



April 1, 2024

Submitted via Regulations.gov

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

**Re: Overdraft Lending: Very Large Financial Institutions
Docket No. CFPB-2024-0002, RIN 3170-AA42**

***Comments of the Consumer Law Advocacy, Scholars, and Students (CLASS) Network,
National Association of Consumer Advocates, UC Berkeley Center for Consumer Law and
Economic Justice, University of Maryland-Carey School of Law Consumer Justice Advocates,
and the UC Berkeley Law Consumer Protection Public Policy Order***

Dear Director Chopra:

The nationwide Consumer Law Advocates, Scholars & Students (CLASS) Network – along with its convenors and partners the National Association of Consumer Advocates and the UC Berkeley Center for Consumer Law and Economic Justice and the consumer justice student organizations at the University of Maryland-Carey School of Law and the UC Berkeley School of Law – submit this filing in response to the Consumer Financial Protection Bureau’s request for comments on its proposed Rule on “Overdraft Lending: Very Large Financial Institutions.”¹

We urge the Bureau to promulgate the proposed Rule in order to better shield consumers from harmful overdraft fees. In the comments below, we explain our support for the Bureau’s rulemaking. We agree that overdraft fees pose a burden – and sometimes a threat – to consumers at all types of depository institutions. Further, because having a bank account is a necessity for full participation in the U.S. economy, and because banks have become so adept at manipulating consumers into opting in to “overdraft protection,” consumers as a whole cannot avoid these fees. When individuals frustrated by overdraft fees decide to opt out of the banking system, often their only practical option is the even more costly industry of alternative financial services.

Our comment includes stories shared by law students who personally suffered financial and emotional harm because of overdraft fees, in addition to examples drawn from litigated cases and complaints in the Bureau’s own database. The comment also explains why we believe the proposed Rule appropriately effectuates and interprets the consumer protection laws that the Bureau is authorized to enforce, and how the Rule will enhance these enforcement activities. Finally, we encourage the Bureau to continue its efforts in future rulemakings to address the growing problem of overdraft fees assessed among financial institutions with less than \$10

¹ 89 Fed. Reg. 13,852 (CFPB Feb. 23, 2024) (amending Regulation E, 16 C.F.R. pt. 1004, and Regulation Z, 12 C.F.R. pt. 1026).

billion in assets, as well as the other practices in the industry, such as forced arbitration, that make it difficult for consumers to enforce their rights against excessive overdrafts.

We thank the Bureau for its work in producing an urgently needed Rule.

I. Introduction and Background: Account Overdraft Fees at Large Banks are Harmful to Consumers.

As the Bureau is aware, the financial toll that overdraft fees take on everyday consumers far exceeds whatever compensation these fees may provide to banks for completing charges on overdrawn accounts. Instead, the overdrafts subject to this Rule largely transfer hard-earned income from already squeezed consumers to enrich very large financial institutions. Each year, consumers in the United States pay from \$10 to \$12 billion in overdraft and non-sufficient funds fees, with the average overdrawn consumer paying more than \$250 annually in overdraft fees alone.² The initial fees charged when an account is overdrawn, typically amount to \$35 per transaction.³ Given that the transactions that incur overdraft fees are often small – usually around \$50⁴ – an overdraft fee can cost 70% or more of the actual good or service purchased.

The harm caused by overdraft fees does not end with the initial fee. Consumers with negative balances also can accrue extended overdraft fees, which often exceed the combined amount of the overdrawn amount and the initial overdraft fee. In one recent case brought against a bank in New Mexico, a customer overdrew their account by approximately \$25 but was charged a \$34.50 initial overdraft fee and thirty-six separate *extended* overdraft fees of \$6.50, altogether totaling \$234.⁵

The Bureau's proposed rulemaking will establish a clear line for fair treatment of consumers across the board, result in billions of dollars in savings for millions of households, and will nurture competitiveness and creativity among the financial institutions. The CFPB's actions on this subject to date have signaled to the public, particularly the financial institutions, that excessive overdraft practices were contrary to its mission to ensure that American consumers are treated fairly by banks. The Bureau for years has examined and scrutinized the

² *The End of Overdraft Fees? Examining the Movement to Eliminate the Fees Costing Consumers Billions: Hearing Before the Subcomm. on Consumer Protection and Fin. Insts. of the H. Comm. on Fin. Servs.*, 117th Cong. 2 (2022) [hereinafter *End of Overdraft Fees*] (statement of Rep. Perlmutter) <https://perma.cc/4KQX-MA6W>; Natasha Etzel, *The Average American Pays This Much in Overdraft Fees. How Do You Compare?*, *The Ascent* (Jul. 26, 2022), <https://perma.cc/NQ2P-75Y6>.

³ *Overdraft and Account Fees*, FDIC (Aug. 17, 2022), <https://perma.cc/HB7L-KM2R>; *see, e.g., Overdraft Services for Personal Accounts*, Wells Fargo (charging \$35 for overdrafts), <https://perma.cc/8ME7-62VT> (last visited Apr. 1, 2024); *Standard Overdraft Practice*, JPMorgan Chase (charging \$34), <https://perma.cc/FYQ3-4RN4> (last visited Apr. 1, 2024)

⁴ Etzel, *supra* note 2.

⁵ *Walker v. BOKF, Nat'l Ass'n*, 30 F.4th 994, 999 (10th Cir. 2022) (ruling that the overdraft fees were not interest under 1864 National Bank Act and interpretative regulations and dismissing the complaint).

cost and impact of predatory overdraft fees on consumers and the financial marketplace.⁶ Its ongoing research, fact-finding, and public inquiries demonstrate its interest in alleviating the egregious harm to consumers caused by this practice. Following public condemnation of their overdraft practices by regulators—including the CFPB—researchers, advocates, and editorial boards,⁷ financial institutions voluntarily began to make changes to their overdraft practices. According to a 2022 Pew analysis, in 2021 and 2022, most of the 25 largest banks lowered their overdraft fees, reduced the daily maximum number of fees charged, and/or added a grace period before charging fees, or eliminated nonsufficient fund fees or overdraft fees altogether.⁸ Pew determined that the changes in overdraft practices that it analyzed were expected to save consumers more than \$4 billion annually.⁹ In addition, Pew observed that the banks also faced increased competition from online-only financial services providers that provided similar services, yet did not charge overdraft fees.¹⁰ This encouraging market change that began much-needed reduction of overdraft charges, and fostered competition among financial institutions, shows that the time is now ripe for a concrete, binding policy.

By capping overdraft fees that may be charged by very large banks, the CFPB can also eliminate a major and largely punitive cost, particularly for those consumers most affected by these fees: low-income communities, students, and communities of color. Because low-income consumers are often living paycheck-to-paycheck, they cannot depend on having an extra cushion in their bank account. When consumers must pay for a household essential (e.g., groceries, gas, or rent) or an unexpected and unbudgeted-for emergency expense (e.g., a medical visit or an auto breakdown), and their paycheck has not yet been deposited into their account to cover the expense, an automatic bank fee that drives them further into the red is the last thing they need.

A. Overdraft Fees Can Force Consumers to Turn to Predatory Financial Products and Drop Out of the Banking System Altogether.

A bank account is a vital tool for full engagement with the modern economy. Bank accounts offer numerous security, financial, and convenience benefits to everyday consumers, such as:

⁶ See, e.g., CFPB, *CFPB Study of Overdraft Programs* (June 2013) <https://perma.cc/H32P-4B66>; *CFPB Fines Regions Bank \$7.5 Million for Unlawful Overdraft Practices* (Apr. 28, 2015), <https://perma.cc/CS4Q-HNL6>; CFPB, Consumer Financial Protection Circular 2022-06, Unanticipated overdraft fee assessment practices, Oct. 26, 2022, <https://perma.cc/J99G-M4MD>; *CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts* (Oct. 26, 2022), <https://perma.cc/4UCE-5SJC>.

⁷ Editorial Board, *Overdraft fees have become a plague. Regulators need to step in.*, WASH. POST (Dec. 12, 2021), <https://perma.cc/X8KQ-AATG>.

⁸ Alex Horowitz & Linlin Liang, *Large Banks Improve Overdraft Policies and Cut Fees*, PEW, (2022) <https://perma.cc/ZQY4-FQJ6>.

⁹ *Id.*

¹⁰ *Id.*

- Protection of assets from theft, fire, flood, or other damage that could occur from storing cash at home¹¹;
- Guardrails set up by federal and state banking laws that govern consumer accounts, such as deposit insurance and limitations of losses in the event of fraud (e.g., unauthorized transactions using a credit or a debit card)¹²;
- Improved personal financial stability through spending and balance notices and interest that may increase the value of deposits¹³;
- Greater access to credit to finance significant purchases, such as cars or homes¹⁴; and
- Convenience, such as an accessible record of transactions and electronic methods to easily pay bills, transfer funds, accept direct deposits for wages and government benefits, and deposit checks.¹⁵

Overdraft fees, however, erode the value of these benefits and can even cause consumers to lose access to the financial system and become unbanked (that is, lacking a checking or savings account) or underbanked (that is, having a bank checking or savings account but still needing to use alternative financial services like payday loans or pawn shops).¹⁶ According to a recent study by the Federal Deposit Insurance Corporation, 14.1% of U.S. households, or about 18.7 million U.S. families, are underbanked, and 4.5% of U.S. households, or about 5.9 million U.S. families, are altogether unbanked.¹⁷ The threat—or unfortunate experience—of incurring bank fees like overdrafts is one of the main reasons why consumers forgo traditional banking and become unbanked or underbanked.¹⁸ In 2019, the Cleveland Federal Reserve found that over one-third of unbanked Americans cited high bank account fees as a reason for not having a bank account.¹⁹ A 2012 survey of unbanked Americans asking about potential changes that could make them more likely to open a bank account found “lower and less confusing fees” among the most common answers.²⁰

¹¹ Catherine Martin Christopher, *Mobile Banking: The Answer for the Unbanked in America?*, 65 *Cath. U. L. Rev.* 221, 228 (2015); FDIC, *Top Reasons to #GETBANKED* [hereinafter *GETBANKED*], <https://perma.cc/R6N4-RQR6> (last visited Apr. 1, 2024).

¹² Avery E. Aulds, *Are Community Banks the Answer? An in-Depth Look at A Possible Solution to the Unbanked Problem in the United States*, 26 *N.C. Banking Inst.* 197, 212 (2022); *GETBANKED*, *supra* note 11; Christopher, *supra* note 11, at 226.

¹³ Emily Guy Birken, *The Costs of Being Unbanked or Underbanked*, *Forbes* (Dec. 2, 2022), <https://perma.cc/ZZ7B-486P>.

¹⁴ *Id.*

¹⁵ Birken, *supra* note 13; *GETBANKED*, *supra* note 11; see 89 *Fed. Reg.* at 13,857.

¹⁶ FDIC, *2021 National Survey of Unbanked and Underbanked Households: Executive Summary* 1, 7 (2022) [hereinafter *National Survey*], <https://perma.cc/AV59-Z8LS>.

¹⁷ *Id.* at 1, 7.

¹⁸ *Id.* at 2 (reporting that almost three in ten unbanked households surveyed cited high or unpredictable fees as a reason for not having an account); Mike Leyba, *State of the Dream 2015: Underbanked & Overcharged* 3 (2015), <https://perma.cc/3SS5-LDU3>.

¹⁹ *Unbanked in America: A Review of the Literature*, <https://perma.cc/S9BR-7VTP> (last visited Apr. 1, 2024).

²⁰ *Id.*

The irony is that without access to traditional financial institutions, unbanked and underbanked individuals often turn to high-cost and predatory alternative financial services that are *more expensive* than paying an overdraft fee.²¹ Check-cashing businesses and payday lenders epitomize the burden these services represent.²² Check cashing businesses allow consumers without a checking account to cash checks,²³ but this service requires consumers “pay[] a fee to access their own money, a fee that banks do not impose.”²⁴ One notable study estimated a person making \$12,000 per year might pay \$250 in fees annually to cash payroll checks using a check cashing business.²⁵ Payday lenders, for their part, offer small dollar loans that can have interest rates of 400% or more, compared to bank credit cards with interest rates between 12-30%.²⁶ Low income, unbanked consumers who use payday loans to access credit may spend as much as 10% of their annual income on the fees and interest that come from such loans.²⁷

B. Consumers Who are Low-Income, Black and Latinx, and Students are Particularly Affected by Overdraft Fees.

Lower-income consumers are more likely to experience overdraft fees and multiple overdrafts. In fact, “eighty percent of overdraft fee revenue to banks comes from 9 percent of bank accounts, and the median account balance for this group is less than \$350.”²⁸ Consumers with a household income between \$25,000 and \$50,000 are more likely to incur overdraft fees than those with an income of more than \$100,000.²⁹ Excessive overdraft fees on debit card accounts also regularly cause the most financially at-risk consumers to leave the banking system or remain unbanked.³⁰

Black and Latinx families are more likely than White families to be charged bank account fees.³¹ In 2020, banks charged Black families \$800 million in bank fees, while Latinx families

²¹ Christopher, *supra* note 11, at 226-30.

²² See Christopher, *supra* note 11, at 229-30 (discussing the costs of payday lenders and check cashing services).

²³ Ben Gran & Daphne Foreman, *What is a Check-Cashing Service?*, Forbes (Jan. 8, 2021), <https://perma.cc/C348-M2VY>.

²⁴ Christopher, *supra* note 11, at 230.

²⁵ Michael S. Barr, *Banking the Poor*, 21 Yale J. on Reg. 121, 134 (2004).

²⁶ *What is a payday loan?*, CFPB (Jan. 17, 2022), <https://perma.cc/22VK-SF5F>.

²⁷ Christopher, *supra* note 11, at 229.

²⁸ *End of Overdraft Fees*, *supra* note 1, at 7 (statement of Elyse Crawford-Hicks, Consumer Policy Counsel, Americans For Financial Reform); see also Prasad Krishnamurthy, “Insufficient funds: How banking overdrafts are hurting Americans’ wallets,” *The Hill* (May 2, 2023), <https://perma.cc/S398-VDZL> (observing that “Accounts that incur more than 10 overdrafts or NSF a year are responsible for almost 80 percent of all fees”).

²⁹ Oz Shy & Joanna Stavins, *Who is Paying All These Fees? An Empirical Analysis of Bank Account and Credit Card Fees*, J. Econ. & Bus. (forthcoming) (available online Jan. 6, 2024).

³⁰ *Id.* at 7.

³¹ Michelle Fox, *Black and Hispanic Americans pay twice as much in bank fees as Whites, survey finds*, CNBC (Jan. 13, 2021), <https://perma.cc/4PE6-BBQD>; see 89 Fed. Reg. at 13,857.

were charged \$1.1 billion.³² While Black and Latinx families on average pay \$12 and \$14, respectively, per month in checking account fees, White families with checking accounts pay only around \$5.³³ Black households were 1.8 times as likely as White households to incur an overdraft or nonsufficient funds fee, while Latinx households were 1.4 times as likely.³⁴

College and graduate students also bear significant costs from overdraft fees.³⁵ The average college student is charged more than two overdraft fees a year, meaning U.S. college students collectively pay around \$722 million in overdraft fees.³⁶ Students at Historically Black Colleges and Universities and Hispanic-servicing institutions have been shown to pay “higher-than-average” fees on their accounts.³⁷ Additionally, 17 college-partnered financial institutions charged accountholders overdraft fees, despite the market availability of accounts without these fees.³⁸

An unexpected overdraft fee can force a student into a terrible Hobson’s Choice between paying the bank or paying for food. As one current law student at Berkeley Law recounts:

Through a website error, I was double-charged for a computer part. The second charge pushed my account into overdraft. Each part cost \$60, and the overdraft fee was nearly \$40. As a result, I was charged \$160 for a transaction that should have been only \$60. Although the computer company cancelled the second, erroneous order and refunded me, my bank was unwilling to cancel the overdraft fee. As a result, I had no money for food or transportation until the end of the month.

Another Berkeley Law student describes the financial stress, hunger, and humiliation experienced after being charged a surprise overdraft fee:

In college I spent a summer working at a nonprofit in Washington, D.C. I came to town with ~\$150 from my school year work-study job, safely tucked away in my Bank of America checking account. I planned to survive off of this money until I got my first paycheck two weeks later.

I spent my first day in town running errands in my new neighborhood; I bought a Metro card, refilled my medication at the pharmacy, bought some sunscreen, and made several other small purchases throughout the day. I didn’t have a smartphone at the time, so I

³² *End of Overdraft Fees*, *supra* note 1, at 1, 14 (statement of Jeremie Greer, Co-Founder/Executive Director, Liberation in a Generation); *accord* Written Testimony for Jeremie Greer, *End of Overdraft Fees* (Mar. 31, 2022), <https://perma.cc/6DMS-CVD2>.

³³ Fox, *supra* note 31.

³⁴ Financial Health Network, *FinHealth Spend Report 2022*, <https://perma.cc/8V4Q-LKLJ> (last visited Apr. 1, 2024).

³⁵ Jessica Dickler, *Bank and credit card fees cost college kids \$795 million*, CNBC (Jun. 6, 2017), <https://perma.cc/WF9J-UEHB>.

³⁶ Dickler, *supra* note 35.

³⁷ CFPB, *College Banking and Credit Card Agreements* 5 (2023), <https://perma.cc/CL8N-D894>.

³⁸ *Id.* at 18-20.

tracked my spending in a notebook to ensure I'd have enough left to go grocery shopping for the next two weeks. However, when I finally made it to the grocery store and swiped my debit card to pay, it was declined.

I was shocked and embarrassed. I had meticulously tracked my spending all day to avoid this exact situation. I knew I should have at least \$75 left in my bank account. When I got home and logged into my online account, I was aghast to see that my balance was overdrawn by over \$300! As I scrolled through the transactions, I realized that my initial \$150 balance had been nearly wiped out by an unexpected bill early that morning. As a result, every single charge I had made over the course of my day had been accompanied by a \$35 overdraft fee! A series of small transactions totaling no more than \$75 had incurred nearly \$250 in overdraft fees in a single day.

The worst part wasn't just that I now couldn't afford food to eat, but that my account was overdrawn by more than the amount of my next paycheck! Even if I made it to my next paycheck, I'd still be broke.

C. Stories From the CFPB's Complaint Database Exemplify the Harms of Overdraft Fees.

The Bureau's own data confirm the hardships that overdraft fees can spur. The number of consumer complaints related to overdraft fees that the Bureau receives has increased steadily since July 2020 – and by a factor of nearly five since May 2023.³⁹ Complaints published on the CFPB's website show that low-income consumers who are charged extended overdraft fees feel helpless—aware that they cannot afford to bring their account current but needing to continue to overdraw to maintain payments for inelastic goods and services (e.g., food, water, rent, utilities, healthcare). One consumer reported to the CFPB that because of an overdraft incurred simply for “coffee and breakfast,” they were short money “for a medication my insurance is not covering.”⁴⁰ Another consumer who was charged three different overdraft fees—on the same day that the consumer was paid—could not get them reversed because the bank had already reversed previous charges; as a result of the fees, the consumer said, “This [fee] took away from money I needed to pay bills with.”⁴¹ Yet another consumer told the Bureau this year that because of a hold on an account and overdraft fees, “I have no money and I have not eaten in two days. I can not buy food or gas. . . . I am afraid that I will not have anything to eat for another few more days.”⁴²

³⁹ This figure was determined based on analyzing 5,346 complaints submitted between March 19, 2019, and March 19, 2024 on the CFPB's website under one of the following four sub-issue categories that directly relate to overdraft fees: (1) overdrafts and overdraft fees,” (2) overdraft charges, (3) “[w]as signed up for overdraft on card, but don't want to be,” and (4) overdraft, savings, or rewards features.

⁴⁰ CFPB Consumer Complaint No. 7095939 (June 9, 2023).

⁴¹ CFPB Consumer Complaint No. 7200996 (July 7, 2023).

⁴² CFPB Consumer Complaint No. 8149597 (January 12, 2024).

Borrowers of student loans, meanwhile, have complained to the Bureau that automatic withdrawals by their loan servicers have resulted in surprise overdraft fees. One borrower on an income-driven repayment plan recently reported that their loan servicer, MOHELA, withdrew an amount more than 24 times the normal recurring payment amount because the loan servicer had not allowed the borrower to renew their payment application—resulting in an overdraft fee that left them “unable to pay other bills.”⁴³

Furthermore, the Bureau’s complaint database contains numerous examples of consumers whose banks charged them additional fees after an initial overdraft, thereby allowing the financial harm to spiral. These complaints involve, for example, the bank’s failure to lock a credit or debit card after the consumer requested the lock to stop overdrafts,⁴⁴ failure to issue a refund on the account for an overdraft,⁴⁵ or failure to detect and avoid fraudulent charges that resulted in overdrafts.⁴⁶

II. The Proposed Rule Effectuates the Purposes of the Consumer Financial Protection Act and the Truth-in-Lending Act.

Considering the significant harms that overdraft fees pose to consumers, we strongly support the Bureau’s efforts to rein in these charges and encourage the Bureau to adopt the Rule as proposed. By issuing the proposed Rule, the Bureau is acting well within its authority under the Dodd-Frank Act “to implement and . . . enforce Federal consumer financial protection law consistently” and to ensure that “consumers are protected from unfair, deceptive, or abusive acts and practices” by large banks.⁴⁷

If adopted, the proposed Rule will protect bank customers—especially “frequent overdrafters,” defined by the CFPB as those who overdraft more than ten times per year⁴⁸—and reduce voluntary “de-banking,” a phenomenon in which consumers leave the banking system

⁴³ CFPB Consumer Complaint No. 8114748 (January 6, 2024); *see also* CFPB Consumer Complaint No. 8149597, *supra* note 42 (complaining that after opening a new checking account and funding it, their bank did not immediately activate the account; thereafter, the consumer’s loan servicer withdraw a monthly payment, resulting in an overdraft).

⁴⁴ CFPB Consumer Complaint No. 5862906 (Aug. 10, 2022) (complaining that locking the account prevent over-drawing on the account did not stop automatic payments, result in several overdraft payments).

⁴⁵ CFPB Consumer Complaint No. 4209963 (Mar. 12, 2022) (complaining that after filing a complaint with a credit card company for not refunding a purchase, the company over-drafted the account and charged a fee with no proof of new transactions).

⁴⁶ CFPB Consumer Complaint No. 5852024 (Aug. 7, 2022) (complaining that after a bank card was stolen and thousands of dollars of fraudulent charged were incurred, the consumer had to pay overdraft fees out of a savings account intended for their children).

⁴⁷ 12 U.S.C. § 5511(a), (b)(4).

⁴⁸ Joe Valenti, CFPB, *Data Point: Checking Account Overdraft* (Mar. 30, 2022) 13 <https://perma.cc/TG9P-DR4A> (last visited Apr. 1, 2024).

due to frustration with fees that keep them on a discouraging “overdraft treadmill.”⁴⁹ By definition, frequent overdrafters are especially vulnerable to overdraft fees. Limiting the amount of overdraft fees will thus have an outsized positive net impact on the finances of frequent overdrafters: for every \$1 reduction in overdraft fees, frequent overdrafters net at least \$10 in savings. The accumulated savings could lead to a corresponding reduction in frequent overdrafters’ sense of suspicion and/or frustration with the banking system, thus encouraging them not to voluntarily de-bank.

The proposed Rule would also likely decrease the number of frequent overdrafters who become *involuntarily* de-banked. Failure to repay can lead not only to the closure of the consumer’s account by their bank, but to a negative mark being added to their ChexSystems report or other banking-related credit report.⁵⁰ This type of negative mark can prevent a consumer from opening a bank account at *any* bank for up to seven years, effectively shutting them out of the banking system.⁵¹

By capping overdraft fees, preferably to the \$3 benchmark, the proposed Rule would likely cause a substantial reduction in the total dollar amount of such fees incurred by consumers, thus also reducing the risk that fees will remain unpaid and the consumer involuntarily de-banked. To illustrate the potential impact: reducing a bank’s overdraft fee from \$35 to \$3 would result in at least \$320 annual savings to a “frequent overdrafter” at that institution.⁵² The reduced fee would be easier to timely repay and therefore less likely to result in involuntary de-banking.

Moreover, by amending Regulation Z under the Truth In Lending Act (TILA), the Bureau is advancing TILA’s statutory purpose to promote clarity in credit markets and “protect the consumer against inaccurate and unfair credit billing and credit card practices.”⁵³ As illustrated by the stories above, overdraft fees are the kind of surprising and unfair practices that TILA was enacted to protect consumers against.⁵⁴ Accordingly, we strongly support the proposed Rule’s expanded definition of covered “finance charge” under TILA to include overdraft fees.⁵⁵

⁴⁹ Joe Valenti, CFPB, *Overdraft fees can price people out of banking* (Mar. 30, 2022), <https://perma.cc/L4SE-DNXF>.

⁵⁰ Emily Williams, Harv. Business School, *Are Banks the ‘Bad Guys’? Overdraft Fees Are Crushing Low-Income Consumers* (May 18, 2022) <https://perma.cc/2K74-D7TM>.

⁵¹ See 15 U.S.C. § 1681c(a)(5).

⁵² This savings is calculated as the difference between 11 overdrafts per year x \$35 and 11 overdrafts x \$3, based on the CFPB’s definition of a frequent overdrafter as someone who incurs more than 10 overdrafts per year.

⁵³ 14 U.S.C. § 1601(a).

⁵⁴ *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 365 (1973) (explaining that TILA was enacted “to combat the divergent, and often fraudulent, practices by which credit customers were apprised of the terms of the credit extended to them”); see also *id.* at 364 (quoting legislative history that “blind economic activity is inconsistent with the efficient functioning of a free economic system”).

⁵⁵ 12 C.F.R. § 1026.4 (proposed).

The Bureau is making a long overdue update to TILA for the benefit of the modern economy. TILA defines finance charges broadly as “the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.”⁵⁶ As the Bureau describes, the earlier formulation of Regulation Z to exempt overdrafts belongs to a bygone era of banking when overdraft fees were primarily driven by the use of paper checks and did not apply to prepaid cards that could be declined by merchants on the spot for insufficient funds.⁵⁷ Today, however, creditors charge overdraft fees in many circumstances that are incidental to the extension of credit. Merchants regularly sell goods to consumers notwithstanding insufficient funds in the accounts; banks simply pay the cost and pass it on—along with the overdraft fee—to the consumer.

There is no reason, however, why overdraft fees should not be treated as “finance charges” today, when the fact of an overdraft is known instantaneously. Congress enacted TILA with a broad remedial purpose,⁵⁸ and the Act’s statutory provisions must be broadly interpreted to effectuate that purpose.⁵⁹ The statutory text plainly covers fees, like overdrafts, that banks charge borrowers as a condition of credit, and the statute does not contain any applicable exceptions for overdrafts. That Congress may not have specifically contemplated overdraft charges when it enacted TILA does not change the result: “the fact that a statute has been applied in situations not expressly anticipated by Congress . . . simply demonstrates the breadth of a legislative command.”⁶⁰ Nor must the Bureau adhere to longstanding interpretations of TILA by the Federal Reserve. To the contrary, the CFPB is entitled to “refine, reformulate, and even reverse [its] precedents in light of new insights and changed circumstances” in the evolving consumer financial services sector.⁶¹

Moreover, requiring very large banks that charge overdraft fees to comply with Regulation Z’s disclosure requirements for overdraft fees will help effectuate TILA’s purpose to promote the “informed use of credit” and underlying philosophy of “Let the seller disclose.”⁶² Regulation Z’s disclosure rules clearly set forth contractual terms for credit products. The new regulatory framework for disclosure will assist consumers in comparing the cost of credit across institutions and varieties of credit—including the costs of overdrafts. Consumers are entitled to

⁵⁶ 15 U.S.C. § 1605(a).

⁵⁷ 89 Fed. Reg. at 13,852, 13,866-68.

⁵⁸ *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980).

⁵⁹ See, e.g., *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 479 (5th Cir. 1995) (stating that TILA must be “construed liberally in favor of the consumer”); *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 650 (1974) (same).

⁶⁰ *Bostock v. Clayton Cty.*, 590 U.S. 644, 669 (2020).

⁶¹ *S. Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 102 (1st Cir. 2002); accord *Solar Energy Indus. Ass’n v. FERC*, 80 F.4th 956, 979 (9th Cir. 2023) (“An agency may change its position for any number of reasons, such as a change in factual circumstances or a shift in its policy priorities”).

⁶² 15 U.S.C. § 1601(a); *Mourning*, 411 U.S. at 377 (“The Truth in Lending Act reflects a transition in congressional policy from a philosophy of ‘Let the buyer beware’ to one of ‘Let the seller disclose.’”).

transparency and protection in all financial transactions; this update simply reflects the realities of the modern economy. Adoption of the proposed Rule is a crucial step towards aligning consumer protection measures with contemporary financial practices.

III. The Proposed Rule Will Support Other Enforcement Efforts to Protect Consumers From Excessive Overdraft Fees.

Another reason that we encourage the Bureau to adopt the proposed Rule is that the Rule will complement – and in many instances enhance – the efforts of consumers to enforce their rights. By establishing a clear baseline of conduct for the largest institutions, consumers will be able to identify violations of the law more quickly. Nevertheless, the Rule will need vigorous supervision and enforcement. First, enforcement by public agencies like the Bureau is paramount. By making clear that excessive overdraft fees are a violation of consumer financial protection laws, the proposed rule will spur the Bureau to enhance its investigation and enforcement efforts in this area. Moreover, by declaring that charging excessive overdrafts amounts to an unfair and abusive practice, the proposed Rule will also provide other public enforcement agencies like state Attorneys General (who can enforce the Dodd-Frank Act and TILA) with the jurisdiction to protect their residents against abusive fees.⁶³

Private enforcement is also a critical tool to enforce these laws and to help vindicate the rights guaranteed by these remedial statutes. Because unlawful overdraft fees are a quintessential example of a “small dollar” claim that is virtually impossible to litigate on an individual basis, these cases are well suited for aggregation as class actions.⁶⁴ Less than a decade ago, as the Bureau studied overdraft fee practice and the consumer relief received from collective and class actions, it determined that very few individuals were challenging overdraft fee practices individually.⁶⁵ Meanwhile, it found that a single court proceeding challenging wrongful overdraft fee practices against several banks between 2010 and 2012 led to six class settlements that provided close to \$600 million in relief and covered over 19 million consumers.⁶⁶ These overdraft cases involved banks that were accused of reordering checking account charges to maximize the number of overdraft charges assessed against consumers. Those class settlements not only provided consumers with financial relief; they also changed some banks’ overdraft practices regarding the reordering of checks. The class actions at that time served to deter that unlawful practice and facilitated improved conduct.⁶⁷ Similarly, once the Rule is finalized, banks will be further deterred from wrongful conduct when they know consumers can sue to obtain relief.

⁶³ See 12 U.S.C. § 5552 (authorizing State enforcement of the Consumer Financial Protection Act); 15 U.S.C. § 1640(e) (authorizing State enforcement of TILA).

⁶⁴ See *Amchem Prods. v. Windsor*, 521 U.S. 591, 616-17 (1997); CFPB, *Arbitration Study Preliminary Results: Section 1028(a) Study Results To Date* 108-09 (Dec. 12, 2013) <https://perma.cc/969B-WCN9>.

⁶⁵ *Id.* Ex. 23.

⁶⁶ See CFPB, *Arbitration Study Preliminary Results*, *supra* note 63, at 108-109; see also *In Re: Checking Account Overdraft Litig.*, MDL No. 2036 (S.D. Fla., Am. Consol. compl. filed Nov. 9, 2009).

⁶⁷ *In Re: Checking Account Overdraft Litig.*, MDL No. 2036.

Private enforcement to combat unlawful overdraft practices, however, will likely run headlong into other insidious practices of which the Bureau is all too aware: forced arbitration and class action bans. These terms, which are now ubiquitous in consumer financial contracts including checking account agreements, pose a nearly insurmountable burden for bringing these cases in court in most cases.⁶⁸ In fact, many class actions challenging excessive overdraft fees have been forced into arbitration.⁶⁹ Individual arbitrations of overdraft claims will rarely be worth the cost of bringing them; that reality effectively thwarts the remedial goals of the underlying consumer protection laws. Circumstances like these particularly militate toward robust enforcement by public agencies like the Bureau that are not bound by arbitration clauses.⁷⁰

The Bureau itself has thoroughly examined the issue of forced arbitration as it pertained to consumers seeking accountability against financial institutions whose allegedly abusive overdraft practices violated consumer protection laws.⁷¹ As the Bureau continues to monitor the financial marketplace and implement reasonable safeguards for consumers from predatory practices, including excessive overdraft fees, it should consider future actions to restore consumers' meaningful consent to arbitration or the civil justice system to help them hold wrongdoers accountable. Specifically, the Bureau should ensure harmed consumers can make choices about dispute resolution after a dispute arises.

Finally, by expanding Regulation Z's disclosure requirements to cover overdraft fees charged by very large banks, the proposed Rule will encourage private enforcement cases brought by consumers—assuming they can overcome the barriers of forced arbitration and class action bans, of course. TILA contains a private right of action as well as a provision for attorneys' fees; indeed “[t]he scheme of the statute . . . is to create a species of ‘private attorney general’ to participate prominently in enforcement.”⁷² By making clear that excessive overdraft fees are a violation of TILA (as well as the Electronic Funds Transfer Act (EFTA)) along with the consumer remedies available under both statutes, the improved landscape will help to deter financial institutions and thereby enhance deterrence and restitution.

⁶⁸ See, e.g., *Am. Ex. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *CFPB Arbitration Study* (2015), <https://perma.cc/M4P4-RFYA>.

⁶⁹ See, e.g., *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230 (11th Cir. 2018) (finding that Wells Fargo did not waive its right to seek to arbitrate multidistrict litigation almost ten years after the initial suits were filed); *Larsen v. Citibank FSB*, 871 F.3d 1295 (11th Cir. 2017) (finding that arbitration provision was not unconscionable or illusory and compelling arbitration); *Canteen v. Charlotte Metro Credit Union*, 881 S.E.2d 753 (N.C. Ct. App. 2022) (finding arbitration agreement was formed under state law).

⁷⁰ See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 295-96 (2002).

⁷¹ CFPB, *Arbitration Study Preliminary Results*, *supra* note 65, at 108-09.

⁷² *Riggs v. Gov't Empl. Fin. Corp.*, 623 F.2d 68, 72-73 (9th Cir. 1980) (assessing legislative history); see 15 U.S.C. § 1640(a).

IV. In Future Rulemakings, The Bureau Should Continue Its Efforts By Targeting Overdraft Fees Imposed By Smaller Financial Institutions.

Finally, while we applaud the Bureau for its efforts in protecting consumers against overdraft fees by the largest banks, we urge it not to stop here. We encourage the Bureau to continue studying the issue of overdraft fees, to monitor the impacts of the proposed Rule once it is finalized and goes into effect, and then, as soon as practicable, to conduct further rulemaking that extends the Rule's protections to smaller financial institutions including credit unions.

We believe that the proposed Rule's current scope will increase competition in the marketplace for consumer banking and encourage all financial institutions, regardless of their size, to limit their fees. However, the ultimate objective of regulations to curtail exorbitant overdraft fees must be to provide *all* consumers with substantive consumer protections (including reasonably priced overdraft protection if they meaningfully choose it). That objective may be achieved only by expanding the proposed Rule—in a future iteration—or issuing a similar rule to cover smaller financial institutions.

The current proposal does not subject financial institutions with under \$10 billion or less in assets to its overdraft fee limitations. This is not insignificant: smaller banks and credit unions account for 97% of American financial institutions.⁷³ While smaller financial institutions hold only 20% of consumer deposit accounts, they assess 32% of overdraft charges. Many customers at smaller banks lack access to larger banks because the smaller institutions often serve communities larger banks do not.⁷⁴ For some smaller institutions, overdraft fees are the main source of profit.⁷⁵ Consequently, smaller institutions have not followed the lead of their larger rivals in voluntarily reducing overdraft fees.⁷⁶ While banks with more than \$10 billion in assets have reported declines in overdraft fee income every quarter since late 2021,⁷⁷ banks with between \$1 billion and \$10 billion in total assets have reported an *increase* in total overdraft-related service charges.⁷⁸

It is, of course, possible that once the Bureau adopts the proposed Rule, smaller institutions could feel increased competitive pressure from their larger rivals to amend their overdraft policies.⁷⁹ However, market pressure alone has been insufficient to change behavior

⁷³ Alison Bennett & Ronamil Portes, *Community banks face regulatory, competitive pressures to alter overdraft policy*, S&P Global Market Intelligence (Jan. 17, 2023), <https://perma.cc/4AFS-QF4S>; Aaron Klein, *A few small banks have become overdraft giants*, Brookings (Mar. 1, 2021), <https://perma.cc/765X-XYNQ>.

⁷⁴ John Foley, *Overdraft fee reform has a big, small-bank flaw*, Reuters (Jan. 19, 2024), <https://www.reuters.com/breakingviews/overdraft-fee-reform-has-big-small-bank-flaw-2024-01-19/>; *What America's tiny banks do that big ones don't*, The Economist, [hereinafter *Tiny Banks*] (May 7, 2023), <https://perma.cc/3W5P-QRN7>.

⁷⁵ Bennett and Portes, *supra* note 72.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

thus far.⁸⁰ Many smaller institutions have built their business models around overdraft fee income, and will likely continue to lack strong incentive to alter their revenue structures absent regulation.⁸¹ Thus, a substantial voluntary reduction of overdraft fees seems unlikely.

New information disclosure requirements in California have brought some of the most egregious abuses by small banks and credit unions to light.⁸² Since the California Legislature enacted Senate Bill 1415 in 2022, state-chartered banks and credit unions in that state have been required annually to report their earnings from overdraft and non-sufficient funds fees to the state Department of Financial Protection and Innovation (DFPI).⁸³ The DFPI's first annual report released in 2023 revealed that many of these institutions are taking millions of dollars from their customers in overdraft fees.⁸⁴

By not covering smaller banks and credit unions, the current proposed Rule will not necessarily hold these institutions accountable. This is particularly concerning given that credit unions are non-profit institutions that often provide banking services to targeted communities.⁸⁵ For example, one institution that California regulators have identified as imposing excessive fees on its members is Cabrillo Credit Union.⁸⁶ Cabrillo Credit Union aims to be the primary financial institution for employees of the U.S. Border Patrol and other federal, state, and local government employees in San Diego, California.⁸⁷ However, because Cabrillo Credit Union's assets in 2022 totaled approximately \$405 million,⁸⁸ it is not subject to the Bureau's supervisory authority. Its practices, nevertheless, are indicative of the perniciousness of those at credit unions that *are* regulated by the Bureau.⁸⁹

Cabrillo's current policy to charge customers \$24 each time they overdraft, though Cabrillo does limit the total fees that may be charged for overdrawing an account.⁹⁰ For 2022, Cabrillo Credit Union received \$1.79 million in non-sufficient funds and overdraft fees from its

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Aaron Klein, *Credit Unions Are Making Money Off People Living Paycheck to Paycheck*, Politico (Oct. 5, 2023), <https://www.politico.com/news/magazine/2023/10/05/credit-unions-overdraft-fees-00119904>.

⁸³ Cal. Stats. 2022, ch. 847; *see* Cal. Fin. Code § 531.

⁸⁴ Cal. DFPI, *Annual Report of Income from Fees on Nonsufficient Funds and Overdraft Charges 2023* [hereinafter DFPI Report], <https://perma.cc/YD63-CPFK>.

⁸⁵ Klein, *supra* note 11.

⁸⁶ DFPI Report, *supra* note 84).

⁸⁷ Cabrillo Credit Union, *The Cabrillo Story*, <https://perma.cc/5LGE-DD57> (last visited March 7, 2024).

⁸⁸ Cabrillo Credit Union, *2023 Annual Meeting*, <https://perma.cc/DWC9-CS3E> (last visited March 7, 2024).

⁸⁹ *See, e.g.*, CFPB Consumer Complaint No. 8203667 (Jan. 22, 2024) (reporting 12 overdraft fees in two days by Security Service Federal Credit Union); CFPB Consumer Complaint No. 7776387 (Oct. 30, 2023) (reporting three overdrafts totaling \$180 charged by Lake Michigan Credit Union).

⁹⁰ Cabrillo Credit Union, *Reg E/Debit Opt-In*, <https://perma.cc/9DJP-QEP6> (last visited March 7, 2024).

members, which amounted to almost 76% of its net income.⁹¹ Given Cabrillo’s reliance on revenue from overdraft fees, it is highly unlikely that the credit union would voluntarily do away with these fees absent regulation.

Additional meaningful, targeted regulation by the CFPB to encompass smaller banks and credit unions is warranted because the free market alone cannot be a sufficient check on them to protect consumers from harmful overdraft fees.⁹² Consumers do not solely or even predominantly choose their financial institution based upon overdraft fee pricing. In fact, consumers have remained at smaller financial institutions with higher fees despite the availability of lower fees at some large financial institutions. Also, many other consumers do not have any other options available.⁹³ The prevalence of “banking deserts” means that many consumers lack opportunities to make choices for their financial well-being.⁹⁴ “In 2023, 4% of census tracts were banking deserts and another 4% could become deserts if a branch closed.”⁹⁵ Even where other banking options are available, some consumers cannot afford the fund transfer costs or punitive fees for closing their accounts.⁹⁶

V. Conclusion.

We strongly support the proposed Rule, which will impose valuable and needed guardrails on large banks to limit their overdraft fees, thereby protecting consumers—especially the most vulnerable—and ensuring that they can continue to participate in the financial system. We also encourage additional study of this critical issue to eventually expand the Rule’s scope to cover more consumers, like those at small banks and credit unions, who must deal with onerous overdraft fees on a regular basis.

If you have any questions or if we can provide further information, please contact Christine Hines of the National Association of Consumer Advocates, Christine@consumeradvocates.org, and David Nahmias of the UC Berkeley Center for Consumer Law & Economic Justice, dnahmias@berkeley.edu.

⁹¹ DFPI Report, *supra* note 15.

⁹² See 12 U.S.C. § 5511(b)(5) (establishing the Bureau’s responsibility to ensure that “markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation”).

⁹³ Emily Guy Birken & Daphne Foreman, *Should You Switch Banks To Get A Better Interest Rate On Your Savings Account?*, Forbes (Dec. 13, 2023), <https://perma.cc/BZX3-CAUM>.

⁹⁴ Alaina Barca, *Banking Deserts Dashboard*, Fed. Reserve Bank of Phil. (Jan. 2024), <https://perma.cc/4WZB-N6GU>.

⁹⁵ Fed Communities, *Banking Deserts Dashboard* (last updated Dec. 2023), <https://perma.cc/A6BR-37DU>.

⁹⁶ Suzanne Martindale, Lauren Bowne & Christina Tetreault, ConsumersUnion, *Trapped at the Bank: Removing Obstacles To Consumer Choice In Banking* (2012), <https://perma.cc/S7NZ-JUGQ>.

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The **National Association of Consumer Advocates** is a non-profit association of attorneys and consumer advocates whose primary focus is the protection and representation of consumers. NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

The **UC Berkeley Center for Consumer Law & Economic Justice** works to establish equity and fairness in the marketplace. We believe that building economic justice means developing and enforcing laws that fight fraud and deception, that protect low-income communities and communities of color, and that promote financial security and empowerment. Through research, advocacy, policy, and teaching, the Center strives to apply robust consumer protection laws in places, and among people, where those laws have not been used before, and to create a society in which economic, racial, and social justice are available to all.

The **Consumer Law Advocates, Scholars & Students (CLASS) Network** is a nationwide initiative spearheaded by the Center for Consumer and Economic Justice and the National Association of Consumer Advocates dedicated to developing consumer law and economic justice curriculum, experiential opportunities, and coordinated projects at law schools around the country. Our network comprised of law students, professors, and advocates is made up of 15 law schools with student organizations that hold events and participate in pro bono research and advocacy projects with our partners in government and non-profit organizations, as well as 15 law school clinics that provide experiential consumer and economic justice law.

The **Consumer Justice Advocates** at the University of Maryland, Baltimore School of Law is a student organization and affiliate of the CLASS Network, dedicated to fostering research, discussion, and advocacy in the field of consumer protection law. CJA is committed to strengthening ties between local and national consumer law groups and advocates, and the UMB Law community.

The **Consumer Protection Public Policy Order** is a student-run, justice-oriented, and CLASS Network-affiliated organization at Berkeley Law School that addresses consumer protection issues affecting everyday consumers, and especially communities most vulnerable to unfair practices. The organization conducts research and produces written work on pressing issues of consumer law and policy. The students are supervised by attorneys affiliated with the UC Berkeley Center for Consumer Law and Economic Justice and the East Bay Community Law Center.