

April 1, 2024

VIA EMAIL

Comment Intake—2024 NPRM Overdraft
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Email: 2024-NPRM-OVERDRAFT@cfpb.gov

Re: Notice of Proposed Rulemaking: Overdraft Lending: Very Large Financial Institutions, Docket No. CFPB-2024-0002

Dear Director Chopra:

On behalf of the Center for Responsible Lending (CRL),¹ thank you for the opportunity to comment on the Notice of Proposed Rulemaking regarding overdraft lending for very large financial institutions. For far too many consumers, unexpected and costly overdraft charges, marketed as a “courtesy,” have caused significant detriment to their financial well being. At the same time, modern technological innovations in the banking sector have reduced the actual costs of providing overdraft protections to consumers, while financial institutions have failed to pass those savings on to their consumers. The result is that “courtesy” overdraft products have become a significant profit generator for financial institutions at the expense of those consumers who can afford it the least. Therefore, CRL commends the Consumer Financial Protection Bureau (CFPB) for properly using its legal authority to ensure a fairer and safer financial marketplace by proposing rules that would narrow the exemption for “courtesy” overdraft, define non-courtesy overdraft products as credit, and subject non-courtesy overdraft products to the standards and scrutiny required under existing, well-established federal, financial consumer protection laws.

CRL believes that the CFPB’s initial proposal is a required and important step towards better protecting consumers that would be greatly improved by eliminating the potential for financial institutions to evade the intent behind the exemption by further narrowing it to include parameters on: (1) limitations on the frequency and total number of overdrafts, (2) precluding fees for de minimis overdraft amounts, and (3) requiring a uniform grace period before overdraft charges can be assessed—policies that a number of responsible, large financial institutions have increasingly adopted in order to ensure fairness to their consumers. These additional restrictions are not only good for consumers, but they also ensure that the industry will be unable to “game” the Bureau’s proposed benchmark-overdraft fee by repeatedly imposing the fee on multiple transactions. Accordingly, CRL will devote the majority of its comment to addressing these suggestions to improve the final rule.

¹ The Center for Responsible Lending is a non-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices, including student loan debt incurred as a result of fraudulent representations by higher learning institutions. CRL’s views on student lending are informed by its affiliation with Self-Help, one of the nation’s largest nonprofit community development financial institutions. Self-Help has provided \$6 billion in financing to 70,000 homebuyers, small businesses and nonprofits and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago.

Introduction

Overdraft fees have proven to be a generous source of revenue for the nation’s largest financial institutions. In 2022 alone, consumers paid over \$6 billion in overdraft fees to the banking institutions that the CFPB supervises.² The Proposed Rule would ensure depository institutions provide consumers with overdraft that is truly a courtesy, while providing consumers with disclosures and consumer protections when overdraft is a profit-producing credit product. The Proposed Rule fulfills these objectives by limiting the overdraft fee so it is at a breakeven cost to the bank. It clarifies that non-courtesy overdraft products are credit and that the fees associated with those products are finance charges, while also providing a much more limited exemption than currently exists for breakeven, courtesy overdrafts. The proposed rule also implements additional guardrails on non-courtesy overdraft products to ensure that consumers are better informed of their costs and have the necessary tools and protections to better protect their financial interests.

I. The Need for An Overdraft Rule

- A. The Proposed Rule amends the overdraft exemption, which is appropriate given bank policies and a changed landscape of overdraft fees.

Policy shifts and technological advancement in the late 1990s and early 2000s resulted in overdraft fees becoming a robust profit generator. Initially, overdrafts were a courtesy to occasionally cover some account holder’s paper checks when the account lacked sufficient funds. Over time, policies that maximized overdraft fees proliferated. Among them:

- Charging overdraft fees on debit, ACH and ATM transactions: Consumers increasingly used debit card and ACH transactions moving the primary conduit of overdraft fees away from checks and depositories charged overdraft fees on these transactions.
- Reordering transactions: Financial institutions allowed debits to post before credits, and/or highest transactions to post first.
- Sustained overdraft: Banks charge additional fees if the account remains overdrafted for more than a few days.
- Surprise overdraft fees: This includes, but is not limited to, authorize positive, settle negative transactions, for which a consumer’s account has sufficient funds to cover a transaction when it initially comes in, but “given the delay between authorization and settlement of the transaction the consumer’s account balance [become] insufficient at the time of settlement.”³

Regulators have repeatedly found common overdraft fee practices violate state and federal law. As early as 2005, the Federal Reserve Board, FDIC, and OCC began issuing guidance on consumer protection violations related to overdraft.⁴ Similarly, the CFPB has issued a wealth of guidance and rulemakings on overdraft. Regulators have addressed overdraft in a somewhat piecemeal manner, covering the right to opt out of overdraft coverage and authorize positive settle negative transactions, among other issues, sometimes repeatedly.

Most recently, in Fall 2023, CFPB noted that during the period from February 2023 to August 2023, “[s]upervision continued to cite unfair acts or practices at institutions that charged consumers for unfair

² CFPB Estimated using data from 2022 Federal Financial Institutions Examination Council (FFIEC) Call Reports]

³ CFPB [Supervisory Highlights Junk Fees Special Edition, Issue 29, Winter 2023 \(consumerfinance.gov\)](#) Winter 2023

⁴ [Circular 2022-06 Unanticipated Overdraft Fee Assessment Practices \(consumerfinance.gov\)](#) page 3

unanticipated overdraft fees, such as Authorize-Positive Settle-Negative (APSN) overdraft fees, during this time period.”⁵

These facts demonstrate that, despite prior regulatory guidance and enforcement, overdraft abuses persist. And, without new regulations, consumers remain vulnerable to changing practices that would devise new ways to extract overdraft fees.

B. Voluntary reforms show the effectiveness of reducing overdraft fee levels, which should be codified in the Proposed Rule

Since the pandemic, some of the financial institutions that the CFPB supervises have implemented voluntary policies that have limited the negative repercussions of overdraft fees but have not outright gotten rid of these fees. In 2022, Wells Fargo and JPMorgan Chase collected one-third of the total overdraft revenue collected by banks required to report their revenue. Each bank raked in over \$1.2 billion in fees that year.⁶ As in the past few years, Wells generated the most overdraft fees and JPMorgan Chase the second most. Both banks eliminated NSF fees and introduced a grace period until the end of the next day before an overdraft fee is charged. JPMorgan Chase also now has a \$50 overdraft “cushion.” As a likely result of these voluntary reforms, as well as some overall decline in overdraft incidence, JPMorgan Chase and Wells Fargo experienced 45% and 44% declines in their overdraft revenue from the fourth quarter of 2019 compared to the fourth quarter 2022, respectively.⁷ However, the voluntary nature of these changes to overdraft fees do not provide consumers with the certainty needed to ensure financial fairness and have not eliminated predatory overdraft policies overall.

In the absence of rulemaking, there is no consistency as to which institutions make these choices, nor any uniformity in the policies they decide to implement. The proposed rule would bring clarity and certainty to both the industry and consumers and ensure that the vast majority of banking customers, who are served by the nation’s largest banks, are able to enjoy consequential savings and consumer protections.

C. Recent overdraft reforms are not sufficient to solve the overdraft problem, especially for Black, Latino and low-moderate income communities

Although recent regulatory actions and voluntary industry changes have made inroads to addressing overdraft concerns, they have not fully resolved overdraft abuse issue—especially for lower income, Black, and Latino consumers. Instead, research shows that excessive overdraft fees continue to disproportionately plague Black and Latino consumers in particular.⁸ In addition, overdraft fees continue to be a major reason why consumers lose bank accounts. Black and Latino consumers are already four to five times more likely to be unbanked than white Americans.⁹ They are also disproportionately likely to

⁵ [CFPB Supervisory Highlights 10 4 2023 \(consumerfinance.gov\)](#) (Fall 2023)

⁶ [Overdraft/NSF metrics for Top 20 banks on overdraft/NSF revenue reported during 2021 \(consumerfinance.gov\)](#)

⁷ [Overdraft/NSF revenue down nearly 50% versus pre-pandemic levels | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

⁸ [Overdraft Trends Amid Historic Policy Shifts — Financial Health Network \(finhealthnetwork.org\)](#), see also: A recent study of Arizona, California and Texas Latinos by UnidosUS echoes and underlines CFPB findings. It found that lower-income Latino respondents are more likely to be charged an overdraft fee. Forty-seven percent of those who make less than \$49,000 a year were charged an overdraft fee, as opposed to 39% of those with incomes above \$50,000. Furthermore, 8% of respondents who were charged an overdraft fee paid more than \$300 in the past 12 months. New Survey Shows Latinos Are Struggling with High-Debt Burdens, Low Savings Rates, and a Lack of Access to Affordable Bank Products (September 2022) [unidosus_oportun_latinosbankingandcreditsurvey_memo.pdf](#)

⁹ [2021 FDIC National Survey of Unbanked and Underbanked Households - Executive Summary](#) Civil rights leaders have noted the cost of this financial disenfranchisement when urging reform of bank overdraft practices: “Once a

be ejected from the financial mainstream. Ejection from the mainstream financial system can have long lasting and negative systemic effects.

The Proposed Rule has the opportunity to save at least \$3.5 Billion for the 23 million consumers who pay overdraft fees yearly. This would result in an average household saving of \$150 and even more for frequent overdrafters, which is quite significant for a low-income family.

CRL'S Recommendations for Improving the Courtesy Exemption in order to Better Protect Consumers

As written, the Proposed Rule would amend Regulation Z so that only breakeven overdraft that is truly a courtesy would be excluded from coverage under the Truth in Lending Act. The rule closes that loophole so that overdraft loans are no longer exempted from TILA or from the Electronic Fund Transfer Act.

The Proposed Rule describes two options, 1) courtesy or non covered overdraft, and 2) overdraft loans or covered overdraft.

Courtesy overdraft, or non-covered overdraft must have a fee based on a breakeven standard with a CFPB benchmark as a safe harbor. Non-covered overdraft would not be subject to Reg Z. Banks would have flexibility either to adopt the CFPB benchmark or to adopt a fee based on their own cost data, following CFPB proposed methodology for calculating a breakeven fee.

Overdraft loans, or covered overdraft would be subject to the requirements of Reg Z including those implementing the CARD Act. Banks making overdraft loans would be required to give disclosures in accordance with Reg Z, to help consumers' understanding of credit and cost comparison.

When overdraft can be accessed by debit card or point-of-sale ACH, CARD act requirements would apply. Consumers would be required to apply for credit with proper underwriting and would be permitted to repay manually and could not be required to use automatic debit. Additionally, there would be limitations on penalty fees and on fees charged in the first year. Depositories would have to allow 25 days after a monthly statement is issued before payment is due and could not use new deposits to offset credit extended.

The proposed overdraft rule applies only to very large institutions with over \$10B in assets. Given that the majority of fees are collected by the largest depositories, the Proposed Rule would cover almost 70% of overdraft fees charged.

CRL recommends adopting a final rule that protects consumers who bank with very large financial institutions supervised by the CFPB. We recommend the rule incorporates:

- A \$6 benchmark fee, with a limitation of one overdraft fee per month, six per year;
- A blanket \$50 transaction threshold before a fee can be assessed; and
- A one business day grace period before an overdraft fee is charged.

person is ejected from the mainstream financial system, it becomes difficult to reenter. And the unbanked and underbanked are more likely to end up with no choice except alternative financial services, which are often more expensive and less secure than a responsible mainstream checking account." Wade Henderson, President and CEO of The Leadership Conference on Civil and Human Rights, & Hilary Shelton, Washington Bureau Director for the NAACP, Predatory Overdraft Practices Should Be Stopped, The Hill, Aug. 20, 2013.

We propose these amendments to preserve the integrity of the benchmark level. Specifically, CRL believes these limitations are necessary to fully define the parameters of the courtesy exemption in a way that ensures that it does not serve as a vehicle for financial abuse of consumers who can least afford those costs.

A. The Bureau should adopt a final rule that narrows the courtesy exemption by adopting a \$6 benchmark fee to cover institutional overdraft costs and establishing limitations on the frequency and number of overdrafts.

We believe a \$6 benchmark best serves consumers' interests. The Bureau has proposed two alternative sets of numbers for a safe harbor for a breakeven overdraft fee. One set is based on the costs incurred by the average bank in the Bureau's dataset; under this approach, the safe harbor would be set at a level sufficient to enable the average bank in that dataset to cover credit losses associated with overdraft plus assumed processing and servicing costs. The alternative set of numbers is based on the costs of the bank with the highest costs. In our view, the former set of numbers are by far the sounder ones to use in setting a safe harbor precisely because they are based upon costs across a range of institutions rather than the costs of a single institution which may be an outlier. Indeed, to use the costs of the bank with the highest costs would be to base the safe harbor on the cost of the bank that does the least good job in assuring that its customers do not take on more debt than they can handle and thus has the highest losses. That could fuel a race to the bottom.

Importantly, under the proposal no depository institution would be required to set its breakeven fee at the safe harbor level so that if the Bureau adopted a safe harbor based on costs at the average bank in its data, depositories who wish to offer non-covered overdraft and conclude that they need to charge a higher fee to cover their costs would be free to do so as long as they can justify their calculations. That is another reason to base the safe harbor on the actual costs at the average covered bank.

A second question posed by the proposed alternative safe harbor thresholds is whether the safe harbor should be calculated based on the total incidents of overdrafts or on the total number of incidents which incur a fee. Under the former approach, a depository could cover its costs only if it charged the permissible fee each time an account goes negative. As the proposal recognizes, today a sizable share of transactions are not charged an overdraft fee. This is due in part to policies that exempt transactions below a certain level from overdraft fees, policies that provide a 24-hour grace period before fees are assessed, and policies that cap the number of overdraft fees that can be charged in a day along with legal rules prohibiting fees against transactions that are authorized against a positive balance but settle against a negative balance.

If the safe harbor were set based on the total incidents of overdrafts, that could lead depositories to tighten their policies and charge fees on every negative transaction that can lawfully be assessed a fee. We do not believe such a result would be in consumers' interest. However, if the Bureau were to set the safe harbor fee based on its data regarding the share of negative transactions that today incur a fee, that would produce a windfall to depositories who are, or choose to become, more aggressive in terms of when they assess overdraft fees. Accordingly, we would support setting the safe harbor based on transactions that result in fees—specifically at the \$6.00 level—if, but only if, the Bureau supplemented the rule with additional consumer protections that we describe below. These protections include imposing a frequency limit, precluding de minimis transactions from overdraft fees and a grace period of at least one business day period to cover a transaction and avoid incurring a fee. Indeed, we believe these features can be viewed as integral to a true courtesy program and thus fall well within the rationale of the proposed rule.

First, the CFPB should limit the frequency of courtesy overdraft to avoid excessive fees. Even at a lower fee level, overdraft fees can be a concern particularly for frequent overdrafters, who tend to be financially vulnerable or lower income.¹⁰ The Bureau has found that frequent overdrafters represented nine percent of all accounts but paid 79 percent of all overdraft and NSF fees in previous research.¹¹ Very frequent overdrafters represented about five percent of all accounts at the study banks but paid over 63 percent of all overdraft and NSF fees.¹² CFPB also found that very frequent overdrafters tended to have lower end of day balances averaging less than \$350.¹³

As it noted in the 2017 Payday Rule, frequency limitations have been posed and supported by other regulators with respect to other small dollar credit products. With respect to short term loans, CFPB relied “in part on norms and precedents that have been set in this market by other Federal regulators, most notably the FDIC and the OCC, which both have issued guidance to the banks under their supervisory authority and have effectively limited borrowers of these kinds of loans to six loans in a 12- month period.”¹⁴ In a slightly different context, joint FDIC/OCC guidance described a “cooling off period” for deposit advance products of at least one month.¹⁵

B. The Bureau’s final rule should also preclude fees for de minimis overdraft amounts.

The rule will be most effective by not only limiting the fee amount and number of overdrafts, but by ensuring small transactions of less than \$50 do not trigger overdrafts. A number of large financial institutions have increasingly adopted a de minimis transaction amount in order to ensure fairness to their consumers. This requirement ensures that for example, transactions of under \$50, or transactions that in total produce no more than a \$50 negative balance, do not incur overdraft fees.

These are especially important and appropriate since CFPB has found that the median transaction amount leading to an overdraft was \$24; the median across all transaction types was \$50.¹⁶ Further, a 2023 Financial Health Network study concluded that almost half (45%) of overdrafters reported that their most recent overdraft occurred on a transaction of \$50 or less.¹⁷

C. The Bureau’s final rule should also require a uniform grace period of at least one business day before overdraft charges can be assessed.

Like the de minimis requirement, a grace period is a popular voluntary reform among the largest depositories that benefits consumers. Banks give consumers an extra day to make a deposit to cover their overdraft and fee.¹⁸ The final rule should include a provision that allows for extra time to make a deposit. In order to truly remain a courtesy, we recommend at least a one business day grace period before

¹⁰ [Overdraft Trends Amid Historic Policy Shifts – Financial Health Network \(finhealthnetwork.org\)](https://www.consumerfinance.gov/overdraft-trends-amid-historic-policy-shifts/)

¹¹ David Low et al., CFPB, Data Point: Frequent Overdrafters, at 5 (Aug. 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf (CFPB 2017 Data Point); CFPB 2014 Data Point at 12 (both analyzing 2011-2012 data).

¹² Id.

¹³ CFPB 2014 Data Point at 12, table 3; see also CFPB Data Point: Frequent Overdrafters 16, table 2 (Aug. 2017).

¹⁴ [Federal Register :: Payday, Vehicle Title, and Certain High-Cost Installment Loans](https://www.federalregister.gov/documents/2013/11/26/2013-28361-payday-vehicle-title-and-certain-high-cost-installment-loans)

¹⁵ DEPARTMENT OF THE TREASURY Office of the Comptroller of the Currency [Docket ID OCC–2013–0005] Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products. Federal Register / Vol. 78, No. 228 / Tuesday, November 26, 2013 / Notices [2013-28361.pdf \(govinfo.gov\)](https://www.govinfo.gov/records/2013-28361.pdf)

¹⁶ CFPB Data Point: Checking account overdraft (July 2014), [201407_cfpb_report_data-point_overdrafts.pdf \(consumerfinance.gov\)](https://www.consumerfinance.gov/overdrafts/)

¹⁷ [Overdraft Trends Amid Historic Policy Shifts – Financial Health Network \(finhealthnetwork.org\)](https://www.consumerfinance.gov/overdraft-trends-amid-historic-policy-shifts/)

¹⁸ [Overdraft/NSF metrics for Top 20 banks based on overdraft/NSF revenue reported \(consumerfinance.gov\)](https://www.consumerfinance.gov/overdraft-nsf-metrics-for-top-20-banks/)

overdrafts are charged. Such a change will assist a significant number of consumers in avoiding overdraft fees, as the Bureau has found that more than half of consumers who overdraft bring their accounts positive within three days, and over three-fourths within one week.¹⁹

If these features are not codified and added to the rule, and banks remove them, consumers could not be afforded sufficient the typically short time needed to make a deposit to cover the overdraft and related fee.

D. For overdraft products that fall outside the courtesy exemption, application of the CARD Act is a vital element of a proposal that protects consumers.

The Proposed Rule includes amendments to Regulation Z that would apply CARD Act coverage to covered overdraft that is open-ended credit accessed by a debit card. The Proposed Rule also would extend CARD Act coverage to an account where the debit card cannot access overdraft (e.g., an account that is not opted in) but where the account and routing number can be used to make purchases and amends Reg Z to cover open end credit lines accessed by a debit card, through defining them as credit cards. The rationale for CARD Act coverage is that so long as a card or access device can be used to access credit for purchases it meets the definition of a credit card.

We believe this is appropriate because it closes a gap in protections to consumers when using a debit card or an account and routing number. CARD Act coverage means, among other things, that credit should only be extended based on a determination that the customer has the ability to repay it, consumers should have a reasonable time to repay an advance and should not be subject to automatic debits, and consumers should get credit disclosures to enable them to compare different forms of credit.

Conclusion

The Center for Responsible Lending thanks the Bureau for soliciting public input on its proposed changes to overdraft fees for very large institutions. We support the effort to protect consumers by narrowing the exemption for “courtesy” overdrafts, defining non-courtesy overdraft products as credit, and subjecting non-courtesy overdraft products to the standards and scrutiny required under existing, well-established federal, financial consumer protection laws.

All consumers, but especially LMI, Black and Latino banking customers, can experience unexpected financial harm related to overdraft fees. Consumers would be best protected by a (1) benchmark fee of \$6, with a limitation of one fee per a month and a maximum limit of six fees per a year; (2) preclusion of fees for de minimis overdraft amounts; and (3) a uniform grace period of one business day before overdraft fees are charged.

Thank you again for the opportunity to share our support and suggestions.

Sincerely,

The Center for Responsible Lending

¹⁹ CFPB Data Point: Checking account overdraft (July 2014), [201407_cfpb_report_data-point_overdrafts.pdf](https://www.consumerfinance.gov/data-reports/data-point-overdrafts/)