the statute.[87] Nowhere does the original Proposed or Final Rule indicate that the Federal Reserve Board was using adjustment or exception authority to exclude overdraft fees from the definition of finance charge when "the payment of the overdraft was not previously agreed upon in writing."[88] By contrast, when the Federal Reserve Board proposed to exempt certain classes of transactions regulated by the States in the same 1968 rulemaking, it cited to the exemption authority provided by TILA section 123.[89] In other words, the Federal Reserve Board made explicit reference to exemption authority when it intended to rely on it. It is therefore telling that the Federal Reserve Board made no mention of exception authority or TILA section 105(a) when it excluded fees for discretionary overdrafts from the definition of "finance charge."[90]

Moreover, the first reference to overdraft being a "courtesy" appears only in a staff interpretation of Regulation Z issued eight years after the regulation itself.[91] And even that interpretation does not support the CFPB's rationale. Although the interpretation refers to overdraft services as "an accommodation to [the bank's] customer" who "inadvertently overdraws that account," it meant only thereby to distinguish such services from "a prearranged line of credit privilege," where the bank lacks the discretion to insist upon immediate payment.[92]

The Proposal's mischaracterization of the Federal Reserve Board's authority is important because it demonstrates the CFPB's fundamental misunderstanding of the difference between discretionary overdraft services (not credit) and contractual extensions of credit previously agreed to in writing. The Federal Reserve Board had no need to rely on its exception authority in

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[85] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,866.

[86] *Id.* at 13,867 (citing Truth in Lending, 34 Fed. Reg. 2002, 2004 (Feb. 11, 1969)).

[87] 15 U.S.C. § 1604(a).

[88] 12 C.F.R. § 1026.4(c)(3).

[89] Truth in Lending, 33 Fed. Reg. 15,506, 15,516 (Oct. 8, 1968); 15 U.S.C. § 1633 ("The Board shall by regulation exempt from the requirements of this chapter any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this chapter, and that there is adequate provision for enforcement.").

[90] 34 Fed. Reg. at 2004; 12 C.F.R. § 226.4(c).

[91] *See* Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,866-67; Official Staff Interpretations, 42 Fed. Reg. 22,360 (May 3, 1977).

[92] 42 Fed. Reg. at 22,362.

determining that overdraft products are not credit and an overdraft charge is not a finance charge unless previously agreed to in writing. This is because the Federal Reserve Board's interpretation follows logically from TILA's definition of credit: "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[93] Where a bank allows a consumer to overdraw their account without a prior written agreement, the consumer does not have the "right" to a specific overdraft. When a consumer lacks such a right, the discretionary overdraft cannot be TILA credit. Instead, the consumer may be granted the overdraft or it may not, depending on the bank's discretionary determination. By comparison, when a consumer obtains a line of credit he or she has an absolute right to obtain credit in accordance with the terms of the contract. The lender has granted a right to access the credit and retains no contractual discretion. By retaining discretion, banks providing overdraft services have not provided their customers a "right" to access credit. As a result, they are not extending TILA credit to their customers.[94]

Regulation E likewise reinforces the above interpretation. The Federal Reserve Board promulgated Regulation E in 1979, implementing the Electronic Fund Transfers Act ("EFTA").[95] Throughout its history, Regulation E has distinguished between overdraft services and overdraft lines of credit. In the initial rulemaking for Regulation E, the Federal Reserve Board indicated that overdraft protection "[i]nvolves an extension of credit" only when there is "an agreement between a consumer and a financial institution to extend the credit when the consumer's account is overdrawn."[96] And on several occasions, the rulemaking associated overdraft "extensions of credit" (or "credit lines") with preexisting agreements.[97]

Further, the Federal Reserve Board explained in its 2009 Regulation E "Opt In" Proposed Rule that:

> Most institutions disclose that payment of overdrafts is discretionary and that the institution has no legal obligation to pay the overdraft. These transactions are generally not covered under Regulation Z if there is no written agreement between the consumer and the institution to pay an overdraft and impose a fee.[98]

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[93] 15 U.S.C. § 1602(f).

[94] We are aware of no form of TILA credit where the lender retains complete discretion to deny a consumer from accessing credit for reasons not explicitly set forth in the contract or loan. [*See Freeman v. Hawthorn Bank*, 516 S.W.3d 417, 423-24 (Mo. Ct. App. 2017) (holding that no loan contract is formed under Missouri law because bank expressly states it retains "discretion" to not pay an overdraft and "does not promise to pay all overdraft transactions").

[95] Electronic Fund Transfers, 44 Fed. Reg. 18,468 (March 28, 1979), to implement the Electronic Fund Transfer Act of 1978 ("EFTA").

[96] 44 Fed. Reg. at 18,482.

[97] *Id.* at 18,469 ("credit extensions under a preexisting overdraft agreement"), 18,472 ("existing overdraft credit line"), 18,474 ("extension of credit under an overdraft plan" and "preexisting overdraft credit lines").

[98] *E.g.*, Electronic Fund Transfers, 74 Fed. Reg. 5212 n.1 (proposed Jan. 29, 2009).

This excerpt reflects the implicit understanding that these transactions are not covered under Regulation Z precisely because the institution has no legal obligation to pay the overdraft and the consumer has no right to incur it. The CFPB similarly explained in its 2014 Prepaid Card Proposed Rule that the Federal Reserve Board's original adoption of Regulation Z "distinguished between 'bounce protection programs' where there is no written agreement to pay items that overdraft the account, and more formal line-of-credit overdraft programs where there is a written agreement to pay overdrafts."[99]

C. Congress has accepted Regulation Z's exclusion of discretionary overdraft

Congress has accepted the Board's interpretation of TILA. Had Congress believed that the Federal Reserve Board's exclusion of discretionary overdraft fees from the definition of finance charge was incorrect because it intended for TILA to apply to discretionary overdraft service fees, it could have amended TILA to that effect. Congress never did and it has therefore acquiesced to the Federal Reserve Board's interpretation.

The Federal Reserve Board first adopted 12 C.F.R. § 226.4(d) interpreting the statutory definition of finance charge in 1969. As discussed above, that provision excludes overdraft fees from the definition of finance charge "unless the payment of overdrafts were previously agreed to in writing."[100] In the 55 years since the Federal Reserve Board first adopted Regulation Z, Congress has made significant amendments TILA at least 13 different times.[101] More specifically, Congress amended TILA section 106, "Determination of the Finance Charge" three times since the Federal Reserve Board excluded discretionary overdraft service fees in 1969.[102] That Congress supports exclusion of discretionary overdrafts from TILA is further confirmed by the multiple bills introduced with minimal Congressional cosponsors, but not enacted, that would have amended TILA to clarify that all overdraft is credit. None of those bills became law.

Congress' declining to overturn an agency interpretation in the face of multiple bills attempting to do so is evidence that Congress agrees with the agency's interpretation. As the Supreme Court has held, "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation

[99] Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77,102, 77,118 (Dec. 23, 2014) (to be codified at 12 C.F.R. pts. 1005, 1026).

[100] 34 Fed. Reg. at 2004.

[101] *See, e.g.*, CONSUMER FIN. PROT. BUREAU, TRUTH IN LENDING ACT EXAMINATION PROCEDURES 10-15 (2021), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_tila-exam-procedures_2021-10.pdf (summarizing the most significant amendments to TILA and Regulation Z).

[102] *See, e.g.,* 15 U.S.C. § 1605. *See also* Monetary Control Act of 1980, Pub. L. No. 96-221 § 606, 94 Stat. 132 (1980) (codified as amended 15 U.S.C. § 1605); Truth in Lending Act, Pub. L. No. 104-29 §§ 2(a), (b)(1), (c)-(e), 3(a), 109 Stat. 271 (1995) (codified as amended 15 U.S.C. § 1605); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1100A(2), 124 Stat. 1376 (2010) (codified as amended 15 U.S.C. § 1605).

specifically designed to supplant it."[103] As just one example, in *Bob Jones v. United States*, the Supreme Court considered the appropriateness of two IRS rulings determining that charitable exemption status could not be granted to private universities that discriminated based on race.[104] The Court held that Congress implicitly acquiesced to the IRS decisions because it had considered at least 13 bills that would have overturned them in the years since they were adopted, but had declined to enact the bills every time.[105] In addition, Congress had amended the exact statutory provision interpreted by the IRS in the intervening years without overturning the decisions, further confirming its acquiescence.[106]

Here, just as in *Bob Jones,* Congress failed to amend TILA to cover discretionary overdraft services, despite multiple bills introduced that would have done so. Here, just as in *Bob Jones,* Congress amended the exact statutory provision at issue several times (TILA section 106's definition of finance charge) without making the change now being proposed by the CFPB. Here, just as in *Bob Jones,* Congress's failure to act over such a long period and given its clear awareness of the issue indicates its acceptance of the Federal Reserve Board's original exclusion of discretionary overdraft services from coverage under TILA.

D. Whether overdraft services are "courtesies" or "accommodations" has no legal significance

The Proposal attributes much significance to the Federal Reserve Board describing overdraft services as "accommodations" or "courtesies" provided by banks to their customers. For example, the Proposal cites a Federal Reserve Board official staff interpretation from 1977 in which it refers to overdrafts as an "occasional" accommodation to its customer, where banks "honor[] a check which inadvertently overdraws that account."[107] That interpretation addressed a request to clarify when overdraft charges are finance charges if a bank provides a demand deposit account with provisions for paying overdrafts by debiting the customer's bank credit card (*i.e.*, an overdraft line of credit).[108] The Federal Reserve Board, interpreting § 226.4(d), responded that charges for overdrafts honored pursuant to a prior written agreement like the one described were finance charges, whereas charges on regular checking accounts for overdrafts honored that the bank did not previously agree in writing to honor were not finance charges. In other words, the key distinction to the Federal Reserve Board was the existence of the prior written agreement to honor the overdraft, not the fact that the overdraft was a courtesy or an accommodation. Again, this logically flows from TILA's definition of "credit" because only

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[103] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (Congressional failure to change the definition of "navigable waters" after Army Corps passed a regulation requiring permit to dump on "wetlands adjacent" to waters of the United States was evidence that the agency construction was reasonable).

[104] 461 U.S. 574 (1983).

[105] *Id.* at 600.

[106] *Id.*

[107] 89 Fed. Reg. at 13,867 (citing Truth in Savings, 70 Fed. Reg. 29,582, 29,582, n.1 (May 24, 2005) (to be codified at 12 C.F.R. pt. 230).

[108] *Id.* at 22,362.

when there is such a written agreement that binds the creditor to provide credit does the consumer have the "right to incur debt." The Federal Reserve Board's passing reference to the fact that overdrafts were occasional or an accommodation was not the basis for its legal conclusion which instead rested on the presence (or not) of a prior written agreement in which the bank agreed to honor the overdraft.

Similarly, the Proposal cites a footnote in the Federal Reserve Board's 2005 Final Rule adopting changes to Regulation DD to address the advertising of overdraft services. This footnote notes that overdraft services are sometimes referred to a "courtesy overdraft protection."[109] However, the body text of that Final Rule explains that such services are excluded from Regulation Z not because they are offered as a courtesy but because there is "no written agreement between the consumer and institution to pay an overdraft."[110] Indeed, the Federal Reserve Board's amendments to Regulation DD in 2005 were intended to ensure that discretionary overdraft services were advertised to consumers accurately. To effectuate this, that rule requires, among other things, disclosures of "the circumstances under which the institution would not pay an overdraft."[111] It further provided as examples of a misleading advertisement "representing that the institution will honor all checks or transactions, when the institution retains discretion at any time not to honor any transaction."[112] The Federal Reserve Board's treatment of overdraft services in the Regulation DD rulemaking supports the conclusion that the reason such services are excluded from coverage under Regulation Z is because they are discretionary and the consumer has no right to incur them.

E. Proposed exemption for break-even overdraft credit lacks legal authority

TILA is only a 'disclosure statute' and 'does not substantively regulate consumer credit.'"[113] It does not give the CFPB authority to cap prices on services by financial institutions.[114] Yet the Proposal aims to do just that, albeit indirectly. Throughout the Proposal, the CFPB repeatedly stresses that overdraft fees are a significant source of profit for financial institutions, a fact the CFPB finds unpalatable. And the CFPB touts the reduction or elimination of these profits as an anticipated and intended consequence of the Proposal.[115] Thus, the point of

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[109] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,867 (citing Truth in Lending, 42 Fed. Reg. at 22,362).

[110] *Id.*

[111] 12 C.F.R. § 230.11(b)(1)(iv).

[112] 12 C.F.R. § 230.8(a) cmt8(a)-10.ii.

[113] *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1120 (9th Cir. 2009); *PayPal, Inc. v. CFPB*, 512 F.Supp.3d 1, 5-6 (D.D.C. 2020), rev'd on other grounds 58 F.4th 1273 (D.C. Cir./ 2023) (holding that a substantive restriction on whether a creditor can offer credit exceeded the CFPB's rulemaking authority under TILA).

[114] While Congress has subsequently added certain substantive provisions in TILA, the CFPB is not citing any of them as a basis for this rulemaking.

[115] *See* Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,853 (emphasizing that overdraft fees are "a source of billions of dollars in profits every year"). And it leaves no question about its desire to limit these profits; *id.* at 13,868 ("A . . . product that produces large amounts of revenue and profit . . . is not consistent with the concept of providing an additional service as a

the Proposal is to impose a Hobson's choice: reduce fees to a "breakeven" amount, or face burdensome and costly compliance rules.[116] Said another way, even if discretionary overdraft were "credit" under TILA, the CFPB would be wielding authority it did have (disclosure authority) to achieve what it otherwise could not: setting an actual price restriction prohibiting banks from profiting off a service they have long provided.

The Proposal justifies its price setting by relying on the mistaken premise that discretionary overdraft transactions are credit because they are "courtesies" offered to the consumer. By the Bureau's logic, the Proposal would subject only those overdraft services from which banks generate a profit — "Above Breakeven Overdraft Credit"—to coverage under TILA but continue to exempt "Non-Covered Overdraft Credit" from which banks do not profit. According to the Proposal, this change "would return the exception to its original conception – excepting overdraft services from Regulation Z when offered as a courtesy or an accommodation to its customers – while adapting it to fit within the modern payment systems."[117] That the CFPB now interprets "courtesy" to mean a bank cannot profit from the related fee just compounds its misunderstanding of the Federal Reserve Board's reasoning in excluding overdraft fees from TILA's definition of finance charge unless imposed pursuant to a written agreement. That interpretation had nothing do with whether a bank profited from the overdrafts it provided (courtesy or not); it turned entirely on whether the consumer had the "right to incur" the overdraft because that is how TILA defines "credit."[118]

When Congress enacted the Dodd-Frank Act, it delegated certain rulemaking and enforcement powers to the CFPB.[119] The Act authorizes it to "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."[120] This basic authority is limited in that all rules must be to "administer and carry out the purposes" of one or more federal consumer finance laws. The relevant law here is TILA, the purpose of which is to "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[121] To the extent Congress authorized the CFPB to exclude certain entities or transactions in TILA, it did so in sections 103 and 104. For example, Congress limited the term "creditor," as defined in TILA section 103(g), to exclude any person that does not

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courtesy."); *id.* at 13,891 ("With smaller profits on each transaction, very large financial institutions could have more of an incentive to educate their depositors and help them avoid negative balance episodes.").

[116] *Cf. Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012) (holding, in a different context, that an agency cannot use its power to "put a gun to the head" and engage in "economic dragooning that leaves the States with no real option but to acquiesce" to the agency's wishes).

[117] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,868.

[118] The lengthy Proposal includes no explanation as to why a service provided as a courtesy must mean that the provider of the courtesy cannot profit from the service.

[119] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5512(b)(1).

[120] *Id.*

[121] 15 U.S.C. § 1601(a).

"regularly" extend credit.[122] And the specific exclusions in TILA section 104 are repeated almost verbatim in Regulation Z's section for "Exempted Transactions."[123] Unlike other terms defined in TILA, the definition of finance charge contains no thresholds or other limiting principles that would authorize the CFPB to carve out institutions of certain asset sizes. More broadly, there is no indication that Congress expected, authorized, or encouraged the CFPB, in implementing TILA's disclosure requirements, to set price caps or size thresholds for the provision of credit.[124]

Congress was so concerned that the CFPB might enact price caps that Congress expressly barred the CFPB from establishing usury caps for credit products.[125] While this provision discusses usury only and does not expressly apply to this Proposal, that does not mean that Congress authorized CFPB to enact other forms of price thresholds in its rules. Rather, this express limitation is indication that Congress wanted to make clear that the CFPB is not in the price setting business. Congress instead authorized CFPB only to enact rules that "carry out the purposes and objectives" of TILA and the other consumer finance laws. The purpose of TILA is the informed use of credit. TILA contains neither exceptions nor instructions that would allow CFPB to exempt overdraft services from the regulation based solely on the cost of that service or the size of the entity that had provided it.

Congress did not authorize CFPB to establish rules for overdraft services based on the price of a service (let alone the profit to the provider). Congress did not define the term "finance charge" based on its amount but instead on whether the fee is "payable directly or indirectly by the person to whom the credit is extended and imposed directly or indirectly by the creditor as an incident to the extension of credit."[126] The same is true for the definition of "credit" and "creditor." Elsewhere in TILA, however, Congress has applied certain provisions only when the cost of credit exceeds a threshold amount. Congress amended TILA in 1994, through adoption of the Home Ownership and Equity Protection Act, to require mortgage lenders deliver certain disclosures only for those mortgages that exceed the average prime offer rate by "more than 6.5 percentage points."[127] In another credit law, the Military Lending Act, Congress applied certain provisions only to credit with an APR over 36 percent.[128] No such statutory instruction applies to the Proposal. There is simply no statutory justification for the CFPB's Proposal to amend Regulation Z to only cover those discretionary overdrafts that are "Above Breakeven" while excluding from coverage overdrafts provided under the same terms and conditions when the

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[122] Regulation Z, interpreting this term, explains that a "person regularly extends consumer credit only if it extended credit . . . more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year." 12 CFR 1026.2(a)(17)(v).

[123] 12 C.F.R. § 1026.3.

[124] While TILA section 105(f) authorizes the Bureau to exempt certain classes of transactions if it considers certain specified factors, the Proposal does not appear to rely on this 105(f) or consider any of the relevant factors

[125] 12 U.S.C. §5517(o).

[126] 15 U.S.C. § 1605(a).

[127] 15 U.S.C. § 1602(bb)(1)(A)(i)(I); Truth in Lending Act § 129.

[128] 10 U.S.C. § 987.

fees charged are below a certain amount. A consumer either has a right to incur an overdraft such that it is TILA credit or it does not have such a right and the overdraft is not TILA credit. The statutory text of TILA provides no support for determining whether a transaction is credit based on its price or the provider's profit.

Moreover, even if the CFPB has statutory authority to limit profitable overdraft fees, it has not given a reasonable explanation for doing so. The CFPB claims the Proposal would further TILA's purposes of (1) "protecting consumers against inaccurate and unfair credit billing and credit card practices"" and (2) "promoting the informed use of credit and comparison shopping across credit products."[129] It seems plain that if furthering these purposes were a goal of the Proposal, that goal should apply equally to Non-Covered Overdraft Credit. The CFPB's only justification for exempting Non-Covered Overdraft Credit is that it is a "courtesy" to consumers. Even if that is the case, were the CFPB genuinely concerned with promoting the informed use of credit or protecting consumers from inaccurate and unfair practices, it would apply TILA protections to all overdraft and not only to overdraft when the fees generate a profit. The CFPB's arbitrary distinction between Above Breakeven Overdraft Credit and Non-Covered Overdraft credit suggests its primary policy objective is reducing large banks' revenues, rather than promoting the informed use of credit for consumers.

Finally, at minimum, even if the Proposal's attempts to *indirectly* regulate profitable overdraft services could somehow be justified, the Proposal also *directly* imposes certain substantive regulations on profitable overdraft services, in violation of TILA's clear conferral of only disclosure authority. In particular, the Proposal would require banks that offer profitable overdraft protection that is accessible with a credit or debit card to underwrite to determine a customer's ability to repay.[130] That "substantive[] regulat[ion]" cannot plausibly be construed as a "disclosure" requirement within the CFPB's authority.[131]

An agency cannot do indirectly what it cannot do directly.[132] And an agency cannot leverage authority it does have to claim authority it lacks.[133] Yet that is what the Proposal would do here: condition the exercise of authority the CFPB does have (namely, disclosure authority) on banks' compliance with terms the CFPB does not have authority to impose (namely, overdraft fee caps). If this tactic were allowed to stand, then "any colorable tie to an agency's authority would permit the agency to act on a problem Congress never intended the agency to solve and would allow agencies to impose unreasonable regulations on citizens and industries to achieve

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[129] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13, 860, 13,868.

[130] *See id.* at 13,869, 13,877 (explaining that the Proposed Rule would extend certain "substantive protections" to overdraft services, including the "ability to pay provisions in [12 C.F.R.] § 1026.51").

[131] *See Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1120 (9th Cir. 2009).

[132] *Cf. T.I.M.E. Inc. v. United States*, 359 U.S. 464, 475 (1959) (refusing to permit an agency "to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly").

[133] *See Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022) (holding that an executive order imposing a vaccination mandate on federal contractors was likely unlawful because nothing in the Procurement Act authorized agencies to condition procurement contracts on the employees of contractors being vaccinated).

outcomes unrelated to the reason the regulation was purportedly adopted."[134] The CFPB could, for example, force banks to install smoke detectors in every branch by applying Regulation Z to the activities of those who refuse. No court would sustain such a policy, yet it is the same kind of choice that the Proposal forces upon banks here.

F. The arbitrary designation and application of a rule only to "Very Large Financial Institutions" lacks legal authority

The Proposal would also apply this new treatment of overdraft only to "very large financial institutions," which it defines as insured depository institutions or credit unions " with total assets of more than $10 billion and any affiliate thereof."[135] The Proposal cites no authority for exempting small institutions, other than an analogy to the CFPB's supervisory authority over financial institutions of $10 billion or more.[136] With respect to the exemption for small institutions, the Proposal says only that it "would cover financial institutions holding approximately 80 percent of consumer deposits as of December 2022 and responsible for 68 percent of overdraft charges."[137] The Proposal further explains that it is exempting smaller institutions "in light of the different circumstances smaller institutions may face in adapting to the proposed regulatory framework… "[138]

TILA does not provide the CFPB the authority to exempt institutions based on their asset size from coverage under the statute. TILA section 105 provides authority for the CFPB to exempt from all or part of the statute "all of any class of transactions" when certain conditions are met. TILA does not give the CFPB the authority to exempt classes of *persons*. Yet the Proposed Rule either covers or exempts the same transaction—overdraft services and fees—based solely on the institution participating in the transaction (*i.e.*, large banks versus small banks). The CFPB has no authority to make this kind of identity-based distinction here. As with fee thresholds discussed in the prior section, when Congress wants to create legal distinctions based on the size of financial institutions, it knows how to do so. In Title X of the Dodd-Frank Act, which established the CFPB, Congress excluded banks and credit unions with less than $10 billion in assets only from the CFPBs' enforcement and supervisory authorities.[139] It did not make the same exclusion from its rulemaking authority.[140] Elsewhere in the Dodd-Frank Act, Congress exempted the same banks from Electronic Fund Transfer Act provisions implemented by the Board regarding interchange fees.[141] Congress did not extend this same authority to

[134] *Wyoming v. U.S. Dep't of the Interior*, 493 F. Supp. 3d 1046, 1074 (D. Wyo. 2020).

[135] 89 Fed. Reg. at 13,860 (to be codified at 12 C.F.R. § 1026.62(b)(8)).

[136] 12 U.S.C. § 5515(a).

[137] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,860

[138] *Id.*

[139] 12 U.S.C. § 5515(a).

[140] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 1022(b)(1). That Congress did not apply this exception to the CFPB's rulemaking authority makes the CFPB's reliance on this provision all the more curious.

[141] *Id.* § 1075; 15 U.S.C. § 1693o–2.

CFPB's rulemaking authority under either the Dodd-Frank Act or TILA (except to exclude those who do not regularly extend credit). The absence of such clear instructions from Congress means CFPB is not empowered to bifurcate its rules solely based on the size of the institutions providing a covered service.

Even if the CFPB did have the authority to carve out small institutions, the Proposal lacks the justification for it to do so. The Proposal sets forth in great detail the alleged harms to consumers that flow from the proliferation of the modern overdraft service, primarily in the form of excessive fees. There is simply no rational justification for exempting small institutions given they impose an outsized percentage of overdraft fees. Small institutions hold 20 percent of deposits but (according to the Proposal) are responsible for 32 percent of overdraft charges to consumers.[142] The CFPB's own data also reflects that smaller institutions generate more revenue per account than larger ones from overdraft fees. Whereas the smallest banks with assets of $100 million or less that did not permit customers to opt-in to debit card overdraft protection generated $32.04 per account in overdraft revenue, banks with between $2 billion and $10 billion in assets averaged only $9.82 per account.[143] Similarly for institutions that did permit consumers to opt-in to overdraft protection on debit card transactions, the smallest banks generated $47.70 per account in overdraft fees, compared to $36.29 for the largest banks.[144] The CFPB appears to have decided that customers of these smaller banks do not deserve the same protections as customers of large banks.

In particular, the CFPB has not explained why subjecting smaller institutions' overdraft services to TILA "does not provide a meaningful benefit to consumers," while subjecting larger institutions' services would.[145] Further, under section 105(f)(2), before exercising its exemption authority, the CFPB must consider five factors: (1) the amount of the loan and whether disclosures provide a benefit, (2) the extent to which application of TILA would hinder the credit process for the transactions, (3) the status of the borrower, (4) whether the loan is secured by the consumer's principal residence, and (5) whether the exemption would undermine the goal of consumer protection.[146]

At minimum, the CFPB must issue a new notice of proposed rulemaking that discusses the five section 105(f)(2) factors before it can issue a final rule. Section 105(f)(2) requires the CFPB to publish its reasoning on the five factors at the time the proposed rule "is published *for comment*."[147] The final rule is thus too late to include an initial discussion of the section

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[142] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13860 ("This proposal would cover financial institutions holding approximately 80 percent of consumer deposits as of December 2022 and responsible for approximately 68 percent of overdraft charges as of December 2022.") (citations omitted).

[143] CFPB, Data Point: Checking Account Overdraft, *supra* note **Error! Bookmark not defined.**, at 41.

[144] *Id.*

[145] 15 U.S.C. § 1604(f)(1).

[146] *Id.* § 1604(f)(2).

[147] *Id.* (emphasis added).

105(f)(2) factors. In addition, the general notice-and-comment provision of the APA, which provides that the rulemaking agency shall "give interested persons an opportunity to participate in the rule making" by submitting comments, independently requires the CFPB to issue a new notice of proposed rulemaking.[148] An "opportunity" to comment means a "*meaningful* opportunity,"[149] which is possible only where the parties do not have "to divine the agency's unspoken thoughts" on essential aspects of the proposed rule.[150]

And even if the CFPB's failure to address statutorily mandated considerations could be ignored, the CFPB's justification for the Proposal would still be fatally flawed. To begin with, the Proposal does not even attempt to give a reasonable explanation for exempting smaller institutions. The Proposal notes that the $10 billion asset threshold is used elsewhere to define the institutions subject to the CFPB's supervisory authority, but does not explain why that threshold is relevant in this context.[151] The Proposal also notes that smaller institutions "may face" "different circumstances" than larger ones, but does not identify what those circumstances might be or why they are material.[152] The Proposal thus fails to identify *any reason* why the CFPB *thinks* smaller institutions should be treated differently, let alone a good one.

G. The Proposal ignores prudential guidance related to overdraft services

The Proposal entirely disregards relevant regulations and guidance from the prudential regulators relevant to banks' overdraft services. The OCC has established that overdraft services are deposit products, that overdraft fees are not interest, and that such fees should be set in accordance with a four-part test set forth in OCC regulations. The CFPB completely ignores the OCC's approach, which several courts have held is entitled to deference.

In 2001, the OCC initially clarified that overdraft fees are "deposit account services" charges and not "interest."[153] The OCC again set forth its position in a 2007 interpretive letter, which explains that "[c]reating and recovering overdrafts have long been recognized as elements of the discretionary deposit account services that banks provide."[154]

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[148] *See* 5 U.S.C. § 553(c).

[149] *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) (emphasis added)

[150] *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009).

[151] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,860.

[152] *Id.*

[153] Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 8178, 8180 (Jan. 30, 2001) (to be codified at 12 C.F.R. pts. 1, 7, 23).

[154] OCC, Interpretive Letter on Overdraft Practices (May 17, 2007), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2007/int1082.pdf. The Department of Justice similarly explained in a 2005 amicus brief that clearing overdrafts and assessing fees are "activities that have long been considered as associated with (as well as necessary to) the administration of deposit accounts." *Id.* n.8 (quoting Brief of the United States at 19-21, *Miller v. Bank of America, N.A.*, 144 Cal. App. 4th 1301 (2006)).

Specifically, OCC regulations set forth how national banks must establish fees they charge for depository services, including overdraft services.[155] Those regulations explain that the "establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles."[156] Banks then must consider four factors in setting their fees:

- Cost incurred in providing the service;
- Deterrence of misuse by customers of banking services;
- Enhancement of the bank's competitive position; and
- Safety and soundness of the institution.

The Proposal fails to address several of these factors, including deterrence, safety and soundness, and enhancement of the bank's competitive position (except to note in a footnote that banks reported these are in fact the bases on which they determine the amount of their overdraft fees).[157]

In its 2007 interpretive letter, the OCC explained it was proper for national banks to consider these factors when considering the amount at which to set their overdraft fees.[158] The OCC explained that a "bank's authority to provide products or services to its customers necessarily encompasses the ability to charge a fee for the product or service."[159] The OCC then evaluated how an overdraft service proposed by a national bank satisfied each the four factors described above.[160] The two federal appellate courts to consider this guidance both concluded it is entitled to deference.[161]

By adopting a one-size-fits-all safe harbor, the CFPB would be forcing the OCC to abandon its four-factor test for imposition of fees for overdraft services. The CFPB fails to even address its fellow agency's approach to overdraft and other deposit services generally and with

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[155] 12 C.F.R. § 7.4002(b)(2).

[156] *Id.*

[157] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,887 n.231 ("In narrative responses to supervisory information requests, financial institutions generally stated that discretionary overdraft fees are set using factors such as: (1) the direct and indirect cost of offering OD services, (2) deterrence effects, (3) positioning with respect to other competitors, (4) customer feedback, experiences, and utility, (5) regulatory requirements and (6) safety and soundness concerns.") (citing CONSUMER FIN. PROT. BUREAU, OVERDRAFT AND NSF PRACTICES AT VERY LARGE FINANCIAL INSTITUTIONS 13 (2024)).

[158] OCC, Interpretive Letter on Overdraft Practices, *supra* note **Error! Bookmark not defined.** (interpreting the National Bank Act).

[159] *Id.* (explaining that 12 C.F.R. § 7.4002(a) "expressly reaffirmed" banks' ability to charge for overdraft services).

[160] *Id.*

[161] *Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 136 (1st Cir. 2019); *Walker v. BOKF, Nat'l Ass'n*, 30 F.4th 994, 998 (10th Cir. 2022); *see also Freeman v. Hawthorn Bank*, 516 S.W.3d 417, 424 (Mo. Ct. App. 2017) (under Missouri law, "the overdraft fee is imposed on a deposit account, not on a loan").

respect to the specific factors identified by the OCC. For example, the CFPB does not address the deterrent effect of overdraft fees. It seems uncontroversial that a higher fee for an overdraft would deter people from overdrafting. In its recent proposal regarding certain NSF fees, the CFPB expressly sought comment on whether such fees have a deterrent effect and its final rule on credit card late fees discussed deterrence in detail.[162] Here, however, the CFPB fails to even address this possibility. Additionally, the CFPB neglects safety and soundness altogether. While the OCC recognized the importance of safety and soundness to an evaluation of a fee, the CFPB does not mention it. Removal of fee income from banks, particularly those dependent on overdraft revenue, could negatively impact some institutions' safety and soundness.

H. The Proposal fails to conduct a Regulatory Flexibility Act analysis

The Proposal cannot lawfully be issued until the CFPB conducts a Regulatory Flexibility Act analysis and gives the public an opportunity to comment on that analysis. As the Proposal acknowledges, "[t]he Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities."[163] But it deemed an IRFA unnecessary here because "this proposed rule only applies to financial institutions with more than $10 billion in total assets" and so supposedly "affects no small entities."[164]

This reasoning is inadequate. The CFPB failed to consider, as the Federal Reserve Board has recognized in the Reg II context, that imposing fee caps on large banks could have a significant impact on small banks by pressuring them to lower their own fees in order to compete with larger banks.[165] Commenters alerted the CFPB to this issue before the CFPB published the Proposal.[166] Yet the CFPB failed to conduct any analysis on the topic. Instead, the CFPB merely presumed that such businesses would not be affected because the rule does not apply to them, which is no real analysis at all. The CFPB cannot proceed with issuing a final rule until it conducts an IRFA and receives public comment.[167] And any final rule must include a final regulatory flexibility analysis that responds to the comments received.[168]

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[162] Fees for Instantaneously Declined Transactions, 89 Fed. Reg. 6,031, 6,048 (Jan. 31, 2024) (to be codified at 12 C.F.R. pts. 1042); Credit Card Penalty Fees (Regulation Z), 89 FR 19,128, 19,152-53 (Mar. 15, 2024).

[163] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,896; *see* 5 U.S.C. §§ 603–605.

[164] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. at 13,896.

[165] *See* Debit Card Interchange Fees and Routing, 88 Fed. Reg. 78,100 (Feb. 12, 2024) (to be codified at 12 C.F.R. pt. 235).

[166] *Projected Rulemakings on Non-sufficient Funds (NSF) Fees and Overdraft Fees*, AM. BANKERS ASS'N (Jan. 3, 2024), https://www.aba.com/advocacy/policy-analysis/projected-rulemakings-on-nsf-fees-and-overdraft-fees.

[167] 5 U.S.C. § 603.

[168] *Id.* § 604(a).

CONCLUSION

For these reasons, CBA encourages the CFPB to rescind the Proposal and to undertake further comprehensive review of the overdraft market before promulgating changes that may have negative effects for consumers, impeding their ability to access tools necessary to address a wide variety of financial needs.

Respectfully,

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General Counsel
Head of Regulatory Affairs