Missouri Bankers Association

April 1, 2024

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

Docket No.: CFPB-2024-0002
RIN 3170-AA42
Submitted: https://www.regulations.gov

Dear Ladies and Gentlemen:

The Missouri Bankers Association (MBA) submits this comment letter on behalf of our member banks and the communities and customers they serve. The MBA has also joined in a comment letter submitted by the American Bankers Association and our sister state associations. We submit this letter separately to reinforce the joint letter and to address additional matters.

In a press release the CFPB premised this proposal as "taking action to close regulatory loopholes that will bring transparency and competition for overdraft *lending.*" (emphasis added). Contrary to this premise, bank overdraft programs are fully and transparently disclosed under regulations developed, refined, maintained, and improved over the course of decades. Banks, thrifts, and credit unions all offer deposit programs in a fiercely competitive market under a dual banking system (state and national charters) that is the best in the world for diversity and strength and competitive services.

Bank overdraft programs have never been a "lending" program. That is why it is inappropriate to apply the Regulation Z regime to bank overdrafts.[1, 2, 3] This is like the proverbial "square peg in a round hole," and this is why the Bureau's proposed regulation is anything but transparent or understandable for banks or for consumers. This proposal will end bank overdraft programs by destroying the value/risk equation for banks and the value, utility and discipline of overdraft programs that make them so effective in meeting consumer needs.

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[1] For example, under both Missouri statutory law and common law, overdraft fees *are not interest*. Section 362.111, RSMo., and *Freeman v Hawthorn Bank*, 516 S.W.3d 417 (Mo. App. 2017). Overdraft fees are not associated to a loan account, they are fees for deposit account services.

[2] In this proposal, the Bureau irrationally, or perhaps magically, transforms *deposit* overdraft programs to *lending* overdraft programs based on bank asset size.

[3] Some banks do offer to link a line of credit or credit card with a deposit account with an automatic draw feature to avoid an overdraft of the deposit account. This could be referred to as lending to avoid overdraft of a deposit account.

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While this rule is addressed to amend "Regulations E and Z to update regulatory exceptions for overdraft credit provided by very large financial institutions," (see note 2) the impact will be to all banks. Few, if any community banks will be able to compete with the terms offered by the very large banks, or alternatively, existing overdraft programs will come to be viewed negatively by community bank customers where competing very large banks are subject to the rules' fee caps.

This is the first ever attempt by any federal agency to cast overdraft services as a "credit" product subject to Regulation Z. The rule imposes safe harbor fee "caps" and thus is an illegal action by the Bureau to set a national usury standard for "overdraft lending" since Section 1027(o) of the Dodd-Frank Act expressly prohibits the Bureau from establishing a usury limit.

These matters are legally unprecedented and raise important legal questions whether the CFPB is acting within the boundaries of its authority and whether the rule stands within the enumerated powers of Congress to delegate to the CFPB. Thus, the CFPB is inviting uncertainty and legal peril to an area of banking where laws have been stable and protective of services and products that banks and their customers have relied on.

The CFPB's action conflicts with the express actions by Congress to authorize state and national banks to operate nationally under lending laws of their home state by exporting the interest rates -- 12 USC 85 and 12 USC 1831(d). These laws created competitive credit markets on a national level that have been a boon to consumers, businesses and for our economy.

To the extent that the CFPB views overdraft programs as a form of short-term small dollar lending, the MBA also notes that historically the banking agencies have discouraged banks from providing innovative small dollar credit programs. For example, both the OCC and FDIC effectively terminated bank deposit advance programs several years ago. These programs were offered as a lower cost alternative to bank overdraft privileges. They did not rely on credit underwriting, but instead looked to the consumer's account management history. As a result of the actions of the OCC and FDIC, most of this activity now occurs outside of banks in the Fintech space (such as "earned access" programs) where the terms, conditions, practices, and the companies are comparatively unsupervised compared to banks. Thus, the CFPB is moving in a direction that has typically been opposed by the bank safety and soundness agencies by attempting to expand bank overdraft programs imbedding credit underwriting and by instituting fee (usury) caps to encourage their use.

Bank overdraft and overdraft protection programs have been used by banks and their customers as a form of short-term liquidity. Banks have not underwritten overdraft protection programs as "credit" but instead have based overdraft privileges on the customers' account history and the characteristics of account usage. Because of the many services and conveniences and financial safety and security associated with transactional bank accounts, customers are incented to resolve overdrafts promptly. By applying Regulation Z, the CFPB will force many banks to underwrite overdrafts as credit rather than as an account privilege and this will cause the costs for banks and their customers to increase. This will also require credit underwriting standards to apply and in this case, many customers will not qualify and will lose access to this valued service.

Finally, many banks will curtail their overdraft privilege programs or eliminate them entirely because the de jure fee caps (very large banks) and de facto fee caps (community banks) determined by the CFPB are too low to recover costs or to cause customers to use the programs prudently.

The CFPB's proposal will effectively curtail all banks' ability to differentiate their transactional account products to meet the needs of different consumers and different markets. Customers that do not use overdraft privileges, even where the fees are capped at below market rates, will pay more for their banking services to subsidize the customers that do. Alternatively, some banks may decline to offer any overdraft privileges, effectively reducing competition for the customers seeking overdraft programs and likely resulting in these customers paying more overall for banking services as their options are reduced.

The CFPB and the banking agencies cannot continually pressure bank revenues (this proposal, credit card proposals, interchange, etc.) and expect banks to continue to be effective in meeting the needs of consumers across the broadest spectrum, maintain safe and sound banks, and maintain competition by preserving and promoting many bank charters across all bank asset sizes.

The Bureau's proposal is a solution in search of a problem. Overdraft is a popular product for short-term liquidity for customers that have comparatively fewer options to meet an unexpected shortfall in funds. Contrary to the Bureau's assertions, consumers can easily track their account balances and outstanding or pending transactions (of which the bank may have no knowledge) and with modest diligence need never incur an unintended overdraft fee. No reasonably prudent consumer is abused by bank overdraft programs.

Banks compete with other banks, and with non-bank providers to offer innovative and competitively priced products and services and consumers choose the services they wish to use. If a consumer is very unhappy with a bank's overdraft program, that consumer can opt out or change banks.

Price caps do not increase or promote competition and they inevitably lead to declines in desired services and products and consumer choice. The Bureau's actions are illegal, arbitrary, and nonsensical and do not serve the interests of consumers. We urge the Bureau to withdraw this proposal.

Sincerely,

Jackson Hataway
President and CEO