Statement for the Record

On Behalf of the

American Bankers Association

Before the

Subcommittee on Financial Institutions and Consumer Protection

of the

U.S. Senate Committee on Banking, Housing, and Urban Affairs

May 4, 2022

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Chairman Brown, Ranking Member Toomey, and distinguished Members of the Committee, the American Bankers Association[1] (ABA) appreciates the opportunity to submit a statement for the record for today's hearing examining overdraft protection services.

ABA has long advocated for regulatory policies that ensure consumers have a wide range of options within the regulated banking industry to meet emergency expenses and to help customers address misalignments in deposits and payments. Consumers should be able to choose from revolving credit, installment loans, single payment loans, and overdraft protection services.

Overdraft protection services are an important source of liquidity for many Americans. With access to overdraft protection, bank customers can have confidence that they can pay their rent or utility bill, thereby avoiding late fees, a utility shut-off, or even eviction. For customers living paycheck to paycheck, access to overdraft provides significant value. The average transaction amount paid into overdraft was $198 in 2019, according to the research firm Curinos.[2] Unsurprisingly, 9 in 10 consumers (89%) find their bank's overdraft protection valuable, according to a February 2022 national survey by Morning Consult.[3]

As Congress examines overdraft protection services, we urge it to take three steps:

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[1] The American Bankers Association is the voice of the nation's $23.7 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.7 trillion in deposits and extend nearly $11.2 trillion in loans.

[2] Curinos, *Competition Drives Overdraft Disruption* 8 (2021), https://curinos.com/insights/competition-drives-overdraft-disruption/.

[3] Press Release, Am. Bankers Ass'n, *ABA Unveils New Consumer Polling Data on Major Bank Policy Issues at 2022 Washington Summit* (Mar. 8, 2022), https://www.aba.com/about-us/press-room/press-releases/aba-unveils-new-consumer-polling-data-on-major-bank-policy-issues-at-2022-washington-summit [hereinafter, 2022 Morning Consult Survey Data]. Morning Consult surveyed 2,210 consumers nationwide between February 18-19, 2022 about their preferences regarding overdraft. *Id.*

1. **Congress should respect and protect consumer choice.** Consumers who do not seek access to overdraft services can open an overdraft-free account, which is widely available at banks across the nation; these include increasingly popular Bank On-certified accounts, which are now available at institutions making up 56% of the U.S. deposit market. However, for those consumers who value access to overdraft protection, Congress should not presume to know what is best for consumers and deprive them of their choice by imposing additional restrictions that would reduce availability of these important services. These restrictions would prevent important payments from being paid, deny customers access to liquidity, and cause customers to incur additional fees and inconveniences. Rather than protecting consumers who choose to access overdraft services, these proposals may drive customers from the banking system and to payday and title lenders, pawn shops, and other nonbank financial service providers.

2. **Congress should direct the Consumer Financial Protection Bureau (CFPB) to study why consumers use and value access to overdraft protection.** Congress' inquiry into overdraft services should not be based on selective anecdotes, unsupported assumptions about consumer behavior, or Congress substituting its own view of what is "best" for consumers, but rather on an evidence-based understanding of regular users 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. Congress also should direct the CFPB to study the monetary value provided to consumers by overdraft—i.e., the amount of the charge that caused each overdraft and the amount of late and other penalty fees avoided by the institution's honoring the charge. 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—individuals should be assumed to be the best judge of what is in their best interest and should remain free to choose to use overdraft.

3. **Congress should encourage regulators to reduce barriers that discourage banks from offering affordable small-dollar credit.** We share Congress' interest in promoting consumer access to safe and affordable small-dollar credit. Congress should encourage regulators to reduce barriers that discourage banks from offering affordable small-dollar credit, such as by directing the CFPB not to initiate new rulemaking to impose prescriptive underwriting or other requirements on small-dollar loans. We should be expanding responsible consumer options in this area, not limiting them.

Banks are Evaluating their Overdraft Protection Programs to Respond to Consumer Preferences and Competition

The regulatory framework governing overdraft provides an effective, pro-consumer baseline. 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 may impose a fee for an overdraft resulting from a debit card point-of-sale or automated teller machine (ATM) transaction.[4] In the years since implementation of the 2009 rule, depository institutions have evaluated their obligations and the markets they serve, listened to consumer preferences, and responded to the market by innovating how they provide overdraft services,[5] as even the Bureau's director, Rohit Chopra, has repeatedly acknowledged.[6] 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, some institutions give customers at least 24 hours to bring a negative balance to a positive position before charging an overdraft fee or allow customers early access to direct-deposited funds. Many institutions do not charge an overdraft fee if the customer overdraws their account by a *de minimis* amount or charge no more than one overdraft fee per day. Other institutions may not charge a transfer fee when money is transferred from the customer's linked account to cover an insufficient funds transaction in the customer's primary account. Finally, some banks and credit unions have announced they will no longer charge overdraft fees or have eliminated the institution's returned item fee. The variety of options demonstrates a competitive marketplace that is responding to consumer preferences and competitive forces.

In addition, today's banks empower customers with real-time information they need to avoid overdrawing their account. Customers 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. As referenced above, customers 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 automatically transfer money into the transaction account if it becomes overdrawn. Furthermore, insured depository institutions nationwide provide overdraft-free account options, including Bank On-certified accounts, at branches and through online and mobile access.

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[4] 12 C.F.R. § 1005 *et seq.* (2022).

[5] *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.

[6] *See Consumers First: Semi-Annual Report of the Consumer Fin. Prot. Bureau: Hearing Before the H. Comm. on Fin. Svcs.*, 117 Cong. (2022) (testimony of Rohit Chopra, Dir., Consumer Fin. Prot. Bureau) ("Institutions are starting to compete more aggressively on fees."); *The Consumer Fin. Prot. Bureau's Semi-Annual Report to Cong.: Hearing Before the Sen. Comm. on Banking, Hou., & Urban Affairs*, 117 Cong. (2022) (testimony of Rohit Chopra, Dir., Consumer Fin. Prot. Bureau) ("But what we are seeing is actually banks across the board are starting to compete on this [overdraft products].").

In presuming to understand what is best for individual Americans, Congress proposes to substitute its own judgment for that of individual Americans, who have a range of choices not just of where they bank but which account works best for them. Evidence abounds that this approach does not respect the clear message from consumers themselves. Surveys indicate that consumers appreciate these overdraft marketplace changes and are satisfied with the services provided by their bank. The 2022 Morning Consult survey found that 89% of consumers are "very satisfied" or "satisfied" with their primary bank, and 88% agree they have multiple options when selecting products and services such as bank accounts, loans, and credit cards.[7] As financial institutions compete for customers, we can expect to see further innovations in the overdraft options banks make available to consumers.

Policymakers Should Not Impose Additional Restrictions on a Product that Consumers Value

Banks' innovations to their overdraft programs reflect the fact that the United States has the largest, most diverse, and most competitive financial services marketplace in the world. Our nation 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.

Unsurprisingly, surveys consistently demonstrate that consumers overwhelmingly value overdraft services. The 2022 Morning Consult survey found that:

- 9 in 10 consumers (89%) find their bank's overdraft protection valuable;
- 3 in 4 consumers (74%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining the payment;
- 61% of consumers think it is reasonable for banks to charge a fee for an overdraft; and
- Three-quarters of consumers (74%) view overdraft fees as reasonable when large payments like mortgages or rent payments are covered and paid on time.[8]

These findings are consistent with prior surveys. For example, a 2021 Morning Consult survey found that 90% of consumers find their bank's overdraft protection valuable, and 72% were happy the overdraft payment was covered by the bank, rather than returned or declined.[9] Similarly, a 2020 Morning Consult survey found that 89% of consumers find their bank's overdraft protection valuable, and 73% were glad the overdraft payment was covered by the bank, rather than returned or declined. Together, these survey data demonstrate the enduring reality that consumers value the peace of mind offered by overdraft protection and do not want their access to this service limited.

[7] 2022 Morning Consult Survey Data, *supra* note 3, at 1.
[8] *Id.*
[9] Press Statement, Rob Nichols, Am. Bankers Ass'n, *ABA Statement on CFPB Overdraft Research* (Dec. 1, 2021), https://www.aba.com/about-us/press-room/press-releases/aba-statement-on-cfpb-overdraft-research.

Restrictions on overdraft may lead financial institutions to stop offering these services, which would result in significantly more returned checks and declined transactions. This, in turn, will mean that consumers will pay returned item fees charged by the payee or merchant and late fees, and may have lower credit ratings or be required to pay using cash, a cashier's check, or a money order. It should be no surprise that, in the most recent Morning Consult survey, significantly more consumers indicated they would oppose (54%) rather than support (26%) a government proposal to prevent banks from offering overdraft protection.[10] Similarly, in its survey of consumers, Curinos found that 62% of consumers would reconsider their support for new regulation of overdraft if it limited access to the service.[11]

Moreover, statutory and regulatory restrictions can quickly become obsolete as consumer needs and demands, technology, and markets change. In fact, prescriptive, time-bound statutes and regulations are likely to chill and artificially constrain an otherwise dynamic and competitive marketplace for cheaper, more convenient, and flexible alternatives to cover bank account shortfalls.

Congress Should Reject Legislation that Would Restrict Overdraft

Legislation introduced in the Senate, the *Stop Overdraft Profiteering Act of 2021*, would prohibit banks and other depository institutions from charging consumers more than one overdraft fee in a month and more than six overdraft fees in a year, among other provisions.[12] This limit applies to ACH, check, and recurring debit card transactions; the bill prohibits overdraft fees for point-of-sale and ATM transactions. The bill permits a depository institution to charge an overdraft fee for ACH, check, or recurring debit card transactions only if the customer opts in to the overdraft service. If enacted, the bill would harm consumers by upending the existing regulatory framework governing overdraft. Congress should reject this legislation.

The bill is overly broad and will prevent important payments from being honored. As stated above, the bill permits a depository institution to charge an overdraft fee for ACH, check, or recurring debit card transactions only if the customer opts in to the overdraft service. The Federal Reserve's 2009 amendments to Regulation E intentionally require a consumer's opt-in only for debit card (in-store purchase) and ATM transactions. This ensures that important checks and ACH, bill-pay, and recurring debit card payments may be paid—payments for rent, utilities, automobile, mortgage, and other loans, and necessities. When these payments are declined, it may set off a cascade of significant adverse consequences for the consumer, as noted above.

[10] 2022 Morning Consult Survey Data, *supra* note 3, at 1.
[11] Curinos, *supra* note 2, at 12 & fig. 2.7.
[12] S. 2677, Stop Overdraft Profiteering Act of 2021, 117th Cong. (2021).

By restricting the number of overdraft fees a customer may incur, the legislation suggests that Congress knows better than an individual what is best for that customer, substituting a government limitation for consumer choice. The Federal Reserve limited its opt-in requirement to debit card and ATM transactions because the agency determined, after extensive consumer testing, that consumers do not want to have to opt in to overdraft protection for check, ACH, and recurring debit card transactions.[13] They want these transactions paid. Indeed, the 2022 Morning Consult survey found that 74% of consumer customers are happy that their depository institution covered an expense when their account was overdrawn.[14] The legislation's limits on overdraft usage overrides this clear consumer preference.

The legislation also is unnecessary because consumers who do not want to have access to overdraft can open an account that does not provide this service. As stated above, consumers already have broad, nationwide access to affordable, overdraft-free transaction accounts (often structured as checkless checking or reloadable prepaid cards), including Bank On-certified accounts, the availability of which are exploding: available accounts have nearly quintupled in the last 18 months alone among banks of all sizes and are reaching low- and moderate-income communities. Congress should not limit the choice of consumers who wish to have overdraft services when overdraft-free accounts are so widely available.

In addition to the limits on the number of overdraft fees that may be incurred, the legislation requires that the amount of any overdraft fee be "reasonable and proportional" to the amount of the overdraft and the cost to the depository institution in providing the overdraft coverage for the transaction. This requirement does not account for the costs to the institution to collect a negative balance or losses to the institution. If overdraft fees cannot reflect the full cost of providing the service, banks may return more items presented against insufficient funds, instead of paying those items into overdraft, especially for those customers who rely most on the service. As noted above, returning important payments results in considerable cost, embarrassment, and inconvenience for consumers. Banks also may limit the availability of fee-free accounts if overdraft fees are restricted.

Congress Should Direct the CFPB to Study Why Consumers Use and Value Overdraft

Instead of limiting consumers' usage of overdraft, Congress and other policymakers should seek to understand consumers' preferences regarding the product. Specifically, any policy action that

[13] In 2008, the Federal Reserve conducted intensive consumer testing of the overdraft opt-in form. Among other conclusions, 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] 2022 Morning Consult Survey Data, *supra* note 3, at 1.

may impair access to overdraft services should be based on an understanding of why many consumers choose to use the product. Congress should direct the CFPB to investigate:

- The features that consumers seek when they open a deposit account;
- 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 consumers who use overdraft protection 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;
- Why many consumers elect to opt-in to debit card overdraft protection instead of using available alternatives for short-term liquidity;
- Whether the consumer has access to modern tools warning them of a potential overdraft, and yet choose to proceed with the transaction;
- What consumers understand about their ability to opt-out and whether they have ever exercised that right; and
- Consumers' options for meeting short-term liquidity needs if access to overdraft protection is restricted or cut off entirely.

The CFPB also should study the amount of the charge that caused each overdraft and the amount of late and other penalty fees avoided by the institution's honoring the charges. These data will help determine the value to consumers of overdrafts. As stated earlier, the Curinos report found that the average transaction amount paid into overdraft was $198 in 2019.[15] This indicates that overdraft provides significant value to consumers.[16]

Policymakers Should Reduce Barriers that Discourage Banks from Offering Affordable Short-term Credit

We share Congress' interest in promoting consumer access to safe and affordable small-dollar credit. Consumers often need this credit to meet emergency expenses, disruptions in pay, and misalignments in the timing of their deposits and expenses. Because borrowers' needs are diverse, policymakers should eliminate barriers to a vibrant market with many choices for small

[15] Curinos, *supra* note 2, at 8.
[16] ABA and other trade associations representing banks and credit unions have urged the Bureau to conduct a consumer survey or focus groups to understand consumers' preferences regarding overdraft and the monetary value provided by overdraft. *See* Letter from Am. Bankers Ass'n *et al.*, to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau (Jan. 13, 2022), https://www.aba.com/advocacy/policy-analysis/joint-trades-letter-to-cfpb-re-overdraft.

dollar credit, including credit cards, installment loans, single payment loans, and overdraft protection services. Unfortunately, actions by Congress and regulators have stifled the market for this credit. At the same time, Congress has driven up consumers' costs to hold a checking account by limiting debit card interchange fees through the Durbin Amendment and Regulation II.[17] Policymakers should focus their efforts on reducing barriers that discourage banks and other depository institutions from providing short-term credit.

Bank-provided small dollar loans are an important part of the solution to consumers' credit needs. Not only do small dollar loans help consumers navigate liquidity shortfalls, they provide a pathway for consumers to access other bank products. When loans are repaid as agreed, consumers can build or improve their credit scores and graduate to other credit products. Expanding access to small dollar credit also supports economic activity in the communities where these borrowers live.

However, the uncertainty over the CFPB's 2017 payday lending rule has discouraged banks from offering short-term credit at the scale needed to meet consumers' needs.[18] As initially finalized, that rule would have imposed prescriptive underwriting requirements on small dollar loans that are inconsistent with efficient underwriting approaches. Today, regulated depository institutions are able to use easily accessible information, such as the consumer's credit score and debt-to-income ratio, to determine whether the consumer can repay the loan. Using data points that banks can obtain quickly, small dollar loans can be made in a matter of minutes from the convenience of the consumer's computer or smart phone. This underwriting approach also drives down the cost of these loans, enabling affordable pricing with several months to repay the loan.

The federal banking agencies have endorsed the use of dynamic underwriting approaches to originate small dollar loans, stating that "responsible" small dollar loans may rely on deposit account activity and other external data sources to underwrite the loan.[19] However, there is continued uncertainty over whether the CFPB may seek to reinstate prescriptive underwriting requirements on these loans. Congress should direct the CFPB not to take this action. A clear signal from the CFPB that the agency does not seek to impose additional requirements on these loans would remove regulatory uncertainty and encourage banks to establish or expand small dollar loan programs that are scaled to meet consumers' needs.

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[17] *See* Vladimir Mukharlyamov and Natasha Sarin, *The Impact of the Durbin Amendment on Banks, Merchants, and Consumers*, Faculty Scholarship at Penn Law 4 & 5 (2019).
[18] *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017).
[19] Bd. of Govs. of the Fed. Reserve Sys. *et al.*, Interagency Lending Principles for Offering Responsible Small-Dollar Loans 1 (2020).

Conclusion

We share Congress' interest in making sure consumers have a range of reliable choices when it comes to financial products and services. ABA looks forward to continued dialogue about how banks can provide consumers with diverse options for meeting liquidity shortfalls, including through use of overdraft. Together, we can ensure that consumers continue to have choices about whether their payments are honored when they are short of funds and avoid the negative consequences of returned payments.