America's Credit Unions

March 25, 2024

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

### RE: Fees for Instantaneously Declined Transactions (Docket No. CFPB-2024-0003)

Dear Sir or Madam:

On behalf of America's Credit Unions, I am writing in response to the notice of proposed rulemaking (NPRM) issued by the Consumer Financial Protection Bureau (CFPB or Bureau) regarding its proposed rule to prohibit covered financial institutions from charging fees, such as nonsufficient funds (NSF) fees, when consumers initiate payment transactions that are instantaneously declined. 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.

America's Credit Unions and its member credit unions appreciate the opportunity to provide input on the proposed rule. Although we deeply value the CFPB's role in protecting consumers and ensuring fair financial practices, we wish to express our concerns regarding the proposed rule to prohibit NSF fees on instantaneously declined transactions and its implications under the broader interpretation of the abusiveness prong of Unfair, Deceptive, or Abusive Acts or Practices (UDAAP). The expansive view of abusiveness espoused in the proposed rule fails to provide the level of clarity that covered entities require to comply with any degree of certainty. America's Credit Unions urges the Bureau to establish clear rules of the road by issuing formal guidance or additional policy statements that include specific examples, case studies, or objective criteria for each aspect of the abusiveness prong and ultimately, to more clearly define this provision through an official rulemaking process. Furthermore, the Bureau should implement a cost-benefit analysis and a "reasonable person" standard in its abusiveness guidance to ensure that valuable financial products and services do not become casualties of an overly broad interpretation of the standard.

### NSF Fees for Instantaneously Declined Transactions

The practice of assessing NSF fees on instantaneously declined transactions is generally not prevalent among credit unions. Our institutions prioritize the financial well-being of their members, proactively implementing policies and practices that avoid placing unnecessary financial burdens on them. Given this context, we question the necessity of a rule targeting these

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types of fees, especially when the Bureau's own research indicates that they are exceedingly uncommon.[1]

This discrepancy between the proposed regulatory action and the reality of credit union operations suggests a solution in search of a problem, rather than a measure designed to address a widespread issue. The Bureau addresses this concern in its proposed rulemaking by citing to *Nasdaq Stock Mkt. LLC* v. *SEC,* which states that "an agency has the latitude to `adopt prophylactic rules to prevent potential problems before they arise'"[2] However, the Bureau fails to acknowledge that *Nasdaq* also notes that "an agency is generally on sounder footing when it "act[s] upon the basis of empirical data."[3] Further, in *Nasdaq*, the Court rejected a challenge to an agency's "purely theoretical concern" because the agency relied on industry comments and its own experience when promulgating the rule.

In this rulemaking, those industry comments are not present, and the Bureau instead issued the rule because:

> "[f]inancial institutions have ongoing incentives to generate revenue, and NSF fees may become increasingly appealing as a revenue source in the absence of this proposal. For example, if the recently released Overdraft Proposed Rule is finalized and curbs overdraft fee revenue, institutions might have an incentive to impose new fees."

It is inappropriate for the agency to use the theoretical impacts of its own rulemaking to justify another rulemaking—that is neither an empirical nor anecdotal reason for the rulemaking. We appreciate the Bureau's recognition that financial institutions are in search of new revenue sources; this is especially true for community financial institutions that are finding it increasingly challenging to generate revenue streams in order to serve their consumers. For these institutions, the need for revenue could be more accurately characterized as an existential requirement rather than an "ongoing incentive." Given this acknowledgement of the need for revenue and the fact that not-for-profit credit unions use revenue to serve their members, the Bureau might be better served by utilizing its exemption authority in the overdraft proposed rule and exempting all credit unions.

The Bureau's promulgation of a rule prohibiting what is an extremely rare practice among credit unions not only fails to protect consumers but may also inadvertently harm the relationship between credit unions and their members. By advancing rhetoric that implies financial institutions, including credit unions, are engaging in predatory behavior, the rule could erode trust and undermine the foundational principles of member-focused service and support that define the credit union movement. Credit unions thrive on a community- and relationship-based

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[1] 89 FR 6031 (2024). "The CFPB understands, based on its market monitoring, that currently covered financial institutions rarely charge NSF fees on covered transactions."
[2] *Nasdaq, 38 F.4th 1126 (D.C. Cir. 2022).*
[3] *Id.*; Citing to *Chamber of Com. of U.S. v. SEC* , 412 F.3d 133, 142 (D.C. Cir. 2005).

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model that values transparency, fairness, and mutual benefit, far removed from the practices the Bureau aims to regulate with this proposal.

Moreover, this rule appears to be part of a broader campaign by the Bureau against what it terms "junk fees," which includes its final rule on credit card late fees and proposed rule on overdraft fees. While the intention to protect consumers from unfair fees is commendable, the aforementioned fees are well-disclosed, fund a service or serve a preventative purpose, and the cumulative effect of these actions can be perceived as a coordinated attack on financial institutions. This perception, especially when it concerns community financial institutions like credit unions that are not assessing "junk fees", can be damaging. It not only misrepresents the nature of credit unions but also risks alienating these institutions from the very regulatory bodies meant to support them in serving their members effectively.

The appearance of a campaign to score political points through regulations that impact financial institutions, particularly smaller community-based ones like credit unions, underscores the need for a more nuanced approach. It is crucial that regulatory actions are grounded in the realities of current practices and designed to address genuine problems. Arbitrary regulations that do not reflect the operations or principles of credit unions do little to protect consumers and may, in fact, limit their access to innovative financial products and services. A balanced regulatory approach should recognize the unique role of credit unions in the financial ecosystem, promoting regulations that protect consumers while supporting the mission and operations of credit unions.

Substantively, the Bureau requests feedback on whether the timing component is sufficiently clear to determine coverage. America's Credit Unions believes the rule creates significant uncertainty for covered institutions through its failure to clearly define a transaction that is declined instantaneously or near-instantaneously. The proposed rule provides the following definition. "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."[4] This definition, however, lacks the precision necessary for financial institutions to uniformly interpret and apply the rule across a broad spectrum of transaction types and technologies.

A core issue with this definition lies in the subjective nature of what constitutes a "significant perceptible delay." The range of transactions covered by the rule, including one-time debit card transactions that are not pre-authorized, ATM transactions, and certain peer-to-peer (P2P) transactions, varies widely in terms of processing times and the technologies employed. For instance, the infrastructure supporting ATM transactions is different from that of P2P payment platforms, and both can differ from the systems processing debit card payments. These technological disparities can naturally result in variations in processing speeds, which might lead to inconsistencies in determining what qualifies as an instantaneous or near-instantaneous decline. Furthermore, the reliance on the consumer's perception of the delay is entirely

[4] 88 FR 21883 (2023) at 6037.

subjective and could lead to frivolous UDAAP complaints from consumers that are charged a fee on a transaction with a transaction that in their view, *does* have a significant perceptible delay.

The lack of a clear, quantifiable threshold for what constitutes a "significant perceptible delay" complicates compliance efforts. Financial institutions are left without a concrete guideline to measure the speed of transaction processing, making it difficult to consistently enforce the rule. This vagueness could lead to unintentional non-compliance, as institutions may interpret the definition differently, or invest in overly cautious measures to avoid potential penalties associated with rule violations.

This ambiguity can also negatively impact the financial institutions' ability to design and implement efficient and consumer-friendly transaction processing systems. Without clear regulatory guidelines, institutions might overcompensate by setting overly strict transaction processing times, which could inadvertently lead to an increase in declined transactions that could have otherwise been approved. Such an approach not only affects the consumer experience negatively but also places a technical and financial burden on the institutions themselves as they strive to adjust their systems to meet an unclear regulatory standard.

Clear, quantifiable standards for transaction processing times are essential for ensuring that financial institutions can effectively adapt their systems and processes to meet regulatory requirements without compromising service quality or efficiency. The Bureau should set clear standards for the definition of instantaneously or near-instantaneously and to the extent that a reasonable timing threshold differs between transaction types, provide individual timing components for each.

## Abusiveness Interpretation

For many years, the uncertainty surrounding the definition and scope of "abusiveness" has posed significant challenges for our member credit unions. Although we welcomed the Bureau's effort to clarify this through a Statement of Policy Regarding Prohibition on Abusive Acts or Practices (2023 Policy Statement) issued last spring, we found that it fell short of providing the needed clarity.[5] The Statement did not sufficiently limit the types of acts or practices deemed abusive, leaving our members in a state of ambiguity over what is permitted and what is not. The current proposed rule serves to confirm those fears, espousing an interpretation of abusiveness that places the very concept of offering financial products and services to consumers in jeopardy.

When CFPB Director Kathy Kraninger was confirmed in 2018, she chose to focus the CFPB's attention on preventative measures to discourage UDAAP among depository and nonbank institutions. In January 2020, then-Director Kraninger announced that the Bureau would clarify

[5] *Id.*

the murky “abusiveness” standard in UDAAP with the release of a Policy Statement (2020 Policy Statement).[6]

The 2020 Policy Statement set forth a three-part set of principles stating that the Bureau would:

1. Focus on citing or challenging conduct as abusive in supervision and enforcement matters only when the harm to consumers outweighs the benefit;

2. Generally avoiding “dual pleading” of abusiveness and unfairness or deceptive violations arising from all or nearly all the same facts; and alleging “stand alone” abusiveness violations that demonstrate clearly the nexus between cited facts and the Bureau’s legal analysis; and

3. Seek monetary relief for abusiveness only when there has been a lack of a good-faith effort to comply with the law, except that the Bureau will continue to seek restitution for injured consumers regardless of a good-faith consideration.

In March 2021, under former Acting Director Uejio, the Bureau rescinded this Policy Statement, claiming it was “inconsistent with the Bureau’s duty to enforce Congress’s standard” and that its rescission will “better serve the CFPB’s objective to protect consumers from abusive practices.”[7]

The 2023 Policy Statement included a much broader set of circumstances in which an entity may take unreasonable advantage of consumers, such as a lack of understanding, inability to protect their interests, or reasonable reliance on a covered person. While these circumstances were described, the policy statement did not provide clear boundaries or thresholds for determining what constitutes unreasonable advantage-taking. This lack of clarity increases the potential for inconsistent enforcement and legal uncertainty for credit unions.

Perhaps the most concerning section of the 2023 Policy Statement was its interpretation of a consumer's lack of understanding. Holding financial institutions accountable for a consumer's lack of understanding places an unreasonable burden on financial institutions. While it is important for financial institutions to provide clear and transparent information to consumers, expecting them to be responsible for ensuring that every consumer fully comprehends the risks, costs, and conditions of a product or service is impractical.

Consumers have varying levels of financial literacy and understanding, and it is not feasible for financial institutions to bridge every knowledge gap. Although credit unions excel in delivering financial literacy training and providing resources, it is important to recognize that these efforts cannot practically address the breadth of such potential issues. Furthermore, these programs,

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[6] CFPB, “Statement of Policy Regarding Prohibition on Abusive Acts or Practices” (Jan. 24, 2020) *available* at https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-enforcement-policy_statement.pdf.
[7] CFPB, “Rescission, Statement of Policy Regarding Prohibition on Abusive Acts or Practices” (Mar. 11, 2021) *available at* https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-policy-statement-consolidated_2021-03.pdf.

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although they are provided at no cost to the consumer, do have costs for the institution providing them, further highlighting the importance that revenue of any kind has for credit unions.

The proposed rule on NSF fees brings this issue into sharper focus, revealing a troubling interpretation of abusive conduct that does not account for situations where consumers' lack of understanding might be unreasonable or where they knowingly accept a risk. In the present case, a consumer's decision to initiate a transaction despite uncertainties about their account balance does not automatically indicate a lack of understanding. It may well reflect an informed *choice* to take a calculated risk, or a *choice* to be uninformed of the risks of initiating the transaction, two entirely possible, and even likely scenarios that the Bureau's current stance fails to acknowledge could ever occur.

In the proposed rule, the Bureau engages in stunning mental gymnastics to absolve consumers from any agency or responsibility in the manner in which they transact with their financial institution. Among the reasons which impact why consumers generally, or certain consumers individually, would lack understanding of the material risks, costs, or conditions when initiating a covered transactions, the Bureau includes:

- The rise in debit card usage for small transactions resulted in increased transaction activity on the account for consumers' individual purchases. These more frequent transactions might make it harder for some consumers to track their available funds.
- Although most consumers can now see a version of their account balance electronically through a mobile application, older consumers are far less likely to access their accounts through mobile apps, and approximately 15 percent of Americans do not own a smartphone. [8]
- Some consumers with smartphones might forgo checking their balance before initiating a covered transaction for a variety of reasons, including the rapidity of these transactions and discomfort with pulling up account information in a public location or using public Wi-Fi.
- While ATM users can check their balance on the screen, some consumers may want to avoid incurring a fee to do so (particularly at an out-of-network ATM).
- When a consumer purchases a good or service at a merchant POS terminal, makes an online purchase, or uses an ATM, the transaction typically occurs very rapidly and the consumer may not have time (or may perceive that they do not have time) to check the account balance.[9]

To translate, the Bureau has listed as reasons why a consumer might lack understanding of the material risks costs and conditions as: the consumer had multiple transactions and *chose* not to check their balance between transactions, an older consumer *chose* not to use their smartphone to check their balance; consumers without smartphones *chose* not to call their financial institution to check their balance; the consumer was uncomfortable in public and therefore *chose* not to check their balance; the consumer did not want to incur a fee and *chose* not to check their

[8] In support of its contention that accessing account balances requires a significant effort, the Bureau cites to 2021 data on the ownership of smartphones and cellphones. For reference, the Bureau states that approximately 15 percent of Americans do not own a smartphone, when in fact 90 percent of Americans own a smartphone, and 97 percent own a cellphone, which can be used to access account balances. *See* Pew Research Center, "Mobile Fact Sheet" (September 5, 2023), *available at* https://www.pewresearch.org/internet/factsheet/mobile.
[9] *Id.*

balance; and the consumer *chose* not to check their balance prior to a transaction because they felt rushed.

To be absolutely clear, in not one of those scenarios does the Bureau describe a consumer that *necessarily* lacks an understanding of the material risks, costs, and conditions of a transaction that withdraws, debits, pays, or transfers funds from their account in a manner that could be instantaneously declined. Instead, it described a variety of instances in which, and supposedly exculpatory reasons why, a consumer may not know what their account balance is prior to initiating a transaction. In all of these instances, the consumer made a *choice* not to check their balance prior to initiating the transaction. They viewed the risk of incurring a fee to be outweighed by comfort, convenience, or financial interest, but they made a *choice*. Furthermore, all of these consumers could be perfectly well aware that it is possible that they lack sufficient funds in their account, and that if that is the case, they will incur a fee, and yet, for all the reasons listed above and the many irrationalities of human behavior, they may still choose to initiate the transaction.

The Bureau refuses to acknowledge that human beings take risks and can be irrational. The Bureau also refuses to acknowledge that a consumer could fully understand the material risks, costs, and conditions, and still decide to initiate the transaction knowing that there is a chance they lack sufficient funds and might be assessed a fee. The Bureau acts as though no consumer has ever stuck a debit card into a POS terminal and thought to themselves, “I sure hope I have enough funds in my account and don’t get dinged with a fee.” For an entity tasked with protecting and informing the American consumer, this line of thinking demonstrates a concerning lack of understanding of the behavior of those consumers.

The Bureau further elucidates its position:

> The CFPB preliminarily finds that a consumer who would be charged an NSF fee on a covered transaction would lack understanding of their account's material risks, costs or conditions at the time they initiated that transaction. Drawing on its experience and expertise regarding consumer behavior, the CFPB believes that **if a transaction entails material risks or costs and consumers derive minimal or no benefit from the transaction, it is generally reasonable to conclude that consumers who nonetheless went ahead with the transaction did not understand the material risks, costs or the conditions giving rise to those risks or costs.**[10]

In support of this remarkably conclusory generalization about the behavior of consumers, the Bureau points back to its own Supervisory Highlights in which the agency found that lenders that sold a guaranteed asset protection (GAP) product to consumers whose low loan-to-value (LTV) ratio meant that they would not benefit from the product was evidence that the consumers lacked understanding of the material risks, costs, or conditions of the product.[11] This comparison does not hold up. In the Supervisory Highlights case, the product was GAP insurance, and its

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[10] 88 FR 21883 at 6042 (2023).
[11] CFPB, “Supervisory Highlights: Issue 19, Summer 2019,” at 3 (Sept. 2019), *available* at https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf.

lack of value was the material condition about which consumers lacked understanding. The Bureau argues that because there is no value to a declined transaction, consumers must lack understanding. But the product in question in the proposed rule is not the declined transaction, it is the consumer's account. Transactions, both declined and successful are a feature of the consumer's account, but until they have been initiated, in the mind of a consumer who has not checked their balance, they are equally possible, if not equally likely.

There is therefore a possible benefit to the consumer's account in the context of transactions; the benefit is that they might go through, that they might not be declined. While there is a 100 percent chance that GAP insurance sold with a sufficiently low LTV ratio would have no value to the consumer, and therefore their purchase of it demonstrates a lack of understanding, and while there is a 100 percent chance that a declined transaction would incur a fee, there is *not* a 100 percent chance that a transaction would be a declined transaction and thus incur a fee. Therefore, when a consumer chooses not to check their balance prior to initiation of a transaction when a fee is *possible*, it does not necessarily demonstrate a lack of understanding of the material risks, costs, or conditions of their account.

By absolving consumers of all responsibility in these scenarios, the proposed rule places an undue burden on financial institutions. This approach risks labeling any product or service with associated fees as potentially abusive if deemed too complex for consumer understanding, thereby stifling innovation and discouraging the introduction of new, potentially beneficial services. This is particularly concerning for smaller credit unions, which might lack the resources to navigate the complexities of UDAAP enforcement. Fearing punitive measures, these institutions may limit their offerings to the most basic services, undermining their competitiveness and, paradoxically, reducing consumer choice and access to innovative financial solutions.

If institutions are constantly concerned about potential regulatory repercussions due to a consumer's lack of understanding, they may become hesitant to introduce new products or services that could benefit consumers but involve inherent complexities. In fact, the 2023 Policy Statement appeared to prohibit the provision of complex products or services.[12] This statement could be interpreted to fit virtually any financial product or service. A deposit or share account may be too complex for some consumers to understand, but that does not mean that the Bureau should have the ability to bring a UDAAP enforcement against an institution for offering one. Further, "sufficiently explained" is a completely arbitrary standard. Must the program be sufficiently explained by the standards of the financial institution, the Bureau, a consumer of median financial literacy, or a consumer with the lowest level of financial literacy? Credit unions are leaders in providing financial education, but to hold them to this amorphous standard would hamper innovation and deprive consumers of potentially valuable financial solutions.

Beyond the prohibition on taking unreasonable advantage of a consumer's lack of understanding itself, the Bureau has failed to provide clear guidelines on how to determine and demonstrate a

[12] *Id.* "An entity's provision of a product or service may interfere with consumers' ability to understand if the product or service is so complicated that material information about it cannot be sufficiently explained."

consumer's lack of understanding. The Policy Statement mentioned various methods that the Bureau or a consumer might use, such as direct evidence, consumer complaints, consumer testimony, and analysis of reasonable consumer expectations. However, without specific criteria or standards, financial institutions have no guidance on how they might assess the comprehensibility of a product or service, whether to assess potential compliance with UDAAP prior to offering the product or service, or in defending against an alleged UDAAP violation.

The Policy Statement and this proposed rule appear to place the burden solely on financial institutions without adequately considering consumer responsibility. The absence of a "reasonable person" standard in the enforcement of the abusiveness prong of UDAAP has serious implications. It stifles innovation and will allow anyone to create seemingly valid claims, leading to increased costs for credit unions and incentivizing plaintiff's attorneys to bring frivolous lawsuits. Without a "reasonable person" standard, fairness and consistency are compromised, and credit unions become vulnerable to subjective interpretations of what constitutes abusive practices. This change burdens credit unions with the potential for baseless accusations, diverting resources from serving their members. A "reasonable person" standard is crucial to maintain a fair and balanced system, prevent the misuse of claims, and protect credit unions from excessive costs.

While financial institutions should, and do, provide accurate and transparent information, consumers also bear a responsibility to educate themselves, seek clarification, and make informed decisions. Ignoring this aspect may create a moral hazard where consumers feel less accountable for their own financial decisions. The prohibition does not consider proportionality in the context of these transactions or the degree of harm caused by the lack of understanding. It treats all instances of lack of understanding equally, regardless of the magnitude or likelihood of harm. This lack of proportionality can lead to unintended consequences, potentially restraining legitimate business practices and innovation without commensurate benefits to consumer protection.

America's Credit Unions urges the Bureau to reinstate the cost-benefit analysis included in the 2020 Policy Statement to ensure that the benefits to consumers from valuable financial products or services are not discarded due to a myopic focus on harm, no matter how minimal. Furthermore, the Bureau should establish a "reasonable person" standard to ensure that credit unions and other community-based financial institutions are not unfairly exposed to the liabilities associated with vexatious litigation, that ultimately will harm the ability of these institutions to serve their members. A clearer, more equitable framework is necessary—one that acknowledges the importance of consumer financial responsibility as much as it does the obligations of financial institutions. We believe that such clarity would benefit both consumers and financial institutions by fostering an environment where innovation can thrive alongside consumer protection.

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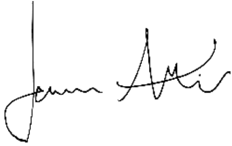
## Conclusion

America's Credit Unions appreciates the opportunity to comment on the proposed rule on fees for instantaneously declined transactions. If you have any questions, please do not hesitate to contact me at 703-842-2268 or jakin@americascreditunions.org.

Sincerely,



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