



March 25, 2024

Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW, Washington, DC 20552.

Re: Fees for Instantaneously Declined Transactions [RIN 3170-AB16]

Dear Director Chopra,

The Mortgage Bankers Association (MBA)¹ appreciates the opportunity to comment on this rulemaking from the Consumer Financial Protection Bureau (the Bureau or CFPB). The proposed rule would prohibit a financial institution from charging a nonsufficient funds (NSF) fee to a consumer who attempts to withdraw, debit, pay, or transfer funds from their account and is declined instantaneously or near instantaneously by the financial institution. The Bureau interprets the fee to be banned as abusive practice under their unfair, deceptive, or abusive acts or practices (UDAAP) authority. MBA recognizes that the proposed rule would have no effect on the mortgage industry. However, MBA objects to the Bureau's overbroad interpretation of the scope of its abusiveness authority. The Bureau's expansive view of its UDAAP authority inappropriately diminishes the role of disclosures in consumer finance.

The Bureau previously released a policy statement on how they interpret their abusiveness authority.² MBA opposed the Bureau's interpretation of abusiveness, and we reaffirm those positions in this letter.³

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 300,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

² Consumer Financial Protection Bureau, Statement of Policy Regarding the Prohibition on Abusive Acts or Practices (April 3, 2023).

³ Mortgage Bankers Association, MBA Joint Comment Letter on CFPB's Statement of Policy Regarding Prohibition on Abusive Acts or Practices (July 3, 2023), available at <https://www.mba.org/industry-resources/resource/mba-joint-comment-letter-on-cfpb-s-statement-of-policy-regarding-prohibition-on-abusive-acts-or-practices>.

I. Policy Interventions Must Be Grounded in the Bureau’s Authority

While Congress has delegated to the Bureau broad authority to require disclosure of fees charged in connection with consumer financial products and services,⁴ it has enacted, or authorized the Bureau to promulgate, relatively few substantive limitations on such fees and only in specific, well-defined circumstances.⁵ The substantive regulation of the allowable fees charged in connection with consumer financial products and services has generally been left to state or local governments or to other Federal agencies.⁶ The existing regime reflects Congress’s judgment regarding the appropriate distribution of regulatory authority over the market, including its judgment as to whether to preempt these state laws. The Bureau should consider its role in the broader regulatory regime for consumer financial services when deciding how to achieve a policy intervention.

Disclosed fees charged in connection with consumer financial services that are reasonably avoidable and pursuant to valid contractual arrangements and in accordance with state or federal laws should not be considered abusive. This is important in the UDAAP context, which generally treats fees incurred by consumers at their election or through their actions differently than fees imposed unilaterally regardless of consumer action. Disclosures should ensure that consumers are not misled or surprised about the existence or nature of fees or unable to take steps to avoid such fees. Restricting financial institutions’ ability to charge reasonable fees may adversely impact consumers’ access to credit and related services, to the detriment of both consumers and competition. As discussed below, any concerns with fees should be addressed through the adoption of appropriate disclosures pursuant to notice and comment rulemaking.

II. The Bureau Has Set Too Low a Bar to Prove a “Lack of Understanding” Among Consumers

Under the abusiveness statute, a financial institution cannot take 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.⁷ The Bureau states that consumers’ lack of understanding can be proven by establishing that an individual consumer does not understand a product or service, that consumers generally do not understand a product or

⁴ 12 U.S.C. § 5532(a) (empowering the Bureau to prescribe rules to ensure that the features of products or services are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service).

⁵ 12 U.S.C. § 5517(o) (providing that the CFPB should not be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law).

⁶ Conference of State Bank Supervisors, 50-State Survey of Consumer Finance Laws (Nov. 19, 2020), available at [link](#); 12 C.F.R. § 701.35(c) (allowing federal credit unions to “determine the types of fees or charges and other matters affecting the opening, maintaining and closing of a share, share draft or share certificate account.”).

⁷ 12 U.S.C. § 5531(d)(2)(A).

service, or that consumers do not understand how a product or service affects other similarly situated consumers.⁸ However, the Bureau is not required to conduct an inquiry into the facts of consumer understanding and does not need to prove that a consumer's lack of understanding is reasonable.⁹ The Bureau also states that an act or practice is abusive if it takes unreasonable advantage of the consumer's lack of understanding of at least one material risk, cost, or condition.¹⁰

Taken together, this overly broad formulation of the statute would allow the Bureau to declare a practice as abusive if a consumer does not understand any single material cost, condition, or risk and how it might be incurred by them individually, consumers generally, or other similarly-situated consumers. All this without a factual inquiry or establishment of a sufficient record beyond the Bureau's own judgment or policy preferences. Nor does the hypothetical consumer need to be reasonable. This would essentially allow the Bureau to preliminarily declare many practices as abusive. There should be a higher burden on the Bureau before declaring a practice abusive and some limiting factor to its application. The Bureau's analysis of consumers' understanding of instantaneous NSF fees – if applied in other contexts – would diminish the role of even well-crafted consumer disclosures for legitimate products or services.

a) A Well-Crafted and Clear Disclosure Provided to a Consumer Should Cure an Individual Consumers Lack of Understanding of That Product or Service

In the proposed rule, the Bureau states that a disclosure, made even at the point of sale, would not cure an individual consumer's lack of understanding of the material costs, conditions, or risks.¹¹ The Bureau does not believe a disclosure could cure a consumer's misunderstanding in this case because providing disclosures are expensive, may be impractical to implement, and, even with proper disclosures, a consumer may not understand the material risks, costs, or conditions of the product. MBA is not commenting on the feasibility of facilitating disclosures for instantaneous NSF fees and is merely discussing the broader implications of this interpretation. However, we do note that financial institutions have spent significant time, money and resources implementing other disclosures required by the Bureau with the purpose of advancing consumer understanding of the cost of consumer financial products and services. It is also premature for the Bureau to dismiss the feasibility of providing disclosures or the associated expense without first undertaking serious analysis in the proposal.

To determine that a consumer may, under no circumstances, understand a disclosure diminishes consumer agency and defeats the purpose of disclosures in the consumer

⁸ Consumer Financial Protection Bureau, Fees for Instantaneously Declined Transactions (Jan. 24, 2023), pg. 31-32 (hereinafter "Proposed Rule").

⁹ *Id.*, at 28.

¹⁰ *Id.*, at 34.

¹¹ *Id.*, at 24.

finance market. Strong consumer understanding of the cost of credit and other terms of financial products and services – including fees charged with consumers’ consent pursuant to contract and other governing law – is the best means to ensure consumer financial services markets remain fair, transparent, and competitive. One of the Bureau’s most important statutory charges is to ensure that “consumers are provided with timely and understandable information to make responsible decisions about financial transactions.”¹² Given that charge, the Bureau should attempt to remedy a lack of consumer understanding with well-crafted disclosures. At a minimum, the Bureau should generally engage in consumer testing before dismissing the potential utility of a disclosure to cure a consumer’s lack of understanding. Such engagement has proven successful in other instances.

b) A Lack of Understanding with a Product or Service Should Not be Defined by Its Novelty, But Should be Based on a Specific Feature of that Product or Service

The Bureau finds that consumers generally have a lack of understanding of the risks of instantaneous NSF fees because they are rarely charged. The Bureau concludes, based on its market monitoring, that covered financial institutions rarely charge instantaneous NSF fees and that this rule is a preventative measure. The novelty of an instantaneous NSF fee, the Bureau argues, contributes to a lack of understanding of the costs, conditions, and risks to an individual consumer or consumers generally. The Bureau admits that if this fee were widely adopted it could change consumers understanding of the fee.¹³ For example, the Bureau notes that consumers who do not anticipate an initial instantaneous NSF fee may be less surprised after incurring multiple instantaneous NSF fees. As mentioned above, the Bureau does not believe that this lack of understanding can be cleared with disclosures.

By determining that disclosures do not mitigate abusiveness risk, financial institutions will be unable to offer new products or services because of concerns that the Bureau will determine their disclosures do not cure a lack of understanding. Consumers will by definition have little understanding of the risks to consumers generally when a product or service is first offered because other consumers will not have used the product. Disclosures inform consumers about the costs, conditions, and risk of a product, including how to avoid fees before the act that would trigger the fee has been taken. If disclosures generally cannot cure a lack of understanding of new products or services, the Bureau’s interpretation of abusiveness could potentially be used to label a novel product as abusive merely because of its novelty. Additionally, fees are used by financial institutions to recoup their investment in innovating new products. If a financial institution cannot charge a fee even with a disclosure, this will hamper their ability to offer new products. A consumer’s lack of understanding of a product or service should be based on a specific feature of the product or service that is demonstrated through inappropriate market usage, a factual record, or far

¹² 12 U.S.C. § 5511(b)(1).

¹³ Proposed Rule, at 24-25, FN 102.

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more than a conclusory rulemaking that asserts a lack of consumer understanding without evidence.

III. Conclusion

We appreciate the Bureau's consideration of these comments. Should you have questions or wish to discuss these issues further, please contact Justin Wiseman at jwiseman@mba.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Mills", enclosed in a thin black rectangular border.

Pete Mills
Senior Vice President
Residential Policy and Strategic Industry Engagement
Mortgage Bankers Association