U.S. Chamber of Commerce

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March 25, 2024

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 20552

Re: Notice of Proposed Rulemaking for Fees for Instantaneously Declined Transactions; Consumer Financial Protection Bureau (88 Fed. Reg. 6031, Jan. 31, 2024)

To Whom It May Concern:

The Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau ("CFPB") regarding the Notice of Proposed Rulemaking for Fees for Instantaneously Declined Transactions ("Proposed Rule").[1]

The CFPB proposes to prohibit covered financial institutions from charging nonsufficient funds ("NSF") fees when consumers initiate payment transactions that are instantaneously or near-instantaneously declined. This Proposed Rule is unnecessary, speculative, and rests on an improper interpretation of the statutory prohibition of abusive acts and practices. It is apparent that the true purpose of this rulemaking is to allow the CFPB to put into regulation an inappropriate reinterpretation of abusive acts or practices that it had previously articulated in the 2023 Policy Statement on Abusiveness.[2]

The Chamber is concerned that the rulemaking is not evidenced-based, would inhibit the use of products that are already highly regulated and would adversely impact

[1] *See Proposed Rule; Request for Public Comment: Fees for Instantaneously Declined Transactions*, CFPB-2024-0003, 89 Fed. Reg. 6031 (Jan. 31, 2024) (hereinafter "*Proposed Rule*").
[2] CFPB, Policy Statement on Abusive Acts or Practices (Apr. 3, 2023), https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/ (hereinafter the "Statement"). We refer the CFPB to the statement the CCMC and other trade groups provided to the CFPB about our concerns with the CFPB's interpretation of abusiveness in the Statement. *See* BPI, et. al, *Re: Statement of Policy Regarding Prohibition on Abusive Acts or Practices* (Docket No. CFPB–2023– 0018) (July 3, 2023), https://bpi.com/wp-content/uploads/2023/06/BPI-Comment-response-to-CFPB-Abusiveness-Policy-Statement-2023.07.03.pdf.

the availability of consumer-friendly financial products. We strongly urge the CFPB to reconsider this rulemaking.

The CFPB acknowledges that NSF fees are rarely charged for instantaneously or near instantaneously declined transactions.[3] The CFPB also recognizes the market trend away from NSF fees generally—a trend reflecting changes made proactively by market participants in response to competitive market forces.[4] The CFPB itself notes that many financial institutions have stopped charging NSF fees,[5] but nonetheless proceeds with this rulemaking on the basis of speculation that the future may see an *increase* in the use NSF fees charged for instantaneously or near instantaneously declined transactions.

The CFPB has claimed to be a data-driven agency. Here, however, the CFPB would proceed on speculation alone—not on the basis of evidence of a problem it seeks to solve or of a likely material risk that it seeks to mitigate. This is a mistake. The CFPB should not issue new rules for the financial services marketplace on the basis of its guess of what the future holds. The CFPB lacks evidence that financial institutions would charge NSF fees on instantaneously or near-instantaneously declined transactions in the future and that they would do so in a manner that constitutes an abusive act or practice that harms consumers.

The CFPB's decision to proceed on the basis of speculation and reshape the law in a purely abstract context unsurprisingly leads to a distorted and misguided interpretation of abusiveness the statutory standard for abusive acts and practices. Existing regulations—including those that impose relevant disclosure requirements—already protect consumers against potentially abusive acts or practices in connection with nonsufficient funds fees. A financial institution should not be found to be engaged in abusive conduct based on a lack of consumer understanding when it clearly and conspicuously discloses the terms and conditions of its products and services, including applicable fees. Nor should the CFPB conclude with all certainty that a financial institution cannot in any circumstances provide a clear disclosure to a consumer of when and how a fee would be charged in accordance with applicable regulations for deposit account opening. The CFPB's interpretation to the contrary is a novel and incorrect reading of the Consumer Financial Protection Act ("CFPA").

We accordingly write to make the following points:

- The rulemaking is unnecessary based on current and expected future market conditions and risk of consumer harm.

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[3] *Proposed Rule* at 6032.
[4] *Id.* at 6032-33.
[5] *Id.* at 6032.

- The CFPB should not set an entirely new rulemaking standard based on mere speculation about potential future issues in a future version of the market.
- The CFPB should adhere to the abusive standard written by Congress and abandon its novel and incorrect reinterpretation of abusive acts and practices.

I. The rulemaking is unnecessary based on current and expected future market conditions and risk of consumer harm.

The CFPB acknowledges that the NSF fees that would be banned under the rule (fees specifically on instantaneously or nearly instantaneously declined transactions) are virtually nonexistent.[6] The current marketplace accordingly provides no justification for banning NSF fees for instantaneously or nearly instantaneously declined transactions.

As part of its justification for the Proposed Rule, the CFPB nonetheless estimates that the Proposed Rule would save consumers between $16.2 and $64.6 million annually. This estimate is unfounded. Speculating without explanation, the CFPB reached this conclusion by assuming that in the future, revenue from NSF fees on transactions that are instantaneously or near-instantaneously declined would correspond to between 5 and 20 percent of current total annual NSF fee revenue. Yet, the CFPB acknowledges that the fees that would be banned under the rule currently may represent $0 in annual revenue from NSF fees.[7] In other words, there is simply no present need for this rulemaking.

Unsurprisingly, there is no precedent in the CFPB's rulemaking for pursuing a rulemaking that has no justification in the current financial record. Unlike the CFPB's prior rules, the CFPB does not even purport to base the Proposed Rule on consumer complaints, market trends, or supervisory or enforcement trends. Instead, the CFPB travels into uncharted territory, far beyond the boundaries of appropriate regulatory conduct. Indeed, there is good reason this type of preventative rulemaking is unprecedented—without the opportunity to engage with stakeholders on a robust factual record, the CFPB cannot produce sound rules.

The CFPB accordingly should abandon this rulemaking. This is particularly the case given the vast scope of the CFPB's authority and the ample areas in which the CFPB could better focus its limited resources.

[6] *Id.* at 6050.
[7] *Id.* at 6047.

II. The CFPB should not set an entirely new standard based on mere speculation about potential future issues in a future version of the market.

a. The CFPB should not base this rulemaking on a series of guesses about the future of the market.

Recognizing that today's market realities do not justify the rulemaking, the CFPB attempts to justify it instead based on a hypothesized future. The CFPB's assumptions about the future are entirely speculative, however, and cannot form the basis for an informed rulemaking. In the Proposed Rule, the CFPB attempts to rest its rulemaking based on how it speculates covered financial institutions will react to market evolution. The CFPB should not regulate the market based on this guess since it may be proven wrong.

The CFPB guesses that financial institutions would charge an increasing number of NSF fees on instantaneously or near instantaneously declined payments based on its assumptions regarding the evolution of the market. Contrary to the CFPB's speculations, however, financial institutions have recently moved to eliminate NSF fees generally as technology has advanced and the use of noncash payment methods, including instantaneous payment methods, has increased. As a result, the CFPB's assumption that providers would charge an increasing number of NSF fees for instantaneously or near instantaneously declined payments runs contrary to market history and trends. The CFPB also reasons that NSF fees on instantaneously or nearly instantaneously declined transactions may become more prevalent in the future due to the CFPB's proposed limitations on overdraft fees.[8] Again, this assumption runs contrary to existing market trends. Over the past 15 years, despite increased regulation of overdraft fees,[9] both overdraft fees *and* general NSF fees have decreased.[10]

Third, the CFPB guesses that future consumers will not understand the content of these hypothesized fees or when they will be charged. This assumption is hard to understand given the substantial investments financial institutions have made to ensure consumers understand their financial services products and the detailed regulations on disclosures. The CFPB offers no persuasive basis for its guess that NSF fees for instantaneously or nearly instantaneously declined transactions will become unduly opaque in the future. The CFPB has the burden to provide evidence in support

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[8] CFPB, *Overdraft Lending: Very Large Financial Institutions*, 89 Fed. Reg. 13852 (Feb. 23, 2024).
[9] *See, e.g.*, Board of Governors of the Federal Reserve System, *Electronic Fund Transfers*, 74 Fed. Reg. 59033, 59038 (Nov. 17, 2009).
[10] CFPB, *Data Spotlight: Overdraft/NSF revenue down nearly 50% versus pre-pandemic levels* (May 24, 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/.

of its proposed rules, whether regulating the fees in question or any other product or service in the market.

b. The CFPB should not proceed with this rulemaking without a defensible cost-benefit analysis.

Due to the entirely speculative nature of this rulemaking, the CFPB performed an unduly limited and confusing cost benefit analysis. The CFPB incorrectly focuses exclusively on variable, per transaction costs to justify its claim that NSF fee revenue generally exceeds costs. Its analysis entirely ignores fixed costs, like the significant investments covered financial institutions have made in infrastructure to enable consumers to make instant payments, or access their balance online or through mobile apps, among many other technological improvements that benefit consumers. As a result, even the CFPB's analysis based on the potential future market it hypothesizes is deeply flawed. The CFPB is legally required to complete an adequate cost benefit analysis for its proposed rules,[11] and indeed, it is sound rulemaking for a regulator to only issue rules after appropriately considering the costs and benefits. The CFPB does not meet that bar in this rulemaking.

Perhaps unsurprisingly given its focus on a hypothetical future market, the CFPB also fails to consider how its rulemaking may be inconsistent with existing market standards. Given existing work on Real-Time Payments and the FedNow Service (which the CFPB does not address in the Proposed Rule), the Proposed Rule could subject financial institutions to inconsistent definitions and terms for real-time transactions. Similarly, the CFPB ignores the variety of current payment types in the market when estimating the cost of NSF transactions. The CFPB's analysis is based on limited information in a federal interchange survey, which applies only to certain payment types. As a result, the CFPB's cost benefit analysis ignores available data points and does not adequately weight the costs associated with its proposed rule.

III. The CFPB should adhere to the abusive standard written by Congress and abandon its novel and incorrect reinterpretation of abusive acts and practices.

The CFPB's focus on an uncommon fee with limited risk of consumer harm is a red herring. The apparent true purpose of this rulemaking is to allow the CFPB to put into regulation an inappropriate reinterpretation of abusive acts or practices that can later be wielded to effectively ban fees it dislikes even where they were lawfully disclosed. and then apply this interpretation in future rulemakings or enforcement actions. To this end, the CFPB's interpretation of abusiveness in the Proposed Rule dramatically lowers the standard for abusive conduct. Through the Proposed Rule, the

[11] 12 USC § 5512(b)(2)(A).

CFPB would set forth a new, impermissibly expansive view of its authority to issue rules or enforce its authority to prohibit unfair, deceptive, or abusive acts or practices ("UDAAP") that would not stand up to judicial scrutiny.

First, the Proposed Rule appears to incorrectly apply a fiduciary-like standard to financial institutions, seemingly on the theory that financial institutions should not permit consumers to incur fees, even if they understood the terms. This would throw aside the informed consent standard applicable to disclosures and product or service agreements. Using UDAAP to instead impose a fiduciary-like standard would be gross overreach and have no basis in the law. This nonetheless appears to be the CFPB's intent. To this end, the CFPB takes the view that in certain circumstances a consumer could not reasonably choose to incur an NSF (or other) fee and that an institution's failure to stop the consumer from taking such an action is per se abusive. Under the CFPB's theory, the institution would have unreasonably taken advantage of the consumer by not preventing the consumer from taking their chosen action. This approach would fundamentally reconfigure obligations within the financial services market. Financial institutions clearly disclose the terms of their services. As long as such disclosures are made, the consumer has responsibility for using the product in a manner that is reasonable for their circumstances.

The CFPB should not use the abusiveness standard to create a new requirement that a bank second guess all consumer behavior. In this context, in particular, an NSF fee is not an exotic fee that consumers would not anticipate. Rather, NSF fees have existed for many years and consumers should not be surprised that trying to use funds they do not have could lead to the imposition of a fee. And banks certainly would be reasonable in charging a fee in such circumstances if they believe that doing so would deter customers from overcharging their accounts. While there might be aggravating circumstances in which there might be abusive conduct—for example, an institution failing to provide accurate account balances or encouraging consumers to incur the fees—banks work very hard to prevent such issues from arising. Absent such action, the CFPB should not jump to the conclusion that a financial institution takes unreasonable advantage of a consumer's lack of understanding when it fails to prevent the very actions that the financial institution seeks to discourage. The CFPB should not remove all responsibility from the consumer to manage their account and should not create a new fiduciary-type standard under the prong of the abusiveness standard on which it relies.[12]

[12] If the CFPB is determined to shift responsibility for consumer conduct to a financial institution, it should look to the last subprong of the abusiveness standard, which focuses on taking unreasonable advantage of "[t]he reasonable reliance by the consumer on a covered person to act in the interests of the consumer." This aspect of the abusiveness standard goes largely ignored in the proposal however, presumably because the CFPB believes that the most directly relevant element of the standard inconveniently cannot be made to serve the CFPB's chosen purposes.

Part of the CFPB's justification that the fees are abusive is that the fees cannot ever be properly disclosed to consumers. The CFPB inappropriately dismisses out of hand that disclosures could be provided at account opening—which is how highly regulated account fees, like NSF fees, are already required to be disclosed. This disclosure framework is covered by the Truth in Savings Act. The CFPB has not given any indication that this framework is inadequate. The CFPB cannot properly use the UDAAP prohibition to nullify any other regulatory scheme expressly outlined by Congress—the specific should take precedence over the general.

Further, it defies logic to assert that for instantaneously or nearly instantaneously declined transactions, an NSF fee must be abusive in part because it cannot be adequately disclosed, while NSF fees are permitted on other types of transactions if they are adequately disclosed in the account opening disclosures. As a result, the CFPB appears to base its action on the incorrect view that financial institutions are not permitted to assess certain fees in specific situations, even when they are adequately disclosed.

The CFPB also appears to seek to hold financial institutions to an unjustifiably heightened standard by considering conduct to be abusive if there is a possibility a tiny portion of consumers are confused by relevant disclosures. To this end, the CFPB asserts in the Proposed Rule that even a "well-crafted disclosure" would be abusive because "there would still be consumers who may not understand it."[13] This is the wrong measure and not grounded in data. As noted above, the consumer finance sector has invested heavily in tools that improve consumer financial literacy. This is because consumers and financial institutions benefit from transparency. Congress agrees: the existing laws and regulations administered by the CFPB and the other prudential regulators impose an extensive disclosure regime for virtually all consumer financial products and services. This regime requires financial institutions to disclose material terms before a consumer chooses a product or service, including terms of any NSF fees. Importantly, these regimes focus on providing appropriate disclosures to reasonable consumers. None of these regimes impose liability if there is a mere possibility some small portion of consumers may not fully understand their terms.

The CFPB's reasoning in part also relies on its broader assertion that consumers incurring the fees "would generally lack awareness of their available account balance."[14] This assertion is unjustified.[15] The vast bulk of consumers are readily capable of

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[13] *Proposed Rule* at 6038.
[14] *Id.* at 6042.
[15] As discussed above, the CFPB cannot predict how consumers will understand terms that do not yet exist on a fee that is virtually nonexistent. The CFPB guesses here that some future consumers would

managing and understanding their account balances, and there is no indication in the Proposed Rule that banks are taking action to materially interfere with or take advantage of consumers' understanding of or access to this information. Indeed, with mobile banking and numerous other tools developed by financial institutions to better serve consumers and remain competitive in the marketplace, consumers have more access than ever to immediate information about their balance and transaction history. Charging a highly disclosed fee while offering numerous ways for the consumer to avoid the fee is not taking unreasonable advantage of a consumer's lack of understanding. Consumers can avoid the fee by merely checking their account balance through one of numerous methods provided by financial institutions or by tracking their account history. Financial institutions should not be found to be taking unreasonable advantage of consumers merely because a small percentage of consumers may not have access to their current balance at all times or because some consumers fail to balance their checkbook or check their balance despite the numerous tools available to them. This sets an impossible standard and would rewrite the meaning of "abusiveness" under the CFPA.

In an attempt to justify its interpretation of abusiveness under the Proposed Rule, the CFPB tries to revise its prior interpretations of abusiveness asserted in the 2017[16] and 2020 Payday Lending Rules.[17] Notably, in the 2020 Payday Lending Rule, the CFPB expressly states that "while the statutory language for reasonable avoidability and lack of understanding is different, the Bureau determines that the lack of understanding element of abusiveness pursuant to section 1031(d)(2)(A) of the Dodd-Frank Act *should be treated as similar to the requisite level of understanding for reasonable avoidability*."[18] With the Proposed Rule, the CFPB completely reverses course on its clear statements regarding a "lack of understanding" from just four years earlier by now proposing a "lack of understanding under CFPA section 1031(d)(2)(A) *is not synonymous with reasonable avoidability under the unfairness standard.*"[19] In fact, the CFPB attempts to disregard the use of the reasonable avoidability standard in the context of evaluations of abusive conduct in the Proposed Rule. If the CFPB were to actually hold itself to the interpretation articulated in the 2020 Payday Lending Rule, the Proposed Rule could not stand because consumers can reasonably avoid NSF fees. The CFPB cannot contradict its own interpretations of statutory law any time it wishes to ban a

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misunderstand the material risks, costs, and conditions of a fee regardless of how it may be disclosed. The CFPB should not proceed on the basis of this guess. A future consumer might fully understand the terms of a transaction, for example, but decide to proceed anyways, or, fail to take reasonable care in determining whether certain terms apply to a given transaction.

[16] *Final Rule; Payday, Vehicle Title, and Certain High-Cost Installment Loans*, CFPB–2016–0025, 82 Fed. Reg. 54472 (Nov. 17, 2017).

[17] *Final Rule; Payday, Vehicle Title, and Certain High-Cost Installment Loans*, CFPB–2019–0006, 85 Fed. Reg. 44382 (July 22, 2020).

[18] *Id.* at 44422.

[19] *Proposed Rule* at 6040.

fee or prohibit some other conduct. Doing so creates massive confusion for consumers, industry participants, and other stakeholders and poses significant due process concerns to financial institutions about which interpretation the CFPB will take in any particular context.

The CFPB's attempt to reinterpret the abusiveness standard, in both this rule and the policy statement it issued in 2023, is wrong on the substance and will create confusion in the market. This is not surprising given, as discussed above, that this is not the proper vehicle for a rulemaking. It is not sound rulemaking practice to interpret key legal requirements in this manner and not effective at protecting consumers. If the CFPB wants to revise its existing interpretation of the abusiveness standard, it should do so in the context of concrete examples of actual conduct in an actual market, not imagined conduct in some future version of a market. Only in this way will the CFPB be able to coherently and consistently articulate workable boundaries of its abusiveness authority.

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

William R Hulse

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