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Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515–6315

May 9, 2024

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

Dear Director Chopra:

The House Committee on Small Business writes to discuss the Consumer Financial Protection Bureau's (CFPB) proposed rule prohibiting the charging on nonsufficient funds (NSF) fees on instantaneously declined transaction. [1] This rule threatens to further complicate Unfair, Deceptive, or Abusive Act or Practice (UDAAP) law and adds to the myriad of burdens being placed on small financial institutions. The Committee is concerned that the CFPB may not have sufficiently considered the needs of small financial institutions when drafting this rule.

CFPB is one of the three agencies currently required to convene a Small Business Advocacy Review (SBAR) panel prior to proposing rules that would have a significant economic impact on a substantial number of small entities. However, they certified that this proposed rule did not have a significant impact on a substantial number of small entities and did not convene this panel.[2] The CFPB limited their analysis of the impacts this rule would have on small businesses by stating that only 2 percent of revenue to small financial institutions comes from NFS fees. Unfortunately, that appears to be an inaccurate assessment of the true cost of complying with this rule. The likelihood that this rule could indeed result in a substantial impact on the wellbeing of these small financial institutions should have at the very least triggered a SBAR panel.[3] Yet, the CFPB failed to consider additional costs such as reporting requirements and manhours needed for compliance resulting in an inaccurate estimate.

Additionally, this rule stipulates that NSF fees on instantaneously declined transactions are inherently "abusive" under UDAAP law because they "take unreasonable advantage of consumers' lack understanding of the material risks, costs, or conditions associated with their

[1] Fees for Instantaneously Declined Transactions, 89 Fed. Reg, 6031 (Jan. 31, 2024) (to be Codified at 12 C.F.R. § 1042).
[2] *Id.*; Letter from Major L. Clark, III, et al., Deputy Chief Counsel, U.S. Small Bus. Admin. Office of Advocacy, to Rohit Chopra, Director, U.S. Consumer Fin. Protection Bureau (Mar. 25, 2024).
[3] Letter from Major L. Clark, III, et al., Deputy Chief Counsel, U.S. Small Bus. Admin. Office of Advocacy, to Rohit Chopra, Director, U.S. Consumer Fin. Protection Bureau (Mar. 25, 2024).

deposit accounts."[4] Despite claiming this practice is abusive due to how uninformed a customer may be, the rule explicitly states that disclosing this fee, either at account formation or during a transaction, *would still not be sufficient* because it would not stop the practice all together.[5] This appears to be a leap in both logic and authority by the CFPB. To this Committees knowledge, the CFPB was not given the authority to prohibit NSF fees themselves, but rather to prohibit abusive practices. Here the CFPB claims that NSF fees are abusive due to a potential lack of knowledge by customers, but also finds that informing the customers is insufficient to mitigate the "abuse." This rationale is not logically consistent and appears that the CFPB is granting itself the authority to prohibit business practices at will.

Notwithstanding the Committee's concerns that this rulemaking is an improper exercise of authority, this action goes further than prohibiting an abusive practice but prohibits a practice which could be done in a non-abusive manner. Categorizing fees, even when they are disclosed in advance, as "abusive" suggests that the CFPB's understanding of what is unfair, deceptive, or abusive amounts to things which may not be ideal. Managing UDAAP compliance is already a substantial burden particularly on small businesses, America's small financial institutions don't need UDAAP further complicated and watered down based on the whims of the CFPB.

It is important for agencies to correctly evaluate small businesses interests—which make up 99.9 percent of all businesses in the United States—when passing any new rule. America's small businesses deserve to have their voices heard and considered. We therefore request the following information as soon as possible but no later than May 23, 2024:

1. The number of small financial institutions will be subject to the CFPB's NSF Fee rule. Please include all factors considered in this determination and the weight given to each factor.

2. The estimated number of hours the CFPB's NSF Fee Rule will require from small businesses to comply with. Please include all factors considered in this determination and the weight given to each factor.

3. In the CFPB's criticism of NSF fees, it notes that the fee charged is not related to any cost incurred by a financial institution. Would a financial institution be permitted to charge a fee on instantaneously declined transactions when the fee is tied to an actual cost, such as the amount it costs banks to process failed transactions?

4. A copy of the training documents or policies and procedures followed by CFBP staff to determine what constitutes an unfair, deceptive, or abusive practices.

5. In the rule the CFPB seemed to stipulate that disclosures are insufficient to warn customers about risks. How did the CFPB determine that the risks here are different than

[4] Fees for Instantaneously Declined Transactions, 89 Fed. Reg, 6031, 6038 (Jan. 31, 2024) (to be Codified at 12 C.F.R. § 1042).
[5] *Id.*

other financial rules which permit disclosures as a form of compliance (Truth in Lending, Military Lending Act, etc.)?

6. The Federal Trade Commission's (FTC) junk fee rule specifically states that fees must be disclosed clearly in advance of any transaction, the CFPB's NSF fee rule indicates that disclosures may not be sufficient to warn a customer of a fee. How do you reconcile the CFPB's view with the FTC's view on the sufficiency of disclosing fees?

To schedule the delivery of responsive documents or ask any related follow-up questions, please contact the Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate "problems of all types of small business" under House Rule X. Thank you in advance for your cooperation with this inquiry.

In God We Trust,

Roger Williams
Chairman
Committee on Small Business

Pete Stauber
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Committee on Small Business

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cc: The Honorable Nydia M. Velazquez, Ranking Member
Committee on Small Business