Missouri Bankers Association

March 25, 2024

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

RE: Docket No. CFPB-20240003; RIN 3170-AB16
Filed: VIA Reguations.gov

Dear Sir or Madam:

The Missouri Bankers Association files this comment on behalf of our member banks and the communities and customers they proudly serve. The CFPB proposes to prohibit NSF fees when transactions are instantaneously, or near instantaneously declined. Transactions covered include one-time debit transactions, ATM transactions, and person-to-person transactions.

The CFPB's stance regarding bank fees and particularly NSF fees and particularly this docket in relation to a scenario the Bureau describes as unlikely (instantly declined transactions) reflects the political bias of the Bureau and a hostility toward consumers having any choice or responsibilities in matters of banking services.

The Bureau also ignores that NSF fees are intended to deter irresponsible, and in some cases fraudulent conduct. By promoting no consequences, the Bureau is increasing the likelihood of consumers falling into debt and insolvency, potentially leading to a lifetime of poverty.

Bank fees are always disclosed at account opening. Banks provide many innovative services to assist customers in managing their deposit accounts and determining their available funds. However, no one has more complete knowledge than the customer (account holder) regarding their account balances, available funds, outstanding items or third-parties to whom the customer may have provided account access or payment authorizations.

The CFPB is perversely promoting financial irresponsibility rather than financial responsibility.

The CFPB states 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.

The CFPB states: *More recently, there has been an effort across the Federal Government to eliminate fees that are not subject to the competitive processes to ensure fair pricing*.

Financial institutions are allowed by law to set their fees, terms and conditions to best fit their business model, and consumers can find a myriad of choices of financial institutions available to

207 E. Capitol Avenue • P.O. Box 57 • Jefferson City, MO 65102 • (573)636-8151 • FAX (573)634-2754
www.mobankers.com

them, and multiple types of deposit accounts offered by each institution. Financial institutions would not stay competitive or viable if their offerings did not appeal to their customers. It is not the role of the federal government to intervene in the pricing of private enterprises and to determine what prices are "fair" and to state that certain fees are to be "eliminated" at the whim of the government.

The CFPB fails to prove that the rule meets the criteria for "abusive" as outlined in federal law, as even a common definition describes "abusive" as involving "injustice" or "illegality" – neither of which are addressed in the proposed rule or the arguments presented by the CFPB as reasoning for the rule.

The CFPB also mixes in rhetoric related to overdraft fees, and other types of NSF fees that are not pertinent to the discussion related to the proposal. The CFPB also tries to make a connection with payday lending rulemaking and mortgage lending as part of their analysis. If the preamble was limited to the discussion of the proposed rule, it could be summarized in the sentence that states that these fees are rarely assessed – in other words, the proposed rule is a solution in search of a problem and the CFPB is using this proposal to lay the groundwork for future rulemakings to attack other fees. The CFPB uses its bully pulpit to bash other types of fees and this proposed rule is merely a ruse to do so.

The CFPB admits that it is proposing this rule primarily as a preventive measure and is guessing at future possibilities that may or may not ever occur in the financial services industry. This practice sets a dangerous precedent and is an abuse of power by a federal government agency to interfere with the free market and impose new rules that will do the opposite of the stated goals of including more consumers in the banking system.

The CFPB references "studies" it has conducted, RFIs it has published, and complaints to the database as justification for its actions related to bank fees. In one instance the CFPB references "80,000 comments" it received, and summarily assumes that all these comments were of the type referenced in the preamble regarding confusion or lack of understanding or lack of fee avoidance. The CFPB fails to consider the millions of consumers who have accounts who have no complaint regarding the fees, as they are able to manage their accounts to avoid fees or select a type of account that has no fees.

Comments comparing the language used in federal law and the language used by the CFPB are shown below.

12 USC §5531. Prohibiting unfair, deceptive, or abusive acts or practices

(a) In general
The Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

(b) Rulemaking
The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction

with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

The rule does not in any way include the option of "requirements for the purpose of preventing such acts or practices" – it just prohibits the practice completely. The CFPB decides unilaterally that there is no disclosure, understanding, or requirement that could occur for the fee to be assessed.

The Bureau does not prove its basis to lead to its conclusion that the fee is abusive. Rather the Bureau includes 182 footnotes referring to various publications and other sources to prove its declaration that the practice is abusive and cites studies and references complaints filed with the Bureau where consumers have complained about paying NSF and OD fees.[1] The Bureau takes these at face value without any analysis of whether the consumers read their disclosures and account agreements or asked questions of their bank regarding how and when the fees might be assessed. The CFPB places absolutely no responsibility on consumers to manage their accounts, rather it expects financial institutions and the vast majority of their customers to subsidize a segment of accountholders who are unable and unwilling to do so.

(d) Abusive
The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice-

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

Definition of "materially" – to a great extent; considerably; to an important degree; substantially; significantly

Definition of "interferes" – intrudes; intervenes; obstructs; restricts

Financial institutions in no way "materially interfere" with a consumer's ability, using the definitions shown above of those two words. Disclosures are given to the customer at account opening and terms and conditions are spelled out in the account agreement the customer signs. The customer always has access to these documents and has the ability to pose a question to the financial institution if they have a question about the language used, or the circumstances under which a fee will be assessed. In no way does the financial institution "materially interfere" with the customer's ability to obtain this understanding.

(2) takes unreasonable advantage of-

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

[1] Complaint data bases are an incomplete reference for the total population of account holders, the vast majority of whom track their account balances and rarely overdraft.

Definition of "unreasonable" – not guided by or based on good sense; baseless; groundless; invalid; irrational

Wording used in these documents must be the same for all customers who hold that type of account, and cannot be customized or use different language to accommodate for all customers' range of ability to understand the language. Differentiating account disclosures would lead to confusion and unfair practices. With uniformity, customers can relay on account disclosures to choose the most appropriate account and account features to meet their needs. The CFPB does not prove that financial institutions are "unreasonable" in their approach to disclosing, assessing, and communicating regarding fees.

The CFPB states: *For example, it is enough to show that a company takes unreasonable advantage of the fact that consumers do not know a fee ("cost'') will be charged in a particular circumstance, even if consumers have some understanding of the "risk'' that a fee might sometimes be charged*.

The CFPB states: *The consumer's lack of understanding, regardless of how it arose, is sufficient*.

The CFPB states: *[i]n relation to the advent and increased usage of debit card and other instantaneous transactions: These more frequent transactions might make it harder for some consumers to track their available funds*.

The CFPB states: *There is a point at which a covered financial institution's conduct in leveraging its superior information becomes unreasonable advantage-taking and thus is abusive…NSF fees are not fees for a service. Profiting from transactions where the consumer receives no service in return raises threshold concerns that a covered financial institution may be engaging in unreasonable advantage-taking*.

The CFPB states: *The CFPB generally considers it unreasonable for a financial institution to benefit from, or be indifferent to, negative consumer outcomes resulting from a consumer's lack of understanding*.

There is no requirement in federal or state law that banks must provide a service in connection with a fee, and there is no statutory authority given to the CFPB to set such fees on deposit accounts. Some fees in fact are intended to serve as a deterrent to bad behavior. There are costs associated with NSF transactions, and NSF fees also serve as a deterrent and reminder to consumers to not spend more money than they have. If there were no fees assessed for NSF transactions, consumers would have little incentive to keep track of their account balances and examine their transactions, making them less likely to manage their financial affairs responsibly and also to be alert to discover unauthorized and fraudulent transactions on their accounts.

The CFPB's analysis of the "costs" that financial institutions incur related to NSF transactions is limited and does not consider many other costs that arise beyond the processing cost.

Fees are disclosed. Customers can manage their accounts to avoid the imposition of fees as a consequence of their actions. Consumers have demanded faster payments but are totally in control as to whether or not they utilize these payment mechanisms. The fact that banking transactions are faster and can be conducted almost instantaneously (both debits and credits) is irrelevant to the discussion, as the responsibility remains with the consumer to keep track of their

money and control how and when they access their account. Numerous tools are available to help them do so, but only they know what they have already authorized, and whether they have "settled" or posted to the account. The CFPB makes excuses as to why consumers cannot be expected to know or remember what their account balances are (or what the balance will be based on what they have already authorized) ultimately reflecting the Bureau's unconcerned and disdainful attitude toward the very consumers the Bureau purports to protect. If the consumer is unsure of the amount of available funds, the consumer could certainly use a different payment method as a reasonable approach. The CFPB refers to an "increased expected burden" of getting information on an account balance. This is not a "burden" and nothing has "increased" – but is an expected part of the consumer's responsibility for entering into a bank account contract and only spending funds that are available to spend. For consumers who cannot or will not, for whatever reason, keep track of their account balance and outstanding items, other financial products such as a prepaid card could be a better solution, where there would always be certainty know at any given moment the amount of funds available on the card to spend.

The CFPB states: *But, in many circumstances, consumers would not have an accurate general understanding of risk in the market because, for example, either (1) they cannot observe harm to other consumers, or (2) even if they could, they would have no way of knowing whether those consumers are similarly situated to them. For example, in the deposit market, consumers cannot observe the frequency with which similarly situated consumers incur NSF fees. A consumer's understanding of the experience of their peers or general risk in the market may sometimes not accurately inform their understanding of the likelihood of incurring NSF fees generally or in connection with a particular transaction*.

This statement does not appear to have any relevance, as "risk in the market" has no impact on an individual consumer. How does what happens to another consumer affect the handling of their own account? There is no way for an individual consumer to have any clue about what types of accounts or fees other consumers experience and in fact consumer financial privacy laws protect this information from disclosure.

The CFPB cites in footnotes 125 and 126 a case from 1985 against the FTC related to disclosures, and references this language:

In theory, financial institutions could provide these types of disclosures at deposit account opening or before consumers initiate a transaction. However, account opening disclosures of this sort would likely have limited salience because at that moment in time, consumers are not focused on the possibility that they will incur a funds insufficiency.

In 1985, Reg. CC, Reg. DD, and Reg. E did not exist. So there is no "in theory" at play here. All of these fees are disclosed to consumers at account opening, along with all other required disclosures of the CFPB and other bank regulatory agencies. It is up to the consumer who enters into a contract with their financial institution to read and understand the disclosures and terms and conditions of their account agreement. The fact that they may not encounter a fee for days, months, or years after account opening is irrelevant to the discussion. And the first time they did encounter such a fee and did not remember that the fee could be charged, they could certainly consult their disclosure/agreement copies and/or ask for assistance from the financial institution to ensure they could take action to avoid this type of fee in the future.

Does a consumer read and understand and commit to memory the instruction manual for their new appliance when they buy it? Of course not. When the consumer needs to understand some appliance function or the appliance subsequently needs service (perhaps days, months, or years after purchase), the consumer has the resources needed by consulting the instruction manual and/or contacting the manufacturer's customer service department. If the consumer ended up paying for a service call because they did not read or understand the instruction manual that clearly outlined how to perform the requested function, does that mean the consumer can decline to pay the service provider for the house call and service performed by saying that they did not "understand" it? Under the CFPB's twisted logic, consumers bear no responsibility for reading and understanding their account documents.

The CFPB considered whether a disclosure remedy would be sufficient, and discarded that theory without any analysis, using the logic of "there would still be consumers who may not understand even a well-crafted disclosure."

To take this to the extreme, the CFPB would argue that it only takes one consumer to have a "lack of understanding" to make the practice abusive. That approach is counter to the operation of a free market by removing the consumer from any responsibility or proactive measures. This approach would also end the rule of law and the law of contracts as no law or contract could ever be fairly enforced due to the CFPBs boundless construct of "abusive" practices.

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

Definition of "inability" – the state of being unable to do something; lack of power, capacity, or means; powerlessness

The CFPB states *"there is a point at which a covered financial institution's conduct in leveraging its superior information becomes unreasonable advantage-taking and thus is abusive. "*

This statement is full of unproven allegations and the use of the words "conduct" and "leveraging" and "superior information" are not defined nor justified. How does the financial institution have "superior information" when only the consumer is aware of what transactions they have previously authorized, what deposits are coming into the account, what debits are coming out of the account?

The consumer always has control of their account and is in the best position to track the account balance and pending transactions, as the consumer has knowledge of every transaction initiated by the consumer. The consumer can "protect" their interests by signing up for low balance alerts, recording all debits (whether they have posted or not) and not engaging in a transaction that will result in a fee. If the consumer is unhappy with the fees, terms and conditions offered by their financial institution, they can evaluate accounts offered by any number of competitors to find the best fit for their needs.

(e) Consultation
In prescribing rules under this section, the Bureau shall consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.

The preamble states that there was this type of consultation but does not identify the "feedback" from other regulators that "assisted" the CFPB in preparing this proposal. In the interest of transparency, that type of feedback should be made public.

The CFPB also sets up a scenario where it is impossible to state account disclosures regarding the assessment of NSF fees that would allow the consumer to understand when the fee might be charged and when it might not be charged as the consumer would have difficulty knowing whether a transaction was declined "instantaneously" or not – for what that word means to the average consumer vs. what it means to the financial institution could be drastically different. So a consumer might think an ACH transaction they authorized in the morning that hit their account in the afternoon was "instantaneous" when it was not under the regulation.

The CFPB should provide model language that can be used by financial institutions that would be deemed acceptable to avoid accusations of UDAAP violations.

Since the enactment of the Dodd-Frank Act, the use of "abusive" allegations have been rare, and reserved for the most egregious actions by isolated financial services providers, specific to their actions. As outlined above, the CFPB is grasping at straws to lay the groundwork for prohibiting any number of fees charged by all financial institutions under the "abusive" authority. This approach totally ignores free markets, consumer free will, and a highly competitive financial services industry.

Sincerely,

Jackson Hataway
President and CEO