

March 25, 2024

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

**Re: Docket No. CFPB–2024–0002; RIN 3170 AA42**

Dear Sir or Madam,

Thank you for the opportunity to provide comments on the above-stated proposal to impose additional regulation on overdraft services.

**Kansas Bankers Association Background Information:**

The KBA, founded in 1887, is a voluntary, non-profit trade association governed by its membership. The KBA is headquartered in Topeka, Kansas, and is led by our 24-member board of directors. The KBA staff, which President/CEO Doug Wareham leads, includes 37 professionals, including 11 attorneys, that provide services to Kansas bankers ranging from legislative advocacy to educational training to insurance services to legal and regulatory compliance support. Our mission statement is direct and straightforward:

"Together, we support our member banks and bankers with leadership, advocacy, and education to benefit the communities and customers they serve."

KBA's membership includes 98% of the headquartered banks in Kansas. Our membership also includes 20 out-of-state commercial banks operating in Kansas and seven savings and loans. Our member banks employ more than 22,000 Kansans that provide financial services in every county across the state. While our member banks range in assets from the smallest in our state to the largest in our state, each member bank that belongs to the KBA has one vote on policy positions adopted by either our general membership or our Board of Directors. One member, one vote.

**Introduction**

Overall, the KBA is concerned this proposal, if finalized, will have unintended consequences that will negatively impact consumers that do business with banks of all sizes. While the proposal purports to only apply to banks with \$10 billion in assets and over, all banks will face market pressure to conform their practices to the Bureau's rule and reduce overdraft fees to the "breakeven" or "benchmark" required for large bank competitors in the proposal. The market for

deposit accounts and overdraft services is competitive. Banks face market pressure to structure overdraft services in a way that best meets their customers' needs. If finalized, the proposal will have the effect of causing overdraft services to be higher risk and cost prohibitive. Competitive pressures will force all banks to evaluate if they are able to afford to offer overdraft services to meet the short-term liquidity needs of their customers, which often includes the payment of mortgages/rents, utilities, medical bills, and emergency expenses before payroll deposits are received.

### **Proposal in Search of a Problem**

Our primary concern with this proposal is that it is searching for a problem to solve when there is not strong data to support a specific issue exists in overdraft services that would require additional regulation or intervention. Our member banks tell us that overdraft services provide a solution for short-term liquidity needs of many of their customers. To use less formal phrasing – most customers appreciate having this as a fallback to help them when “life happens” and they make a mistake in their budgeting or the timing of a payment, when unexpected expenses arise, or when a paycheck is delayed or less than expected. Generally, bank customers understand the reasoning for the fee and appreciate that the overdraft repayment process does not require additional steps or action on their part to resolve.

A March 2024 survey conducted by Morning Consult on behalf of the American Bankers Association (ABA) offered data supporting a strong majority of adult Americans appreciate and value bank overdraft programs. The survey results demonstrate that more than two-thirds of consumers (67%) find their bank's overdraft services valuable—as compared with only 16% who do not find it valuable—and eight in 10 consumers (79%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining payment. Sixty-four percent of consumers think it's reasonable for banks to charge a fee for an overdraft, as opposed to only 23% who think it's unreasonable, and nearly three-quarters (72%) view overdraft fees as reasonable when considering that large payments like mortgages or rent payments are covered and paid on time or that customers are protected from late or other penalty fees if payments overdraft a customer's account (71%). (See ABA Consumer Survey Press Release March 20, 2024.)

### **Unaccounted Costs in the “Breakeven” or “Benchmark” Fee Analysis**

One concern we have with the Bureau's proposal is the provision that allows a bank to avoid subjecting its overdraft program to Regulation Z's requirements by charging a fee that is below the so-called “breakeven fee”. Each bank is to calculate its own “breakeven” cost – what it costs to operate its overdraft program which is to include charge-off losses.

The KBA is hearing from member banks that the benchmark costs calculation excludes important costs including things such as the cost to review and respond to customer complaints, personnel time to communicate with those who frequently overdraft their accounts and the cost of mailing overdraft notices to customers.

The proposed benchmark fee between \$3 and \$14 does not begin to cover the bank's total costs of providing overdraft services to customers and we believe this proposal should be re-drafted to take into account all of these costs.

### **Implications of Applying Regulation Z to Overdraft Services**

We are also concerned with the application of Regulation Z loan requirements to overdraft protection services on deposit accounts where institutions choose to charge more than the benchmark amounts.

Applying the Regulation Z prohibition on the use of "offset" to overdraft protection services when a debit card is the source of an overdraft is of significant concern because Regulation Z prohibits using the right of setoff to collect credit card debt. Under the Bureau's proposal, this would extend to overdraft debt that would not have previously been subject to Regulation Z. This will result in additional charge-off losses for banks that would have been avoided by being able to use the traditional right of setoff without being concerned about Regulation Z.

It is of particular concern that in the proposal the Bureau incorrectly defines a deposit made to an overdrawn account as "offset." (Proposal at 78.) The law of "offset/setoff" is very clear that it only exists when a three-part test is met: 1) mutuality of debt, which requires two separate obligations, one where the bank owes the customer money and another where the customer owes the bank money; 2) a liquidated obligation; and 3) a matured obligation. A deposit made to an overdrawn account does not pass the first requirement of this three-part test because there is only one account. (See *Miller v. Bank of America NT & SA*, 46 Cal.4th 630 (2009) for a very thorough discussion of this test and how "offset" does not apply when a bank accepts a deposit to an overdrawn account).

The Bureau's inaccurate use of the term "offset" creates very specific legal problems in how banks administer accounts and collection of overdrawn balances (whether an overdraft fee is involved or not). The first of these problems is that some states prohibit using federal benefit payments to set off debt. As many consumers rely on federal benefits to pay their living expenses and also rely on overdraft services to cover expenses while waiting for benefit payments, disrupting this process would have a negative impact and place the burden on consumers to take additional steps or action on their part to resolve issues this may cause. The utilization of the term "offset" places overdrafts into a legal category and description held in *Tom v. First American Credit Union* which was a 10<sup>th</sup> Circuit Court of Appeals decision that placed offset in the same category as a judicial lien. By doing this, the Court stated that offset couldn't be used on funds that would have been exempt from a judicial lien, including federal benefit funds.

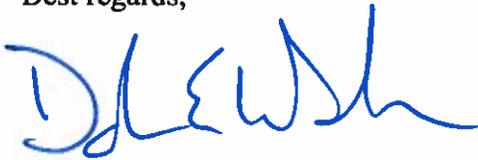
Furthermore, this legal distinction is also based on the premise that each deposit made into an overdrawn account may be treated as a voluntary payment of the overdraft, because the consumer is free to withhold a deposit or change deposit instructions. Whereas, utilizing "offset" rights against a loan or otherwise unrelated account requires further agreement by the consumer because the act of depositing funds into that unrelated account may not be indicative of account holder's intent to pay the unrelated loan. (*Tom v. First American Credit Union*, 151 F.3d 1289 (10th Cir. 1998).)

In summary, by improperly classifying the act of accepting a deposit to an overdrawn account as “offset”, the Bureau is confusing two very different legal principles. Furthermore, applying the Regulation Z offset definition to overdrawn accounts will increase collection risk for banks and cause existing overdraft repayment processes to be lengthier and more restrictive, leading to more cost attributed to providing overdraft services.

**Conclusion**

The KBA believes that this proposal is trying to solve a problem that does not exist. Bank customers appreciate the short-term liquidity that overdraft services provide and the understand that this service carries with it costs to the bank. This proposal will harm the customers who most need this service by forcing banks to discontinue offering overdraft services or restricting which customers receive it. Please consider the overall picture of overdrafts when you consider drafting a final rule.

Best regards,



Douglas E. Wareham

President & CEO