



April 1, 2024

VIA E-MAIL ONLY

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

RE: Overdraft Lending: Very Large Financial Institutions, 3170-AA42

Dear Director Chopra,

The Wisconsin Bankers Association (WBA) is the largest financial trade association in Wisconsin, representing nearly 200 state and nationally chartered banks, savings banks, and savings and loan associations of all sizes located in Wisconsin, their branches, and over 30,000 employees. WBA appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) proposed rule to amend Regulations E and Z to update regulatory exceptions for overdraft credit provided by very large financial institutions (proposal).

Banks offer various types of overdraft services, some of which are subject to Regulation Z and some of which are not. Consumer credit is generally subject to Regulation Z if the creditor imposes a finance charge. However, Regulation Z excepts from coverage certain charges for credit extended to pay account overdrafts. CFPB has proposed to apply Regulation Z to overdraft credit provided by very large institutions unless it is provided at or below costs and losses as a true courtesy to consumers.

Overdraft products are an important tool for many consumers, and the proposal would undermine the usefulness of these tools. WBA is concerned that the proposal's implications, as discussed further below, will eventually force Wisconsin banks to eliminate these tools entirely causing direct harm to customers. Banks need the ability to choose what products they offer, based on the needs of their customers. WBA requests that CFPB withdraw the proposal.

Background

The proposed rule would change two long-standing regulatory exceptions from the statutory definition of finance charge. First, the proposal would change the exception that currently provides that a charge for overdraft is not a finance charge if the financial institution has not previously agreed in writing to pay items that overdraw an account so that the exception would not apply to "above breakeven overdraft credit" offered by a very large financial institution. The proposal would give financial institutions the ability to determine whether an overdraft charge is considered above breakeven overdraft credit by either:

1. Calculating its own costs and losses using standards set forth in the proposal, or
2. Relying on a benchmark fee set by the CFPB in the proposal (CFPB is considering setting the benchmark fee at \$3, \$6, \$7, or \$14).



As a result, above breakeven overdraft credit that is not currently subject to Regulation Z would become subject to Regulation Z.

Second, the proposal would update a related exception that provides that a charge imposed in connection with an overdraft credit feature (e.g., a charge for each item that results in an overdraft) is not a finance charge if the charge does not exceed the charge for a similar transaction account without a credit feature (e.g., the charge for returning each item). As a result of the proposed change, all transfer charges that very large financial institutions impose on asset accounts with linked overdraft lines of credit (i.e., fees imposed for transferring funds to an asset account from an overdraft line of credit to cover an item that would otherwise take the asset account's balance negative) would be finance charges.

While these amendments would apply only to very large financial institutions with more than \$10 billion in assets, WBA is very concerned that the practical reality of the marketplace is such that similar changes will be forced upon financial institutions with assets of \$10 billion or less. For now, the proposal only provides that CFPB will monitor the market's response to this rule before determining whether to alter the regulatory framework for financial institutions with assets less than or equal to \$10 billion.

Comments

Consumer Harm

Wisconsin banks offer deposit account products designed to meet their customers' needs, including overdraft options which are transparent, easy to understand, and meet all disclosure requirements. For example, a Wisconsin bank offers products whereby customers may select:

1. Overdraft protection transfers from another bank account to cover overdrafts at no cost,
2. A BankOn-certified account that does not incur overdraft or Non-Sufficient Funds (NSF) fees, or
3. An overdraft program with the ability to opt-in or opt-out of one-time debit card and ATM transactions with fully disclosed limits that allow customer access to short-term liquidity. Customers can pair the overdraft program with overdraft protection transfers, so overdrafts are first covered by existing account funds before creating an overdraft.

This bank has customers who use each of these overdraft coverage options. Their customers have a choice, at account opening or any other time, between accounts with overdraft access and accounts without overdraft access, and they make their informed choice based on which account is best for them. A majority of customers select the third option. This option provides peace of mind for customers who know it is available if needed. The bank regularly monitors the overdraft program disclosures, training program, and customer usage to ensure disclosures are clear and transparent, that customers are provided clear information about all the options, and encouraged to ask questions and select the option that best suits their needs. Customers with high overdraft volumes are contacted as directed by FDIC's 2010 guidance.¹

As seen by this bank, the desire for these types of products is strong, and the market for overdraft services is competitive. These market demands, along with regulatory pressure, has impacted overdraft programs for many financial institutions, and this Wisconsin bank has provided specific changes they've made to their overdraft programs for the benefit of their customers including:

¹ FIL-81-2010 Overdraft Payment Programs and Consumer Protection, <https://www.fdic.gov/news/financial-institution-letters/2010/fil10081.html>

1. Modified transaction processing order,
2. Implemented strategies to not charge for Authorize Positive, Settle Negative (APSN) transactions,
3. Eliminated NSF fees on represented transactions,
4. Eliminated fees for overdraft protection transfers from a savings account,
5. Reduced NSF fees,
6. Capped the total daily fees charged for overdraft and NSF items, and
7. Waived overdraft fees when the total amount overdrawn is \$15.00 or less.

Despite the costs such changes incur upon the bank, it understands the needs of its customers, and so continues to invest in options for tools to manage their finances while meeting regulatory demands. Recent new developments by this bank include:

1. Online banking and a mobile app to check balances and review transaction activity at any time,
2. Self-serve account alerts which customers can set up to be notified when their balance is low or their debit card is used,
3. Administrative controls to lock/modify their debit card usage,
4. Additional channels to communicate with the bank based on customer preferences, such as email, virtual bankers, call center and chat functions in addition to their full-service branches and interactive teller machines, and
5. Financial literacy tools, including budgeting and analysis solutions and credit score monitoring.

These financial management tools are available to all of the bank's customers free of charge. This technology continues to evolve, and costs continue to rise, but it is important to Wisconsin banks that their customers have accessible solutions to manage their finances.

WBA is concerned that the proposal will jeopardize Wisconsin banks' ability to offer these pro-consumer innovations. While the proposal does not directly apply to many Wisconsin banks, every bank in Wisconsin will face market pressure to conform its practices to CFPB's rule regardless of asset size. WBA has no doubt that the effects of the proposal will "trickle down" until it is felt by every bank in Wisconsin, ultimately threatening the margins of many small community banks.

WBA is also concerned that the proposed rule will reduce competition for products and services that CFPB accurately identifies as important for all consumers. Competition in any marketplace only benefits consumers. Moreover, the ability of banks to offer free or low-cost deposit products to consumers who rely on these accounts will be impacted by this proposal. Depending on the circumstances, other cost-savings measures may also need to be instituted by banks that will harm consumers and stifle innovation.

"Breakeven" and "Benchmark" Fees

WBA is concerned that the costs to calculate the "breakeven" fee, including the risk that this calculation could be challenged by a regulator or lawsuit, are too great for some banks to offer overdraft services even at a breakeven fee. CFPB's cost calculation excludes important costs from the benchmark fee. A fee between \$3 and \$14 does not cover a bank's direct costs to provide overdraft to its customers, much less cover the bank's even broader costs to provide deposit accounts to its customers.

The majority of banks in Wisconsin will struggle to offer deposit overdraft services at the



proposed breakeven or benchmark fee causing these consumer-valued services to disappear altogether. There are tangible costs in providing consumers with overdraft products including reviewing and responding to customer inquiries, mailing of overdraft notices, collection efforts and other customer follow-up, core provider and other technology costs, and compliance costs. Furthermore, WBA is also concerned that its members will be unable to absorb the operational costs and compliance and litigation risks in offering an overdraft program that would now be subject to Regulation Z. Instead, the only choice will be to significantly reduce customers' access to overdraft services altogether rather than offer an unsustainable product.

WBA has heard from its member banks that the regulatory oversight environment in recent years is such that bank examination staff have been directed to scrutinize bank procedures and documents for potential UDAAP violations. As a result, some banks have determined it is too great of a risk to attempt to calculate a breakeven overdraft fee and then face regulatory scrutiny with an additional potential threat of a UDAAP violation, and/or customer restitution over its calculations. Additionally, these banks cannot stratify costs to a particular segment of customers. Based on CFPB's own research with the largest financial institutions, it appears even they will struggle with this calculation.

Ability to Offer Overdraft under Regulation Z

The proposal presents the option to offer overdraft at a fee that is above the breakeven or benchmark fee in compliance with Regulation Z's credit card requirements. CFPB provides that "extend[ing] consumer credit protections that generally apply to other forms of consumer credit to certain overdraft credit . . . would allow consumers to better compare certain overdraft credit to other types of credit" through enhanced disclosures, "and would provide consumers with several substantive protections that already apply to other consumer credit."

WBA is concerned that consumers are more likely to be confused and inconvenienced by applying Regulation Z's regulatory framework to overdraft programs. Regulation Z hosts a multitude of requirements, including disclosures, limitations on first-year fees, finance charges, fees on over-the-limit transactions, penalty fees, requirements for applications, solicitations, periodic statements, payment due dates, and dispute rights. Many of these requirements are either difficult to calculate for an overdraft program or not applicable. The compliance and operational complexity created by now considering an overdraft to be a loan product subject to Regulation Z is significant, leading WBA to believe banks will not even offer the service anymore.

Some Wisconsin banks have informed WBA that they will not be able to offer overdraft under Regulation Z. The compliance risks and costs of administering an overdraft program under CFPB's proposed changes to Regulation Z are untenable. Some of these risks and costs include:

- Prohibiting right of offset: the prohibition increases the risk of nonpayment for overdrafts and will increase charge-offs, further harming customer credit, and their future ability to borrow.
- Costs to maintain separate overdraft accounts: the requirement to create a separate account to hold the "covered overdraft credit" will increase bank costs, including staffing and technology resources. There is also a concern of whether core providers have systems in place to comply with the unique requirements of CFPB's proposal.

Banks have also commented on how the proposal applies CARD Act requirements to overdraft "credit" that is accessed by a debit card. The CARD Act requirements will limit accessibility to



the product because the CARD Act requires an ability-to-pay determination prior to extending credit. This process alone will create customer frustrations and stop a bank's otherwise normal payment of a transaction. For example, one of WBA's member bankers shared that her bank averages three customers each week literally calling the bank from the merchant asking to overdraw their account at the time of purchase. Presently, this bank explains the overdraft program, including applicable fees. However, with CFPB's proposal, those requests will be declined because completing an ability-to-repay analysis and disclosure process prior to authorizing the transaction is untenable. Many consumers don't have alternatives due to lack of credit, credit history, or unverifiable income, none of which is used in this bank's overdraft program options. The flexibility offered in overdraft programs is why the occasional overdraft is preferred by customers over non-payment.

Consumers will Lose Access to Overdraft Services as a Result of the Proposal

WBA believes that consumers should have access to a wide range of options to meet their short-term liquidity needs. Regulatory policies must be tailored to ensure consumers have access to services allowing for the payment of emergency expenses, timing issues between deposits and payments, and other circumstances demanding short-term liquidity. This includes not only credit cards, installment loans, and single pay loans, but also overdraft services.

By the CFPB's own admission, the proposal would restrict a consumer's choice. In its proposal CFPB acknowledges that as a result of the proposal some institutions may underwrite overdraft credit more conservatively, reduce credit limits, or even eliminate access to overdraft credit. Despite this, CFPB has not taken the next step as part of the proposal to investigate the meaningful negative impacts on consumers who will lose access to liquidity provided by overdraft.

WBA's members have specifically shared that a reduction in banks offering overdraft programs will negatively impact many customers who rely on overdraft programs for short-term or emergency liquidity needs. The effect of late payments or non-payments in "credit" transactions is long-term, including impacting access to housing, access to continued service from utilities, and access to credit.

Conclusion

WBA appreciates CFPB's careful consideration of our many comments on this proposal. In light of the significant consumer harm the proposal would cause due to the price cap placed on overdraft services resulting in Wisconsin banks no longer offering, or significantly reducing access to these valued and needed forms of short-term liquidity, WBA strongly recommends that CFPB withdraw the proposal. Moreover, the right of banks to choose what overdraft products are offered based upon the needs of their customers should be preserved and not taken away.

Once again, WBA appreciates the opportunity to comment.

Respectfully,

A handwritten signature in black ink that reads "Rose Oswald Poels". The signature is written in a cursive, flowing style.

Rose Oswald Poels
President/CEO