U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

March 25, 2024

VIA ELECTRONIC SUBMISSION

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

Re: Fees for Instantaneously Declined Transactions Docket No. CFPB–2024–0003, RIN 3170–AB16

Dear Director Chopra:

On January 31, 2024, the Consumer Financial Protection Bureau (CFPB) published a notice of proposed rulemaking (NPRM) on Fees for Instantaneously Declined Transactions in the Federal Register.[1] The proposed rule would prohibit covered financial institutions from charging fees, such as insufficient funds fees when consumers initiate payment transactions that are instantaneously declined. The Office of Advocacy (Advocacy) is concerned about the lack of an adequate factual basis in the CFPB's Regulatory Flexibility Act (RFA) certification and recommends that the CFPB exempt small entities from the rulemaking.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

[1] 89 Fed. Reg. 6031 (Jan. 31, 2024).

The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.[4] Additionally, section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.[5] The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.[6] If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.[7] The agency must provide a statement of factual basis that adequately supports its certification.[8]

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[9] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.[10]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[11]

The Office of Advocacy performs outreach through roundtables, conference calls, and other means to develop its position on important issues such as this one. The Office of Advocacy held a conference call with stakeholders on March 5, 2024, to discuss the impact of this NPRM on small entities and less burdensome alternatives to the rule as proposed. Advocacy's comments reflect the feedback that it received from stakeholders about the potential impact of the proposal on small businesses.

[2] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[3] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[4] 5 U.S.C. § 603.
[5] *Id.* § 609.
[6] *Id.*
[7] *Id.* § 605(b).
[8] *Id.*
[9] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[10] *Id.*
[11] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

B. The Proposed Rule

On January 31, 2024, the CFPB published a proposed rulemaking on Fees for Instantaneously Declined Transactions in the Federal Register.[12] The proposed rule would prohibit covered financial institutions from charging fees, such as nonsufficient funds fees when consumers initiate payment transactions that are instantaneously declined. If a covered institution charges such fees, it would constitute an abusive practice under the Consumer Financial Protection Act's prohibition on unfair, deceptive, or abusive acts or practices.[13]

Section 1042.2 of the proposed rule states that a covered institution means a "financial institution" as defined in Regulation E, 12 CFR § 1005.2(i).[14] 12 CFR § 1005.2(i) states that:

> "Financial institution" means a bank, savings association, credit union, or any other person that directly or indirectly holds an account belonging to a consumer, or that issues an access device and agrees with a consumer to provide electronic fund transfer services, other than a person excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376.

The CFPB certified that the proposed rule on instantaneously declined transactions would not have a significant economic impact on a substantial number of small entities.[15]

It should be noted that on February 23, 2024, the CFPB published a proposed rule on Overdraft Lending: Very Large Financial Institutions.[16] Since the overdraft proposed rule only applies to financial institutions with more than $10 billion in total assets, it affects no small entities.[17]

Advocacy acknowledges that insufficient funds fees and overdraft fees are different. Overdraft fees are charged when a transaction (debit, payment, transfer, or withdrawal) that exceeds the consumer's account balance is paid by the financial institution. An insufficient funds fee is charged when a transaction (debit, payment, transfer, or withdrawal) that would exceed the account's balance is returned unpaid by the financial institution. However, according to the CFPB, surveys, reports, and studies often group these two types of fees together because banks with over $1 billion in assets report overdraft and nonsufficient funds (NSF) fees together within the ''consumer overdraft-related service charges'' category.[18]

[12] 89 Fed. Reg. 6031.
[13] *Id.*
[14] *Id.* at 6,050.
[15] *Id.*
[16] 89 Fed. Reg. 13852 (Feb. 23, 2024).
[17] *Id.* at 13,896.
[18] 89 Fed. Reg. at 6032.

II. The Certification under the Regulatory Flexibility Act Lacks an Adequate Factual Basis

As noted above, the CFPB prepared a certification in lieu of an initial regulatory flexibility analysis (IRFA). Section 603 of the Regulatory Flexibility Act (RFA) requires agencies to perform an IRFA to explain the economic impact of the action on small entities and consider less costly alternatives. The CFPB must convene a panel for rulemaking that may require an IRFA. However, section 605 of the RFA allows the agency to prepare a certification in lieu of an IRFA if the action is not expected to have a significant economic impact on a substantial number of small entities. The certification must be supported by a factual basis.

The CFPB's certification lacks a sufficient factual basis. In the certification, the CFPB states that:

> Small institutions, for the purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, are defined by the Small Business Administration. Effective December 19, 2022, depository institutions with less than $850 million in total assets are determined to be small. As mentioned above, the CFPB understands that covered persons rarely currently charge NSF fees on covered transactions. As a result, under current market practices, the proposed rule should not have a significant impact on a substantial number of small entities. Moreover, even when combined with overdraft fees, total NSF fees generally represent well under 2 percent of total revenue at the smallest financial institutions that regularly report this information, suggesting that any potential reduction in NSF fee revenue would not be likely to have a significant impact on institutions with less than $850 million in total assets. As a result, the proposed rule should not have a significant impact on a substantial number of small entities even if NSF revenue were entirely comprised of NSF fees on covered transactions.[19]

The certification lacks the information necessary to form a factual basis. There is no information about the number of financial institutions that qualify as small. There is no information about the number of small financial institutions that charge fees for insufficient funds. There is only an assertion that smalls rarely charge insufficient funds fees. From the information provided, one cannot ascertain whether a substantial number of small entities will be impacted.

Likewise, the CFPB's assertion of no significant economic impact is also suspect. In a footnote, it provides its explanation for the statement that the fees will represent well under the 2 percent total revenue. The CFPB states in footnote 182:

[19] *Id.* at 6,050.

> Calculations based on publicly available FFIEC Call Report data from 2022 suggest that only 11.9 percent of reporting financial institutions with total assets below $2 billion had combined revenue from overdraft and NSF fees on depository consumer accounts that exceeded two percent of their total revenue. In the past, the CFPB has estimated that NSF fees make up less than 20 percent of combined overdraft and NSF revenue. Since NSF fees on covered transactions are likely to represent less than half of combined overdraft and NSF revenue, this suggests that less than 12 percent of reporting banks would expect a decline in revenue of even 1 percent, suggesting that the rule would not have a significant impact on a substantial number of small entities. The CFPB caveats that this calculation relies on data from reporting financial institutions with between $1 billion and $2 billion in total assets to make projections about financial institutions with below $850 million in total assets.[20]

The CFPB has no true information on the impact of this proposal on small entities. Although the CFPB completed a study on insufficient funds fees, that study excludes NSF revenue collected by banks with assets of less than $1 billion and by all credit unions. The CFPB stated that those institutions are not required to publicly report their overdraft/NSF fee revenue as a separate line item. As such, no information is available to truly determine what the economic impact would be on small financial institutions.

III. Small Entities Should Be Exempt from the Rulemaking

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Arguably, if small entities are not required to report about insufficient fees, it is because small entities are not causing the problem that CFPB is trying to address. If small entities are not causing the problem, they should be exempt from the proposed rule. Exempting small entities will prevent them from having to expend valuable resources to determine if the rule applies to them.

Advocacy notes that the CFPB’s proposed overdraft rule only applies to financial institutions with more than $10 billion in total assets. As such, it affects no small entities. Advocacy recommends that the CFPB take a similar stance with this rulemaking and exempt small entities.

If the CFPB believes that it cannot exempt small entities, Advocacy recommends that the CFPB convene a SBREFA panel and perform a subsequent initial regulatory flexibility analysis so that it can obtain the necessary information to ascertain the impact of this action on small entities prior to going forward with the final rule.

[20] *Id.*

IV. The CFPB's Underlying Assumption about Abusiveness Is Problematic

Finally, based on feedback from small business stakeholders, Advocacy is concerned about the CFPB's underlying assumption that charging fees for instantaneously declined transactions would constitute an abusive practice under the CFPB's prohibition on unfair, deceptive, or abusive acts or practices.[21] The CFPB asserts that it is reasonable to assume that consumers do not understand that they will be charged an insufficient funds fee under the circumstances addressed in the proposal.[22]

Affected small business stakeholders believe consumers understand their own finances. A consumer not understanding they will be charged an insufficient funds fee is not an issue of abusiveness. It is an issue of financial literacy and understanding the agreement that the consumer entered into with the financial institution when the consumer opened the account. The CFPB is asking financial institutions to absorb the costs of and be responsible for a consumer's budgetary or mathematical mistake or, possibly, knowledgeable disregard for the fact that there may be insufficient funds in the account. Advocacy encourages the CFPB to reconsider its determination that charging a fee for instantaneously declined transactions is abusive because consumers do not understand.

V. Conclusion

Thank you for the opportunity to comment on this important proposal. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Jennifer A. Smith at (202) 205-6943 or by email at Jennifer.Smith@sba.gov.

Sincerely,

/s/
Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Jennifer A. Smith
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

[21] *Id.* at 6,031.
[22] *Id.* at 6,043.