American Bankers Association
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Via email to:
cfpb_overdraft_comments@cfpb.gov

Mr. David Silberman
Associate Director
Research, Markets & Regulations Division
Consumer Financial Protection Bureau
1801 L Street, N.W.
Washington, D.C. 20036

Re: Notice and Request for Information on the Impacts of Overdraft Programs on Consumers; Docket No. CFPB-2012-0007

Dear Mr. Silberman,

We appreciated having the opportunity to meet with you and members of the Research, Markets and Regulations team on March 13, 2012 to discuss the Consumer Financial Protection Bureau's overdraft study. I am writing to follow up on one of the matters we discussed – the fact that the Notice and Request for Information on the Impacts of Overdraft Programs on Consumers (the RFI) states that "comments must be received on or before April 30, 2012, to be assured of consideration." As we discussed, the American Bankers Association (ABA) urges you to reconsider the imposition of a firm comment deadline, a practice that is more appropriate for formal proposed rulemaking. Instead, we believe the Bureau should announce its willingness to consider public comments and data provided throughout the period that the Bureau is collecting and analyzing data from the eight institutions served with the supervisory request for information on overdraft practices (the Large Bank Data Request).

Because the Bureau is not pressed by a statutory deadline, we question the imposition of a sixty day comment period, particularly in light of the fact that Bureau staff anticipates that the collection and analysis of the large bank data is likely to extend throughout the summer. As you are aware, the RFI seeks a broad range of information from consumers, third-party processors, and financial institutions, and the identification and development of responsive data will take a significant amount of time. ABA believes that imposing an artificial deadline of April 30 may preclude the development of a sufficiently broad and complete factual record necessary to support policy action. And certainly the Bureau will want to share the data from its large bank study to discern how it compares with banking experience more broadly.

In addition, ABA appreciates the fact that the Bureau intends to publish a report about the information and data received from the RFI and the Large Bank Data Request and its analysis of that information. ABA believes, however, that interested parties should be given the opportunity to respond – on the public record – to that report, particularly to discern how what is learned from the experience of these few banks compares with experience of the banking industry more broadly. As we discussed, this need is exacerbated by the fact that the Bureau refuses to make public even the data requests contained in the Large Bank Data Request. Thus, we urge the Bureau to schedule an ample reply comment period following the issuance of its report and to commit not to announce any policy decisions regarding the need for additional rule making or supervisory guidance until after a full opportunity for consideration and evaluation of these comments.

ABA is concerned that the timetable the Bureau projects for conducting its inquiry will cause it to ignore relevant lines of investigation and consequently undermine its usefulness as a basis for policy decisions that will be of genuine benefit to bank customers. An examination of payment order, for example, cannot be considered complete if it only evaluates the implications for overdraft services and programs. Payment order is also relevant for situations where banks do not accommodate overdrafts or where customers do not opt-in to the service or other options offered. Consequently, ABA urges the Bureau to consider the following as it analyzes the impact on consumers of overdraft programs and payment order:

- Test each payment order against "no pay" policies to determine how this affects which transactions are declined and the impact on consumers. Many community banks have a policy and practice of not paying ATM or one-time debit card transactions into overdraft; they do not approve point-of-sale (POS) or ATM transactions that at the time of authorization will overdraw the account. The Bureau should determine whether mandating a "low to high" payment order (regardless of transaction type) for a no pay bank will result in an increase in checks being returned for non-sufficient funds (NSF), increased merchant returned check fees, increased value of transactions denied payment, and other negative ancillary effects.

- Test each payment order change against the experience of those who did not opt-in for coverage to determine if the adverse impact on this customer segment is similar to that observed at no pay banks.

- Consider the impact of delays between authorization and settlement on payment order and overdraft transactions; in particular, consider three common scenarios: Automatic Fuel Dispenser (AFD), hotel and rental car, and restaurant debit card transactions. Successful policy will require a clear understanding of the variety of entities involved in each transaction, their individual rules and capabilities governing authorization, presentment, and settlement, and the risk mitigation options available to banks.

- Consider the incidence and impact of payment order in situations where authorization of a POS transaction uses a stand-in balance or a static balance based on the prior day's available funds on both NSF and overdraft transactions.

- Consider the value of the transactions being covered by an overdraft program, not just the amount of the overdraft.

In addition, as the Bureau considers whether overdraft programs have a disproportionate impact on vulnerable groups, ABA believes that the Bureau must examine the appropriateness of using census tract data as an income proxy. We urge the Bureau to compare census tract data across a variety of Metropolitan Statistical Areas (MSA) and non-MSA markets with the average monthly deposits of overdraft customers for each market or if available from other accountholder information, with actual income. We also believe that the Bureau must exercise care to identify true "consumer" accounts – accounts used for personal or household use – as distinguished from accounts used for non-household purposes, i.e., by sole proprietors or other business uses.

We also encourage the Bureau to reach out to core processors (i.e., Fiserv, FIS, Jack Henry, Open Solutions, etc.) to ask them to describe the payment order options they offer their community bank customers; to state the rationale for offering/adopting a particular order (i.e., cost, risk, operational considerations, etc); and to identify the number of their financial institution customers that subscribe to a particular order. While we understand that the Bureau will test large bank transaction processing orders, we do not believe that these proprietary systems are necessarily representative of community bank options.

Therefore, ABA believes that it is essential that the Bureau understand and model the payment order options and choices of community banks. Future policies on payment order or overdraft programs must not be predicated on the practices of large banks at the expense of all other banks. Community banks are usually dependent on core processors for payment capabilities and have fewer resources to apply to technological innovations. Consequently, it is important for the Bureau to evaluate from the very beginning how altering existing payment processing arrangements will impact community banks given their constraints and to what degree their customers will be benefitted or adversely impacted by such changes. These considerations involving payment order represent just one example of the need for full inquiry and care so that customer needs and uses are not compromised by Bureau policies with regard to bank overdraft programs.

We appreciate your consideration of our request for additional time and suggestions for analysis. Feel free to contact me at rriese@aba.com or 202-663-5051 if you or a member of your staff has any questions.

Sincerely,

Richard R. Riese
Senior Vice President

Cc: Cory Stone, CFPB Assistant Director of Credit Information Markets
Gary Stein, CFPB Deposits Markets Program Manager