March 25, 2024

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

RE: ICBA Comments in Response to CFPB's Notice of Proposed Rulemaking on Fees for Instantaneously Declined Transactions [Docket No. CFPB-2024-0003; RIN 3170-AB16]

Dear Director Chopra:

The Independent Community Bankers of America ("ICBA")[1] appreciates the opportunity to respond to the Bureau of Consumer Financial Protection's ("CFPB" or "Bureau" or "Agency") proposed rule ("NPR") prohibiting covered financial institutions ("FIs") from charging fees, such as nonsufficient funds ("NSF") fees, when consumers initiate payment transactions that are instantaneously declined.[2] According to the CFPB, charging such fees would constitute an abusive practice under the Consumer Financial Protection Act's prohibition on unfair, deceptive, or abusive acts or practices ("UDAAP").[3]

While community banks do not charge NSF fees for instantly declined transactions, ICBA would be remiss not to urge the CFPB to stop misusing its UDAAP authority to undermine the adequacy of federal disclosure rules.

Improper Expansion of CFPB UDAAP Authority:

Recently, the CFPB has expanded the scope of its UDAAP authority to prohibit several long-standing practices that financial institutions had previously understood to be permissible and to create new powers for the agency.

In March of 2022, the CFPB updated its UDAAP Manual to consider discrimination to be an unfair act or practice. In its press release, the Bureau announced that, going forward, it would, "examine for discrimination in all consumer finance markets, including credit, servicing, collections, consumer

[1] The Independent Community Bankers of America® has one mission: to create and promote an environment where community banks flourish. We power the potential of the nation's community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America's community banks leverage their relationship-based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers' financial goals and dreams. For more information, visit ICBA's website at www.icba.org.
[2] 89 Fed. Reg. 6031, available at: https://www.govinfo.gov/content/pkg/FR-2024-01-31/pdf/2024-01688.pdf.
[3] 12 U.S.C. 5536(a)(1)(B).

reporting, payments, remittances, and deposits."[4] Discrimination on the basis of race, sex, age, or other prohibited characteristics is a contemptable practice that community banks do not engage in. Community banks are committed to serving their entire communities and they only succeed when their entire community succeeds. Discrimination is already prohibited in lending by the Fair Housing Act and the Equal Credit Opportunity Act, which create mechanisms for enforcement by the federal prudential banking regulators, the Department of Justice, the Department of Housing and Urban Affairs, and by private plaintiffs.

By collapsing the long-standing legal distinction between practices that are "unfair" and practices that are "discriminatory" the Bureau expanded its own examination and enforcement authority to a new class of conduct. In 2023, the United States District Court, Eastern District of Texas, set aside the Bureau's UDAAP Manual change, holding that "the Dodd–Frank Act treats discrimination and unfairness as distinct concepts" and that "Congress knew how to clearly add nondiscrimination to the CFPB's portfolio when it meant to do so."[5]

The Bureau's overzealous attempts to expand its UDAAP authority are not limited to discrimination. In 2022, the CFPB issued a circular on "unanticipated" overdraft fees, which declared that the assessment of an overdraft fee can constitute an unfair practice "even if the entity complies with the Truth in Lending Act (TILA) and Regulation Z, and the Electronic Fund Transfer Act (EFTA) and Regulation E."[6] The circular described "authorize positive, settle negative" (APSN) fees as likely unfair because "overdraft fees assessed by financial institutions on transactions that a consumer would not reasonably anticipate are likely unfair."[7] The circular also concluded that such fees cannot be reasonably avoided by the consumer. The rule fails to consider the consumer's ability to track and remain aware of pending transactions in their checking account.

This proposal represents another chapter in the CFPB's troubling attempt to interpret its UDAAP powers too broadly. The Bureau should not use its UDAAP authority to curtail practices that it disagrees with when those practices are contractually consented to by the consumer and do not meet the statutory definition of abusive. It should also avoid painting with a broad brush, labeling all fees of a particular type as UDAAP violations rather than making fact-specific inquiries into individual banks' acts or practices, taking into account the extent of disclosure provided, the consumer's ability to avoid fees, and other relevant circumstances.

Policy Statement on Abusive Acts or Practices:

In April 2023, the CFPB released its Policy Statement on Abusive Acts or Practices ("Policy Statement"

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[4] CFPB, "CFPB Targets Unfair Discrimination in Consumer Finance" (March 16, 2022), available at: https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/.
[5] *Chamber of Commerce of the United States of America et al. v. Consumer Financial Protection Bureau et al.*, Case No. 6:22-cv-00381, Document 41, p. 15-16 (E.D. Tex., 2023), available at: https://bankingjournal.aba.com/wp-content/uploads/2023/09/gov.uscourts.txed_.217590.41.0.pdf.
[6] CFPB, "Consumer Financial Protection Circular 2022-06: Unanticipated overdraft fee assessment practices" (Oct 26, 2022), available at: https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf.
[7] Ibid.

or "Statement").[8] The CFPB's view of its own UDAAP authority as outlined in the statement is overbroad and will lead to an impermissible expansion of the Bureau's authority. According to the Bureau, the Policy Statement was designed to "elucidate how enforcers evaluate potential wrongdoing."[9] Remarks made by Director Rohit Chopra conveyed his hope that the Policy Statement would "provide a practical analytical framework for identifying abusive conduct," operate as a "practical educational tool," and provide a straight-forward and analytical framework that helps promote "a visceral understanding of the prohibition."[10]

The Policy Statement, citing the Consumer Financial Protection Act, states that an act or practice is abusive if it: "(1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) Takes unreasonable advantage of:

- A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
- The inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
- The reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[11]

At the time the Policy Statement was released, ICBA urged the Bureau to develop guidance that is reasonable and designed to allow financial institutions to create policies that could protect them from claims of abusive conduct, rather than allowing for polices that, when followed, could render them defenseless from such claims.[12]

NSF Fees for Near Instantaneously Declined Transactions are Not Categorically "Abusive:"

At the core of our objection to the CFPB's overbroad use of its UDAAP authority to curtail what it erroneously describes as "junk fees" is that the Bureau consistently underestimates the intelligence and agency of consumers and dismisses their ability to understand written disclosures. An act or practice may be abusive if there is "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."[13] It must be true, however, that a lack of consumer understanding of the risks, costs, or conditions of a product or service can be remedied by educating consumers and providing information about the risks, costs, and conditions – if it were not, FIs could offer no product or service without being considered abusive. FIs inform customers about the risks,

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[8] CFPB, "Policy Statement on Abusive Acts or Practices" (April 3, 2023), available at: https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf.
[9] Chopra, R., *Director Rohit Chopra's Prepared Remarks at the University of California Irvine Law School* (April 3, 2023), available at: https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/.
[10] Ibid.
[11] *Supra* note 8 at p. 4, citing 12 U.S.C. 5531(d).
[12] *See* Rhonda Thomas-Whitley, ICBA, "RE: Policy Statement on Abusive Acts or Practices - Docket Number: CFPB-2023-0018" (July 3, 2023), available at: https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/comments-on-cfpb-udaap-policy-statement.pdf?sfvrsn=b4d2ec17_0.
[13] 15 U.S.C. 5531(d).

costs, and conditions of products and services by providing disclosures to its customers, pursuant to federal regulations.

The CFPB has taken the position that all consumers lack understanding and are not capable of comprehending the language in disclosures that the CFPB and federal prudential regulators require for fee-based products and services. In their own words, the CFPB states that it "is proposing this rule because of its preliminary determination that consumers would lack understanding of the material risks, costs, or conditions of a covered financial institution's charging of an NSF fee in connection with a covered transaction."[14]

This is a reductive view of consumers. Disclosures are required to be clear and conspicuous and the Bureau itself provides model disclosures on a number of topics.[15] If the Bureau continues to classify fees that are disclosed to consumers and contractually agreed to, it will cause financial institutions to question the adequacy of any disclosure.

The proposed rule states:

> "The CFPB considered whether a disclosure remedy to the preliminarily identified abusive practice would be sufficient and has preliminarily determined that although such a remedy might reduce the incidence of the abusive conduct, it would not eliminate it and would likely be too costly or not feasible in many or most situations. Theoretically, a financial institution could present a disclosure when the transaction is attempted, explaining that the transaction would be declined and a fee would be charged. However, the CFPB is skeptical that such a disclosure would be feasible because the financial institution is often not the party operating the point-of-sale terminal, ATM machine, or P2P application interface…. And a disclosure of that nature would not eliminate the incidence of the abusive practice because there would still be consumers who may not understand even a well-crafted disclosure."[16]

This is a deeply troubling line of reasoning for financial institutions. If a fee is disclosed, pursuant to regulatory requirements and parameters, a well-crafted disclosure can still be considered abusive simply because some consumers potentially may not understand it. It is unclear how any disclosed fee is protected from future Bureau action. All disclosures – even the model disclosures created by the Bureau – may be misunderstood by some consumers. That alone does not make the act or practice abusive.

We disagree with the premise that NSF fees should be considered an abusive practice because they are not unreasonably difficult for consumers to avoid. An act or practice may be abusive based on the "inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[17] To avoid being assessed an NSF, a consumer would need to refrain from engaging in transactions that they do not have sufficient funds to complete. Consumers have agency and

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[14] 89 Fed. Reg. 6045.
[15] *See* CFPB, "Model Forms and Disclosures," available at: https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/fair-credit-reporting-act/model-forms-and-disclosures/.
[16] 89 Fed. Reg. 6038.
[17] 15 U.S.C. 5531(d).

a responsibility to know how much money is in their account – online banking and banking apps have simplified this responsibility even further.

The Proposed Rule Is a Solution in Search of a Problem:

In addition to being an excessively broad application of the agency's UDAAP authority, this proposed rule is attempting to solve a problem that does not exist by prohibiting a practice that rarely, if ever, occurs. ICBA is troubled that the NPR acknowledges the fact that this proposal is aimed at curtailing a nearly unheard-of practice, saying, "The CFPB understands, based on its market monitoring, that currently covered financial institutions rarely charge NSF fees on covered transactions. The CFPB is proposing this rule primarily as a preventive measure. 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."[18] The agency's position is speculative, which raises the question as to the ripeness of this rulemaking.

NSF fees have existed for years and are permissible under federal and state laws and regulations. The notion that banks will be incentivized to look for new ways to generate income by imposing "new" NSF fees is misleading and implies NSF fees have never been part of the banking industry fee menu. But furthermore, even if future regulatory changes or market conditions do prompt banks to begin charging NSF fees in circumstances where they would not have been charged before, there is no sufficient legal basis for the Bureau to categorically prohibit the practice.

Conclusion:

We strongly object to the premise of this proposed rule and urge the Bureau to withdraw it. It is both a continuation of the worrying trend of the Bureau using an overbroad interpretation of its UDAAP authority and does not address any real harm to consumers that is occurring in the marketplace.

Please feel free to contact us at rhonda.thomas-whitley@icba.org or mickey.marshall@icba.org if you have any questions about the positions expressed in this letter.

Sincerely,

/s/

Rhonda Thomas-Whitley
SVP and Regulatory Counsel

/s/

Mickey Marshall
AVP and Regulatory Counsel

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[18] 89 Fed. Reg. 6038.