



March 25, 2024

Comment Intake — 2024 NPRM Fees for Instantaneously Declined Transactions  
c/o Legal Division Docket Manager  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, DC 20552

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

To Whom It May Concern:

Better Markets<sup>1</sup> appreciates the opportunity to comment on the above-captioned proposed rule (“Proposal” or “Proposed Rule”) issued by the Consumer Financial Protection Bureau (“CFPB” or “Bureau”).<sup>2</sup> The Proposed Rule would prohibit covered financial institutions from charging fees, such as nonsufficient funds (“NSF”) fees, when consumers initiate payment transactions that are instantaneously declined.

By defining these fees as an “abusive practice” under the Consumer Financial Protection Act’s (“CFPA”) prohibition on unfair, deceptive, or abusive acts or practices, the Proposal will finally put a stop to banks extracting millions of dollars each year from financially insecure account holders in the form of NSF fees that serve no useful purpose other than to enrich bankers at the expense of the financially vulnerable.

We support the Bureau’s Proposed Rule to put a stop to these exploitative financial practices once and for all. Because NSF fees exploit financially vulnerable consumers’ lack of understanding about declined transactions associated with their accounts, and because NSF fees provide no benefit or service to consumers and vastly exceed the costs incurred by financial firms for such transactions, these fees are abusive under the CFPA and should be prohibited. We applaud the Bureau for this important Proposal and look forward to seeing its beneficial impact in the financial markets.

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<sup>1</sup> Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies — including many in finance — to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

<sup>2</sup> Fees for Instantaneously Declined Transactions, 89 FED. REG. 6031 (Jan. 31, 2024), <https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions>; Press Release, CFPB, *CFPB Proposes Rule to Stop New Junk Fees on Bank Accounts* (Jan. 24, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-stop-new-junk-fees-on-bank-accounts/>.

## BACKGROUND

When a consumer attempts to make a payment or withdrawal from their account for an amount that exceeds their available funds, “a financial institution might decline the transaction and charge the consumer a fee, often called a nonsufficient funds (NSF) fee.”<sup>3</sup> In other words, rather than extend an overdraft loan to cover the transaction, the bank will instead simply disallow the transaction from completing in the first place, sometimes charging a fee in the process, typically known as a non-sufficient funds (NSF) fee.

The Proposed Rule would address these situations. Rightly concerned about the proliferation of ‘junk fees’ plaguing American consumers,<sup>4</sup> the Bureau has identified these NSF fees as uniquely exploitative and is therefore proposing to prohibit such fees as an unlawful “abusive” practice under the Consumer Financial Protection Act (CFPA). The Proposed Rule provides that “nonsufficient funds fee or NSF fee” means “a charge that is assessed by a covered financial institution for declining an attempt by a consumer to withdraw, debit, pay, or transfer funds from their account due to insufficient funds.”<sup>5</sup> The rule would apply to transactions that are declined “instantaneously” or “near-instantaneously,”<sup>6</sup> such as ATM transactions, debit or prepaid card transactions, online transfers, and more.<sup>7</sup>

## COMMENTS

### **I. The Practice of Charging Non-Sufficient Fees Constitutes an Abusive Practice under the Consumer Financial Protection Act.**

Under the Consumer Financial Protection Act, “the CFPB may declare an act or practice to be abusive in connection with the provision of a consumer financial product or service if the act or practice takes *unreasonable advantage of a lack of understanding* on the part of the consumer of the material risks, costs, or conditions of the product or service.”<sup>8</sup>

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<sup>3</sup> Proposal at 6032.

<sup>4</sup> See Press Release, The White House, *Biden-Harris Administration Announces Broad New Actions to Protect Consumers From Billions in Junk Fees* (Oct. 11, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees/>; Diane Bartz, Jeff Mason, & Douglas Gillison, *Biden administration takes aim at junk fees across the economy*, REUTERS (Oct. 11, 2023), <https://www.reuters.com/world/us/biden-administration-takes-aim-junk-fees-with-new-proposed-rule-guidance-2023-10-11/>.

<sup>5</sup> Proposal at 6037.

<sup>6</sup> *Id.* (“A declination occurs instantaneously or near-instantaneously when the transaction is processed in real time and there is no significant perceptible delay to the consumer when attempting the transaction.”).

<sup>7</sup> *Id.* (“Based on this proposed definition, one-time debit card transactions that are not pre-authorized, ATM transactions, and certain P2P transactions would be covered by the proposal, assuming these payment mechanisms continue to be declined instantaneously or near-instantaneously.”).

<sup>8</sup> Proposal at 6038 (emphasis added).

The practice of charging NSF fees is abusive because it takes unreasonable advantage of financially vulnerable consumers' lack of understanding about fees associated with declined transactions. Moreover, as explained below, it serves no legitimate economic purpose other than sheer profit-generation, establishing that it takes *unreasonable* advantage of consumers.

**1. There Is Widespread Lack of Consumer Understanding Associated with NSF Fees.**

Many, if not most, consumers charged NSF fees for declined transactions clearly lack an adequate understanding of the risks of their account and the transaction at the time of the declined transaction.<sup>9</sup> Indeed, it is clear from the nature of an NSF fee itself that consumers generally lack awareness of their available account balance or other information about the risks, costs, or conditions regarding their account and a given declined transaction. After all, as discussed below and in the Proposal, NSF fees are a no-service transaction. If consumers understood that they would be charged for initiating a transaction and that they would otherwise derive no other benefit whatsoever from initiating the transaction, why would the consumer knowingly proceed?

The very notion of an NSF fee is premised on the consumers' lack of understanding and subsequently exploiting this lack of understanding. As the Bureau rightly put it in the Proposal, "if a consumer knew at the time of initiating a specific payment, debit, transfer, or withdrawal that they did not have enough funds to cover the transaction and an NSF fee would be charged, that consumer would likely either use a different payment method that would not result in such a fee or would postpone or forgo the transaction."<sup>10</sup>

**2. The Practice of Charging NSF Fees Takes Unreasonable Advantage of Vulnerable Consumers and Is Therefore Abusive.**

According to the CFPB's Abusive Policy Statement, a determination of unreasonable advantage-taking involves an evaluation of whether the advantage-taking was "unreasonable under the circumstances."<sup>11</sup> When considering the totality of circumstances, it is clear that the practice of charging NSF fees for instantaneously declined transactions is unreasonable for several reasons.

*A. NSF Fees Provide No Legitimate Benefit or Service to Consumers.*

NSF fees are particularly exploitative given that the fees provide no benefit or service to the consumers. Unlike overdraft loans, where consumers actually receive an extension of credit, in the case of NSF fees, consumers are paying something for receiving literally nothing. In other words, as the Bureau itself points out in the proposal, NSF fees are not fees for a service. They provide no benefit to consumers whatsoever, which places NSF fees in stark contrast to overdraft fees. Unfortunately, such fees are consistent with the banking industry's historical penchant for

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<sup>9</sup> See Proposal at 6042.

<sup>10</sup> *Id.*

<sup>11</sup> Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 FED. REG. 21883, 21886 (Apr. 12, 2023), <https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/>.

attempting to nickel-and-dime their customers at every turn with fees that do not come with beneficial financial products or services.<sup>12</sup>

*B. NSF Fees Serve No Legitimate Economic Purpose and Are Vastly Disproportionate to the Trivial Costs Incurred by the Financial Institutions Who Charge Them*

NSF fees serve no legitimate economic purposes, vastly exceeding the associated costs actually incurred by the financial institution for declining the transaction. According to data from the Bureau, the average NSF fee charged to consumers is typically approximately \$32 for each separate declined transaction, yet the average cost of handling these declined transactions incurred by the banks is trivial.<sup>13</sup> In fact, the Bureau found that “the average transacted weighted average cost of nonsufficient funds handling has fallen to \$0.005” — less than one cent.<sup>14</sup> To impose a \$32 cost on consumers in exchange for providing no benefit whatsoever is the essence of unreasonable exploitation. Indeed, as the Federal Reserve Board recently wrote, such fees “could raise significant fairness issues” under the Federal Trade Commission (FTC) Act because “the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction.”<sup>15</sup>

*C. NSF Fees Disproportionately Impact Financially Vulnerable Consumers.*

NSF fees also disproportionately impact some of the most financially vulnerable consumers, further exacerbating the exploitative nature of the fees.<sup>16</sup> As noted in the Proposal, researchers recently found that only 4 percent of “Financially Healthy” households with checking accounts reported paying an overdraft or NSF fee in 2022, compared with 46 percent of “Financially Vulnerable” households.<sup>17</sup> It is clear that those living paycheck to paycheck, whose account balances may occasionally approach a zero balance, are the most likely to face fees for charges declined due to insufficient funds. For these vulnerable consumers, it is more challenging to maintain a comfortable cushion in one’s account balance to always ensure that transactions

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<sup>12</sup> Press Release, CFPB, *CFPB Exams Return \$140 Million to Consumers Hit by Illegal Junk Fees in Banking, Auto Loans, and Remittances* (Oct. 11, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-exams-return-140-million-to-consumers-hit-by-illegal-junk-fees-in-banking-auto-loans-and-remittances/>.

<sup>13</sup> Proposal at 6041 (“NSF fees that are charged in today’s market are usually approximately \$32 and typically are assessed on a per-transaction basis.”).

<sup>14</sup> Proposal at 6033 n.32 (citing 76 FR 43394, 43398 (July 20, 2011)).

<sup>15</sup> 74 FED. REG. 59033, 59041 (Nov. 17, 2009).

<sup>16</sup> Proposal at 6033 (“NSF fees tend to be incurred by consumers with higher financial vulnerability (including those with lower incomes and lower credit scores”).

<sup>17</sup> MEGHAN GREENE ET AL., FIN. HEALTH NETWORK, *FINHEALTH SPEND REPORT 2023: U.S. HOUSEHOLD SPENDING ON FINANCIAL SERVICES AMID HISTORIC INFLATION AND AN UNCERTAIN ECONOMY 12* (June 2023), <https://finhealthnetwork.org/wp-content/uploads/2023/06/Spend-Report-2023-Final.pdf>.

never exceed their balance. In effect, NSF fees are punishing consumers for being poor, for the sole purpose of enriching banks and other predatory financial institutions.<sup>18</sup>

D. *Given the Totality of Circumstances, NSF Fees Therefore Constitute an Abusive Practice.*

These factors lead to the inescapable conclusion that NSF fees constitute an unreasonable advantage-taking of financially vulnerable consumers, and the Bureau is justified in prohibiting them as an abusive practice. Again, NSF fees are not fees for a service. Financial firms who charge NSF fees are profiting off of transactions that provide no benefit to the consumer, while taking advantage of consumers' likely lack of understanding or awareness about the costs associated with the transaction. The sole purpose of this fee is sheer profit-generation, given the de minimis costs actually incurred by firms for declined transactions. This form of wealth-extraction is all the more exploitative given the financially vulnerable status of those who tend to incur these charges, as discussed above. The Bureau has thus appropriately found that NSF fees "constitute unreasonable advantage-taking because covered financial institutions are profiting directly from consumer hardship rather than from providing useful services to avoid or alleviate it."<sup>19</sup>

**II. The Bureau Rightly Rejected Industry Arguments That the Proposed Rule Is Unnecessary or Otherwise Inferior to a Disclosure Regime.**

Better Markets commends the Bureau for prohibiting NSF fees and rebuffing industry arguments that this rule is not needed simply because NSF fees are rarely charged in today's market. In the first instance, the CFPB applies equally to abuses that are rampant and those that are less frequent. The precise rate of occurrence among abusive practices does not bear on whether they are unlawful and predatory.

In addition, there are a variety of circumstances under which firms may be inclined to impose NSF fees on consumers in the future, especially as firms seek ways to replace revenue lost from the Bureau's related Overdraft Fees proposal. The Proposed Rule preempts these attempts and ensures consumers will be protected from exploitative NSF fees now and in the foreseeable future.

We similarly praise the Bureau for its conclusion that a disclosure remedy would not sufficiently protect consumers from these fees, as it is well-established that disclosure alone, while necessary to protect financial consumers, is not sufficient.<sup>20</sup> Disclosures suffer from a host of

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<sup>18</sup> See Proposal at 6045 ("NSF fees function as a penalty imposed on these consumers *because* they do not have enough money in their account, whether that deficiency is due to chronic income shortfalls, timing mismatches regarding inflows and outflows over which they have no control, or other reasons.").

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011) (finding that disclosure as a regulatory tool has a history of being ineffective); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 749–54 (2006) (detailing how mandated disclosures is not enough to sufficiently protect consumers shopping in the home loan marketplace).

problems: consumers often do not receive them, do not read them, do not understand them, and do not place a great deal of stock in them, especially where actors in the financial services industry bury them in fine print forms and contracts and discount them as mere “boilerplate.”

### **III. The Bureau’s Cost-Benefit Analysis Is Appropriate.**

The Bureau’s Proposal also faithfully implements the Consumer Financial Protection Act’s cost-benefit analysis requirements without needlessly attempting an exhaustive quantitative analysis.<sup>21</sup> With respect to cost-benefit analysis, the Consumer Financial Protection Act provides that:

In prescribing a rule under the Federal consumer financial laws— (A) the Bureau shall consider— (i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons, as described in section 5516 of this title, and the impact on consumers in rural areas . . . .<sup>22</sup>

We note that decades ago, the Supreme Court held that an agency’s duty to conduct cost-benefit analysis is not to be inferred without a clear indication from Congress: “Congress uses specific language when intending that an agency engage in cost-benefit analysis.”<sup>23</sup> And one of the basic canons of judicial review of agency rules is that “the scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of an agency.”<sup>24</sup> This is “especially true when the agency is called upon to weigh the costs and benefits of alternative policies,”<sup>25</sup> and in fact, “cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency.”<sup>26</sup> The Supreme Court has also explained that the duty to “consider” various economic factors in the rulemaking process entails wide agency discretion. As the Court explained, when statutorily mandated “considerations” are not “mechanical or self-defining standards,” they “in turn imply wide areas of judgment and therefore of discretion.”<sup>27</sup>

The Bureau has thus rightfully exercised its discretion in conducting an appropriately qualitative cost-benefit analysis, one that clearly supports the Proposal. Indeed, the Bureau canvassed in detail the many benefits of the Proposal while considering the costs on covered

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<sup>21</sup> See 12 U.S.C. 5512(b)(2)(A); Proposal at 6045–50.

<sup>22</sup> 12 U.S.C. 5512(b)(2)(A).

<sup>23</sup> *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510–12 & n.30 (1981).

<sup>24</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>25</sup> *Consumer Elecs. Ass’n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003).

<sup>26</sup> *Office of Comm’n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983).

<sup>27</sup> *See Sec’y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611–12 (1950).

persons and consumers.<sup>28</sup> The Bureau's Proposal is thus well justified not only on policy and legal grounds but also on economic ones.

## **CONCLUSION**

We hope these comments are helpful in guiding the Bureau's important and ongoing work to make the financial system more fair, stable, and transparent for the benefit of all Americans.

Sincerely,



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<sup>28</sup> See Proposal at 6045–50.