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Comment Intake—2024 NPRM Overdraft
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Overdraft Lending: Very Large Financial Institutions

To Whom It May Concern:

The Center for Capital Markets Competitiveness ("CCMC") believes the Consumer Financial Protection Bureau ("CFPB") Notice of Proposed Rulemaking for Overdraft Lending: Very Large Financial Institutions (the "Proposed Rule")[1] should be withdrawn. The Proposed Rule is an anti-consumer measure that would restrict consumer access to financial products and drive-up costs.

A recent study by the Federal Reserve Bank of New York found that when the Office of the Comptroller of the Currency (OCC) exempted national banks from state overdraft fee caps in 2001, banks "raised overdraft fees but also expanded overdraft coverage and deposit supply, leading more low-income households to open accounts." We believe the proposal has the following significant flaws and the best course of action is to withdraw the rulemaking:

- Reducing availability and access to overdraft services will harm consumers.
- Limiting overdraft fees to a "benchmark" or "breakeven cost" is deeply flawed.
- Regulating overdraft services as loans under TILA and Regulation Z is statutorily unauthorized, unnecessary, and impractical.
- The application of the Proposed Rule to only depository institutions with over $10 billion in total assets is unsupported and arbitrary, and conflicts with the purposes of TILA.

[1] *See* CFPB, *Proposed Rule; Request for Public Comment: Overdraft Lending: Very Large Financial Institutions*, 89 Fed. Reg. 13,852 (Feb. 23, 2024) (hereinafter "*Proposed Rule*").

- If the rule is not withdrawn, the CFPB should provide at least one year to comply.

Discussion

Financial institutions offer a wide range of consumer banking services. These services have long been supported by fees and interest rates designed to meet customer needs while also encouraging prudent consumer behavior, fostering a safe and sound banking system, and achieving other important goals. Overdraft services enable consumers to complete desired transactions when there may be insufficient funds to cover those transactions, allowing critical transactions to go through when they would otherwise be denied. Overdraft services have been a familiar part of the banking landscape and consumers have long understood that they will pay a set fee if their bank authorizes a transaction that overdraws their account. The fees for this important service have decreased and even become less common in recent years due to market shifts, but overdraft services remain an appropriate—and requested—feature of many checking accounts.

The Bureau nonetheless has sought to drastically reduce overdraft fees, thus effectively curtailing overdraft services in their current form. When the CFPB announced its initiative against "junk fees" in January 2022, it specifically called out overdraft fees as a type of fee that may "obscure the true cost of a product and undermine a competitive market."[2] Despite reporting that revenue from overdraft and nonsufficient funds ("NSF") fees decreased by nearly 50% between 2019 and 2022, the CFPB also noted in May 2023 that it would "continue to track overdraft/NSF fees and [is] considering rulemaking activities related to these fees."[3] And on other occasions in the past three years, the CFPB has repeatedly maligned overdraft services, characterizing them as a tool that banks use to generate unreasonable

[2] CFPB, *Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees* (Jan. 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/.

[3] 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/#:~:text=Overdraft%2FNSF%20revenue%20for%20the,over%20%245.5%20billion%20going%20forward. (hereinafter "*Data Spotlight*").

profits.[4] Even though market forces are working, the CFPB is embarking on the next step in its campaign to impose its preferences around overdraft fees on the market.

Notwithstanding the unknown consequences for consumers and market participants, the CFPB will likely force financial institutions to offer these services below their true cost or face insurmountable regulatory burden—setting up a false choice for institutions to make. In doing so, the CFPB will dramatically limit the availability of overdraft services for consumers who need and want access to them without offering feasible alternatives. The Proposed Rule fails to consider the value of overdraft services and whether consumers will be better off if overdraft services become scarce or non-existent because of the impractical regulatory requirements that the CFPB would impose. The CFPB also fails to consider that overdraft services enable consumers to pay for necessities like food, medicine, shelter, electricity, and other critical household expenses. The CFPB does not consider that these consumers may not be able to obtain those necessities without overdraft services and certainly not without incurring a higher cost from alternative liquidity sources compared to current overdraft fees. Nor does the CFPB consider potential late fees that consumers may incur from service providers if their payments are late because they no longer have access to overdraft services.

The Proposed Rule would limit how banks provide overdraft services by changing how fees charged for overdraft services are treated under the consumer financial laws. Departing from fifty years of precedent, fees for overdraft services would be treated as finance charges subject to the Truth in Lending Act ("TILA"). The CFPB would apply this rule selectively, arbitrarily making it applicable only to financial institutions with assets exceeding $10 billion without an adequate explanation for the distinction. Bifurcating consumer protections is a new concept that lacks logic, study, or explanation. The CFPB also offers an exception if the fees do not exceed an institution's cost to provide the service or a benchmark fee set by the CFPB. The promise of these exceptions is illusory, however. Because the CFPB's proposed exceptions are extremely impractical, the Proposed Rule will effectively impose a price cap of the CFPB's choosing on the market. In so doing, the Proposed Rule will limit consumer access to overdraft services and dramatically change market practices in a piecemeal and unsupported fashion. The result could be the effective elimination of overdraft services altogether.

[4] *See, e.g.*, CFPB, *CFPB Research Shows Banks' Deep Dependence on Overdraft Fees* (Dec. 1, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/.

Although we do not ask the CFPB to expand the scope of the Proposed Rule, the CFPB's decision to apply the rule only to very large financial institutions is arbitrary and unjustified. Bifurcating consumer protection based on the asset size of a depository institution will undoubtedly cause consumer confusion. It also may provide limited benefits for institutions that, while technically out of scope, feel that for competitive reasons they must meet the standards applicable to their largest competitors. Further, the CFPB's unjustified selective approach is a symptom of the arbitrariness that infects the entire Proposed Rule. As we detail below, the Proposed Rule is not supported by data. Rather, the Proposed Rule reflects the CFPB's apparent commitment to eliminating overdraft fees to the extent possible, regardless of the negative consequence for consumers and what the factual record demonstrates.

It is no comfort that the CFPB proposes to allow very large financial institutions to charge an amount above "breakeven" (as calculated subject to the Proposed Rule's requirements) or a benchmark fee (established by the CFPB) if financial institutions structure overdraft services as loans subject to TILA. This "alternative" is a false choice given the impractical implications of applying TILA to overdraft products and the CFPB's recent significant changes to Regulation Z.[5] Financial institutions are unlikely to develop expensive, net-new products and services that are incredibly operationally complex. The ability to charge the "breakeven" amount is a similarly meaningless option for very large financial institutions, given the uncertainty surrounding establishment of a fee amount that reflects average costs to offer overdraft.

The CFPB undertakes this rulemaking based on a fundamentally flawed premise that additional regulation of overdraft fees is needed. This premise rests on the unjustified belief that fee income is a measure of consumer harm. Fees in exchange for the provision of services are a common feature of the competitive marketplace for any number of consumer products, including those outside the financial sector. Overdraft services are already appropriately regulated under Regulations E and DD. The legal record does not justify further regulation. The CFPB also certainly does not have an adequate factual basis to radically depart from this existing—and sufficient—regulatory approach. In particular, the CFPB has not adequately studied consumer demand for overdraft services and how the potential loss or restriction of overdraft services may impact consumers.

[5] CFPB, *Final Rule; Credit Card Penalty Fees (Regulation Z)* (Mar. 4, 2024), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees_final-rule_2024-01.pdf.

As reflected herein, we have significant concerns about this rulemaking. We urge the CFPB to take these concerns seriously and fairly evaluate the factual record to develop a regulatory approach that will best serve consumers in the long run. Unfortunately, there have been clear indications that the CFPB and the Biden Administration do not intend to treat the Notice and Comment process for the Proposed Rule as a real dialogue with stakeholders. Rather than follow the process required by the Administrative Procedure Act,[6] the CFPB and the Biden Administration have apparently already settled on their preferred approach. To that end, the Biden Administration announced in preparation for the 2024 State of the Union that the CFPB's proposed rules would save consumers "approximately $19.5 billion annually" on credit card late fees, overdraft fees, and NSF fees, before the rulemaking comment period has even closed on the CFPB's proposed overdraft and NSF fee rules.[7] Additionally, in a White House Fact Sheet, the White House states that the CFPB has already decided to set the benchmark fee at $4, which is not even one of the four benchmark fees proposed.[8] We urge the CFPB to follow the facts and the best interests of consumers, not to shape its rulemaking to meet political demands. Fail to do so, and the CFPB will issue a regulation that not only is bad for consumers and wrong on the substance, but also fails to meet legal requirements.

I. Reducing availability and access to overdraft services will harm consumers.

As a result of this rulemaking, financial institutions will likely restrict or eliminate access to overdraft services. Underwriting standards and risk determinations may cause financial institutions to limit the availability of overdraft services to only lower-risk customers. Yet, consumers rely on these overdraft services for their wants and needs, including at times for critical items such as rent, groceries,

[6] 5 U.S.C. §§ 551–559.

[7] *See* 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] *See* White House*, Fact Sheet: The President's Budget Lowers Costs for the American People* (Mar. 11, 2024), https://www. embarrassment associated with having payment attempts declined or rejected.") (hereinafter "*Consumer Voices on Overdraft Programs*").

[8] CFPB, *Overdraft and Nonsufficient Fund Fees*, CFPB Office of Research Publication No. 2023-9, 13 (Dec. 2023), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-report_2023-12.pdf (hereinafter "*Overdraft and Nonsufficient Fund Fees*").

[8] *Consumer Voices on Overdraft Programs*.whitehouse.gov/omb/briefing-room/2024/03/11/fact-sheet-the-presidents-budget-lowers-costs-for-the-american-people/.

or medication.[9] Moreover, consumers choose whether to opt into overdraft services. As noted in the CFPB's recent report on overdraft services "some consumers appear to use overdrafts often and intentionally as a source of credit."[10] The CFPB does not mention this recent report in its rulemaking, nor other prior data indicating that consumers value overdraft services.[11] To the extent that some financial institutions cease offering overdraft services or only offer them to a subset of consumers (such as consumers that can qualify under the terms of TILA and Regulation Z), consumers who rely on overdraft services based on their current availability will be harmed. In particular, harms may be concentrated with consumers with limited or no access to credit products who rely on overdraft services for necessities.

The CFPB also fails to address the deterrent impact of overdraft fees and how overdrawn accounts may impact financial institutions. One valid purpose of overdraft fees is to provide a meaningful incentive for consumers to manage their account responsibly and spend within their means to avoid overdrawing their account. An overdraft fee that is too low will no longer deter consumers from continuing to make transactions that will result in an overdraft. This could have long-term negative consequences for both the consumer and the bank. The CFPB suggests that there is no need for financial institutions to deter the consumer's conduct because it says the costs and risks of an overdraft are minimal. Yet the CFPB does not address the impact that an increase in overdrafts—and instances of delinquency and non-payment—would have on consumers and financial institutions. If consumers overdraft too frequently for a financial institution's risk management purposes, the financial institution will likely start declining more transactions outright, limiting overdraft services.

[9] CFPB, *Consumer Voices on Overdraft Programs* (Nov. 2017), https://www.consumerfinance.gov/data-research/research-reports/consumer-voices-overdraft-programs/ ("The consumers noted several ways in which overdraft programs provided them with benefits as well as the drawbacks they experienced when overdrafting. Consumers in the study described overdraft as a resource for making important payments, such as for medical bills, groceries, or utility bills. They also described financial benefits from having bills paid through overdraft, such as avoiding late fees or negative credit reporting. Several consumers in the study also noted that overdraft can help avoid embarrassment associated with having payment attempts declined or rejected.") (hereinafter "*Consumer Voices on Overdraft Programs*").

[10] CFPB, *Overdraft and Nonsufficient Fund Fees*, CFPB Office of Research Publication No. 2023-9, 13 (Dec. 2023), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-report_2023-12.pdf (hereinafter "*Overdraft and Nonsufficient Fund Fees*").

[11] *Consumer Voices on Overdraft Programs.*

If overdraft fees are capped as proposed, financial institutions may also end certain consumer-friendly features they are currently able to offer. For example, many financial institutions offer features such as grace periods, waiving overdraft fees if a transaction is below a certain amount, or limiting the number of overdraft fees a consumer may incur per day. Many of these features support frequent users of overdraft services, ensuring they are always able to access this critical safety net to cover essential life expenses. If financial institutions eliminate these features, consumers may end up paying more in overdraft fees compared to today because they may incur these fees more frequently, even though at a lower cost per fee. Financial institutions may also eliminate certain deposit account features that they are currently able to offer consumers. The CFPB should be encouraging, not derailing, consumer-friendly innovations that reduce consumers' financial burdens while also providing necessary cashflow support.

Limiting overdraft services also could cause more households to become unbanked or underbanked. Great progress has been made over the past several decades on this front, and the Proposed Rule will undo gains that have been made. A recent study by the Federal Reserve Bank of New York found that when the OCC exempted national banks from state overdraft fee caps in 2001, banks "raised overdraft fees but also expanded overdraft coverage and deposit supply, leading more low-income households to open accounts."[12] The study found that the rise in account ownership persisted, "suggesting newly banked households valued their account even after learning about its costs."[13] In addition, the study found "no evidence that being banked weakens households' broader credit health, including delinquency, indebtedness, and credit scores."[14] The study concluded "that overdraft fee caps hamper, rather than foster, financial inclusion."[15] Although the CFPB criticizes this study,[16] it still supports a simple principle: banks that can charge fees can offer services to a broader range of consumers. Conversely, limiting the fees banks may charge will make it harder to serve a broad range of consumers. Notably, the study remains the best available evidence that capping overdraft fees may have a negative impact on maintaining the progress made in meeting the needs of unbanked and underbanked consumers. And despite the CFPB's insistence that the Proposed Rule

[12] J. Dlugosz, et. al, Federal Reserve Bank of New York, *Who Pays the Price? Overdraft Fee Ceilings and the Unbanked* (July 2023), https://www.newyorkfed.org/research/staff_reports/sr973.html.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Proposed Rule* at 13,890.

would not cap overdraft fees because of the alternative to offer overdraft as a loan, as explained below, that alternative is unworkable—leaving financial institutions no choice but to charge the CFPB's benchmark overdraft fee.

The Proposed Rule could also result in an increase of consumer use of higher-cost nonbank credit services. According to the Federal Deposit Insurance Corporation ("FDIC"), 4.4% of households use nonbank credit services, such as rent-to-own services and payday, pawn shop, tax refund anticipation, and auto title loans.[17] The low percentage of households using nonbank credit services today reflects the great progress that has been made in providing banking services to consumers. Financial institutions helped to lead this drop in unbanked or underbanked consumers. To bank different types of consumers, however, institutions need to be able to appropriately structure their services. The CFPB fails to acknowledge in its Proposed Rule that decreasing the fee amount will lead banks to decrease access to overdraft services, which will impact the households that use this service the most. Again, the Proposed Rule goes in the wrong direction. If the CFPB takes away the tools financial institutions use to offer services to more people, it will push those consumers to different products that the CFPB has stated have worse terms and weaker consumer protections to meet their short-term cashflow needs. According to the CFPB, use of these nonbank credit services (e.g. payday) "can signal acute financial strain, both because taking out a high-cost loan indicates distress and the high repayment costs can put additional strain on finances."[18] Further, the CFPB found that use of these nonbank credit services can harm consumers by trapping them in extended loan sequences of unaffordable loans.[19] Overdraft services allow many consumers under stress to pay bills and make ends meet without taking out a high-cost loan.

Further, overdraft services connected to a consumer's existing debit account are an easy-to-use service that offers particular benefits. Consumers understand how overdraft works and appreciate that it does not have the risk of building a debt that interest is charged on. The automatic nature of overdraft services also allows for frictionless transactions, especially at point of sale. Consumers do not have to worry that their payment will be declined while in the checkout line. A consumer who is no

[17] FDIC, *2021 FDIC National Survey of Unbanked and Underbanked Households* (July 24, 2023), https://www.fdic.gov/analysis/household-survey/index.html.

[18] *Overdraft and Nonsufficient Fund Fees* at 36.

[19] CFPB, *Final Rule; Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54,472, 54,472 (Nov. 17, 2017).

longer able to access overdraft services risks having to abandon a purchase and seek another source of funds, adding time, hassle, and expense.

These negative consequences are likely to disproportionately impact the consumers who most want and need to use banking services, jeopardizing their overall financial health. The CFPB's recent report to Congress states that frequent users of overdraft services tend to have lower average credit scores and are the most likely to have a subprime credit score, no available credit on a credit card, and delinquent debt.[20] These consumers may not have access to credit options from depository institutions and may not qualify for overdraft services that must meet TILA's ability-to-pay requirements. Further, these consumers are more likely to have higher credit risk, such that they will be the consumers most likely to be denied overdraft services if fees are capped. If overdraft services are not available to these consumers, they may need to go with more costly options, with higher fees and fewer consumer protections, that could result in further debt. And those consumers who are unable to access such products will not be able to obtain necessities. Consumers' lives would be harmed by this regulatory overreach.

The Proposed Rule thus will have numerous negative consequences for consumers, but the CFPB has not adequately studied or addressed these harms. It should not gamble on a radical change to the regulation of overdraft services that poses such significant risks and potentially higher costs to consumers, especially those in difficult financial circumstances. The CFPB instead should incentivize banks to innovate in a way that supports diverse financial needs.

II. Limiting overdraft fees to a "benchmark" or "breakeven cost" is deeply flawed.

Under the Proposed Rule, if a financial institution decides to continue charging overdraft fees that are not considered finance charges under Regulation Z, the financial institution would not be permitted to charge "above breakeven overdraft credit."[21] The Proposed Rule would give financial institutions the ability to determine whether an overdraft charge is considered above breakeven overdraft credit by either: (1) calculating its own costs and losses using standards set forth in the Proposed Rule; or (2) relying on a benchmark fee set by the CFPB. This proposed approach is anti-competitive and impractical.

[20] *Overdraft and Nonsufficient Fund Fees* at 6.
[21] *Proposed Rule* at 13,853.

a. The CFPB should not engage in anti-competitive price fixing.

Setting a benchmark fee that financial institutions will effectively be required to follow is anti-competitive price setting. Under the Consumer Financial Protection Act, one of the CFPB's statutory purposes is to foster competition in the market.[22] Competition is also beneficial to consumers, as reflected in the consumer-friendly changes that have been made in the marketplace. Enacting an anti-competitive regulation will not only contradict one of the CFPB's main purposes, but, more importantly, will harm consumers in the long run. Indeed, CFPB Director Chopra has acknowledged that features financial institutions are currently able to offer, like grace periods, foster competition in the industry. He has said that "[overdraft services provide] short-term credit, and we want to make sure that people have the availability to access credit. But what we are seeing is actually banks across the board are starting to compete on this. Many are reducing their overdraft fees. Many of them are offering grace periods. So the competitive process I think is going to yield a lot of benefits for people, and that is exactly what we want to see."[23] Setting a single price regardless of features will eliminate that competition.

The CFPB should not interfere with the consumer financial services market by setting the prices or costs of products and services offered by a subset of financial institutions, nor determine whether financial institutions can profit from certain activities. The anticompetitive effects of the proposal are especially egregious because, as explained in more detail below, the Proposed Rule would arbitrarily apply to a small number of financial institutions. Any regulation that caps prices for some market participants but not others offering identical services is anticompetitive on its face. Specifically, here, financial institutions that are not subject to the Proposed Rule may benefit competitively from the ability to charge higher overdraft fees than financial institutions subject to the Proposed Rule, without being required to offer overdraft services as TILA-regulated credit in order to profit. Moreover here, the competitive market has independently reduced or eliminated many overdraft fees. The CFPB should allow competition to continue this beneficial trend, not interfere unnecessarily and counterproductively in the market.

[22] 12 U.S.C. § 5511(a).

[23] United States Senate, Hearing Before the Committee on Banking, Housing, and Urban Affairs (Apr. 26, 2022), https://www.congress.gov/117/chrg/CHRG-117shrg53478/CHRG-117shrg53478.pdf.

b. The breakeven cost standard is impractical, does not permit banks to make a reasonable profit, and does not adhere to existing regulatory requirements.

One of the CFPB's two alternatives to charging the benchmark overdraft fee is for financial institutions to determine and then charge an amount equal to a limited subset of their own costs and losses as set forth in the Proposed Rule. Determining this "breakeven" amount would be highly complex and require a financial institution to devote significant resources towards meeting the necessary compliance burdens and operational changes. Further, financial institutions are unlikely to use this option as it will result in increased compliance risks over charging the benchmark fee. These facts render the "breakeven" standard impractical and prevent it from being a realistic option for use by financial institutions.

Moreover, the CFPB should not adopt a "breakeven"-based approach since that is not how the banking industry determines whether it makes business sense to offer a product or service and conflicts with existing Office of the Comptroller of the Currency ("OCC") regulations. Financial institutions choose whether to offer particular products or services in part based on whether it makes sense financially to offer that product or service. Those financial considerations are not factored into the "breakeven" calculation put forth by the CFPB. The concept that a financial institution is not entitled to any profit for a service is offensive to the principles of free-market capitalism. Further, OCC regulations under the National Bank Act require banks to calculate fees for deposit services based on (among other things) "[t]he cost incurred by the bank in providing the service" and "[t]he deterrence of misuse by customers of banking services."[24] The CFPB does not address—or even acknowledge—the interplay between the Proposed Rule and these legal requirements.

The CFPB's proposed method for calculating the breakeven amount is nonsensical. To employ the breakeven standard proposed, a financial institution could only use very limited total direct costs and charge-off losses for providing non-covered overdraft credit to all accounts open at any point during the previous 12 months. If a financial institution paused or ceased providing overdraft services for a period of time, or was forced to remove its consumer-friendly fee waiver policies due to loss of fee revenue, its inputs into any breakeven calculation would be zero, essentially preventing it from ever being able to come up with a reasonable calculation of costs to attempt to

[24] 12 C.F.R. § 7.4002(b).

provide this type of service. The breakeven calculation would be a downward spiral and not a realistic alternative to the CFPB's price cap benchmark.

c. The CFPB's proposed benchmark fee is not supported by sufficient data.

In addition to being anti-competitive, the CFPB lacks sufficient data to justify the four potential benchmark fees it proposes. The CFPB's proposed benchmark fees are based on data obtained from only five very large financial institutions, or about 3% of the financial institutions that the CFPB estimates will be directly subject to the Proposed Rule.[25] This small sample size is insufficient to create a benchmark fee that will apply to all very large financial institutions.

Further, although the CFPB has chosen to only directly regulate very large financial institutions, the benchmark fee will likely indirectly influence fees on overdraft services for financial institutions not directly subject to the Proposed Rule. These smaller institutions may charge much different fees than the five very large financial institutions surveyed, particularly if those smaller institutions do not have as many resources to keep costs lower. Additionally, smaller non-covered institutions may experience market pressure to set their fees lower, and thus will be impacted by the Proposed Rule. Accordingly, the CFPB should also have studied the costs and losses of smaller financial institutions.

III. Regulating overdraft services as loans under TILA and Regulation Z is statutorily unauthorized, unnecessary, and impractical.

a. Regulating overdraft services as credit under TILA/Regulation Z exceeds the CFPB's statutory authority.

The CFPB does not have authority under TILA to regulate overdraft fees where the financial institution has not agreed in advance to permit overdraft services for all transactions. A bank does not extend "credit" under TILA when it permits a discretionary overdraft. TILA governs only the extension of "credit," which TILA defines as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[26] That definition does not encapsulate or apply to the overdraft services that the Proposed Rule seeks to regulate. Unless there is a specific agreement in advance, a bank *permits* an account holder to defer payment when it extends overdraft services *at the bank's discretion* (for example, as described in the CFPB's Regulation E Model

[25] *Proposed Rule* at 13,871.
[26] 15 U.S.C. § 1602(f).

form at Appendix A-9). Rather than extensions of credit, overdraft services and related fees are deposit account services and service charges imposed to keep an account open where a consumer overdraws their account. Based on TILA's definition of "credit," the proposed rule exceeds statutory bounds by seeking to include overdraft services within the scope of the statute and Regulation Z.

Prudential regulators have taken the view that overdraft services are deposit services and not credit. Guidance from the OCC confirms that overdraft services are "deposit account services," and overdraft charges are not "interest" on a debt. For example, in 2001, the OCC said that "overdraft and returned check charges" imposed by a bank were "deposit account services" charges and not "interest."[27] In 2007, the OCC's Chief Counsel issued Interpretive Letter No. 1082, which considered whether overdraft fees are deposit account service charges under 12 C.F.R. § 7.4002 or "interest" on a debt. The OCC explained, "[a] bank's authority to provide products or services to its customers" (*i.e.*, deposit accounts with overdraft protection) "necessarily encompasses the ability to charge a fee for the product or service" (*i.e.*, an overdraft fee).[28] So long as a bank's decision-making process complies with the requirements of § 7.4002, "there is no supervisory impediment to the bank exercising its discretionary authority to charge non-interest fees and charges—such as . . . overdraft fees."[29] As the OCC explained: "[w]hen the Bank processes an overdraft item and recovers a fee for doing so, it is not exercising its right to collect a debt."[30] To the contrary, "the processing of an overdraft and recovery of an overdraft fee by balancing debits and credits on a deposit account are activities directly connected with the maintenance of a deposit account."[31] The Proposed Rule conflicts with this well-established interpretation that overdraft services are not credit and overdraft fees are "deposit account service" charges. The OCC's interpretation shows that the Proposed Rule's treatment of overdraft services as subject to Regulation Z is outside of TILA's statutory scope, or at the very least arbitrarily and capriciously conflicts with OCC positions without any explanation.

The CFPB's "exemption" theory for overdraft is similarly flawed. The CFPB claims the Board of Governors of the Federal Reserve System's ("Board") decision not to cover overdraft fees in Regulation Z was an exemption grounded in overdrafts being a

[27] OCC, *Investment Securities; Bank Activities and Operations; Leasing*, 66 Fed. Reg. 8178, 8180 (Jan. 30, 2001).
[28] OCC, *Interpretive Letter No. 1082*, 3 (May 17, 2007).
[29] *Id.* at 4.
[30] *Id.* at 6.
[31] *Id.*

courtesy, not an interpretation of the statute. However, Regulation Z does not identify overdraft services as an exempted class of transactions.[32] Instead, Regulation Z excludes overdraft fees from the definition of a "finance charge."[33] The Board's interpretation of a finance charge, notably the distinction made between discretionary overdrafts and overdrafts pursuant to agreement, is perfectly sensible when viewed as an interpretation of the statute.

The history of the Board's promulgation of Regulation E likewise shows that the Proposed Rule exceeds statutory authority to treat overdraft services as "credit," as Regulation E has distinguished between overdraft services and overdraft lines of credits throughout its history. Specifically, the Board explained that the primary method for covering overdrafts in connection with electronic fund transfers used to be "an overdraft line of credit linked to a debit card or other access device."[34] By 2009, however, "consumers [were] more likely to have these overdrafts covered by their institution's overdraft service, rather than by a separate overdraft line of credit."[35] In other words, an overdraft "service" is not a "line of credit," which was confirmed by the fact that the rulemaking defined "overdraft service" to specifically exclude "payment of overdrafts pursuant to a line of credit."[36] There would be no need to distinguish between "overdraft service" and "overdraft line of credit" if both are extensions of credit.

b. Regulating overdraft services under Regulation Z is unnecessary as the relevant disclosures are addressed in Regulations E and DD.

Overdraft fees are appropriately regulated under Regulation E, making this rulemaking unnecessary. When the Board revised the requirements for charging and disclosing overdraft fees in 2009, the Board found that the limitations and disclosures it issued appropriately struck a balance between providing consumers desired overdraft services and obtaining consumers' informed, affirmative consent to opt-in to overdraft services.[37] The CFPB has not adequately explained what circumstances have changed between the Board's final rule in 2009 and today that would justify a radical change in the regulatory scheme. Indeed, market data trends do not indicate that any radical change in the regulatory framework is needed: the CFPB found that revenue

[32] 12 C.F.R. § 1026.3.
[33] *Id.* at § 1026.4(c).
[34] Board, *Final Rule; Electronic Fund Transfers*, 74 Fed. Reg. 59,033, 59,037 (Nov. 17, 2009).
[35] *Id.*
[36] *Id.* at 59,040; *see also id.* at 59,047.
[37] *Id.* at 59,038.

from overdraft and NSF fees has decreased from an estimated $12 billion in 2011[38] to $7.7 billion in 2022.[39]

The Board's approach to regulating overdraft services remains the correct approach. It successfully balances the need for informed consumer consent with consumer choice in a competitive market that can offer a wide variety of products and services. Under Regulation E and Regulation DD, all financial institutions provide extensive, highly regulated disclosures to inform a consumer's choice to opt into overdraft services. Further, financial institutions have developed numerous tools to help consumers track their balance, including investment in mobile banking, text alerts, emails, and app notifications. These tools and disclosures, along with the market trend of eliminating and reducing overdraft fees, make this rulemaking unnecessary. Notably, the above regulations uniformly apply to *all* covered financial institutions; they are not subject to the Proposed Rule's arbitrary carveout for institutions with less than $10 billion in assets.

c. The CFPB's proposal to regulate overdraft services under TILA/Regulation Z is impractical and unduly burdensome.

The CFPB's plan to revise the existing exemption and apply Regulation Z to this context is impractical. The Proposed Rule would require that financial institutions, among other things, establish a separate overdraft account, impose ability to repay underwriting requirements, and calculate the annual percentage rate for each overdraft fee—requirements that are simply impractical for an overdraft fee of such short duration and small amount.

In addition to applying existing TILA, Credit Card Accountability Responsibility and Disclosure Act, and Regulation Z requirements, the CFPB also proposes to restrict overdraft credit products even further. The proposed requirement that financial institutions cannot automatically transfer funds to repay the overdraft line of credit would likely result in further restrictions on the availability of overdraft services, in order for financial institutions to appropriately manage risk. If financial institutions are not guaranteed payment via automatic transfers, there will likely be a higher underwriting bar than currently used for existing overdraft services. This will render overdraft services impractical in many contexts, including with respect to overdraft services that are currently offered as a line of credit. Importantly, the Proposed Rule's impractical preauthorization prohibition will significantly reduce the number of

[38] *Proposed Rule* at 13,856.

[39] *Data Spotlight*.

consumers who qualify for overdraft services offered as a line of credit. As a result, the Proposed Rule may force many consumers to look to other, more costly options to meet their credit needs. The CFPB should remove the prohibition against requiring consumers to authorize prepayment from their debit account so that financial institutions can continue offering overdraft services in a practical manner and consumers are not pushed to less safe credit products.

Consumers may also experience higher product or service costs generally because of the unduly burdensome requirements the CFPB contemplates. Further, these requirements will likely deter financial institutions from investing in the creation of overdraft services as credit. Offering a significant amount of overdraft services as credit may be impractical, if not impossible, for some financial institutions from an operational or financial standpoint. Building out overdraft credit for additional products and additional consumers will require significant capital, as well as technology, risk-monitoring, credit bureau reporting requirements and customer servicing investments, including the costs to comply with Regulation Z's many requirements. The result will likely be limited availability of overdraft services to consumers.

IV. The application of the Proposed Rule to only depository institutions with over $10 billion in total assets is unsupported and arbitrary, and conflicts with the purposes of TILA.

Although CCMC does not ask the CFPB to expand the scope of the Proposed Rule, we are extremely concerned that the CFPB has arbitrarily limited the application of the Proposed Rule to very large financial institutions. This limited application of the Proposed Rule conflicts with the purposes of TILA and consumer protection regulations, more broadly. We believe that these significant flaws in the application of the Proposed Rule reflect the short-sighted nature of the entire rulemaking. This flaw is alone sufficient cause for the CFPB to abandon this rulemaking.

a. A threshold based on asset size is not supported by the data.

The application of the Proposed Rule based on asset size is not supported by the data. According to the preamble of the Proposed Rule, the rulemaking would not directly regulate overdraft fees for approximately one third of consumers who are charged overdraft fees.[40] In fact, the Proposed Rule would only apply to approximately

[40] *Proposed Rule* at 13,860 ("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.").

175 of the 9,000 banks and credit unions in the country, or less than 2% of all financial institutions.[41] Overdraft fees are also prevalent among smaller financial institutions relative to the number of consumer deposits, given that very large financial institutions hold approximately 80% of consumer deposits but are responsible for 68% of overdraft fees.[42] The CFPB does not seem to be focused on these statistics, however. Indeed, the CFPB fails to point to any data that would explain why the Proposed Rule should not provide the same coverage for one third of consumers impacted by overdraft fees. The CFPB should not make such a critical decision in this rulemaking without robust support in relevant data, including consumer testing.

b. The application of the Proposed Rule to only very large financial institutions is arbitrary and the CFPB failed to consider the impact of the Proposed Rule to smaller financial institutions.

The application of the Proposed Rule to only “very large financial institutions” is arbitrary. The CFPB asserts that the Proposed Rule would provide protections to consumers. However, it does not make sense to differentiate whether a fee or service is restricted based on the asset size of the bank where a customer holds their account. The CFPB does not provide an explanation for why overdraft services will be restricted only for customers of certain financial institutions. And it will likely be confusing to consumers, who may assume that the Proposed Rule applies to all financial institutions. A consumer should not need to determine the asset size of their bank to determine whether overdraft fee restrictions apply to their account.

Notably, the CFPB has failed to articulate a convincing reason to apply the Proposed Rule only to very large financial institutions. Among the few times the CFPB addresses its reasoning, the CFPB states: “in the supervisory context, Congress adopted in 12 U.S.C. 5515(a) a $10 billion threshold to define the ‘very large banks, savings associations, and credit unions’ that would be subject to the CFPB’s primary supervision authority. The CFPB has preliminarily determined that a $10 billion threshold similarly should be used to define ‘very large financial institution’ for limiting the scope of overdraft credit that would be covered by the proposed rule.”[43] However, the CFPB fails to address how its statutory authority to primarily supervise very large

[41] Stacy Cowley, *Consumer Bureau Proposes Overdraft Fee Limits for Large Banks*, *New York Times* (Jan. 17, 2024), https://www.nytimes.com/2024/01/17/business/cfpb-bank-overdraft-fees-rule.html.
[42] *Proposed Rule* at 13,860.
[43] *Id.*

financial institutions justifies limiting the Proposed Rule's application to those institutions.

The CFPB similarly fails to provide an explanation regarding why smaller institutions are excluded from the requirements of the Proposed Rule. With respect to smaller institutions, the CFPB states it will not apply the Proposed Rule "[i]n light of the different circumstances smaller financial institutions may face in adapting to the proposed regulatory framework" and will retain existing regulations with respect to smaller institutions because doing so "will alleviate undue compliance burdens as the CFPB continues to examine the market for smaller financial institutions."[44] The CFPB fails to articulate what the compliance burdens or "different circumstances" are, how they impact smaller institutions' ability to comply with the Proposed Rule, and how this exclusion will advance the CFPB's consumer protection mandate, especially for those consumers that bank with smaller institutions.

The lack of detail in the CFPB's explanation suggests that the CFPB has not studied the potential impacts of the Proposed Rule on smaller financial institutions. Instead, the CFPB rushed into a piecemeal rulemaking rather than taking the time to fully research the costs and benefits of the Proposed Rule. Though the CFPB certified, pursuant to the Regulatory Flexibility Act (the "RFA"), that the Proposed Rule would not have a significant economic impact on a substantial number of small entities, the CFPB did not explain why or provide empirical support for why the Proposed Rule would have no significant effect on small businesses. Instead, the CFPB incorrectly presumed that in the competitive banking industry, small banks would not be affected because the rule does not directly apply to them. The CFPB failed to consider that imposing fee caps on large banks would have a significant impact on small banks by pressuring them to lower their own fees to compete with large banks. The CFPB has failed to conduct any analysis on this topic, which runs contrary to the intent of the RFA.

c. The application of the Proposed Rule to only very large financial institutions conflicts with the purposes of TILA.

In addition to being unsupported and arbitrary, the application of the Proposed Rule to only very large financial institutions conflicts with the purposes of TILA. The purposes of TILA include ensuring a meaningful disclosure of credit terms and protecting consumers against unfair credit billing practices.[45] The overdraft services

[44] *Id.*
[45] 15 U.S.C. § 1601(a).

regulated under the Proposed Rule are already subject to meaningful disclosure under Regulation E and Regulation DD or Regulation Z, depending on the type of overdraft service or product.

The failure to regulate financial institutions charging overdraft fees to approximately one third of consumers who are charged those fees also runs contrary to the purposes of TILA. If the CFPB believes that the current regulatory schemes are insufficient and overdraft services as they exist are unfair, it seems contrary to TILA to apply regulations that will only impact two thirds of consumers. In addition, the CFPB states in the Proposed Rule, “strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA’s purposes.” The CFPB is acting contrary to this purpose by not only engaging in anti-competitive price fixing but engaging in price fixing only as to a subset of the market.

V. If the rule is not withdrawn, the CFPB should provide at least one year to comply.

The CFPB proposes an effective date of the October 1 which follows by at least six months after the final rule is published in the Federal Register. We acknowledge that the CFPB has proposed this effective date in compliance with the TILA requirement for the promulgation of regulations impacting TILA-regulated disclosures. However, the CFPB should provide at least one year for impacted financial institutions to comply with the final rule.

As the CFPB acknowledges, the industry has been operating under the existing overdraft regime for at least the past 30 years. Any final rule significantly impacting the structure of this regime would be a major change for both the industry and consumers. In addition to revising existing disclosures, impacted financial institutions will potentially need time to evaluate whether they will build out new products that offer overdraft credit regulated under TILA and/or charge the financial institution’s “breakeven” amount as defined by the CFPB in connection with existing overdraft fees. Further, financial institutions who choose those options will need to build out new products and/or calculate the “breakeven” amount under the final rule. Less than one year is not enough time for financial institutions to so significantly adjust their overdraft services.

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We believe that the Proposed Rule should be withdrawn and we look forward to any opportunity to discuss our concerns with you or your staff in greater detail.

Sincerely,

William R Hulse

Bill Hulse
Senior Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce