March 25, 2024

Director Rohit Chopra
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Re: Fees for Instantaneously Declined Transactions – Notice of Proposed Rulemaking
Docket No. CFPB-2024-0003

Dear Director Chopra:

The undersigned consumer advocacy organizations write in support of the proposed rule to prohibit covered financial institutions from imposing fees when consumers initiate payment transactions that are instantaneously declined because of nonsufficient funds ("NSF" fees). These fees allow financial institutions to benefit from penalizing vulnerable consumers, and the Bureau has express authority to protect consumers from such abusive practices.

We welcome the Consumer Financial Protection Bureau's (the "Bureau's") effort to view its rulemakings in conjunction with each other rather than in a vacuum and to clarify the scope of abusive conduct in order to ensure that companies do not engage in abusive practices. This measure is consistent with the CFPB's other rulemakings to protect consumers from a broad swath of excessive bank fees and make banking more equitable and accessible.

I. NSF Fees on Instantaneously Declined Transactions are Abusive.

NSF fees punish consumers and specifically target consumers living at the margins financially. NSF fees can be charged on variety of payments, including checks and preauthorized electronic payments, when there is a delay between the consumer's authorization of the payment and the debit from the bank account. NSF fees can also be charged even when a payment is instantly declined at the point of sale, as when a consumer uses a debit card or prepaid card at a store or online. However they are charged, NSF fees inflict high costs on those who are least able to bear them, and serve no purpose other than punishing people when they are down. Thankfully, 19 of the 20 largest banks have completely eliminated NSF fees. Nonetheless, some institutions may charge the fees, sometimes under the label "declined transaction" fee. For example, the ACE Elite Prepaid Card issued by NetSpend includes a $1.00 ATM Transaction Decline Fee.[1]

When a transaction is instantly declined, there is no justifiable basis to support these NSF fees. There is likely no cost when an electronic system immediately declines a transaction and no basis to impose a fee.[2] As the Bureau states in the Notice of Proposed Rulemaking ("NPRM"),

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[1] *See* https://www.aceeliteprepaid.com/rates/

[2] The Federal Reserve Board, when discussing the 2009 Regulation E bank account overdraft fee rules, noted that denied transaction fees "could raise significant fairness issues under the [Federal Trade Commission (FTC)] Act,

NSF fees are particularly problematic because they are imposed under troubling and embarrassing circumstances for the consumer, they are not accompanied by any service on the part of the financial institution, and they reward banks for punishing consumers.

NSF fees (like overdraft fees) contribute to the racial wealth gap in our country. The Bureau's December 2023 Overdraft/NSF report demonstrated that when compared with white, non-Hispanic consumers, Black and Hispanic consumers are 69 and 60% (respectively) more likely to reside in a household charged at least one overdraft or NSF fee in the past year.[3] These consumers are also 84 and 89% more likely to reside in a household in the frequent overdraft/NSF group.[4] NSF and overdraft fees also disproportionately burden low-income consumers. The Bureau's 2017 overdraft study revealed that nearly 80% of bank overdraft and NSF fees are borne by only eight percent of account holders, who frequently have credit scores below 600.[5] The Bureau's 2023 overdraft survey and report demonstrates that 34% of consumers with an annual household income below $65,000 experienced an overdraft or NSF fee, as compared with roughly 10% of households with $175,000 or more in annual income.[6] Further, most frequent overdrafters (81%) reported difficulty paying a bill at least once in the past year.[7]

In addition to being inequitable, we support the Bureau's conclusion that these fees violate the Consumer Financial Protection Act. The Bureau correctly concludes that financial institutions take unreasonable advantage of consumers' lack of understanding of the material risks, costs and conditions of fees for instantaneously declined transactions, and that this conduct is therefore abusive.[8] Consumers do not initiate transactions knowing that they will be declined. They clearly lack understanding about their bank account balance, and no one would initiate a transaction knowing they would incur a high fee. Consistent with the Bureau's logic, consumers who incur NSF fees, even multiple times, lack the requisite understanding of at least one of these elements any time an NSF fee is charged, primarily because there is no benefit to the consumer whatsoever in initiating the transaction – the purchase is declined **and** they incur a penalty.

because the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction." 74 Fed. Reg. 59,033, 59,041 (Nov. 17, 2009).

[3] "Overdraft and Nonsufficient Fund Fees: Insights from the Making Ends Meet Survey and Consumer Credit Panel," (December 2023) at 25, available at https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-report_2023-12.pdf (hereinafter "2023 Making Ends Meet Report").

[4] *Id*.

[5] "Data Point: Frequent Overdrafters," (August 2017), at 5-6. Available at https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf

[6] 2023 Making Ends Meet Report, at 5.

[7] *Id*. at 6.

[8] *See* 12 U.S.C. § 5531(d)(2)(A).

Consumers surveyed about NSF and overdraft fees report that they are often surprised by the fee.[9] The circumstances under which they are charged contribute to this confusion. Critics of the NPRM posit that the rule would promote the idea that "ignorance is bliss" because many financial institutions provide online access to bank account information. However, having "access" to bank account information does not make these fees avoidable by consumers, because account balance information is not always accurate or current.[10] It may lag behind by a few days or transactions, making it difficult to ascertain how much money is available. Further, consumers do not have control over the order in which their bank may post transactions, or when previous debits will be posted, creating an opportunity to impose NSF fees improperly. For those consumers hit by NSF fees, inaccurate account balance information – even by a few dollars – can be extremely problematic.[11] Consumers are also confused about the overlap and interplay of overdraft and NSF fees, and the circumstances under which they have overdraft "protection," versus a rejected payment accompanied by a fee.

Even consumers who incur multiple NSF fees may not be "surprised" in the same way each time, and therefore lack the requisite understanding for the purpose of an abusiveness determination. The statute requires a lack of understanding of the material risks, costs **or** conditions. While consumers who have experienced an NSF fee may have notice that, under certain conditions, they will incur such a fee again, they may still lack understanding of the status of their account at the time of the transaction, as described above, and therefore lack understanding of their risk of incurring the fee. It is extraordinarily unlikely that consumers would consent to a pure penalty.

Financial institutions who impose NSF fees are taking unreasonable advantage of these circumstances. The expense to a financial institution for declining a transaction is minimal to nonexistent, and the corresponding penalty for a consumer is unconscionably high in comparison. As described below, the Bureau's authority to regulate abusive practices is informed by the economic meltdown which precipitated its creation: misaligned incentives as a result of financial institutions creating a system designed to benefit the institution without regard for, and at the expense of, consumers. This concept is equally applicable to the imposition of NSF fees for instantaneously declined transactions.

II. The Bureau's Clarification of the Abusiveness Standard is Consistent with the Intent of Congress.

The NPRM correctly clarifies misunderstandings based on the Bureau's discussion of abusiveness when it rescinded portions of the 2017 Payday Lending Rule in 2020. When Congress granted authority to the Bureau to prohibit abusive conduct, it explicitly identified and

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[9] 2023 Making Ends Meet Report at 15. *See also* Financial Health Network, "Overdraft Trends Amid Historic Policy Shifts," (June 1, 2023), available at https://finhealthnetwork.org/research/overdraft-trends-amid-historic-policy-shifts/ (hereinafter "2023 Financial Health Network Survey").

[10] 2023 Financial Health Network survey, concluding that overdrafting an account is frequently the result of a mistake or miscalculation.

[11] *Id*., finding that nearly half of the participants' most recent overdraft occurred on a transaction of $50 or less.

intended to fill the gaps in the other two prongs of traditional authority - deception and unfairness. Members of Congress explicitly acknowledged that the financial meltdown of 2008-09 was, in part, due to the lack of effective tools to foresee and prevent abusive conduct. Thus, Congress gave the CFPB a third, distinct authority over abusive conduct to add to other federal law prohibiting deceptive and unfair conduct. However, the discussion in the 2020 payday rule rescission could be read to depart from the intent of Congress, adding elements to a cause of action that Congress did not intend, and effectively overruling Congress's decision to add abusive authority by turning the standard into a mirror of unfair or deceptive.

In this NPRM, the Bureau has explained the concept of abusiveness as exploiting an "information asymmetry" or gaps in understanding. This standard acknowledges the grossly unequal positions between consumers and businesses and precludes a covered financial institution from taking unreasonable advantage in these circumstances. The consumer's lack of understanding is not subject to a *reasonable avoidability* standard, as stated in the 2020 rescission. Congress added that standard as part of unfairness but deliberately omitted it from abusiveness. Requiring regulators and courts to evaluate the reasonableness of the consumer's understanding in comparison to the financial institution's, even when the financial institution is taking advantage of that lack of understanding, interjects an element Congress deliberately avoided, adds uncertainty into the standard, and waters down the potency of a prohibition on abusing an information asymmetry. Adding a reasonable avoidability standard could be misconstrued to create an additional element of the cause of action for abusiveness, leading to irrelevant investigation, evidence, and evaluation. Had Congress intended for this to be an element of abusiveness and part of the analysis, it would have said so. It did not, and in fact said the opposite. By contrast, Congress specifically did add this element to unfairness. It is black letter law that courts interpret laws to assume that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another section of the same Act.[12]

Similarly, the 2020 rescission's discussion of the standard for a consumer's understanding of the material risks, costs and conditions is also inconsistent with the adoption of abusiveness. The 2020 rescission stated that a consumer does not lack understanding if they have a general understanding of the likelihood and risks of harm associated with payday loans. The NPRM clarifies this and explains why this general vs. specific understanding is not a helpful framework to evaluate a consumer's true "lack of understanding." It is not always this simple – an awareness that a product could cause harm does not protect a person from being exploited if a company takes advantage of the consumer's inability to focus on future harm or their belief that the likelihood of harm is remote or will not apply to them.

Further, employing this generalized standard of understanding could signal that the use of a written disclosure may be sufficient to prove that a consumer had understanding, creating problematic burden shifting. Disclosures are frequently weaponized against consumers who genuinely lack understanding in consumer transactions. In the case of NSF fees, disclosures

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[12] *See Polselli v. Internal Revenue Serv*., 598 U.S. 432, 439 (2023).

typically occur at the time of account opening, years before the declined transaction, and they may change or become inapplicable depending on whether a consumer selects an overdraft protection product or makes other changes to their bank account(s). Disclosures are generally not an effective way to prevent consumer harm and should not be encouraged by the CFPB.[13]

The 2020 rescission could be read to take the focus off the conduct of the covered entity and instead to place it onto the consumer by comparing their understanding and awareness of harm and reasonable steps they could have taken to avoid it. However, abusiveness is focused on the conduct of the covered entity and how it is able to manipulate circumstances and dynamics to the detriment of consumers.[14] Avoiding that focus would defeat the purpose of abusiveness as intended by Congress.

The NPRM's clarification of the standard, along with the CFPB's April 2023 Policy Statement on Abusiveness, is consistent with the manner in which the Bureau has evaluated abusive conduct since it was created.[15] Simply put – there are no surprises in the approach to abusiveness outlined by the Bureau in this rulemaking for covered financial institutions. Even prior to the passage of Dodd-Frank, the equitable principle of unjust enrichment, in which this particular prong of abusiveness sounds, was well-established. The NPRM is not a radical outlier of consumer protection law.

The 2020 rescission's approach to abusiveness had the effect of narrowing or limiting the Bureau's authority unnecessarily. As new consumer financial products emerge and payment systems become faster and more automated, it is critical to ensure that the Bureau's approach to abusiveness is not limited in this manner. The NPRM ensures that covered financial entities understand abusiveness in the way the statute was written and adopted by Congress – not the manner in which a prior administration misunderstood the language of the statute or inserted higher thresholds.

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[13] Further, the CFPB has brought several enforcement actions involving disclosures that were nullified or manipulated by other conduct. *See* Consent Order, *In the Matter of Cash Express, LLC*, No. 2018-BCFP-0007, Oct. 24, 2018, at ¶¶ 26, 35 (disclosure of consumer's rights was "nullified" by defendant's conduct to the contrary); Complaint, *CFPB v. All American Check Cashing, Inc*., No. 3:16-cv-00356- WHB-JCG, S.D. Miss., May 11, 2016, at ¶¶ 67-68 (defendant hid disclosures on signage and receipts).

[14] The CFPB's Abusiveness Policy Statement explains that abusiveness "focused on conduct that Congress presumed to be harmful or distortionary to the proper functioning of the market," available at https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/#10

[15] *See, e.g.,* CFPB, *Supervisory Highlights: Issue 19, Summer 2019*, at 3 (Sept. 2019), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf ("By purchasing a product [guaranteed asset protection] they would not benefit from [because of the low loan-to-value ratio of their auto loans], consumers demonstrated that they lacked an understanding of a material aspect of the product.").

III. Conclusion: The CFPB's Preventive Approach is Responsive to a Holistic View of the Marketplace

As the preamble to the Dodd-Frank Act states, the Consumer Financial Protection Act was created to **protect** consumers from abusive financial services practices.[16] The Bureau refers to its proposed rule prohibiting NSF fees as a form of "prophylactic rulemaking," as many financial institutions have stopped imposing NSF fees.

We fully support the NPRM's preventive measure. First, the shift away from NSF fees was voluntary, and there is no broad prohibition against covered financial institutions deciding to reinstate these fees in the future. Second, some prepaid card companies charge these fees, and users of prepaid cards are especially low-income, vulnerable consumers. Third, the Bureau's rulemaking authority is not constrained to address circumstances where the practice has already devastated consumers before it can intervene. The Consumer Financial Protection Act created the CFPB to act as a regulatory watchdog, preventing financial ruin to Americans through increased market monitoring and supervision. As identified and explained above, NSF fees are abusive, penalizing the most vulnerable consumers. The CFPB is proceeding with this rulemaking with an informed view of the marketplace to prevent a known harm. As the CFPB continues its efforts to rein in junk fees in other parts of the banking sector, it is fully appropriate to recognize the possibility that banks, prepaid card companies, and person-to-person payment apps will reinvigorate NSF fee practices.

The CFPB and its authority to address abusive practices were created after existing regulation and consumer safeguards in the financial sector **failed to protect** our economy from a disaster. It is wholly appropriate for the Bureau to take preventive measures before abusive practices rise to the level of widespread harm, particularly when this lull in NSF fees could simply be a pause rather than a complete termination.

We also support the NPRM's proposal to make the rule effective 30 days after publication in the Federal Register. Because many financial institutions no longer impose NSF fees, they are not substantially harmed by this prohibition, and it will not be burdensome to implement. It is also a simple matter to stop charging a single, rarely charged fee. Arguments that banks may reduce their services to consumers are similarly not well founded in light of these developments. Furthermore, financial institutions that do allege they are substantially harmed are relying on these abusive fees as revenue and should be stopped expeditiously. We fully support this proposal and encourage the CFPB to implement this Rule. Should you have any questions, you can contact Erin Witte at Consumer Federation of America at ewitte@consumerfed.org, or Lauren Saunders at the National Consumer Law Center at lsaunders@nclc.org.

[16] Pub. L. No. 111-203, (listing, in the preamble to the Dodd-Frank Act, one of the purposes of the Act as "protect[ing] consumers from abusive financial services practices.")

Sincerely,

Americans for Financial Reform Education Fund
Center for LGBTQ Economic Advancement & Research (CLEAR)
Center for Responsible Lending
Consumer Federation of America
Maine People's Alliance
National Consumer Law Center, on behalf of its low-income clients
New Economy Project
Public Citizen
UnidosUS
U.S. PIRG