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March 25, 2024

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC, 20552

Re: Fees for Instantaneously Declined Transactions
Docket ID: CFPB-2024-0003

To Whom It May Concern:

My name is Nicholas Anthony, and I am a policy analyst at the Cato Institute's Center for Monetary and Financial Alternatives. I appreciate the opportunity to provide input to help the Consumer Financial Protection Bureau (CFPB) better understand the ramifications of its proposal to prohibit financial institutions from charging fees "when consumers initiate payment transactions that are instantaneously declined."[1] The Cato Institute is a public policy research organization dedicated to the principles of individual liberty, limited government, free markets, and peace, and the Center for Monetary and Financial Alternatives focuses on identifying, studying, and promoting alternatives to centralized, bureaucratic, and discretionary monetary and financial regulatory systems. The opinions I express here are my own.

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The CFPB's approach in this proposal raises significant concerns and is fundamentally flawed. It is understandable that the CFPB may be under considerable pressure to act given it has become a cornerstone of President Joe Biden's "war on junk fees," but that is not a justifiable reason to push through restrictions on the freedoms of the American people.[2]

As it currently stands, the argument in the proposal appears to be that the CFPB is concerned that harms *may* take place and thus it seeks to preemptively prohibit participation in charging what the CFPB defines as covered nonsufficient fund (NSF) fees. By working backwards from a predetermined conclusion, the proposal seemingly undermines the importance of financial literacy and responsibility while also painting a caricature of the financial system.

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[1] Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions.

[2] As the proposal clearly states, "More recently, there has been an effort across the Federal Government to eliminate fees that are not subject to the competitive processes to ensure fair pricing." Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, Page 6034, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions; Nicholas Anthony, "CFPB Targets Overdraft Fees in Biden's War on Prices," *Cato Institute*, January 23, 2024, https://www.cato.org/blog/cfpb-targets-overdraft-fees-bidens-war-prices.

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Addressing Abusiveness and Responsibility

The proposal repeatedly states that the CFPB is taking these measures to "*protect* consumers from abusive practices" and to "*prevent* abusive practices" (emphasis added).[3] Under 12 U.S.C. Section 5531(d)(2), abusiveness is defined as an act or practice that takes "unreasonable advantage" of:

> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
> (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
> (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[4]

The proposal points to a lack of understanding on the part of the consumer as being the basis for its abusiveness claim. For example, the proposal states that "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."[5] This argument seems to completely disregard both that a consumer has a responsibility to monitor the balance of their account and that a consumer might choose to take the risk that they may have available funds.

The proposal doubles down on this argument saying, "the CFPB preliminarily concludes that consumers initiating covered transactions that incur NSF fees would generally lack awareness of their available account balance."[6] It appears the CFPB believes consumers have no responsibility in this framework. In fact, it goes further by suggesting consumers shouldn't be expected to check their accounts because the rise of debit card use "might make it harder for some consumers to track their available funds," "older consumers are far less likely to access their accounts through mobile apps," and some consumers might feel "discomfort with pulling up account information in a public location."[7]

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[3] Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, Page 6032, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions.
[4] 12 U.S.C. Section 5531(d)(2).
[5] Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, Page 6042, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions.
[6] Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, Page 6042-6043, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions.
[7] Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, Page 6042, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions.

The CFPB should not make excuses when all of the actions it listed (e.g., tracking spending, checking accounts, and planning) would have been appropriate measures for consumers to avoid the fees in question without any government intervention.

Yet after removing responsibility on the part of the individual, the proposal then argues that charging these fees represents taking unreasonable advantage of consumers because the fees are not for a service, the fees charged to customers outweigh the costs incurred by institutions, and "covered financial institutions would have no reason for imposing such fees other than reaping a windfall."[8]

In arguing the "inappropriateness" of the fee, the proposal states that the fees charged outweigh the costs incurred by the institutions. Generally speaking, the benchmark should never be that prices are equal to costs. Prices exceeding costs are a signal that an institution has added value. To be fair, the matter is complicated in this case given the price (e.g., the NSF fee) has a deterrent aspect to it (i.e., the charge occurs when a consumer has tried to spend money they do not have). However, for this same reason, it is inappropriate to say that "covered financial institutions would have *no reason* for imposing such fees other than reaping a windfall" (emphasis added).[9] This framing ignores the role of playing a deterrent.

Conclusion

Were the questions surrounding abusiveness not enough, the proposal effectively calls into question the need to intervene considering it repeatedly notes, "many financial institutions in recent years have stopped charging NSF fees" and "NSF fees are rarely charged [currently.]"[10] The proposal even says at one point that it is only "proposing this rule primarily as a preventive measure" because the CFPB's proposed price controls on overdraft fees would give financial institutions "an incentive to impose new fees."[11] In other words, the CFPB seems to see the issue as a problem of its own creation.

To be clear, if financial institutions are refusing to present disclosures, hiding information, or tricking consumers, there may be an argument to be made. However, that does not appear to be the case the CFPB has presented in this proposal.

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[8] Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, Page 6044, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions.
[9] Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, Page 6044, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions.
[10] Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, Page 6032, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions.
[11] Consumer Financial Protection Bureau, "Fees for Instantaneously Declined Transactions," *Federal Register*, Page 6038, January 31, 2024, https://www.federalregister.gov/documents/2024/01/31/2024-01688/fees-for-instantaneously-declined-transactions.

I thank the CFPB for the opportunity to comment on this proposal and I urge it to reconsider this approach.

Sincerely,

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