



America's
Credit Unions



January 3, 2024

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

Re: Projected Rulemakings on Non-sufficient Funds (NSF) Fees and Overdraft Fees

Dear Director Chopra,

The American Bankers Association,¹ America's Credit Unions,² and Independent Community Bankers of America³ write to express our concern that the Consumer Financial Protection Bureau (Bureau) will soon issue proposals to impose additional regulation on non-sufficient funds (NSF) and overdraft fees without undertaking the statutorily required Small Business Regulatory Enforcement Fairness Act (SBREFA) review. These rulemakings will have a significant economic impact on banks and credit unions with assets of \$850 million or less, which triggers the SBREFA review process. We urge you not to proceed with these rulemakings until the Bureau assesses the economic impact of its rulemakings on community banks and credit unions, as the Bureau is required to do under section 1100G of the Dodd-Frank Wall Street Reform and Consumer Protection Act.⁴

As you are aware, that section amended SBREFA to require the Bureau to consider the impact on small businesses when the agency is considering initiating a rulemaking that will have a "significant economic impact on a substantial number of small entities."⁵ As part of that process, the Bureau,

¹ The American Bankers Association is the voice of the nation's \$23.4 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard \$18.6 trillion in deposits and extend \$12.3 trillion in loans.

² America's Credit Unions is the voice of consumers' best option for financial services: Credit unions. We advocate for policies that allow the industry to effectively meet the needs of their nearly 140 million members nationwide. As not-for-profit, member-owned financial cooperatives, credit unions uphold a "people helping people" philosophy and are dedicated to improving the financial well-being of the people and communities they serve.

³ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5.8 trillion in assets, over \$4.8 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 1100G (2010).

⁵ Small Business Regulatory Enforcement Fairness Act of 1996, *codified at* 5 U.S.C. § 605(b).

working with the Small Business Administration’s Office of Advocacy and the Office of Management and Budget’s Office of Information and Regulatory Affairs (the SBREFA Panel) must convene a group of small business entities (SERs) that may be affected by the proposal and solicit feedback from them on the proposals under consideration prior to issuing a proposal.⁶ These steps promote the issuance of rules that minimize the costs and burdens on small businesses and promote access to credit.

The Bureau’s most recent semiannual Rulemaking Agenda, issued last month, states that in the coming days, the Bureau projects to issue proposals to regulate NSF fees using the Bureau’s authority to prevent unfair, deceptive or abusive practices⁷ and to define overdraft fees as credit subject to the Truth in Lending Act and Regulation Z.⁸ The Bureau, however, has not initiated a SBREFA review for either of these rulemakings, so one can only conclude that the Bureau intends to skip this critical step in the rulemaking process.

If the Bureau intends to use its authority to regulate unfair, deceptive or abusive acts and practices to prohibit charging NSF fees under certain circumstances, that prohibition will apply to *all* banks and credit unions, regardless of asset size. After all, if the Bureau concludes in a rule that certain practices are unfair, deceptive or abusive, that conclusion would apply universally, and the Federal banking agencies must apply it to the banks they supervise.

Similarly, if the Bureau writes a rule that subjects overdraft fees to Regulation Z—which would require the calculation and disclosure of an annual percentage rate on each overdraft fee, among other requirements—that regulation would also impact overdraft protection services offered by all banks and credit unions. Regardless of which banks are directly subject to the Bureau’s rule, all banks would face market pressure to conform their practices to the Bureau’s rule.

Therefore, any rule issued by the Bureau on overdraft or NSF fees will have a significant impact on a substantial number of institutions with assets of \$850 million or less, and as Congress clearly directed in the Dodd-Frank Act, the Bureau must initiate a SBREFA review before issuing notices of proposed rulemakings.

Sincerely,

American Bankers Association
America’s Credit Unions
Independent Community Bankers of America

Cc: Major Clark, Deputy Chief Counsel for Advocacy, Office of Advocacy
U.S. Small Business Administration

Alexander Goodenough
Office of Information and Regulatory Affairs, Office of Management and Budget

⁶ 5 U.S.C. § 609(b).

⁷ Office of Info. & Reg. Affairs (OIRA), Current Unified Agenda and Regulatory Plan, Fees for Insufficient Funds, RIN 3170-AB16 (Fall 2023), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3170-AB16>; 12 U.S.C. § 5531(b).

⁸ OIRA, Current Unified Agenda and Regulatory Plan, Overdraft Fees, RIN 3170-AA42 (Fall 2023), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3170-AA42>.