January 13, 2022

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Dear Director Chopra,

The American Bankers Association,[1] Consumer Bankers Association,[2] Credit Union National Association,[3] National Association of Federally-Insured Credit Unions,[4] and National Bankers Association[5] write in response to the two overdraft research reports that the Consumer Financial Protection Bureau issued on December 1, 2021.[6] As expected, these reports have stimulated policy discussion about overdraft, but we are concerned that the reports lack important facts about overdraft services—namely, information about the consumers who use and value the product. Therefore, we write to offer suggestions for additional data development and analysis in

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[1] The American Bankers Association is the voice of the nation's $23.3 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.2 trillion in deposits and extend nearly $11 trillion in loans.
[2] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.
[3] Credit Union National Association (CUNA) is the only national association that advocates on behalf of all of America's credit unions, which are owned by 120 million consumer members.
[4] NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 127 million consumers with personal and small business financial service products.
[5] Since 1927, the National Bankers Association has served as the voice for minority depository institutions. Our members include Black, Hispanic, Asian, Pacific Islander, Native American, and women-owned and -operated banks, all working to help low- and moderate-income communities who are underserved by traditional banks and financial providers.
[6] *See* Bureau of Consumer Fin. Prot., Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors, Data Point No. 2021-11 (2021); *Id.*, Data Point: Overdraft/NSF Fee Reliance Since 2015 – Evidence from Bank Call Reports, Data Point No. 2021-12 (2021).

order to promote our shared goal of understanding the market, the options available to consumers, and consumer understanding and experience with overdraft services.

In 2009, the Federal Reserve amended Regulation E to require that a consumer affirmatively consent – or "opt in" – to overdraft services before a bank or credit union can impose a fee for an overdraft resulting from a debit card point-of-sale or Automated Teller Machine (ATM) transaction.[7] In the years since implementation of the 2009 rule, depository institutions have evaluated their obligations and the markets they serve, listened to consumers' preferences, and responded to the market by innovating in how they provide overdraft services.[8] The process has yielded a variety of overdraft protection programs that fairly and transparently respond to consumer needs, promote free choice, and encourage competition.

For example, several institutions give customers at least 24 hours to bring a negative balance to a positive position before charging an overdraft fee or allow customers to use direct-deposited funds prior to receiving those funds in their account. Many institutions do not charge an overdraft fee if the customer overdraws by a *de minimis* amount or charge no more than one overdraft fee per day. In addition, today customers have more opportunities than ever before to check their account balances. They can elect to receive low balance alerts by text or email, and they can check balances through mobile and online banking, voice or automated phone service, or ATM inquiries. Customers also may have the option to link a transaction account to a savings or money market account, personal line of credit, or credit card, in order to transfer automatically money into the transaction account when it becomes overdrawn. Furthermore, institutions provide overdraft-free account options, including Bank On-certified accounts, which are available at institutions making up more than 50% of the U.S. deposit market share. Finally, some banks and credit unions recently announced they would no longer charge overdraft fees or have eliminated the institution's returned item fee when the institution does not pay the transaction because the customer has insufficient funds in the account.

These innovations reflect the fact that the United States has the largest, most diverse financial services marketplace in the world. The United States is home to nearly 10,000 banks and credit unions, and an ever-expanding array of fintech providers. Consumers enjoy a wide range of choices when it comes to financial products and services, including overdraft protection. Indeed, a recent national survey conducted by Morning Consult revealed that 9 in 10 U.S. adults find their bank's overdraft protection valuable, and that 3 in 4 were happy their payment was covered when overdraft protection was used. Restrictions on overdraft may lead financial institutions to stop offering these services to their customers, which would result in significantly more returned checks and declined transactions. This may lead to unnecessary credit rating harm; returned item fees charged by the institution or by the merchant; fees from landlords and others; or requirements to pay using alternative methods such as money order. It should be no surprise that a survey of consumers by the research firm Curinos found that 62% of consumers would reconsider their support for new regulation of overdraft if it limited access to the service.[9] As

[7] 12 C.F.R. § 1005 *et seq.* (2022).
[8] *See* Am. Bankers Ass'n, *A New Framework for Overdraft Program Compliance* 2-3 (2010), https://www.aba.com/news-research/research-analysis/a-new-framework-overdraft-program-compliance.
[9] Curinos, *Competition Drives Overdraft Disruption* 12 & fig. 2.7 (2021), https://curinos.com/insights/competition-drives-overdraft-disruption/.

financial institutions compete for customers, we can expect to see further innovations in the overdraft options available.

In remarks made at the time of the release of the Data Points, you stated that the Bureau is "considering additional policy guidance outlining unlawful practices" and that "[l]aw-abiding institutions should not be disadvantaged by these practices."[10] We agree with your recent assurance that regulated financial institutions should have "laws that are clear, easy to follow, [and] easy to enforce."[11] The Bureau's activities related to overdraft should not be a "gotcha" exercise through enforcement. Instead, any changes to supervisory expectations or guidance applicable to overdraft should be made transparently and should be based on current and complete data. It is critical that any changes not push consumers outside of the mainstream banking system to meet their financial needs.

Before the Bureau takes further action, we urge you to conduct a study of consumers' preferences regarding overdraft. Any policy action that may impair access to overdraft services should not be based on selective anecdotes or unsupported assumptions about consumer behavior but by seeking to understand the regular user of overdraft protection—why they use the product, what they understand about their ability to opt in and out, and what their preferences are relative to available alternatives. We recommend that the Bureau focus on frequent users of overdraft, which constitute approximately 9% of all overdraft users, according to a 2017 Bureau report,[12] in order to develop data on regular users, the people that will be most affected by any changes to the regulatory treatment of overdraft. The Bureau should investigate:

- The features that these consumers seek when they open a deposit account;
- Why these consumers elect to opt-in to debit card overdraft protection;
- What they understand about their ability to opt-out and whether they have ever exercised that right;
- What occasions or needs typically prompt overdraft use;
- Whether overdraft protection has helped the consumer avoid a late or other penalty fee, meet another emergency need (such as avoiding a utility shut-off or eviction or responding to a medical emergency), or avoid the embarrassment, inconvenience, or other negative consequence caused by a declined transaction;
- Whether these consumers receive waivers of overdraft fees;
- Whether these consumers are aware of, and qualify for, available alternatives for covering overdraft transactions;
- Whether the consumer has prior experience using available alternatives for covering short-term liquidity needs;
- Reasons for choosing overdraft protection over available alternatives; and

[10] Bureau of Consumer Fin. Prot., Prepared Remarks of CFPB Director Rohit Chopra on the Overdraft Press Call (Dec. 1, 2021).
[11] *Bringing Consumer Protection Back: A Semi-Annual Review of the Consumer Financial Protection Bureau*: *Hearing Before the H. Comm. on Fin. Svcs.* (2021) (testimony of Dir. Rohit Chopra, in response to question from Rep. Andy Barr (R-Ky.)).
[12] Bureau of Consumer Fin. Prot., Data Point: Frequent Overdrafters 13 (2017) (table 1).

- Options for meeting short-term liquidity needs if access to overdraft protection is restricted or cut-off entirely.

By conducting a survey or focus groups, the Bureau will hear directly from consumers about their decision to use overdraft protection. Absent compelling evidence of knowledge gaps or that consumers are using the product irrationally—i.e., evidence that regular users of overdraft protection do not understand the product and its costs relative to available alternatives—people should be assumed to be the best judges of what is in their best interests and should remain free to choose.[13]

The Bureau also should study the amount of the charge that caused each overdraft, the amount of late and other penalty fees avoided by the institution's honoring the charge, and the rate by which institutions waive overdraft fees. These data will help determine the value to consumers of overdrafts. Importantly, the Curinos report found that the average transaction amount paid into overdraft was $198 in 2019.[14] This indicates that overdraft provides significant value to consumers.

After the Bureau has completed these studies, we urge the Bureau to publish another data point on its research before proposing policy recommendations and to invite the public to comment on its research methodologies, statistical findings, and conclusions about the need for (and format of) further regulatory action.

We look forward to continued dialogue about how banks and credit unions can strengthen their overdraft programs to best meet consumers' needs. It is critical that consumers continue to have diverse options for meeting shortfalls in funds. Together, we can ensure that consumers continue to have their payments honored even when the consumer is short of funds.

Sincerely,

American Bankers Association
Consumer Bankers Association
Credit Union National Association
National Association of Federally-Insured Credit Unions
National Bankers Association

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[13] In 2008, the Federal Reserve conducted intensive consumer testing of the overdraft opt-in form. The Federal Reserve found that consumers understood how overdraft coverage works—"that is, they understood what would happen if they overdrew their account through an ATM, debit card, recurring debit, or check transaction"—and understood that they "had the right to opt out of overdraft coverage." Bd. of Govs. of the Fed. Reserve Sys., Review and Testing of Overdraft Notices iii & iv (2008).
[14] Curinos, *supra* note 9, at 8.