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March 21, 2024

Submitted via E-Mail at: 2024-NPRM-OVERDRAFT@cfpb.gov

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

Re: NPRM Overdraft Lending: Very Large Financial Institutions
[Docket No. CFPB-2024-0002]

To whom it may concern:

This letter is submitted to the Consumer Financial Protection Bureau (the "**CFPB**") on behalf of the Innovative Payments Association ("**IPA**"),[1] in response to the Notice of Proposed Rulemaking on Overdraft Lending by Very Large Financial Institutions issued by the CFPB on January 17, 2024 (the "**Proposed Rule**"). The IPA's members appreciate the opportunity to comment on this important rulemaking.

The Proposed Rule would amend Regulation Z to apply to overdraft services offered by "very large banks,"[2] except where such services are offered at or below cost as a "true courtesy" to consumers. A covered provider under the Proposed Rule may determine its "cost" either through its own calculation of costs and losses or by relying on a benchmark set by the CFPB. Overdraft services offered by covered banks above cost or breakeven would be subject to a host of requirements under Regulation Z, including, but not limited to, the following:

- Structuring the overdraft service as a separate account from the asset account.
- Subjecting covered accounts to open-end credit provisions of Regulation Z.[3]

[1] The IPA is a trade organization that serves as the leading voice of the electronic payments sector, including prepaid products, mobile wallets, and person-to-person (P2P) technology for consumers, businesses and governments at all levels. The IPA's goal is to encourage efficient use of electronic payments, cultivate financial inclusion through educating and empowering consumers, represent the industry before legislative and regulatory bodies, and provide thought leadership. The comments made in this letter do not necessarily represent the position of all members of the IPA.

[2] Covered financial institutions under the Proposed Rule include banks and credit unions with over $10 billion in assets.

[3] The Proposed Rule would modify the exception in Regulation Z excluding charges imposed for paying items that overdraw an account from the definition of a finance charge. While we do not have an issue with such a characterization in this instance, we are concerned with a precedent giving the CFPB seeming discretionary authority to re-characterize fees charged in connection with a service that may entail the offering of credit as per se "finance charges." Our expectation is that the determination that overdraft fees, outside of the exclusion under Regulation Z , qualify as finance charges for purposes of the regulation is limited to this particular rulemaking and not a precedent to be used by the CFPB in future rulemakings.

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- Subjecting covered accounts to provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the CARD Act) including ability to repay analysis.

Though the Proposed Rule is currently limited to large financial institutions, the CFPB notes it intends to closely monitor the market response to the rule, which may result in expansion to smaller institutions in the future.

While we understand the CFPB's aim of protecting consumers from potentially harmful financial products and services, our members are concerned that the Proposed Rule will do just the opposite. As the CFPB notes in its commentary accompanying the proposal, in the 30 years since the inception of the current overdraft rule, the service has become a popular and relied upon tool for consumers to handle short term liquidity issues in their financial lives and prevent income volatility. The demand and need for such a service is particularly acute for the more than 100 million Americans who have less than $400 in savings and would experience financial hardship if they received an unexpected bill for medical expenses or a car repair. Income volatility can lead to poverty for families. In The Financial Diaries, the authors write that trying to understand poverty only through the lens of annual income misses both problems and possible solutions:

> "The data show that poverty is not usually about struggling to make ends meet each month on a small, but predictable budget. Rather, insufficiency of resources is accompanied by instability. […] The income dips, on the other hand, can present severe financial challenges that are not always evident in yearly data."

Overdraft services help to address this important need by offering consumers flexibility and peace of mind that even where they may not have sufficient funds in their accounts on a short term basis, they will nevertheless have the ability to purchase necessities, pay bills, and provide for their families.[4] In order to ensure that such services are provided only to consumers that want to take advantage of the product, the current overdraft rule employs important safeguards that require a consumer's opt-in to overdrafts for ATM and one-time debit transactions where a fee may be assessed and that provide consumers a means to withdraw that consent if the service is no longer needed or wanted. In short, overdraft services are an important and popular tool used by consumers to manage their finances. Furthermore, they are subject to existing protections that ensure consumers that avail themselves of this tool first provide their affirmative and informed consent.

[4] A number of studies have been conducted that show a clear need and desire on the part of consumers for overdraft services. For example, according to a 2021 overdraft protection study by Curinos, Inc., a leading provider of data to financial institutions, nearly 80% of overdraft transactions come from consumers who opted into the service with the expressed intention of using it to cover an overdrawn payment. Further, the study found that 66% of the same group of consumers indicated that, while overdraft can be expensive, they don't want to see a reduction in their access to the service. (Curinos, Inc., Competition Drives Overdraft Disruption, Israel and Kumka, 2021).

In addition, a 2022 survey conducted by Morning Consult found that 9 out of 10 consumers (89%) find their bank's overdraft protection valuable, and nearly 75% of consumers who paid an overdraft fee in the last year were glad their bank covered their overdraft payment, rather than returning or declining the payment. (Morning Consult, on behalf of the American Bankers Association, February 2022).

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The Proposed Rule in its current form will make it impracticable for many covered providers to continue offering overdraft services to consumers, thereby removing an important and popular service from the marketplace. While the Proposed Rule would allow providers to continue to offer overdraft services and assess a fee in an amount sufficient to cover the provider's costs, we note that the safe harbors offered by the CFPB for this purpose are likely not sufficient for providers to even breakeven and providers are unlikely to undertake the additional work needed to determine a true breakeven amount where there is no opportunity for a return. The alternative for providers under the Proposed Rule is to offer a line of credit subject to Regulation Z. Implementing such a product would itself require a very large and costly undertaking that providers are unlikely to consider. Finally, while the Proposed Rule on its face may be limited only to large financial institutions, the CFPB's message to providers as a whole is clear – overdraft services offered above breakeven are, in the CFPB's view, harmful to consumers.

Thus, the likely net result of the Proposed Rule will be the removal of an important financial liquidity tool from the market.[5] However, while the tool may be gone, the consumer need and demand will remain, and consumers will be forced to use more expensive alternatives such as payday loans.

Given these concerns, we urge the CFPB to revisit the Proposed Rule,[6] and further consider the negative impact it will have on consumers who do not have access to credit, but who also need access to real-time short-term liquidity in its current form.[7]

The IPA appreciates your consideration of these comments. If you have any questions or wish to discuss this letter, please do not hesitate to contact me at: btate@ipa.org.

[5] A study by the Federal Reserve Bank of New York found that fee caps on overdraft will restrict access to the consumers who need credit the most and may create unintended consequences. It is possible that restrictions on overdraft could prompt banks to introduce additional fees elsewhere in the relationship or even reduce consumer access to checking account services. The New York Fed study went on the suggest:

Overdraft fee caps hinder financial inclusion. When constrained by fee caps, banks reduce overdraft coverage and deposit supply, causing more returned checks and a decline in account ownership among low-income households ……..the positive result in our paper is that expanding overdraft credit increases financial inclusion, suggesting that policies promoting competition and transparency might be a better path than fee caps. (Dlugosz, J.L., Melzer, B.T., & Morgan, D. P., 2021, Who Pays the Price? Overdraft Fee Ceilings and the Unbanked. New York: Federal Reserve Bank Staff Reports).

[6] In addition to the negative consequences described in the comments above, we note that serious questions remain as to the legality of the proposal itself, including its conflict with prior jurisprudence and regulatory guidance concerning TILA. In light of these concerns, we believe the most appropriate course of action for the CFPB upon revisiting the Proposed Rule would be to withdraw it completely.

[7] We note here that the requirements under the Proposed Rule share many characteristics in common with the CFPB's treatment of overdraft offered in connection with a prepaid account under the Prepaid Account Rule. (See 12 CFR § 1005.18; 12 CFR § 1026.61) During the CFPB's rulemaking process for the Prepaid Account Rule, we cautioned the CFPB on numerous occasions, both in our comment letters regarding the rule and in in-person meetings with that the Prepaid Account Rule's treatment of overdraft in connection with prepaid accounts, was impracticable and would remove the product from the marketplace. This prediction, unfortunately, proved correct and today very few, if any, prepaid accounts feature an overdraft or other credit service.

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Sincerely,

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