March 25, 2024
Via Electronic Mail, Regulations.gov

Comment Intake – 2024 NPRM Fees for Instantaneously Declined Transactions
c/o Legal Division Docket Manager, Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20052
2024-NPRM-NSF@cfpb.gov

Re: Docket No. CFPB-2024-0003 – Fees for Instantaneously Declined Transactions

To Whom it May Concern:

The Consumer Bankers Association (CBA)[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (the CFPB or Bureau) Notice of Proposed Rulemaking on Fees for Instantaneously Declined Transactions [2] (the Proposal or Proposed Rule). Under the Proposed Rule, one-time debit transactions, ATM transactions, and person-to-person transactions would be covered. The Bureau states it has preliminarily concluded that the targeted fees are abusive under the Consumer Financial Protection Act (CFPA) because they represent unreasonable advantage-taking of consumers who lack awareness of the risks, costs, or conditions of a financial service or product.

CBA appreciates that the Bureau is engaging in a notice and comment rulemaking process for this rule on abusiveness. However, this Proposal is a solution in search of a problem as it seeks to solve a market problem that simply does not exist. Additionally, CBA is concerned about the lack of clarity regarding "instantaneous" or "near-instantaneous" transactions given the novelty of this regulatory concept and the growth in popularity of faster payments. We also request the Bureau extend the effective date to 90 days so that our members may complete necessary compliance updates, again given the novelty of the Bureau's use of abusiveness here. Finally, while the market failure the CFPB attempts to solve for does not exist, CBA reiterates concerns regarding the aggressive development and future application of CFPB's abusiveness authority. These regulatory efforts create costs– opportunity costs for both regulators and industry– and important compliance and operational risk-related costs. It isn't clear what, if any, consumer benefit would offset these costs. Further, such aggressive development will stifle innovation and ultimately limit our members' ability to serve

[1] CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.
[2] Fees for Instantaneously Declined Transactions, 89 Fed. Reg. 6,031 (Jan. 31, 2024).

their customers. As the CFPB considers next steps, we would appreciate attention to the concerns described in greater detail below.

I. The Proposal is A Solution In Search of A Problem As It Seeks To Solve A Market Problem That Does Not Exist.

We appreciate that the Bureau is following the notice and comment rulemaking process. However, promulgating a rule based on a market failure that simply does not exist and frustrates the public's ability to provide meaningful comment, and ultimately minimizes the utility of the guidance.

A. CFPB's assertion that financial institutions are looking for ways to harm their customers is unproductive and suggests that the outcome of this Proposed Rule is predetermined.

We were surprised and dismayed to see the Bureau's characterization of our members as "concot[ing] new junk fees for fake services. . .and. . . innovating to impose extra fees for no value."[3] America's leading banks play a pivotal role in supporting consumers and the economy at large. From helping families buy their first home and save for their children's education, to supporting entrepreneurs opening a small business, and so much more, CBA is proud of the role banks play to help Americans achieve the American Dream. In this vein, CBA and our members support consumer protection.

By leading the release of notice and comment rulemakings with inaccurate inflammatory language, the Bureau raises the risk that it is inappropriately predetermines the outcome of this rulemaking before considering public comment. Whether it's through the development of consumer tools such as mobile apps, or other innovative products, financial institutions are constantly innovating to better serve their customers, not to extract fees for "no value" as the Bureau suggests. CBA is concerned that the CFPB's statements are part of a series of unfounded mischaracterizations about the marketplace that could ultimately be construed as a deliberate attempt to demonize a competitive, and well-regulated marketplace to pave the way for unnecessary regulatory action.[4] This not only creates clear reputational harm to the banking industry – but it also damages the reputation of the CFPB, by creating the appearance that the CFPB doesn't understand the marketplace it's tasked with regulating and prioritizes political wins and headlines over data and long-term consumer welfare.[5]

---

[3] 89 Fed. Reg. 6,031 (Jan. 31, 2024).

[4] See e.g., Consumer Bankers Ass'n, Facts Matter: CBA Uses CFPB Data to Set Record Straight on CARD Act Report.

[5] See, e,g., Testimony of Lindsey Johnson, President and CEO of Consumer Bankers Association before the U.S. House Financial Services Committee Subcommittee on Financial Institutions and Monetary Policy (March 7, 2024), https://docs.house.gov/meetings/BA/BA20/20240307/116927/HHRG-118-BA20-Wstate-JohnsonL-20240307.pdf ("As Federal Reserve Governor Michelle Bowman recently made clear, "We live in a time when confidence in public institutions is waning. As such, the banking agencies should strive to demonstrate beyond doubt that they execute their duties in an independent manner, focusing on statutory obligations." At the very least, regulators must follow the law. And while policymakers are entitled to their own opinions, they aren't entitled to their own facts. The politicization of the CFPB's policymaking apparatus erodes public confidence in government as a whole, damages the

Further, statements by both the Bureau and the White House raise concern about whether the CFPB's ability to review and consider substantive comments with an open mind, as required by the Administrative Procedure Act, is compromised.[6] In that regard, prior to the finalization of the comment process, much less the rulemaking, the White House has already released public statements taking political credit for proposals that would save consumers billions of dollars of NSF fees. [7] Accordingly, even if public comment and data showed a clear case for the withdrawal or reversal of the proposed rule, the CFPB could not pursue such changes without actually reversing a political promise.

B. Most banks do not charge insufficient funds fees.

As discussed below, the Proposed Rule and the Bureau's own data indicate that insufficient funds fees (NSF) are rarely used, especially as it relates to instantaneous and near instantaneous transactions.[8] In October 2023, the CFPB released a data spotlight on NSF fees, which highlighted that banks have eliminated the vast majority of NSF fees and estimated that consumers save almost $2 billion annually from these bank-led changes.[9] In this data spotlight the CFPB highlights nearly two-thirds of banks with more than $10 billion of assets have eliminated NSF fees– "representing an estimated 97 percent of annual NSF fee revenue earned by those institutions"– while a majority of banks that earned the most from NSF fee revenue have eliminated these fees entirely. Additionally, none of the largest banks (those with more than $75 billion of assets) charge NSF fees. The CFPB even notes that this is due to "changes in bank policies," as opposed to the result of regulation.

The Proposed Rule indicates that as faster payments develop, and as the Bureau regulates other aspects of the deposit product marketplace, banks *may* begin charging NSF fees for instantaneous and near instantaneous transactions.[10] The Bureau suggests its Proposed Rule is a prophylactic measure to prevent future consumer harm. [11]However, the Bureau fails to substantiate their belief that banks will begin to charge fees they've largely eliminated. Instead, in the discussion of market conditions, the

CFPB's long-term durability, and may lead to policy outcomes that are optimized for short term political wins, at the cost of consumers' long-term financial health.").

[6] *Air Transport Ass'n of America Inc. v. National Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (stating that "[d]ecisionmakers violate the Due Process Clause and must be disqualified when they act with an "unalterably closed mind" and are "unwilling or unable to rationally consider arguments.").

[7] The Biden Administration announced that the CFPB's proposed rules would save consumers "approximately $19.5 billion annually" on credit card late fees, overdraft fees, and non-sufficient funds (NSF) fees" even though the rulemaking comment period has not yet closed on either overdraft or NSF proposal. White House Press Release, 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/.

[8] 89 Fed. Reg. at 6,032.

[9] https://www.consumerfinance.gov/dataresearch/research-reports/vast-majority-of-nsf-fees-have-been-eliminated-saving-consumers-nearly-2billion-annually

[10] 89 Fed. Reg. at 6,038, "Financial institutions have ongoing incentives to generate revenue, and NSF fees may become increasingly appealing as a revenue source in the absence of this proposal. For example, if the recently released Overdraft Proposed Rule is finalized and curbs overdraft fee revenue, institutions might have an incentive to impose new fees."

[11] 89 Fed. Reg. at 6,038.

CFPB relies upon eight and twelve-year old data to suggest that NSF fees are incurred by vulnerable populations.[12] Furthermore, the Bureau cites to consumer confusion regarding NSF and overdraft fees as justification for this rulemaking. As the *single*, nearly four-year-old, consumer complaint cited in the Bureau's stakeholder outreach suggests, this complaint was sent to the bank and appropriately resolved.[13]

II. The Bureau Needs To Clarify "Instantaneous" And "Near-Instantaneous" Given The Advancement In Payments Technology.

A. The Bureau should consider providing definitions or examples of what it means (or does not mean) for a payment to be "instantaneous" or "near-instantaneous."

The Proposal states that it would be an abusive practice under the CFPA for a "covered financial institution" to charge a NSF fee on covered transactions, which are defined as consumer payment transactions that are declined "instantaneously or near-instantaneously" due to insufficient funds in a Regulation E account.[14] Additionally, the Proposal states that "[a] declination occurs instantaneously or near-instantaneously when the transaction is processed in real time and there is no significant perceptible delay to the consumer when attempting the transaction."[15] The proposed regulation text does not define instantaneously or near-instantaneously, nor does it provide commentary or examples of situations where a transaction would or would not be covered. Historically, the Bureau has provided examples of transactional coverage in other rulemakings.[16]

The Bureau should consider providing a definition of "instantaneous" and "near-instantaneous" in regulation text and examples in commentary. Specifically, the Bureau should consider how the development of faster payments may impact when a transaction would be "near-instantaneous." For example, the Proposal suggests that a transaction would not be covered if it is declined or rejected due to insufficient funds "hours or days" after the initial request. It would be helpful if the Bureau included this distinction in the regulation itself and provided example transactions, especially in light of the involvement of third parties like Peer-to-Peer payment providers. To facilitate compliance with the rule, banks need this clarity and certainty to know what transactions are covered by the rule. In other words, given that the operative aspect of the abusiveness determination is time-constricted, it is imperative that industry be provided with additional details on when exactly a transaction is "near-instantaneous."

III. The Proposal Repeats Flawed Characterizations Of The CFPB's Interpretation Of Abusiveness.

---

[12] 89 Fed. Reg. at 6,033.
[13] 89 Fed. Reg. at 6,035.
[14] *Id.*, at 6,050, proposed § 1042.2(c).
[15] *Id.*, at 6,037.
[16] See e.g., 12 C.F.R. pt. 1005, Supp. I, cmt. 3(b)(1)-1 and 2 (commentary examples of what Fund transfers are covered and not cover under 12 C.F.R. § 1005.3(b)(1).

As we noted in our response to the Bureau's April 2023 Policy Statement on Abusive Acts or Practices (Abusiveness Policy Statement), the Bureau's proposed standard for finding that conduct is abusive in this Proposed Rule departs from well-established federal policy on consumer protection.[17] Specifically, the CFPB makes a preliminary finding that charging an NSF fee on covered transactions is abusive. However as discussed above, the practice the Bureau identifies as abusive rarely, if at all, occurs in the marketplace. The presence of a market failure is a necessary predicate for a rulemaking.

A. *The Proposed Rule's view of a consumer's lack of understanding is inconsistent with the Dodd-Frank Act and fails the CFPB's own test.*

In the Proposed Rule the CFPB concludes that consumers must lack awareness of the risks, costs, and conditions in covered transactions, because the Bureau assumes consumers would presumably not otherwise go through with a transaction that will certainly be declined and for which they will pay a fee.[18] The Bureau then goes on to use the Abusiveness Policy Statement to support its assertion that consumers' lack of awareness does not need to be reasonable.[19] As a threshold matter, the Bureau's interpretation of reasonableness is inconsistent with the statutory language as the actual standard is taking "*unreasonable* advantage of a lack of understanding."[20](emphasis added).

Notwithstanding the Bureau's incorrect assertion that for conduct to be considered abusive under the CFPA there is no requirement that the lack of understanding be reasonable, the conduct the Bureau attempts to identify as abusive does not even meet the Bureau's own test. The Proposed Rule concludes that consumers charged NSF fees on covered transactions lack understanding of the material risks, costs, or conditions of their account at the time they are initiating covered transactions and as such, charging NSF fees on covered transactions is abusive.[21] However, as discussed below, CFPB's suggestion that consumers do not have insight into their finances is incorrect.

CBA disagrees with the Bureau's suggestion that consumers do not know how to manage their own money, particularly the CFPB's assertion that innovations in payments precipitate consumer harm. In order to substantiate its claim that consumers lack understanding, the rule paints an inaccurate picture of the marketplace and ignores the tools and resources available to consumers to manage their finances. Specifically, the rule suggests, without evidence, that innovations in payments, including the use of debt cards, make it so consumers are unable to keep track or manage their funds.[22] The Proposal goes on to rely on a single article from over seven years ago to suggest that

---

[17] See CBA's comment letter in response to Docket No. CFPB–2023–0018, Statement of Policy Regarding Prohibition on Abusive Acts and Practices, https://www.consumerbankers.com/cba-media-center/media-releases/icymi-cba-advocates-revisions-cfpb-policy-statement-abusive-acts-or.
[18] 89 Fed. Reg. at 6,042.
[19] 89 Fed. Reg. at 6,042.
[20] 12 U.S.C. § 5531(d)(2)(A) (emphasis added).
[21] 89 Fed. Reg. at 6,042.
[22] 89 Fed. Reg. at 6,042.

bank apps may not reliably show a consumer their account balance accurately and because perceived inaccuracy, a consumer cannot reliably check deposit account balances and therefore any charge dependent on a consumer knowing their account balance is abusive. In fact, consumers have considerable resources to track, monitor and control their spending habits. Banks have developed consumer-friendly mobile apps and online banking tools with detailed and accurate real time information about account balances, particularly for card and digital payment transactions. Further, given the high level of competition in the deposit markets, banks vigorously continue to innovate in this space.[23] There are also a plethora of budgeting apps and programs available to help consumers manage their finances.[24] Consumers not only have tremendous choice when it comes to the type of budgeting tools available to them, they are also able to engage with these tools to customize them to their unique needs. In particular, balance alerts and transaction alerts for specific transaction types are available to monitor spending from banks. Further, the Proposal relies on outdated information when it suggests that despite these innovation in payments, fifteen percent of Americans do not own a smart phone. According to recent data on mobile phone usage from the Pew Research Center, the vast majority of Americans, 97% own a cellphone of some kind and nine-in-ten own a smartphone.[25] Despite the growth and increased utilization of mobile phones, having a mobile phone is not a prerequisite for being able to manage ones own money.

B. The Proposed Rule dismisses the value of consumer disclosure.

The Proposal improperly dismisses the value of disclosure, much less Congressional direction on a range of consumer finance laws, and inappropriately draws conclusions that could subject almost every fee or practice to a finding of abusiveness. The Proposed Rule states that the CFPB considered disclosure as a possible remedy to the consumer lack of understanding for NSF fees for covered transactions but concluded that because disclosure would be infeasible at point of sale, that disclosure would not be an effective remedy.[26] The Bureau sets an unreasonably high standard for adequate disclosure that is inconsistent with decades of federal consumer financial protection law. Specifically, the Proposal fails to acknowledge the Bureau's own rules under the Truth in Savings Act (TISA) that require disclosure of NSF fees at account opening. These disclosures have been effective for decades. Instead, the Proposal implies that the only

---

[23] See, e.g.,. Ron Shevlin, How Fintechs Are Dominating New Checking Account Openings, Forbes (July 5, 2023), https://www.forbes.com/sites/ronshevlin/2023/07/05/the-checking-account-war-is-over-and-the-fintechs-have-won/?sh=68df593e3a31 ("According to Cornerstone's survey, 14% of Americans have opened a new checking account this year—and we're only half way through the year. In all of 2022, 15% of consumers opened a new checking account—up from 12% in 2021 and 10% in 2020.")

[24] Plaid's 2022 Consumer Survey: The Fintech Effect ("With eight in ten consumers using digital financial apps and services in 2022 (80%), fintech's COVID acceleration is holding strong. Half of Americans use fintech to manage their finances daily (48%) — up from 42% in '20 to 44% in '21 — and consumers reported a 10% increase year-over-year in the number of fintech apps they use, highlighting technology's central role in consumers' financial lives.")

[25] Pew Research Center, Mobile Fact Sheet (Jan. 31, 2024) https://www.pewresearch.org/internet/fact-sheet/mobile/?tabId=tab-5b319c90-7363-4881-8e6f-f98925683a2f

[26] Id. at 6038.

option for disclosure is at the time the fee will be charged, without explaining why current and well-accepted account opening disclosures are not appropriate.[27]

The Bureau concludes, without evidence or additional research, that disclosure at the time the charge is imposed is not a remedy to potentially abusive conduct because "some consumers may not understand even the most well-crafted disclosure. Taken to its logical conclusion, it will never be the case that all consumers understand all disclosures, all the time. This approach is also inconsistent with Congressional finding underlying TISA. Congress found that "competition between depository institutions would be improved" through the "clear and uniform" disclosure of interest rates and "fees that are accessible against deposit accounts," so that consumers can shop effectively.[28] The Bureau's absolutist approach to consumer awareness suggests that disclosed fees and practices could be viewed as abusive.

Most of the Bureau's consumer financial laws, TISA, the Truth in Lending Act, the Electronic Fund Transfers Act, and the Real Estate Settlement Procedures Act are founded upon consumer disclosure. These laws are premised on the foundational belief that clear and timely disclosures empower consumers with the information they need to shop for the right products and services for their circumstances. Congress would not have authorized and directed the Bureau to implement these consumer financial laws and their disclosure requirements, if Congress did not believe that disclosure was an appropriate solution.

* * *

CBA values the opportunity to comment on this Proposal. In light of the absence of market problem, CBA hopes that the Bureau will reevaluate the necessity of this rulemaking and withdraw this Proposal. However, in the event the Bureau decides to finalize this rule, we would appreciate the Bureau providing greater clarity on the operative terms of the regulation to clarify the limited scope of this rulemaking. Additionally, given this is a unique rule on abusiveness, we request the Bureau extend the effective date to 90 days so that our members may complete necessary systematic updates, especially given the unique UDAAP nature of this rulemaking. CBA remains available to meet with the Bureau to discuss any of the issues discussed in this letter and develop solutions that will ensure a tenable and viable abusiveness policy that protects consumers and provides industry with clear rules of the road.

Sincerely,

Rachel Ross
Senior Regulatory Counsel, Vice President, Associate General Counsel
Consumer Bankers Association

[27] Id.
[28] Pub. L. No. 102-242, § 262 (1991) (codified at 12 U.S.C. § 4301).