Overdraft Lending at Very Large Financial Institutions

Comments

to the

Consumer Financial Protection Bureau

regarding

12 CFR 1005 and
12 CFR 1026

Docket No. CFPB-2024-0002

89 Fed. Reg. 13852 (Feb. 23, 2024)

by the

National Consumer Law Center
on behalf of its low-income clients

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Introduction and Executive Summary

The National Consumer Law Center (on behalf of its low-income clients) submits the following comments in response to the proposed rule issued by the Consumer Financial Protection Bureau (CFPB) regarding overdraft lending at very large financial institutions. We strongly support the proposed rule, which will stop abusive overdraft fee practices that have harmed the most vulnerable consumers and will lead to a fair, more transparent marketplace that will keep people in the banking system.

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services; and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

NCLC has long advocated for stronger laws, regulation, and enforcement to ensure that consumers have access to safe and affordable banking services and credit. We interact with legal services, government, and private attorneys, as well as community groups and organizations from all over the country, who represent low-income and vulnerable individuals on consumer issues. As a result of our daily contact with these advocates, we have seen many examples of the damage wrought by overdraft fees and unaffordable credit. It is from this vantage point that NCLC provides its comments.[1]

Bank accounts are critical to participation in the financial mainstream and to financial well-being. But for too many low-income consumers living on fixed incomes or struggling to make ends meet, bank accounts are fraught with pitfalls or simply inaccessible. Overdraft fees are one of these pitfalls; they are essentially a penalty for being poor or financially insecure.

Overdraft fees are junk fees that harm the most vulnerable consumers— those who have run out of money. They can drain money and benefits, like Social Security, needed for food and medical expenses. Overdraft fees result in a transfer of money from low-income consumers to the wealthiest businesses and people in our society. Overdraft fees exacerbate racial injustices and inequality. The fees are a leading reason why 11.3% of Black and 9.3% of Latino households are unbanked compared to only 2.1% of white households.

Decades ago, overdraft fees were charged rarely, merely to cover the cost and risk to the bank for the occasional courtesy of covering a check that would otherwise bounce. However, today, the number of overdraft fees has skyrocketed, and overdraft practices have become a

[1] These comments were written by Carla Sanchez-Adams, Lauren Saunders, and Chi Chi Wu.

disguised, high-cost form of credit that generates large profits. Roughly $9.1 billion in overdraft revenue was reported by very large financial institutions in 2022. To maximize overdraft revenue, many financial institutions engage in harmful and abusive practices and even manipulate people into overdrafting and incurring excess overdraft fees. These high fees, coupled with destructive overdraft programs, severely harm consumers; they prevent consumers from meeting other expenses, can lead to bank account closures, and can keep consumers from opening new bank accounts.

The proposed rule preserves overdraft coverage while limiting snowballing fees and incentives for financial institutions to engage in practices that are at odds with their customers' financial health. Very large financial institutions would have flexibility to provide overdraft coverage in various forms by limiting their overdraft fees to a modest fee that covers their costs; by offering overdraft credit in compliance with the Truth in Lending Act; or by linking to savings accounts and credit cards. Consumers will benefit from more affordable, honest, and transparent forms of overdraft credit.

The protections of the Truth in Lending Act are important for overdraft credit, and applying those protections will serve TILA's goals. APR disclosures, periodic statements, and notice of due dates with time to repay will help consumers compare, understand, and manage the cost of overdraft credit. When overdraft credit is accessed through a card, consumers need the protections given other credit cards, including control over how to repay, the ability to assert claims and defenses for purchases, lending based on ability to repay, limits on fees in the first year, reasonable penalty fees, and more.

We disagree with critics of the proposed rule who predict that financial institutions will react in a way that leads to consumer harm. About 23 million households pay overdraft fees, and financial institutions cannot afford to ignore that market or to repeatedly bounce payments, causing friction with their customers. Financial institutions will find a way to continue providing helpful overdraft protection and to help consumers avoid overdrafting. Some overdrafts may be curtailed, but that will be positive for many consumers, who will have more money in their pockets, will adjust, and will find better ways to manage.

The proposed rule is fully within the CFPB's authority. The CFPB has broad rulemaking authority under TILA, and overdraft credit is unquestionably credit within the meaning of TILA. The CFPB has the authority to narrow the regulatory exemptions for overdraft fees not found in the TILA statute. Moreover, under longstanding interpretations of TILA, debit cards that access credit are a form of credit card. The CFPB has the authority to eliminate nonstatutory exemptions pertaining to credit cards and to apply credit card protections to hybrid debit-credit cards.

The CFPB proposes to allow very large financial institutions to continue to provide courtesy overdraft services under Regulation E, rather than Regulation Z, as long as the fee does not exceed a breakeven fee reflecting the institution's costs or a benchmark fee. That approach is reasonable and consistent with the statutory framework. The protections of credit laws are especially important when financial institutions charge high costs and generate profits from overdraft credit.

The CFPB proposes a standard benchmark fee between $3 and $14. The amount varies, depending on (1) whether typical charge-off costs are calculated using only the institution with the highest charge-offs in the CFPB's sample or whether the average of all very large institutions are used, and (2) whether costs are spread across all overdraft transactions or only those that generate a fee. We urge the CFPB to utilize the formula it proposes to arrive at the benchmark fee of $3. Fees for all consumers should not be based on the costs of the outlier financial institution with the highest charge-off costs, which likely reflect poor or abusive practices. Additionally, the benchmark fee should not be calculated by excluding transactions that did not generate fees. Those overdrafts could still generate charge-offs, and fee waivers can be based on discretionary decisions that disadvantage lower income consumers and communities of color and yield disparate impacts. Moreover, higher overdraft fees will cause more harm and lead to more charge-offs and more consumers losing their bank accounts.

It is a reasonable decision for the CFPB to limit the proposed rule to very large financial institutions at this time. The CFPB has more data about and knowledge of overdraft practices and costs at these institutions. Additionally, most consumers have accounts at very large financial institutions, which collect over two-thirds of overdraft fees, and these very large financial institutions have the resources and technology to adjust quickly to the proposed rule. However, we urge the CFPB to begin collecting data about the costs of overdrafts at smaller institutions and plan for a future rulemaking covering all institutions, as overdraft credit should be safe, affordable, and transparent for all consumers.

We have some suggestions for improving the proposed rule and preventing evasions. The CFPB should:

- Limit fees for courtesy overdraft services under Regulation E to one per overdraft episode and six per year. Allowing more than that will allow costs to mount and reflect a routine source of credit rather than an occasional courtesy.

- Prevent evasions from big tech and prepaid card companies by either clarifying that accounts offered by nonbanks are prepaid accounts subject to that rule's overdraft requirements or by including very large nonbanks in the definition of "very large financial institution." The CFPB should also clarify that so-called "tips" paid for overdraft credit are a finance charge.

- Fix loopholes in the APR for open-end credit to ensure that fees are included and the APR fully reflects the cost of credit.

- Require financial institutions to provide essential Regulation E and Z notices in both English and Spanish to all consumers and ensure that disclosures are readily available in other languages commonly spoken.

We have also offered more technical suggestions in the section-by-section analysis below.

1. Overdraft fees are an abusive junk fee.

1.1 Overdraft fees harm the most vulnerable consumers.

Overdraft fees have long been one of the most pernicious and deceptive taxes on being poor. Decades ago, overdraft fees were charged rarely, merely to cover the cost and risk to the bank for the occasional courtesy of covering a check that would otherwise bounce.

Then, electronic banking spread. Consumers began to receive wages, benefits, and other income by direct deposit, while making more of their payments using debit cards that can be approved or declined in real time. Financial institutions and their consultants saw an opportunity to push consumers to overdraft and to make money from people who live paycheck to paycheck or who are on a fixed or limited income. A variety of practices sprang up that put financial institutions at odds with their customers; rather than helping improve consumers' financial health, these practices focused on increasing profits.

Financial institutions now collect billions of dollars in overdraft fees from consumers. Before the pandemic, overdraft revenue was as high as $12.6 billion.[2] While those numbers have gone down to an estimated $9.1 billion in overdraft revenue as of 2022,[3] financial institutions are still collecting several billion dollars in overdraft fees paid by those who can least afford them.

A recent survey by the CFPB found that only 22% of households expected their most recent overdraft; 35% thought it was possible, and 43% percent were surprised.[4] The numbers are similar even among consumers who received 4 to 10 overdraft fees in the previous year: only 21% expected the overdraft, 41% thought it was possible, and 37% were surprised.[5] Moreover, the majority of consumers charged overdraft and NSF fees— even in the group that frequently overdrafted— had some credit available on a credit card during the period that they reported the fees, which was likely to be substantially cheaper than overdraft credit.[6]

Another survey confirms that most people do not know that they are going to overdraft at the time of the transaction. A survey by the New York Federal Reserve Bank found that only a tiny fraction of people consistently expected transactions to overdraft when they did, and over three-

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[2] *See* CFPB, Notice of Proposed Rulemaking on Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 13852, 13856 n.29 (citing Éva Nagypál, Ph.D., CFPB, Data Point: Overdraft/NSF Fee Reliance Since 2015 – Evidence from Bank Call Reports, at 7 (Dec. 2021)), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-call_report_2021-12.pdf (CFPB 2021 Data Point).

[3] *Id.*

[4] Overdraft and Nonsufficient Fund Fees: Insights from the Making Ends Meet Survey and Consumer Credit Panel at 5 (Dec. 19, 2023), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-report_2023-12.pdf (2023 Making Ends Meet Survey).

[5] *Id.* at 14.

[6] *Id.* at 6-7.

quarters expected the overdraft less than 90% of the time.[7] Few also understood their banks' practices about reordering.

According to research by the Consumer Financial Protection Bureau (CFPB), frequent overdrafters tend to have low end-of-day balances, low or moderate credit scores, and low or moderate monthly deposits.[8] That same report found that 79% of bank overdraft and NSF fees were borne by only 9% of accounts, and the median account balance of this group is less than $350.

Furthermore, overdraft fees disproportionately impact communities of color. Black and Latino Americans with checking accounts are more likely than white Americans to incur overdraft fees.[9] A study by the Federal Reserve Banks of Atlanta, Boston, and San Francisco found that 17% of Black consumers paid bank overdraft fees, versus 10% of white consumers.[10] A 2023 CFPB report found that Black consumers are 84% percent more likely and Hispanic consumers 89% more likely to reside in a household that frequently overdrafts as compared to White, non-Hispanic consumers.[11]

Bank account fees, including overdraft and NSF fees, are one of the main reasons why consumers do not have a bank account.[12] The cost of these abusive practices effectively

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[7] Li Donald P. Morgan and Wilbert van der Klaauw, Liberty Street Economics, Federal Reserve Bank of New York, Learning by Bouncing: Overdraft Experience and Salience (Apr. 1, 2024), https://libertystreeteconomics.newyorkfed.org/2024/04/learning-by-bouncing-overdraft-experience-and-salience/.

[8] CFPB, Data Point: Frequent Overdrafters, https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf, at 5 (Aug. 2017).

[9] FHN Brief 2023 available ay https://finhealthnetwork.org/research/overdraft-trends-amid-historic-policy-shifts/ (finding that 26 percent of Black, 23 percent of Latinx, and 14 percent of White households reported having overdrafted); see also Meghan Greene et al., FHN, FinHealth Spend Report 2022: What U.S. Households Spent on Financial Services During COVID-19, at 14 (Apr. 2022), https://finhealthnetwork.org/wp-content/uploads/2022/05/FinHealth_Spend_Report_2022_Final.pdf (finding in a 2021 survey that Black and Latinx households with a savings or checking account were 1.8 and 1.4 times as likely as White households to report having overdrafted).

[10] Kate Fitzgerald, American Banker, "Wealthy, white consumers pay fewer bank fees: Report" (Jan. 22, 2023), https://www.americanbanker.com/payments/news/wealthy-white-consumers-pay-fewer-bank-fees-report (describing Oz Shy, Fed. Reserve Bank of Atlanta, Joanna Stavins, Fed. Reserve Bank of Boston, Who Is Paying All These Fees? An Empirical Analysis of Bank Account and Credit Card Fees (Aug. 2022), https://www.bostonfed.org/publications/research-department-working-paper/2022/who-is-paying-all-these-fees-an-empirical-analysis-of-bank-account-and-credit-card-fees.aspx.

[11] CFPB Office of Research, Publication No. 2023-9, Overdraft and Nonsufficient Fund Fees: Insights from the Making Ends Meet Survey and Consumer Credit Panel at 25 (Dec. 2023), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-report_2023-12.pdf.

[12] Who Is Paying All These Fees? An Empirical Analysis of Bank Account and Credit Card Fees, Oz Shy and Joanna Stavins (August 2022), https://www.bostonfed.org/publications/research-department-working-paper/2022/who-is-paying-all-these-fees-an-empirical-analysis-of-bank-account-and-credit-card-fees.aspx. *See also* FDIC's 2021 National Survey of Unbanked and Underbanked Households–*Appendix*

pushes the most vulnerable out of the banking system, especially communities of color. Unbanked rates are highest among lower-income households, less-educated households, Black households, Latino households, working-age households with a disability, and single-mother households. While unbanked rates are down in the latest survey by the Federal Deposit Insurance Corp. (FDIC), 11.3% of Black and 9.3% of Latino households are unbanked compared to only 2.1% of white households.[13] Disparities exist even within the same income tier: among households with $30,000 to $50,000 in income, 8% of Black and Latino households were unbanked, compared with 1.7% of white households.[14]

Older adults living on fixed or limited incomes are also at risk of incurring overdraft fees. Over 16.5 million (or roughly 1 in 3) older adults aged 65 or over are economically insecure, with incomes below 200% of the Federal Poverty Level.[15] Inflation poses a particular challenge to those on fixed incomes. Overdraft charges can derail tight budgets, making it harder for older adults to pay for necessary expenses such as food and medicine. Older adults whose financial resources are depleted by caregiving responsibilities or by the loss of a partner who contributed financially to the household are also at heightened risk of incurring these fees, as are those with cognitive impairments that can come with aging.

Overdraft fees collected from older adults and from low-income households receiving public benefits are likely to be collected from, or offset by, deposits of exempt income such as Social Security, military/veterans' compensation, unemployment compensation, disability benefits, Temporary Assistance to Needy Families, or other benefits. While this income may be exempt from being garnished by debt collectors, courts have ruled that banks may deduct overdraft and other fees from Social Security.[16]

A single overdraft episode can explode into hundreds of dollars in fees, which can make it impossible for a consumer to recover, leading the bank to close the account.[17] The resulting

Tables, at 11 tbl.A.6 (Nov. 14, 2022) (among previously banked households, 30.5 percent cited bank account fees are too high, 28.8 percent cited bank account fees are too unpredictable, and 43 percent cited that they do not have enough money to meet minimum balance requirements).

[13] *See* FDIC's 2021 National Survey of Unbanked and Underbanked Households at 2 (Nov. 14, 2022), https://www.fdic.gov/analysis/household-survey/index.html.

[14] *Id.*

[15] NCOA, Get the Facts on Economic Security for Seniors, June 8, 2023, https://ncoa.org/article/get-the-facts-on-economic-security-for-seniors.

[16] *See, e.g.,* Lopez v. Washington Mut. Bank, 302 F.3d 900 (9th Cir. 2002) (bank did not violate Social Security Act's protections by deducting overdraft and overdraft fees from consumers' next deposit of SSI benefits because account agreement allowed this).

[17] NCLC, Statement Before the Senate Banking Committee on Overdraft Fees and Their Effects on Working Families (May 4, 2022), at 4, https://www.nclc.org/wp-content/uploads/2022/10/overdraft_05_05_22_testimony.pdf.

negative reports to account screening agencies such as ChexSystems and Early Warning Services then stop people from getting new accounts and exile them from the banking system.[18]

Abusive overdraft practices also lead to diminished access to other financial products. Without a bank account to corroborate cash-flow history and income data, these same vulnerable consumers will have less access to other financial services and credit.[19]

1.2 Financial institutions engage in abusive practices to increase overdraft fees.

Instead of competing honestly with transparent monthly fees, many financial institutions have promoted "free checking" but covered their costs with back-end fees imposed on their most vulnerable customers. Instead of offering reasonably priced overdraft lines of credit, they offer so-called "courtesy" overdraft programs that end up charging huge amounts of fees to struggling consumers.[20]

A variety of pernicious overdraft practices cause devastating harm to consumers.[21] These practices include:

- Charging unreasonably high fees for each overdraft, typically $35, which is far higher than the amount needed to cover the financial institution's costs; in many cases, particularly with debit card transactions, the overdraft charge is higher than the overdraft itself.[22]

- Charging multiple overdraft fees per day, with no limits at some financial institutions and as many as six $35 overdraft fees ($210) per day at institutions that do limit the number.[23]

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[18] *See* NCLC, Press Release, Report: Account Screening Consumer Reporting Agencies Impede Access for Millions (Oct. 19, 2015), https://www.nclc.org/media-center/report-account-screening-consumer-reporting-agencies-impede-access-for-millions.html.

[19] Chi Wu & Katie Plat, CFE Fund & NCLC, Account Screening Consumer Reporting Agencies – A Banking Access Perspective (Oct. 19, 2015), at 6, https://cfefund.org/wp-content/uploads/2016/08/Account-Screening-CRA-Agencies-Banking-Access-report.pdf.

[20] *See* 75 Fed. Reg. 7658, 7664 (Feb. 22, 2010) (stating that overdraft lines of credit are not in wide use).

[21] *See* Peter Smith et al., Center for Responsible Lending, Banks Must Stop Gouging Consumers During the COVID-19 Crisis at 1-2 (June 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-overdraft-covid19-jun2019.pdf; NCLC, Statement Before the Senate Banking Committee on Overdraft Fees and Their Effects on Working Families (May 4, 2022), https://www.nclc.org/wp-content/uploads/2022/10/overdraft_05_05_22_testimony.pdf.

[22] *See* CFPB, Overdraft/NSF metrics for Top 20 banks based on overdraft/NSF revenue reported during 2021 (Dec. 6, 2022, partially updated May 22, 2023) ("CFPB Overdraft Metrics"), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-table_2023-05.pdf.

[23] Some of the top 20 banks permit five overdraft fees per day. *See id.*

- Charging "extended" or "sustained" overdraft fees for each day that an account has a negative balance, making it more difficult for a struggling account holder to recover.[24]
- Opaque and often manipulative practices to increase overdraft fees involving deposit clearing, debit holds, and transaction posting order.[25] Examples include:
  - Manipulating the order in which transactions are processed to deduct the largest one first, causing the account to overdraft sooner with more overdraft fees.
  - Charging fees because of a debit hold on funds, *i.e*., by a restaurant, hotel, or gas station, even though the account has sufficient funds.
  - Charging fees when the consumer has sufficient funds in the account when the transaction is authorized but the balance is lower when the transaction settles.
  - Pushing people into opting in to "courtesy" overdraft services that allow overdraft fees for ATM and debit card transactions— often using deceptive tactics that obscure the cost— instead of simply declining the transaction at no charge.[26]
- Automatically collecting the overdraft by offsetting the next deposit, even when it is Social Security, unemployment, military/veterans' compensation, public benefits, or wages needed to pay for necessities.[27]

These abuses are driven by the ability to earn high profits on overdraft fees without honest pricing information in the form of APR disclosures, market competition over prices, or the protections for other forms of credit. These practices reveal a fundamentally broken market for bank accounts, one where financial institutions profit while their customers face hardship.

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[24] *Id.*

[25] *See* National Consumer Law Center, Consumer Banking & Payments Law §§ 2.7.2, 2.7.5, 2.7.9 (6th ed. 2018), updated at library.nclc.org; *See* Peter Smith et al., Center for Responsible Lending, Banks Must Stop Gouging Consumers During the COVID-19 Crisis at 1-2 (June 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-overdraft-covid19-jun2019.pdf.

[26] Nick Bourke & Rachel Siegel, Pew Charitable Trusts, "Customers Can Avoid Overdraft Fees, but Most Don't Know How; Bank disclosures and poor communication obscure options despite federal law" (Mar. 21, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/03/21/customers-can-avoid-overdraft-fees-but-most-dont-know-how.

[27] *See*, NCLC, Consumer Banking & Payments Law § 10.2.8.4.

2. The proposed rule preserves overdraft protection while limiting snowballing fees and incentives for abusive practices that put financial institutions at odds with their customers' financial health.

2.1 Financial institutions will have flexibility to choose how they provide overdraft protection.

The proposed rule would give very large financial institutions options as to how to provide overdraft protection. They could choose to:

1. Continue to provide overdraft credit following the requirements of Regulation E, as long as they limit their fees to cost or a benchmark fee.

2. Offer overdraft credit without limiting the amount that they charge as long as they comply with Regulation Z, including the credit card provisions if the overdraft credit is accessed by a card.

3. Provide overdraft coverage through links to savings accounts or credit cards.

This approach will protect consumers and lead to a fairer, more competitive marketplace.

Under Regulation E, very large financial institutions could continue to offer courtesy overdraft services as structured today, as long as the fees are limited to their costs. Financial institutions would not need to make any changes to their systems; they would merely need to reduce the size of the fees. Indeed, several large financial institutions such as Capital One Bank, Citibank, and Ally Bank have eliminated their overdraft fees altogether, and others such as Bank of America have significantly lowered the size of their fees. This form of overdraft protection would be a true courtesy service that enhances the value of a checking account without being a hidden, back-end profit center that piles on high fees to those least able to bear them.

For higher-cost overdraft draft credit, the proposed rule targets a loophole in Regulation Z that currently allows overdraft credit to be offered without the protections of the Truth in Lending Act (TILA). Higher cost overdraft credit would have to be offered honestly as credit and in compliance with TILA. Therefore, very large financial institutions could continue to provide overdraft credit without limiting the fees they charge as long as they comply with the consumer protections set forth in Regulation Z.

Finally, financial institutions will still retain the ability to offer overdraft coverage through links between an asset account and a credit card or a savings account under the proposed rule. Likewise, consumers will still be able to prevent overdrafts by transferring funds from a credit or savings account to the asset account and to set up voluntary automatic payments in the other direction.

In sum, the proposed rule allows financial institutions the flexibility to responsibly offer overdraft credit to consumers with the capacity to handle it.

As discussed in Section 3.1 below, we disagree with claims that financial institutions will stop offering overdraft services to many consumers, neither providing low-cost courtesy overdraft services nor Regulation Z covered overdraft credit. Instead, we are confident that there are strong reasons why financial institutions will continue to offer overdraft services. The proposed rule is crafted in a way that allows very large financial institutions to continue to sustainably offer Regulation E overdraft services while covering their costs, and there is no reason why they cannot develop and offer affordable lines of credit for many consumers.

2.2 Consumers will benefit from being able to choose between low-cost overdraft services or honestly priced overdraft lines of credit.

The proposed rule will shield consumers from the current predatory and unaffordable nature of overdraft fees while still allowing liquidity for consumers. It limits harmful, high-cost forms of credit that are not based on ability to pay; that are structured in ways that make the credit more difficult to manage and costs harder to control; and that lead to a cycle of debt that can drive people out of the banking system.

The option of low fees for courtesy overdraft services or honestly priced lines of credit will provide lower-cost alternatives to predatory products and can help bridge financial gaps. Additionally, the proposal will promote fair competition and financial inclusion.

2.2.1 Low fees for Regulation E covered overdraft services will have benefits for both consumers and financial institutions.

For various reasons, including the manipulative practices described in Section 1.2 above, consumers often do not anticipate when a payment will cause an overdraft.[28] Because they cannot control these surprise fees, consumers have difficulty anticipating and preventing overdraft fees, and those fees even drive some consumers out of holding their funds in a bank. The proposal will reduce the fee a financial institution can charge for courtesy overdraft services to the amount needed to cover costs. This reduction in “gotcha fees” can help restore trust in banks among low-income consumers and consumers of color, and prevent people from losing their accounts, increasing the number of “fully banked” households.

The cost reduction will prevent snowballing fees that lead to large negative balances from which consumers cannot recover, limiting the number of accounts that are charged off. We understand from talking to banks that the number of charged off accounts decrease when overdraft fees are eliminated or significantly reduced.

Limiting “courtesy” overdraft fees to costs will also reduce incentives for very large financial institutions to push consumers into incurring overdraft fees or to downplay more affordable options for covering overdrafts. Without the profit motive of large fees, financial institutions will

[28] *See* 89 Fed. Reg. at 13891 n.251; 2023 Making Ends Meet Survey, *supra*.

not have reasons to use deceptive tactics to push consumers into opting in to overdraft fees on ATM and debit card transactions; to re-order transactions for the purpose of increasing overdraft fees; or to engage in other manipulations. These institutions will also have incentives to develop and promote other affordable overdraft options, like low-cost lines of credit and links to savings accounts and credit cards.

Competition and transparency will also be served by limiting fees that are regulated only under the EFTA and not under TILA. Very large financial institutions that currently do not engage in predatory overdraft practices will now be able to compete on a fair playing field, resulting in more institutions competing better for customers. As a result, consumers will have more ability to comparison shop. The cost of accounts will not be hidden in back-end fees that consumers cannot possibly compare or anticipate given the complex variety of practices institutions currently use to manipulate how often consumers incur overdraft fees.

2.2.2 Subjecting overdraft lines of credit to the same consumer protections as all other credit under Regulation Z will promote TILA's purposes and provides transparency and fairness.

Under the proposed rule, very large financial institutions can continue to provide overdraft coverage that meets the needs of consumers, while making a profit, by offering an overdraft line of credit. If the institution offers a line of credit, it would be structured as an explicit, separate credit account and be treated similarly to other forms of open-end credit offered under TILA. The financial institution would be required to provide APR disclosures, among other disclosures, enabling consumers to evaluate the true cost of the credit. This change will allow consumers to compare and decide which form of overdraft protection is best for them. The consumer would also receive periodic statements, which could be combined with the bank account statement.

As with other credit accessed through cards that can be used for goods and services, TILA's credit card provisions would apply to covered overdraft credit that can be accessed by a hybrid debit-credit card. Those protections, discussed in detail below, include the assessment of a consumer's ability to repay, time to repay, choice of how to repay, limits on high fees that distort the credit line in the first year, and chargeback dispute protections for consumers who did not get what they paid for.

Additionally, an overdraft line of credit that complies with the repayment protections afforded under Regulation Z offers a safer structure for consumers than the repayment by offset under existing overdraft products. When the overdraft credit, along with large fees, is immediately due and debited from any deposit into the consumer's account, it acts as a debt trap that harms consumers. Consumers have a harder time knowing how much they are going to owe, when repayment will be taken, and what their balances are. They cannot manage competing obligations. In contrast, an overdraft line of credit will allow a consumer the choice of how and when to repay any overdraft credit borrowed.

Collectively, as discussed in the sections that follow, these protections will make overdraft credit safer, more sustainable, more transparent, and easier to manage, without the high risks of today's overdraft services. Applying Regulation Z promotes TILA's purposes, discussed in Section 5.1 below, and TILA's protections are essential when financial institutions are making a profit from providing credit and the costs of that credit are significant. Promoting TILA's core purpose of ensuring the informed use of credit is also appropriate given that most people do not expect overdrafts, as noted in Section 1.1 above.

2.3 All credit that has a finance charge needs the most basic TILA protections.

Since 1968, Congress has required that credit provided to consumers with either a finance charge or more than four payments come with basic, minimal protections. As described in Section 5.3, overdraft credit is covered by and is not exempt from the TILA statute. Consumers need and will benefit from the core TILA protections of APR disclosures and periodic statements.

2.3.1 APR disclosures and the ability to compare credit options.

The core, original protection provided by TILA is the APR disclosure. Under the proposed rule, very large financial institutions providing covered overdraft credit will be required to provide consumers a disclosure of the annual percentage rate (APR), which expresses the cost of a loan on an annual basis. An APR disclosure will provide transparency benefits for consumers if very large financial institutions price overdraft credit through a periodic interest rate, which hopefully they will do. The CFPB should prevent evasions and deceptive pricing by closing loopholes in the APR disclosure through a "fee-inclusive" calculation, as discussed in Section 10.1.

In general, the APR enables loans of different amounts, different lengths, and different mixtures of interest and fees to be compared to each other. A loan that has a lower APR will generally cost less than one with a higher APR if the two are used for the same amount of time, whether for one week or one year.

The current pricing and disclosures on overdraft fees prevent a consumer from comparing the cost of borrowing $100 for 10 days until payday using different options. A $35 overdraft fee is equivalent to an APR of 290%. The cost of putting $100 on a 29% APR credit card and repaying it in 10 days would be about 79 cents.

Consumers do not need to understand how the APR is calculated; they only need to know that lower is better than higher. Consumers can understand that 290% APR is more than 29% APR.

2.3.2 Separate periodic credit statements, with time to repay.

Another core TILA protection for open-end credit is periodic statements, including time to repay the credit following the statement. Under the proposed rule, very large financial institutions that offer covered overdraft credit would be required to structure the credit as a separate credit account with separate periodic credit statements.

Periodic statements allow a consumer to clearly see how much credit has been used and how much it has cost each month and year-to-date. The usage and cost of credit will not be buried in the bank account transaction history, obscuring how much the consumer has overdrafted and what it cost. Although bank account statements include the amount of overdraft fees, they do not need to disclose the amount of overdraft credit extended at all. There is no way for the consumer to see how much credit they used and the price they paid relative to the amount of credit.

Consumers will benefit by being able to see how much credit they are using and what they are paying for it. This requirement is another way consumers can understand the cost of overdraft credit and decide whether the product continues to meet their needs.

Additionally, the proposal would require very large financial institutions providing covered overdraft credit to comply with § 1026.7(b)(11), which, in accordance with TILA, requires periodic statements to disclose a payment due date. (As discussed below, the CARD Act also requires that date to be the same day of the month for each billing cycle.) Although TILA does not specify payment frequency, it does require statements for each month where there is activity. For open-end credit that is not subject to the Credit CARD Act, the creditor must mail or deliver the periodic statement at least fourteen days before the due date. As discussed below, the CARD Act requires at least 21 days following each statement. In practice, payments would not be required more frequently than once a month under either scenario.

Advance notice of the due date with time to pay will help consumers manage their finances. It is a far safer approach than the way overdraft credit is currently repaid by immediately seizing the next incoming deposit, regardless of what other bills the consumer planned to pay. As discussed in Section 2.3.3 below, we support the proposal to prohibit high-cost overdraft credit from being structured as a negative balance on an asset account.

While TILA also does not dictate that open-end credit be repaid in installments rather than as a balloon payment, balloon payment repayment obligations are rare. Thus, consumers could benefit from the shift to providing statements with time to repay combined with the ability to make partial payments over time. They will be able to revolve their overdraft debt, freeing up more funds available to manage other expenses and pay less in per-transaction fees. Instead of having their accounts charged off after 60 days if they cannot repay the overdraft debt and fees, they will likely have more time and more ability to resolve that debt.

Periodic statements must also disclose late payment fees and penalty rates for late payment. Currently, however, consumers do not get timely disclosures or warnings about sustained overdraft fees that some institutions charge if overdraft credit is not immediately repaid, other than through fine print disclosures at account opening.

Together, the information and predictability provided by periodic statements will make it much easier for consumers to manage their finances by knowing when they are required to pay and making plans for payment on that date. Consumers will also then have options for scheduling their payments on various obligations. All these requirements equip consumers with more information about the cost of overdraft credit and permit consumers to plan when to make payments on the overdraft credit obligation.

2.3.3 Overdraft credit with above breakeven fees should be structured as a separate credit account, not a negative balance on an asset account.

We support prohibiting very large financial institutions from structuring covered overdraft credit as a negative balance on a checking or other asset account and instead requiring them to structure the credit as a separate credit account, as the CFPB has proposed in § 1026.62(c). When the cost of overdraft credit exceeds a nominal fee to cover the financial institutions costs, there are several benefits to structuring it as a separate account instead of a negative balance.

First, the important protections of TILA described in Sections 2.3 to 2.5 are designed for separate credit accounts. Many of them would be difficult, confusing, or even impossible to implement if the credit were structured as a negative balance on a non-credit account. APR disclosures, the periodic statement requirements for open-end credit, the ban on collecting payments by offset and other protections would not make sense if overdraft credit were a feature of an asset account rather than a distinct account. Thus, TILA's purposes of ensuring the informed and safe use of credit would be difficult if not impossible to facilitate.

Second, credit structured as a negative balance is repaid immediately (in whole or part) upon the next deposit. That makes it difficult for consumers to manage their finances, pick which bills they pay and when, and predict when payments will be taken. While a negative balance may be repaid on a regular payday, it could also be repaid when another type of credit posts, including a provisional credit for a dispute unauthorized charge or error that could later be reversed.

Third, when overdraft credit is repaid immediately by offset, it can cause other payments to bounce, causing consumers to be late on their rent, utility payments, or other bills. That problem is exacerbated when the repayment amount includes high fees that are added to the overdraft credit. Thus, repayment by offset can cause late fees and even additional overdraft or NSF fees.

Fourth, when financial institutions are able to repay themselves ahead of all other creditors the instant a deposit is received, they have less of an incentive to do responsible underwriting. They can collect, even if the consumer cannot afford to repay. That is less of a problem if the financial institution is not making a profit on the credit, but it is a significant problem and a key source of today's problems due to the high profits made off overdraft fees today.

2.4 Hybrid debit-credit cards need the protections long provided for other credit cards.

As discussed in Section 5.6 below, hybrid debit-credit cards meet the core definition of "credit card" that has been in TILA for about five decades. TILA's original credit card protections are equally important for overdraft credit accessed through a hybrid debit-credit card.

2.4.1 Control over how to repay: no mandatory offset.

Some credit cards are issued by banks or other financial institutions which have a deposit account relationship with the card user. This relationship formerly gave the bank an inordinate amount of power because it could collect payments by setting off money in a deposit account against the credit card debt. If the customer disputed the charges to their card, the bank could ignore the dispute and collect the payment. When considering the Fair Credit Billing Act, Congress heard testimony about the harm and hardship that offset caused to the consumer; checks for rent and other essentials could bounce when the bank, without notice, took funds out of the account.[29]

When Congress enacted the Fair Credit Billing Act, it restricted the right of the card issuer to take funds out of a deposit account to satisfy its credit card claims. TILA provides that the card issuer cannot take funds out of a deposit account to satisfy a credit card debt except under an automatic payment plan previously authorized by the cardholder in writing. Even then, the card issuer must not take out the automatic payments with respect to a disputed amount upon timely notice.

The proposed rule would require very large financial institutions providing covered overdraft credit accessed by a hybrid debit-credit card to comply with these same rules, prohibiting them from utilizing the practice of offset. The concerns that motivated Congress to adopt the Fair Credit Billing Act apply equally to overdraft credit accessed through hybrid debit-credit cards. The current practice of collecting repayment of overdraft credit by offset causes the same problems with rent checks or other payments bouncing and makes it difficult for consumers to pay for necessities. If a consumer uses a hybrid debit-credit card to make a purchase but then has a dispute about that purchase, the consumer will also benefit from more control over that dispute, as discussed in Section 2.4.2 below.

In addition, as discussed in Section 11.1 below, the proposed rule would subject very large financial institutions providing covered overdraft credit to the EFTA's ban on mandatory

[29] "The Center has received numerous complaints of this practice from lawyers throughout the country. In every instance, the account being set-off against consisted of the family checking account which represented the wages of the head of the family and was being relied upon for the procurement of necessary goods and services… The particular evil of the set-off against deposits is that it is virtually unknown to the average consumer. Deposit account holders were the prime source of the unsolicited mailings which characterized the implementation of the bank credit card system a couple of years ago. Since that time, banks have apparently attempted to recoup losses occasioned by their reckless and improvident merchandising by appropriating the checking accounts of unwary consumers, extending them no opportunity to defend themselves of work out an alternative system for payment."

A Bill to Amend the Truth in Lending Act to Protect Consumers Against Careless and Unfair Billing Practices, and for Other Purposes: Hearing Before the Subcomm. on Fin. Inst. of the Senate Comm. on Banking, Housing and Urban Affairs, 92d Cong. 236–237 (1971) (statement of Professor William F. Willier, Director, National Consumer Law Center, Boston College Law School).

repayment by preauthorized electronic fund transfer. However, a consumer may choose voluntarily to set up automatic payments.

When the prohibition of offset is coupled with the prohibition of requiring automated payments, consumers can control when, how, and from what account payments are made. This will allow consumers the ability to recover from an overdraft and can protect the consumer from an automatic deficit after an incoming deposit. It will also enable consumers to prioritize which of their obligations to pay, something that is especially important to consumers with irregular income. As a result, consumers will be able to ensure their deposits are first used to cover necessary costs like housing, food, and medicine.

The prohibition on offset will also serve to protect consumers' benefits that are considered exempt income. If worse comes to worst and the consumer cannot afford to repay the overdraft credit incurred on a hybrid debit-credit card, that debt may be sent to collection, but it cannot be automatically taken from the consumer's bank account. If the financial institution chooses to sue the consumer, they cannot seize any resulting judgment from income such as Social Security, veterans' benefits, or disability payments, which are protected from garnishment.

These collective requirements also incentivize very large financial institutions providing covered overdraft credit through hybrid debit-credit cards to consider affordability. They will not have first lien on the consumer's income, so they must extend credit prudently on affordable terms, which is important as discussed in Section 2.5.1 below.

2.4.2 Right of cardholder to assert claims or defenses against card issuer.

Under the proposed rule, consumers who utilize a hybrid debit-credit card tied to a covered overdraft credit product offered by a very large financial institution would have the ability to assert claims or defenses against the card issuer. We support that proposal.

The proposed rule allows consumers to object to charges if they did not get what they paid for when they make a purchase with a hybrid-debit card. As they can do with a credit card, they could avoid repaying the credit by asserting the same claims and defenses against the financial institution that they can against the merchant who failed to resolve satisfactorily a dispute about the credit card purchase. This protection is important whether the payment is made by drawing on overdraft credit or a traditional credit card. Either way, the consumer has a debt that they should not have to repay if their claims and defenses are valid.

Moreover, credit and debit cards are issued on the same major networks: Visa, MasterCard, Discover, and American Express. The claims and defense rule gives card issuers and card networks the incentive to vet and monitor the merchants who they authorize to accept their cards because it makes them more accountable for the merchants' conduct. That vetting and monitoring already takes place and applies to both debit and credit cards. For example, once a merchant is authorized to accept Visa cards, they must accept all Visa cards.[30] Accepting claims and defense asserted against hybrid debit-credit cards will give financial institutions and the card networks a broader view of problematic conduct by authorized merchants that may demand changes or, in extreme cases, revocation in the ability to accept cards.

2.4.3 Other TILA credit card requirements.

As discussed in the section-by-section comments below, consumers will also benefit from the application of other core TILA credit card requirements. For example, the requirements related to the application for, and issuance of, cards will ensure the choice and voluntary use of credit. Consumers will also benefit from the stronger protections for billing errors and unauthorized use that apply to credit cards under TILA, which are more robust than their EFTA counterparts.

2.5 Hybrid debit-credit cards need the protections of the Credit CARD Act.

In the 1990s and 2000s, credit card lenders engaged in numerous abuses, demonstrating that TILA's existing protections for credit cards were not enough.[31] Consequently, Congress adopted the Credit Card Responsibility, Accountability, and Disclosures (CARD) Act of 2009 to provide additional protections to address these abuses and the significant problems that consumers were facing with credit card debt.

As discussed in Section 5.7 below, hybrid debit-credit cards meet the definition of a credit card as used in the CARD Act. The protections that the CARD Act provides will benefit consumers who use overdraft credit accessed by a hybrid debit-credit card, and extending those protections is consistent with Congress's intent to protect consumers when they use credit accessed by a card.

2.5.1 Ability to Pay.

The assessment of a consumer's ability to repay is one of the most basic elements of responsible credit. It only harms, rather than benefits, a consumer to extend credit they are unable to repay. As a result, ability to repay requirements, as well as prohibitions on lending without regard to ability to repay, are found throughout federal law in many different forms.[32]

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[30] *See* Visa, 5 Important Visa Rules That Every Merchant Should Know (2015), https://usa.visa.com/content/dam/VCOM/download/merchants/5-important-rules-every-merchant-should-know-052615.pdf ("To offer the broadest possible range of payment options to cardholders, merchants must accept all categories of Visa debit, credit, and prepaid cards.").

[31] National Consumer Law Center, Consumer Credit Regulation, § 8.2 (3d ed. 2020), updated at http://www.nclc.org/library.

[32] *See* Lauren Saunders, NCLC, Federal ability-to-repay requirements for small dollar loans and other forms of non-mortgage lending (Nov. 1, 2021), https://www.nclc.org/wp-content/uploads/2022/08/IB_ability_to_pay-1.pdf.

It is no surprise, therefore, that Congress adopted an ability to repay requirement for credit cards because of the severe problems consumers were facing with unaffordable credit card debt.

Unaffordable debt incurred through hybrid debit-credit cards poses similar problems, and it is consistent with Congress's intentions in passing the Credit CARD Act to extend that protection to overdraft credit accessed through a hybrid debit-credit card.

Under the proposed rule, very large financial institutions who offer covered overdraft credit accessed by a hybrid debit-credit card would be required to consider the consumer's ability to make the required minimum payment under the terms of the account based on the consumer's income or assets and the consumer's current obligations.[33] The rule does not impose any specific residual income, debt-to-income, or documented underwriting requirements. It does, however, require the financial institution consider the consumer's obligations and whether the consumer has the capacity to repay the overdraft credit per the terms of the credit.[34]

The requirement to assess a consumer's ability to pay is a bare minimum act any institution lending responsible forms of credit should undertake. If anything, the CARD Act rules are too weak.[35] Indeed, the CFPB recently found that more cardholders are carrying balances month to month or failing behind on payments, and a greater percentage of balances are becoming more than 180 days delinquent.[36] Nearly one in ten credit card users find themselves in "persistent debt" where they are charged more in interest and fees each year than they pay toward the principal, and they find that pattern difficult to escape.[37] But the existence of an explicit ability to repay requirement provides some protection by ensuring a baseline of minimal underwriting.

The CARD Act's ability to repay requirement should be especially easy for providers of hybrid debit-credit cards to satisfy because they have access to the consumer's bank account transaction data. Thus, they can analyze the consumer's income, expense, and repayment patterns without having to request outside data.

Finally, the CARD Act's ability to repay requirement will incentivize very large financial institutions to structure and price overdraft credit in a way that ensures consumers are better

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[33] Reg. Z § 1026.51.

[34] "Reasonable policies and procedures also include consideration of at least one of the following: the ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations." Reg. Z §1026.51(a)(1)(ii).

[35] The CARD Act requires consideration of "debt obligations" but not regular expenses like rent, food and transportation.

[36] CFPB, Press Release, CFPB Report Finds Credit Card Companies Charged Consumers Record-High $130 Billion in Interest and Fees in 2022 (Oct. 25, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-credit-card-companies-charged-consumers-record-high-130-billion-in-interest-and-fees-in-2022/.

[37] *Id.*

able to repay the obligation. This is in stark contrast to current overdraft practices, where high-cost overdraft credit is extended with little to no assessment of the consumer's ability to repay the overdraft credit while also meeting other obligations.

As discussed in Section 3.1 below, we do not believe that applying a minimal ability to repay requirement for hybrid debit-credit cards will result in consumers being denied access to overdraft credit. Very large financial institutions will still have the option of offering low-cost overdraft services and can structure overdraft lines of credit so they are affordable.

2.5.2 Limit on "fee harvester" fees in the first year.

The Credit CARD Act's "fee harvester" provision, reflected in Regulation Z § 1026.52(a), limits the total amount of fees that a consumer is required to pay with respect to the account during the first year to 25% of the account's credit limit. That provision accomplishes two goals. First, it limits the ability of credit card issuers to use fees to distort the disclosed APR, deceiving consumers about the cost of credit.[38] Second, it prevents high fees from consuming a large portion of the credit line, leaving consumers with less credit than they expected and potentially high fees for exceeding their limit.

The fee harvester provision would benefit holders of hybrid debit-credit cards for similar reasons, and extending those protections would be consistent with Congress's intentions in adopting the fee harvester provisions. By limiting these fees, costs may be priced more often through a periodic interest rate, which will result in more accurate APR disclosures.

While the interest rate itself is not capped, the important fee harvester rule will prevent deception, evasion, and consumer abuses. A very large financial institution who offers covered overdraft will have limited ability to impose fees that individually might not appear excessive but cumulatively pile up and distort the APR.

For example, although a very large financial institution could charge 500% APR under the proposed rule, it would have to disclose that rate, and would have limited ability to hide that rate in fees. A consumer can then decide whether they want to choose this product or opt for a lower-cost alternative. As a result, the proposed rule would improve consumers' ability to understand the price of credit and compare it to the pricing of other forms of credit a consumer may be considering.

Similarly, applying the fee harvester rules will make it easier for consumers to understand how much overdraft credit they have and how they can use it, without high participation fees consuming the credit limit.

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[38] As discussed in Section 10.1 below, we urge the CFPB to close the loopholes in TILA's APR disclosures for open-end credit.

The potential for abuse and evasions by hybrid debit-prepaid cards is similar to the problems that plagued fee harvester credit cards. Congress would reasonably expect that other forms of credit accessed through a card would receive similar protections to prevent deceptive and abusive use of fees to distort credit lines.

Though the limits on harvester fees only apply for first year of an account, imposing numerous fees after the first year could be characterized a bait-and-switch tactic. Doing so might amount to an unfair, deceptive, or abusive practice, especially considering how difficult it is to switch bank accounts.

Recommendation: We urge the CFPB to consider extending the fee-harvester protections beyond the first year of the account for hybrid credit-debit cards using either TILA or its UDAAP authority. We also urge the CFPB to make clear that the fee harvester rules apply even for bank accounts that are more than one year old at the time of the effective date.[39]

2.5.3 Reasonable and proportional penalty fees.

The Credit CARD Act limits the amount card issuers can charge for ''back-end'' penalty fees, such as when a consumer makes a late payment or exceeds their credit limit. *See* Reg. Z, § 1026.52(b)(1). This limit would be important to prevent hidden back-end fees on hybrid debit-credit cards. It would provide an incentive for institutions to price overdraft credit transparently, as part of the upfront price of the covered overdraft credit, and would prevent evasions by hiding overdraft fees in different forms.

2.5.4 Ban on declined transaction fees and other penalty fees with no associated cost.

The Credit CARD Act prohibits ''declined transaction fees'' and other penalty fees where there is no cost to the card issuer associated with the violation of the account agreement. *See* Reg. Z, § 1026.52(b)(2). This provision would also prohibit declined ACH transaction fees.

Consumers would benefit from having this prohibition applied to hybrid debit-credit cards. It would save consumers from punitive fees for transactions that impose no cost on the financial institution and would stop institutions from pushing consumers into choosing expensive overdraft protection as a way of saving themselves from their bank's own high declined transaction fees. We agree with the CFPB that this rule would also aid in the shift away from back-end fees and toward upfront pricing in the form of periodic rates disclosed as APRs.

[39] This will likely happen automatically if banks offer new overdraft line of credit accounts in response to the proposed rule, and any fees charged on deposit accounts outside of a separate account should be limited to breakeven fees.

2.5.5 Ban on retroactive increases in the APR and fees.

The Credit CARD Act prohibits increases in any APR, fee, or finance charge applicable to any outstanding balance on a credit card account, with exceptions where advance notice is provided and with a requirement that the promotional rate generally cannot expire earlier than six months. *See* Reg. Z, § 1026.55. The Act also requires that card issuers reevaluate rate increases. *See* Reg. Z, § 1026.59.

Retroactive interest rate increases on balances that the consumer has already incurred would be equally harmful if imposed on overdraft credit accessible through a hybrid debit-credit card. And for the same reasons, consumers who are subject to rate increases but have improved their circumstances should have the opportunity to have rate increases reevaluated.

2.5.6 Requirements for over-the-limit fees.

The Credit CARD Act restricts fees for over-the-limit transactions to one per billing cycle and requires that the consumer opt-in to payment of such transactions for the fee to be charged. *See* Reg. Z, § 1026.56. While hybrid debit-credit cards do not currently charge over-the-limit fees, restricting such fees could be important to prevent evasions and the abusive practices that led to the CARD Act rules.

2.5.7 Twenty-one days to repay following statement, with same due date every month.

The Credit CARD Act extended the payment deadline from 14 days to 21 days from the date that the card issuer sends the periodic statement. *See* Reg. Z § 1026.5(b)(2)(ii)(A)(1). The Act also required that the due date be the same date every month. *See* Reg. Z § 1026.7(b)(11)(i)(A).

Fourteen days is a short period of time, especially given that there could be delays in the mail on both ends. Consumers need a reasonable time to pay hybrid debit-credit cards just as they do other credit cards. They will also benefit from the certainty of being able to plan when their bills will be due.

2.5.8 Other CARD Act requirements.

The Credit CARD Act has other provisions, including those governing how a card issuer must allocate payments in excess of the minimum periodic payment; limits on imposing a finance charge as a result of the loss of a grace period; a requirement to submit credit card agreements to the CFPB on a quarterly basis; and limits on credit cards promoted to students.

While some of these provisions will not be applicable to hybrid debit-credit cards, they do not pose any problems for financial institutions, and they serve to prevent the emergence of creative evasions and abuses.

Others, such as the ability for the CPFB to collect agreements and make them available to the public, will promote transparency in and understanding of the hybrid debit-credit card market. The protections for students will also be helpful for hybrid debit-credit cards, as explained in Section 12.15 below.

3. Predictions that the proposed rule will result in changes that harm consumers more than benefit them are unwarranted.

Opponents of the proposed rule have predicted that financial institutions will react to the rule in a way that will lead to consumer harm. While the full range of responses in the marketplace by all covered financial institutions are myriad and difficult to predict, and some consumers may be worse off while others are better off, we disagree that consumers overall will be harmed by less overdraft protection, higher costs, less access to bank accounts, or other claims of harm. To the contrary, we believe that strong forces will compel financial institutions to continue offering overdraft protection, to avoid large fee hikes in other areas, and to continue serving their communities.

3.1 Financial institutions will not eliminate overdraft protection, and consumers will overdraft less and be better off.

Contrary to industry allegations, financial institutions will not react to the proposed rule by largely eliminating overdraft coverage for wide swaths of consumers and declining transactions *en masse*. The CFPB estimates that 23 million households pay overdraft fees in any given year. Financial institutions cannot afford to ignore that market. Some overdrafts may be curtailed, but that will be positive for many consumers. Overall, financial institutions will find a way to continue providing helpful overdraft coverage, and consumers will adjust and be better off.

It is highly unlikely that financial institutions will make dramatic changes that significantly curtail access to overdraft protection in the areas where consumers need it. Bouncing payments causes considerable friction with their customers with little benefit to the financial institution, especially as more and more have eliminated nonsufficient funds fees. Declining overdrawn payments that consumers want covered will add customer service costs as consumers complain to call centers.

The American Bankers Association has argued that consumers value and appreciate overdraft coverage.[40] It seems unlikely that very large financial institutions will cease offering a service that their customers value and expect as part of a banking relationship.

[40] *See* Rob Nichols, American Bankers Association, ABA Statement on CFPB's Proposed Rule to Limit Overdraft Protection (Jan. 17, 2024), https://www.aba.com/about-us/press-room/press-releases/cfpb-proposed-rule-to-limit-overdraft-protection.

Overdraft services do not need to directly turn a profit. They are part of the broad set of services that come with a bank account. Not every component of those services needs to be independently profitable. Just as financial institutions initially charged for bill pay and eventually decided they needed to offer it for free as part of their service offering, they may do the same with overdraft protection. It is the account overall, or actually the broader, long-term banking relationship, that needs to be profitable, not every discrete service.

In addition, financial institutions have a responsibility to serve their broader communities. Providing functional accounts for lower income consumers is part of their community service obligation, as discussed in Section 3.2 below.

Moreover, very large financial institutions that wish to continue turning a profit on overdraft credit can develop overdraft lines of credit in compliance with Regulation Z. Financial institutions offer a wide range of credit products under Regulation Z to a wide range of consumers with different credit profiles. The proposed rule imposes no price limits on overdraft credit under Regulation Z, and the ability-to-repay requirements are quite minimal, as discussed in Section 2.5.1 above.

Overdraft credit lines developed under the proposed rule may look different from those typically offered today. Instead of credit lines in the thousands of dollars with very low minimum payments that can stretch payment out for years, financial institutions can offer low-limit lines and minimum payments that result in repayment over a few months. Just as some institutions have managed to offer credit cards to consumers with less than pristine credit without charging abusive fees, very large financial institutions can adapt those learnings to overdraft lines of credit.

Financial institutions will also develop and promote other tools to help consumers avoid overdrafts to avoid the friction of declining transactions. Some financial institutions have already found that tools like low balance alerts, overdraft alerts combined with a 24-hour grace period, and financial management tools in mobile apps can decrease overdrafts. Given the high number of overdrafts that are inadvertent,[41] more help in avoiding them will result in a win-win for the bank and the consumer.

As the CFPB describes, the new rule might cause financial institutions to waive overdraft fees less frequently. But we agree that, for almost all consumers and certainly the lowest income ones, a small fee that is more predictable and less onerous is a better outcome than a high $35 fee that the most vulnerable consumers rarely get waived. Less discretion in the waiving of overdraft fees also will lessen inequality and disparate impacts across groups of consumers.

If sufficient overdraft protection is no longer offered to consumers at their current financial institution, market competition will lead consumers to find an account at another institution that

[41] 89 Fed. Reg. at 13891 n.251 (citing various sources indicating that many overdrafts are a mistake); 2023 Making Ends Meet Survey, *supra.*

will offer services they desire. Even if specific accounts are not high profit centers initially, financial institutions may view them as part of a longer term, lifetime relationship.

It is also possible that some financial institutions could respond by underwriting non-covered overdraft services more conservatively or by reducing the hidden overdraft credit limits for some consumers. Some changes in that direction could benefit consumers in a number of ways. Consumers could avoid fees for transactions that they would prefer to be declined. In some cases, the consumer might have other liquid funds or credit options. The CFPB found in one survey that over half of consumers, even those who frequently overdraft, had available credit.[42] In other cases, the consumer would prefer to forgo the purchase rather than pay a large fee. Consumers would also save money on escalating fees that make it harder to cover other expenses. They would avoid large negative balances that they cannot bring positive, causing them to close their accounts.

As they learn their institution's new overdraft policies, consumers will adjust, and they are likely to find better alternatives. They may sign up for other, less expensive, and easier to manage forms of overdraft coverage, like overdraft lines of credit or links to savings or credit card accounts. If consumers learn that their overdrafts will not be covered, they may find other ways to manage their finances, such as taking advantage of the growing availability of tools to monitor balances, anticipate payments, and predict shortfalls. Consumers may cut back on expenses or anticipate potential overdrafts and proactively seek out credit or other options ahead of time.

Changes are likely to be most significant for heavy overdrafters who may find that they cannot overdraw their accounts as frequently. But frequent overdrafters have suffered the most harm and will most benefit from having more money in their pockets that previously went to overdraft fees and from being less at risk of losing their bank accounts. Frequent overdrafts with high fees are simply not a safe and sustainable way of obtaining credit on a regular basis; they are a debt trap that creates more problems than it solves. It is possible that some frequent overdrafters may qualify for overdraft lines of credit or other forms of credit that are cheaper and easier to manage. Even if frequent overdrafters do not qualify for other credit products, unaffordable overdraft credit that puts them deep in debt and threatens their access to banking services is not the answer to not having enough money.

As with the elimination of payday loans, consumers overall will find better ways to manage without high-cost bank overdraft loans. When payday loans are eliminated, consumers find better ways to cope with financial challenges:

- Former borrowers generally agree that they are better off without payday loans and express relief that the loans are no longer available.

[42] 2023 Making Ends Meet Survey, *supra*, at 6-7.

- People use a variety of strategies to manage their finances, including borrowing from family and friends, negotiating payment plans with utility companies, and using pawn shops or traditional credit products like credit cards.

- Eliminating high-cost loans spurs an increase in affordable loans like credit union loans and more attention on other safer alternatives.[43]

Consumers will make similar adjustments if they cannot overdraft as frequently. Consumers have a wide array of potential alternatives available to help meet shortfalls, and elimination of convenient but destructive options can spur consumers to find much better choices.[44]

3.2 The proposed rule will not make bank accounts more expensive or push vulnerable consumers out of banking.

Some critics claim that the proposed rule will lead to the disappearance of free checking. But competition will preserve the option of free checking, which is a popular marketing technique. For example, financial institutions in the past found it difficult to charge monthly fees in the face of competitors who offered free checking, and that will remain a restraining force.

Very large financial institutions like Capital One have shown that it is possible to serve consumers with <u>no</u> overdraft fees, no monthly fees, and no minimum balances. Capital One serves a large subprime consumer population, showing that overdraft fees are not a necessary component of offering banking services to those consumers.

Some financial institutions may reconsider monthly fees, or higher minimum balance requirements to avoid fees. But accounts with modest and transparent fees can be a better option than "free" accounts with hidden back-end junk fees. The CFPB estimates that the savings from the proposal would translate to $150 for households that pay overdraft fees. Even with a $10 per month fee, costing $120 a year, those consumers will be ahead. The most vulnerable consumers, who pay 10 or more overdraft fees a year, will be far better off even if they pay monthly fees. And new monthly fees may be even lower than $10. As the CFPB has shown, the lost overdraft revenue per account is in the range of $2 to $3.[45]

Any movement toward monthly fees is also likely to have positive benefits for the most vulnerable consumers as it will spread the costs of checking accounts more equitably instead of

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[43] *See* NCLC, After Payday Loans: Consumers Find Better Ways to Cope with Financial Challenges (March 2022) (summarizing studies), https://www.nclc.org/wp-content/uploads/2022/10/IB_After_Payday_Loans.pdf.

[44] *See* Consumer Federation of America & Woodstock Institute, Alternatives to High-Cost Loans and Policy Solutions to Expand Affordable Options (Dec. 2022), https://consumerfed.org/wp-content/uploads/2022/12/Report-Alternatives-to-High-Cost-Loans-and-Policy-Solutions-to-Expand-Affordable-Options-1.pdf.

[45] *See* 89 Fed. Reg. at 13893.

subsidizing the cost of checking accounts with punitive fees leveraged on those least able to pay them.[46] While a small monthly fee may be an annoyance for a consumer used to free checking, large overdraft fees can be devastating for consumers who are struggling to get by month to month and to maintain their access to the banking system.

But competition will prevent prices from escalating significantly. That competition will come from other large financial institutions and from the growing set of banking services offered by nonbank fintechs in partnership with banks. Financial institutions that price their accounts transparently, without abusive overdraft fee practices, will have an easier time competing with those that hide costs. More transparent pricing for overdraft protection and fewer hidden practices will make it easier to comparison shop and keep prices down.

Similarly, the CFPB notes that the expected loss in overdraft fee revenue is likely to be on par with or lower than the voluntary decrease in revenue that many large financial institutions absorbed between 2019 and 2022, without disrupting access to bank accounts and overdraft protection.[47] The CFPB's predictions are also bolstered by the experience in the United Kingdom under their new overdraft regulations.[48]

Moreover, there are other low-cost banking options for consumers who have struggled with overdrafts. For example, there are nearly 450 Bank On-certified overdraft-free accounts, available in all 50 states, with monthly fees of $5 or less (or $7 with paper statements).[49] Those monthly fees add up to an annual cost of about two overdraft fees. "Bank On" coalitions across the country, composed of local governments, financial institutions, and community groups, help to bring unbanked people into the banking system by offering them safe accounts with no overdraft or NSF fees, among other features. While these Bank On accounts are not free, they are far cheaper than incurring multiple overdraft fees, and many underbanked consumers choose to utilize these accounts because of their transparency and safety.

Opponents of the overdraft fee rule are falling into what economists call the "lump of profits" fallacy: any attempt to tamp down on costs of one illicit activity will automatically lead to a newfound source of profits elsewhere; squeeze one side of the balloon and the other expands.[50] Opponents of the overdraft fee rule fall into that fallacy when they assert that bank accounts will become more expensive if the CFPB addresses overdraft fee abuses. Put differently, they imply that financial institutions will automatically be able to recoup their back-end, uncompetitive overdraft fees if they are forced to move fees into a more transparent front-end posture. But that is a fallacy. Correcting for market distortions, as the CFPB's proposed rule does, allows market

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[46] *See* 89 Fed. Reg. at 13893.

[47] *See* 89 Fed. Reg. at 13893.

[48] *See id.*

[49] A list of coalitions across the country along with other information is available at joinbankon.org.

[50] Hal Singer, The Lever, The Lie Banks Use To Protect Their Late-Fee Profits (Mar. 20, 2023), https://www.levernews.com/the-lie-banks-use-to-protect-their-late-fee-profits/.

forces to drive those excess profits down. And the benefits of this competition are especially high for the vulnerable consumers who pay most of these back-end fees.

The experience with the Credit CARD Act is illustrative. Banks claimed that reducing hidden back-end fees and retroactive price hikes would drive up prices. Those claims did not come to pass, and in fact fees overall went down. Consumers saved $16 billion in late and over-the-limit fees from 2011 to 2014.[51] They also saved $2.1 billion in interest rate reductions in the first few years after the Act's passage.[52] The CFPB has estimated that, for cardholders who carry a balance, the total cost of credit fell 150 basis points from the end of 2008 to the end of 2012, due in large part to the reductions in fees caused by the Credit CARD Act.[53] By 2015, the total cost of credit card had fallen another 40 basis points.[54] In general, the Act created a market "in which the costs incurred by consumers are driven more by APR and annual fees and less by back-end penalty fees and APR repricing."[55] Overall, credit cards remained and remain widely available. Although there have been some contractions among young consumers and those without ability to repay, that was an intended effect of the Credit CARD Act.[56]

Very large financial institutions are simply not going to give up the large segment of their customer base that pays overdraft fees, sustaining a large decline in their account volume. They will find a way to continue serving them. Capital One, even without charging any fees, has "seen customers succeed by using no fee overdraft responsibly," and the bank has found "our decision has also been good for our business, by attracting new customers, retaining current customers and reducing operational complexity," as well as by helping "deepen our relationships with customers who can continue to grow and thrive with us over the longer term."[57]

Indeed, serving low-income consumers is a legal obligation. The Community Reinvestment Act (CRA) requires financial institutions to serve their entire communities. The CRA devotes 15% of the performance evaluation for large banks to their performance on the *Retail Services and*

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[51] *See* Consumer Financial Protection Bureau, Consumer Credit Card Market Report 10 (Dec. 3, 2015), http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf (hereinafter "CFPB 2015 CARD Act Report").

[52] Consumer Fin. Prot. Bureau, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market 72 (Oct. 1, 2013), https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf (hereinafter "CFPB 2013 CARD Act Report").

[53] *Id*. at 33.

[54] CFPB 2015 CARD Act Report at 77.

[55] *Id.* at 37.

[56] CFPB 2014 CARD Act Report at 6.

[57] Comment of Capital One Bank to CFPB re: Overdraft Lending: Very Large Financial Institutions, Docket No. CFPB– 2024–0002 or RIN 3170–AA42 (Apr. 1, 2024).

Products Test.[58] CRA examiners will reward a bank if it can show evidence that it has a suitable deposit account product to fit the needs of low to moderate income households in their assessment areas, considering both the features of the product and scale of adoption. Therefore, even if accounts for low-income customers are not hugely profitable, very large financial institutions will feel obliged to serve those customers as part of their legal, moral, and community service obligations.

Some argue that transparent bank fees might deter some consumers from having bank accounts. However, as the FDIC's 2021 National Survey of Unbanked and Underbanked Households revealed, the second-most cited reason by consumers for not having a bank account was because consumers "don't trust banks."[59] Transparent fees mean less fear of surprise fees, which can lead to more trust in banks, and thus more consumer confidence in holding their money in a bank.

Additionally, any consumers who forgo bank accounts due to transparent fees are likely to be far outweighed by the number of consumers who obtain or are able to retain an account due to the impact of the proposed rule. A major reason vulnerable consumers become unbanked, whether voluntarily or involuntarily, is because of high overdraft fees. For example, a Pew survey found that 41% of prepaid card users said they had closed or lost a checking account because of overdraft fees.[60]

Currently, consumers are being charged exorbitant overdraft fees that pile up because of unfair or predatory practices that lead to more overdrafts— practices like high to low transaction reordering, authorized positive settle negative practices, or deception surrounding the use of the available versus actual balance. When overdraft fees pile up because of these predatory and abusive practices, consumers end up saddled with insurmountable debt they cannot repay. As a result, the consumer's account is closed, and the bank charges off the account as a loss. The proposed rule could effectively eliminate the incentive for very large financial institutions to continue these predatory practices, leading to fewer overdrawn and closed accounts.

By curbing predatory practices that lead to overdrawn and closed accounts, the proposed rule could also lead to fewer consumers being impacted by blemished account histories. When consumers' accounts are closed due to unpaid and overdrawn accounts, financial institutions report the information to specialty consumer reporting agencies who prepare reports that are used for checking account screening. Negative reports prevent consumers from being able to

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[58] *See* Mark Pearce, FDIC, Memo to FDIC Board of Directors on Final Rule on Community Reinvestment Act Regulations (Oct. 18, 2023), https://www.fdic.gov/news/board-matters/2023/2023-10-24-notice-dis-a-mem.pdf.

[59] 2021 FDIC National Survey of Unbanked and Underbanked Households Executive Summary at 2, https://www.fdic.gov/analysis/household-survey/2021execsum.pdf.

[60] Pew Charitable Trusts, Why Americans Use Prepaid Cards - A Survey of Cardholders' Motivations and Views at 8 (Feb. 2014), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2014/prepaidcardssurveyreportpdf.pdf.

open a bank account. If fewer consumers' accounts are overdrawn and reported to check screening consumer reporting agencies, then more consumers will be able to obtain bank accounts, increasing financial inclusion.

The number of unbanked consumers has steadily declined over the last few decades as the cash economy has shrunk, electronic payments have become more important, and technology has made it easier to offer and maintain banks accounts. As the CFPB has described, that trend continued despite the adoption of the Regulation E rules curtailing some overdraft fees on debit and ATM card transactions and voluntary changes that reduced the fees.[61] The broader forces that are leading people to become banked will continue even without back-end overdraft fees. For all the reasons mentioned above, the proposed rule will increase financial inclusion, bringing more people into the banking system and helping narrow the fully banked gap between white consumers and communities of color. As a result, the CFPB should reject unsupported "Chicken-Little" claims that the proposed rule will lead to the elimination of free checking or will price consumers out of bank accounts.

4. The alternatives the CFPB considered would not sufficiently protect consumers.

The CFPB considered other approaches to address problematic overdraft practices, but none of these alternatives sufficiently protect consumers from the harms of current overdraft practices.

First, the CFPB considered striking § 1026.4(c)(3) from Regulation Z in its entirety, effectively making all overdraft fees subject to Regulation Z. The CFPB has the authority to pursue this alternate approach, which would be more faithful to the Truth in Lending Act. But the CFPB also has the authority to include exemptions and has expressed legitimate reasons to propose the narrow exemption permitting non-covered courtesy overdrafts that are at or below the breakeven standard. We support this approach as it will allow very large financial institutions to still provide courtesy overdrafts to consumers who may not qualify for or choose not to enroll in an overdraft line of credit while still providing Regulation Z protections where most needed.

Second, the CFPB also considered updating the opt-in requirements at § 1005.17 of Regulation E, "in a manner that would better disclose the costs associated with authorizing non-covered overdraft protection for ATM and debit card transactions."[62] Although the Regulation E opt-in rule could be improved, those improvements would be around the edges,[63] and the

[61] *See* 89 Fed. Reg. at 13890.

[62] 89 Fed. Reg. at 13869.

[63] If the CFPB does do a future Regulation E rulemaking, we recommend that (1) the opt-in notice prominently disclose all options available for covering overdrafts, the cost of each option for a sample overdraft, and the cost of declining the transaction, and (2) financial institutions be required to provide the same, easy mechanisms for consumers to revoke consent as to opt in, such as online, through the mobile app, and by telephone.

Regulation E framework is not sufficient to address the full range of harms caused by present overdraft fee practices.

To begin with, the Regulation E opt-in requirement does not address all types of overdrafts. The Federal Reserve Board adopted the “opt in” amendment to Regulation E to address when an overdraft fee could be charged on a one-time debit or ATM card transaction. As a result, large overdraft fees and abusive overdraft practices that increase fees triggered by checks, ACH payments, and recurring debit card transactions, among others, would not be addressed by updates to the opt-in requirements.

The opt-in rules and Regulation E do not give consumers the range of protections that they need for costly credit products, such as APR disclosures, ability to repay requirements, and the many other benefits of the TILA framework described in Sections 2.3 to 2.5 above.

Additionally, the “opt in” rule does not address most of the overdraft fee abuses described above or prevent millions of consumers from incurring fees that can add up to hundreds or even thousands of dollars a year. The opt-in framework is an all or nothing – in or out – approach that does not provide incentives to financial institutions to reduce overdraft fees and leaves those who have opted in suffering severe harm. As the CFPB has found, consumers typically pay $35 overdraft fees even though most debit card overdrafts are for less than $26 and are repaid within three days. Frequent overdrafters who are opted in pay 260% more in overdraft fees than the median frequent overdrafter who is not opted in, paying an estimated $442 more in overdraft fees over the course of a year.[64]

Because financial institutions can make large profits off consumers who opt in, they have found ways to undermine opt in disclosures and to push people into opting in. Improved disclosure forms cannot compensate for the persuasive powers of opt in marketing or determined customer service agents who pressure people to opt in. The Pew Charitable Trust found that 68% of consumers who overdrew and incurred a fee would have preferred to have transactions declined rather than pay a $35 fee and that consumers are deeply confused and are not making opt-in choices based on correct information.[65]

As a result, merely modifying Regulation E disclosures would not address harms caused by current predatory overdraft practices like the debt trap of automatic repayment or lack of transparency of the cost of overdraft fees. In the contrast, the proposed rule would address these harms by limiting very large financial institutions to charging a breakeven fee and

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[64] David Low et al., CFPB, Data Point: Frequent Overdrafters, at 32-33 (Aug. 2017), https://files.consumerfinance.gov/f/documents/201708_ cfpb_data-point_frequent-overdrafters.pdf.

[65] Nick Bourke & Rachel Siegel, Pew Charitable Trusts, “Customers Can Avoid Overdraft Fees, but Most Don’t Know How; Bank disclosures and poor communication obscure options despite federal law” (Mar. 21, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/03/21/customers-can-avoid-overdraft-fees-but-most-dont-know-how.

providing Regulation Z protections— like offset protections and required APR disclosures— to covered overdraft credit.

5. The CFPB has the authority to regulate overdraft credit under TILA.

5.1 The CFPB has broad rulemaking authority to promote TILA's purposes.

The proposed rule is written in the context of implementing TILA and its core consumer protection purposes. The proposed rule directly and specifically serves those core purposes. TILA's declaration of purpose states:

> Informed use of credit
>
> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.[66]

In addition, since TILA was first passed in 1968, the statute has been amended to add many substantive provisions that go beyond disclosures and informed use of credit, including the Fair Credit Billing Act in 1974, the Credit CARD Action of 2009, and the Dodd-Frank Act of 2010.

TILA is designed to protect borrowers who are not on an equal footing with creditors either in bargaining power or with respect to knowledge of credit terms.[67] The Act is remedial and must be "liberally construed in favor of borrowers."[68] This rule of liberal construction applies not just to the Act's substantive provisions but also to its scope.[69]

The proposed rule fulfills TILA's purposes by recognizing that overdraft credit is credit, as discussed in Section 5.3, and that the narrow exceptions that the FRB adopted decades ago in the era of paper checks have created a major gap that prevents consumers from receiving

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[66] 15 U.S.C. § 1601(a).

[67] Krieger v. Bank of Am., 890 F.3d 429, 432 (7th Cir. 2018) (the goals of TILA include leveling the playing field through deterrence of practices that confuse consumers about the nature of credit obligations); Thomka v. A.Z. Chevrolet, Inc., 619 F.2d 246 (3d Cir. 1980) (TILA was passed to aid the unsophisticated consumer); Wiggins v. Avco Fin. Servs., 62 F. Supp. 2d 90 (D.D.C. 1999) (same).

[68] 15 U.S.C. § 1601(a); *see* National Consumer Law Center, Truth in Lending § 1.5.2.3 n.214 (11th ed. 2023), updated at library.nclc.org (collecting cases).

[69] Oas v. Rama Capital Partners, L.L.C., 2020 WL 7089828, at *5 (C.D. Cal. Nov. 3, 2020); Westbank v. Maurer, 658 N.E.2d 1381 (Ill. App. Ct. 1995).

the consumer protections, including both disclosures and substantive protections, required for credit.

The CFPB's authority in this area is unusually broad when used in furtherance of the core consumer protection purposes of TILA. TILA provides:

> The Bureau shall prescribe regulations to carry out the purposes of this subchapter. Except with respect to the provisions of section 1639 that apply to a mortgage referred to in section 1602(aa), such regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.[70]

Congress enhanced the CFPB's rule-writing powers in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 by explicitly giving the CFPB authority to add "additional requirements" beyond those in TILA's statutory text.

The proposed rule, for the most part, simply implements existing TILA requirements and applies them to above breakeven overdraft credit by very large financial institutions and by adopting rules to prevent circumvention or evasion and to facilitate compliance. The CFPB's authority to add additional requirements reinforces the CFPB's power to ensure that existing requirements apply to different forms of credit.

The CFPB also has the power to adopt classifications, differentiations, adjustments, and exceptions, and the CFPB has exercised that power in this rulemaking by applying TILA only to overdraft credit that exceeds breakeven costs and only to credit by very large financial institutions. As discussed below, those classifications and exceptions are appropriate at this point in time as the CFPB undertakes a new regulatory framework for overdraft credit.

Indeed, there is no question that the CFPB could simply strip all the exceptions for overdrafts from Regulation Z, covering all of them as credit and credit cards. Instead, the CFPB used its classifications and exceptions authority to design a careful, balanced, and well-crafted approach that protects consumers from the abuses of very large institution overdraft practices while still allowing such institutions to charge a modest fee to cover their costs when they offer overdraft services.

5.2 Overview of the treatment of overdraft credit under TILA.

Under longstanding interpretations, overdraft credit is "credit" within the meaning of TILA, as discussed in Section 5.3. But for nonstatutory exemptions, overdraft credit accessed by debit

[70] 15 U.S.C. § 1604(a).

card would be subject to TILA, including all the credit card provisions. The CFPB has the authority to narrow those exemptions.

So-called “courtesy” overdraft services have generally been exempted from TILA due to nonstatutory exemptions added under Regulation Z. Regulation Z currently exempts from the definition of “finance charge” overdraft fees incurred without an agreement by the bank to cover overdrafts. Regulation Z also exempts from the “finance charge” definition fees that are equivalent to those charged in a comparable cash transaction, which has been interpreted to include overdraft fees that do not exceed nonsufficient funds (NSF) fees charged if credit is not extended.

Neither of those exemptions are based on the TILA statute, and overdraft fees fit the definition of “finance charge,” as discussed in Sections 5.4 and 6.2. Therefore, the CFPB could eliminate those exemptions altogether and bring all overdraft credit that incurs a fee within TILA. The CFPB certainly has the authority to narrow the nonstatutory exemptions and to bring some overdraft fees within the definition of “finance charge.” Doing so appropriately extends TILA’s open-end credit provisions to covered overdraft credit.[71]

Once certain overdraft fees are deemed to be finance charges, hybrid debit-credit cards that incur those charges fit naturally within the definition of “credit card” subject to TILA’s core credit card provisions. As discussed in Section 5.6, longstanding interpretations of TILA include within the definition of “credit card” debit cards and similar devices that access overdraft credit.

The CFPB also has the authority to subject certain overdraft credit to the special credit card requirements of the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (CARD Act). The CARD Act applies to a “credit card account under an open-end (not home-secured) consumer credit plan” (which we will refer to as “CARD Act credit cards”). Regulation Z added a nonstatutory exemption to that definition to exclude debit cards that access overdraft lines of credit. The CFPB has the authority to narrow that exemption, which is not in TILA. As discussed in Section 5.7.2, accounts that access overdraft credit are an open-end consumer credit plan and fit the statutory definition of CARD Act credit cards.

In short, there is ample authority and precedent to require that credit extended through asset accounts be treated as credit covered by TILA in general and all the credit card provisions. The CFPB could eliminate all nonstatutory exemptions and bring overdraft credit under TILA, regardless of the size of the fee or of the institution. The CFPB’s proposal to bring a narrower portion within TILA is both within its statutory authority and justified given the abuses in the marketplace. Exercising that authority fulfills the broader purposes of TILA when consumers use overdraft credit from very large financial institutions that subjects them to more than minimal, break-even fees.

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[71] As discussed in section 5.3 below, overdraft credit is open-end credit.

5.3 Overdraft credit is credit within the meaning of TILA.

The CFPB has proposed to narrow the definition of "overdraft services" – which are subject to Regulation E rather than Regulation Z – by excluding "covered overdraft credit" from Regulation E coverage and bringing that credit within Regulation Z. We support that proposal.

All overdraft services, as currently defined, are clearly "credit" under both the common understanding of the term and TILA's definition of "credit." Using a commonsense analysis, overdraft services lend funds to consumers after their accounts are empty— funds that are repaid later. Under any normal usage of the term "credit," that is what overdraft services are.

Similarly, overdraft services fit within the TILA and Regulation Z definitions of "credit." Credit is "the right granted by a creditor or a debtor to defer payment of a debt or to incur debt and defer its payment."[72] Federal regulators have long acknowledged that the act of covering overdrafts is an extension of credit.

- In 2005, the Office of the Comptroller of the Currency (OCC), Federal Reserve Board (FRB), Federal Deposit Insurance Corp. (FDIC), and National Credit Union Administration (NCUA) issued Joint Guidance on Overdraft Protection Programs. That guidance stated that "[w]hen overdrafts are paid, credit is extended," and "[o]verdraft balances should be reported on regulatory reports as loans."[73]

- In 2011, the OCC issued proposed guidance on deposit-related consumer credit products. That guidance stated that deposit-related consumer "credit products" "include automated overdraft protection"[74] The OCC stated that automated overdraft programs pose "credit risks" to consumers who use the product extensively.[75] Among the practices about which the OCC expressed concern were the imposition of fees that cumulatively exceed a customer's "overdraft credit limit" and failure to identify and take steps to address "credit risks."[76] The OCC encouraged banks to review whether the customer has "an inability or unwillingness to repay credit" and to establish "product programmatic

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[72] 15 U.S.C. § 1602(f). *See also* Reg. Z, 15 C.F.R. § 1026.2(a)(14) ("Credit means the right to defer payment of debt or to incur debt and defer its payment.").

[73] 70 Fed. Reg. 9127, 9129, 9129-30 (Feb.24, 2005).

[74] Office of the Comptroller of the Currency, Proposed Guidance on Deposit-Related Consumer Credit Products, 76 Fed. Reg. 33409 (June 8, 2011).

[75] 76 Fed. Reg. at 33410.

[76] 76 Fed. Reg. at 33411.

limitations on the amount of credit that may be extended under an overdraft protection program."[77] Earlier issuances by the OCC also noted that overdrafts are credit.[78]

- Under Federal Reserve Board's Regulation O, which governs loans to bank insiders, overdrafts are defined as credit.[79]

- In the context of a proposed rule to address prepaid accounts and overdrafts, the CFPB stated that overdrafts are credit "because, in accordance with TILA's definition of credit, the payment of an overdraft represents the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[80] It repeated this position when issuing the final rule.[81]

As discussed in Section 5.4 and 9.8 below in the section-by-section analysis, it is also immaterial to the definition of "credit" whether the financial institution has committed to extend credit (or has an absolute right to use every means to collect it). As long as the institution has provided overdraft credit and given the consumer the right to defer its payment, it is credit.

Indeed, much of the public-facing criticism of this proposed rule emphasizes how overdrafts serve as credit, such as:

- A Washington Post article critical of the rule arguing "overdraft fees can be an expensive alternative to even worse options, such as payday loans" and financial institutions "must find some way to defray the cost of providing what is basically an unsecured loan to people who are, as we've seen, often financially struggling and might be unable to repay the money."[82]

- The Consumer Bankers Association campaign website on the proposed rule refers to overdraft services as a means of "short-term liquidity" that can help consumers "make ends meet," providing flexibility by "offer[ing] a bridge to cover a purchase or expense" like important bills.[83]

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[77] Id.

[78] *See, e.g.,* Daniel P. Stipano, Deputy Chief Counsel, OCC, Interpretive Letter #914, 2001 WL 1090788 (August 3, 2001) ("An overdraft would be "credit," as defined by the Truth in Lending Act and Regulation Z.").

[79] 12 C.F.R. § 215.3(a)(2).

[80] 79 Fed. Reg. 77, 102, 77,206 (Dec. 23, 2014).

[81] 81 Fed. Reg. 83,934, 84,167–84,168 (Nov. 22, 2016).

[82] Megan McArdle, Capping overdraft fees could actually hurt poor families, Washington Post (Jan. 2, 2024), https://www.washingtonpost.com/opinions/2024/01/24/cap-overdraft-fees-hurt-poor-families/.

[83] Consumer Bankers Association, The Value of Overdraft Services, https://overdraftfacts.com/ (viewed Mar. 23, 2024).

- The American Bankers Association statement similarly refers to overdraft services as a "means to access needed liquidity."[84]

There should be no doubt that overdraft services are credit.

5.4 Overdraft fees charged for "courtesy" "overdraft services" are finance charges, and the CFPB has the authority to narrow the nonstatutory exemption that excludes them.

In light of the unmistakable conclusion that overdraft services are credit, it was the FRB's discretionary decision decades ago to exclude overdraft fees from the definition of "finance charge" that is primarily responsible for bringing overdraft services out of TILA. To be a creditor subject to TILA, the creditor generally must extend credit that is either subject to a finance charge or is payable in more than four installments.[85]

We support the CFPB's proposal to bring overdraft fees charged for "covered overdraft credit" within the Regulation Z definition of "finance charge," and the related proposal to exclude "covered overdraft credit" as defined in Regulation Z from the definition of "overdraft services" covered only by Regulation E.

Overdraft fees meet TILA's basic definition of a "finance charge," which is "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit."[86] Overdraft fees are payable by the consumer and are imposed directly by banks as an incident to and as a condition of the extension of credit.

However, the FRB exempted overdraft fees from TILA's finance charge definition unless "the payment of such items and the imposition of the charge were previously agreed upon in writing."[87] Fees are exempt even if there is a written agreement and a charge is computed by applying a rate of interest, "unless the financial institution agrees in writing that it will pay such items."[88]

That may have been an appropriate approach back when overdraft credit was truly an occasional courtesy to prevent checks from bouncing. But today, banks that solicit consumers to opt in to overdraft fees do a hypocritical, deceptive dance. They tout the "protection" and

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[84] Rob Nichols, American Bankers Association, ABA Statement on CFPB's Proposed Rule to Limit Overdraft Protection (Jan. 17, 2024).

[85] 15 U.S.C. § 1602(g). But neither a finance charge nor four installments are needed to be a "charge card" and therefore a "credit card" subject to the credit card provisions of TILA.

[86] 12 C.F.R. § 1026.4(a).

[87] 12 C.F.R. § 1026.4(c)(3).

[88] Official Interpretations to Reg. Z §Z § 1026.4(c)(3)-1.

"service" that they offer to persuade consumers to opt in to overdraft coverage. At the same time, in the fine print, they claim that they are not actually "agreeing" to provide any protection or service and may only do so as a "courtesy" at their sole discretion. Of course, the consumer must agree to repay the courtesy.

There is nothing in the TILA statute that requires an absolute promise to extend credit. If a charge is imposed as an incident to or condition of credit, it is a finance charge under TILA.[89]

We agree with the CFPB's explanation about why it is appropriate and within the TILA authority to narrow the overdraft fee exemption from the "finance charge" definition, bringing within that definition charges for certain overdraft credit extended without a formal promise to extend credit.[90] The historic finance charge exemption for overdraft fees is not grounded in the language or purposes of TILA. Instead, it goes back decades ago to the check world and was designed as a narrow exception to accommodate banks that granted consumers the occasional courtesy of covering a check, typically written several days before it was deposited and that would otherwise bounce. Changes in the past half century have exploded that narrow exemption into a loophole that must be closed.

Financial institutions have automated their overdraft programs and expanded them to cover a broader range of payment types, predominantly electronic payments. The increased number of and type of transactions that can trigger overdraft fees increased enormously. In 1969, checks made up the lion's share of overdraft transactions.[91] The CFPB's 2014 study, in contrast, found that barely 10% of large banks' debit transactions occurred by check, while over 60% occurred by debit card, and most of the rest were other types of electronic transactions.[92] Undoubtedly, the share of checks is even lower today, 10 years later.

Moreover, people today use debit cards for very small transactions that previously would have been paid in cash.

Overall, far more transactions may trigger overdraft fees today than decades ago. The volume of overdraft transactions and associated fees has increased.[93]

Financial institutions have also come to view overdraft fees as a revenue source, not merely a fee to cover the cost of covering occasional courtesy overdrafts. Over the years, several unsavory practices sprung up designed to push people into overdrafting and incurring overdraft fees, as discussed in Section 1.2 above.

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[89] Although TILA has some statutory exemptions from the finance charge definition, none of them applies to overdraft fees.

[90] *See* 89 Fed. Reg. at 13866 to 13869.

[91] 89 Fed. Reg. at 13867.

[92] CFPB 2014 Data Point at 17.

[93] 89 Fed. Reg. at 13867.

These overdrafts fees are far beyond an occasional courtesy now. They are the price of a routine source of credit,[94] and one that generates high profits.

In fact, despite the fine print disclaiming any promise to extend credit, consumers understand that they have a hidden line of credit, and many learn what that credit limit is. Recognizing that consumers know they have overdraft credit, the FDIC has found that banks may commit deceptive acts or practices when they fail disclose that they have changed the overdraft limit "to which the customer had become accustomed" from a fixed amount to a dynamic limit that varies.[95]

TILA's language and purposes support treating overdraft fees for these hidden credit lines as finance charges. As discussed in Section 6.2, the CFPB's proposal to limit the finance charge exception for very large financial institutions to breakeven fees is appropriate to return the exception to its original purpose and to prevent a large source of credit from operating outside TILA's protections.

We also support the specific examples of fees triggered by covered overdraft credit that the CFPB proposes to include within the definition of "finance charge." Those examples are discussed in Section 12.6 below, in the section-by-section analysis.

5.5 Requiring overdraft fees over a certain size to comply with TILA is not a usury cap.

The Dodd-Frank Act does not confer "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."[96] Some financial institutions may attempt to argue that the CFPB has established a usury limit by designating the benchmark fee or breakeven fee to delineate whether overdraft credit by very large financial institutions is regulated by Regulation Z or E. Nothing could be further from the truth.

The relevant Black Law Dictionary definitions of "usury" are, "the charging of an illegal rate of interest as a condition to lending money," or "an illegally high rate of interest."[97] Thus, a usury limit would be a limit that makes the rate illegal.

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[94] *See* Fed. Deposit Ins. Corp., FDIC Study of Bank Overdraft Programs, at v (Nov. 2008) (noting that 93% of overdraft fees are incurred by consumers who overdraw five or more times per year, suggesting these consumer use overdrafts on a chronic and regular basis).

[95] Fed. Deposit Ins. Corp., Consumer Compliance Supervisory Highlights at 7 (Mar. 2022), https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2022.pdf.

[96] 12 U.S.C. § 5517(o).

[97] Black's Law Dictionary (11th ed. 2019), usury.

But the proposed rule does not set any limit on interest rates. It only limits the fees that may be charged under the Regulation E framework, where financial institutions would deny that the fees are interest, because that would make them finance charges. Fees that do represent interest under the proposed rule will be governed by Regulation Z, where there is no interest rate limit.

Again, the proposed rule also does not limit rates at all. It only designates the form in which any interest rates may be charged and disclosed and the accompanying protections that apply. Financial institutions that wish to charge more than breakeven or benchmark fees can do so; they merely must abide by the TILA framework.

Other laws may already establish usury rates, but the proposed regulation does not establish one. The definition of finance charge under TILA does determine the definition of interest under the National Bank Act or under the state laws that govern banks in their home state. The Military Lending Act (MLA) and the Department of Defense (DOD) regulations under the MLA may look to TILA to identify what are finance charges, but the MLA's rate cap was established by Congress, not the CFPB, and the regulations extending that cap to overdraft lines of credit and credit cards were adopted by DOD. Most usury limits come from state law, and states have the choice of what limits they set, how they calculate them, and what charges they include. The CFPB's conclusion about what constitutes a finance charge is a far cry from any limit.

5.6 Hybrid debit-credit cards are "credit cards" subject to TILA's core credit card provisions.

The CFPB has proposed to bring within TILA's core definition of "credit card" a "hybrid debit-credit card," which is proposed to be "any card, plate, or other single credit device that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution."[98] "Covered overdraft credit" encompasses any overdraft credit that incurs a finance charge (*i.e.,* a fee greater than the breakeven amount in proposed § 1026.62(d)) or has more than four installments. We support this proposal, which appropriately requires credit that is accessed through hybrid debit-credit cards to comply with TILA's core credit card rules, as discussed in Section 2.4 above.

Treating a device that accesses overdraft credit with a finance charge as a credit card is consistent with longstanding interpretations of TILA. The definition of "credit card" in TILA is quite expansive, applying to any device that accesses credit. It does not even require a card. That definition is "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit."[99]

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[98] Proposed § 1026.62(b)(5).

[99] 15 U.S.C. § 1602(*l*).

When a card is being used to access credit, it makes sense to consider it a credit card. The fact that the credit being accessed takes the form of an overdraft on an asset account does not change the analysis. The overdraft is credit, and the card is a vehicle to access and use credit.

For over nearly 40 years,[100] Regulation Z has deemed debit cards that can access overdraft lines of credit to be credit cards.[101] The same is true of check guarantee cards that can be used repeatedly to accesses an overdraft line.[102]

Consistent with Congress's broad definition of "credit card," a card is not even needed. An overdraft line of credit accessed by an account number has long been considered a credit card if the account number that accesses the credit line can be used directly to purchase goods or services.[103] When those devices are used to access overdraft credit that carries a large fee, they should be viewed as credit cards.

Moreover, neither a finance charge nor four installments are required for a device to be considered a "credit card" under TILA,[104] or for an entity to be considered a "creditor" for credit card purposes.[105] Thus, the CFPB actually has the authority to bring all overdraft credit accessed through a device within the definition of credit card, regardless of the size of the fee or even the presence of any fee at all. Therefore, the CFPB certainly has the authority to take the narrower step of applying credit card rules to hybrid debit-credit cards that charge fees above breakeven cost, as discussed at greater length in Section 6.2.

In addition to being consistent with the basic definition of "credit card" in the TILA statute, hybrid debit-credit cards are also similar to other devices that Regulation Z includes as credit cards:

A. A card that guarantees checks or similar instruments, if the asset account is also tied to an overdraft line or if the instrument directly accesses a line of credit.

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[100] 50 Fed. Reg. 13181 (Apr. 3, 1985).

[101] Official Interpretations of Reg. Z, § 1026.2(a)(15)-2.i.A, -2.i.B.

[102] Official Interpretations of Reg. Z, § 1026.2(a)(15)-2.

[103] *See* Official Interpretations of Reg. Z, § 1026.2(a)(15)-2.ii.C, adopted by 76 Fed Reg. 22948 (Apr. 25, 2011).

[104] 15 U.S.C. § 1602(*l*). We recognize that the CFPB has proposed not to extend credit card rules to prepaid cards that access credit if the creditor does not impose a finance charge or allow payment in more than four installments. As discussed in Section IV.E and IV.F of these comments, we urge the CFPB not to establish the exemption, or at a minimum to narrow the exceptions from the finance charge definition, because otherwise the proposed exemption will allow for evasions from the credit card protections.

[105] *Id.* at § 1602(g)(2)("For the purpose of [Part D and selected disclosure requires in 1637], the term "creditor" shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Bureau shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open-end credit plans").

B. A card that accesses both a credit and an asset account (that is, a debit-credit card).

…

E. A card or device that can be activated upon receipt to access credit, even if the card has a substantive use other than credit, such as a purchase-price discount card. Such a card or device is a credit card notwithstanding the fact that the recipient must first contact the card issuer to access or activate the credit feature.[106]

The Official Interpretations also state that if a "line of credit can also be accessed by a card (such as a debit card), that card is a credit card for purposes of § 1026.2(a)(15)(i)." [107]

Thus, there is longstanding precedent for treating debit cards that access overdraft credit as credit cards. Consistent with its rulemaking authority discussed above, the CFPB has the authority to narrow or even eliminate the Official Interpretation adopted by the Federal Reserve Board stating that the term "credit card" does not include:

> "A check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft."[108]

The exclusion is entirely a creature of rulemaking. As discussed in Section 5.2 above, there is nothing in the TILA statute that excludes overdraft services that are clearly used as a form of credit, and overdraft credit has become far from occasional or inadvertent. Applying credit card rules to debit cards that access overdraft credit at more than breakeven costs is consistent with TILA's purposes and will have many benefits for consumers, as discussed in Section 2.2.2 above.

5.7 Hybrid debit-credit cards are CARD Act credit cards.

5.7.1 The CFPB has the authority to eliminate the nonstatutory overdraft line of credit exception to the CARD Act definition of credit card.

The Credit Card Accountability, Responsibility, and Disclosure Act of 2009, (Credit CARD Act or CARD Act) established a number of important substantive consumer protections for "credit cards under an open-end (not home-secured) consumer credit plan."[109] The plain language of

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[106] Official Interpretations of Reg. Z § 1026.2(a)(15)-2.i. See also Official Interpretations of Reg. Z § 1026.2(a)(15)-2.ii.C (if a line of credit "can also be accessed by a card (such as a debit card), that card is a credit card).

[107] Official Interpretations of Reg. Z § 1026.2(a)(15)-2.ii.C.

[108] Official Interpretations of Reg. Z § 1026.2(a)(15)-2.ii.A.

[109] Pub. L. No. 111-24, 123 Stat. 1734 (May 22, 2009).

this phrase only excludes one category of credit cards from the CARD Act protections, *i.e.*, credit cards where the credit is secured by a home-equity plan.

In February 2010, when enacting regulations to implement the CARD Act, the Federal Reserve Board stated: "The Board believes that, as a general matter, Congress intended the Credit Card Act to apply broadly to products that meet the definition of a credit card."[110] The Board also acknowledged that debit cards that access an overdraft line of credit "<u>are</u> 'credit cards.'"[111] However, the Board created an exemption for such cards in Regulation Z, finding that, at that time, alternative forms of regulation were better suited to protecting consumers from harm.[112] The exclusion is regulatory and is not mandated by the statute. At the same time, the FRB declined requests from industry commenters to exempt all lines of credit accessed solely by an account number, noting Congress's intent to apply the CARD Act broadly.[113]

In April 2011, the FRB later amended Regulation Z to add a partial exemption from the definition of credit card for account numbers that access lines of credit. However, the Board was concerned about account numbers linked to asset accounts when they can be used to access an open-end line of credit to purchase goods or services, stating that "it would be inconsistent with the purposes of the Credit Card Act to exempt the line of credit from the protections provided for credit card accounts."[114]

In response, the FRB adopted an official interpretation stating that account numbers that access credit are not credit cards unless they can access an open-end line of credit to purchase goods or services.[115] The Board further explained that if an account number can access an open-end line of credit in order to transfer funds into an asset account with the same creditor, the account number is a credit card if it can also access the line of credit in order to purchase goods or services.[116]

The Board emphasized that "if the line of credit can also be accessed by a card (such as a debit card or prepaid card), then that card is a credit card for purposes of § 226.2(a)(15)(i)."[117] However, the official interpretations continued to exclude debit cards from the definition of credit

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110 75 Fed. Reg. 7658, 7664 (Feb. 22, 2010).

111 75 Fed. Reg. at 7664 (emphasis added).

112 12 C.F.R. § 1026.2(a)(15)(ii) added by 75 Fed. Reg. 7658 (Feb. 22, 2010).

113 75 Fed. Reg. at 7664.

114 76 Fed. Reg. 22948, 22949 (Apr. 25, 2011).

115 Official Interpretations of Reg. Z, § 1026.2(a)(15)-2.ii.C (adopted by 76 Fed. Reg. at 22949).

116 76 Fed. Reg. at 22949.

117 *Id.*

card if they have no explicit credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft.[118]

The CFPB has ample authority to eliminate this nonstatutory exemption of overdraft lines of credit from the CARD Act credit card definition. The stated reason in 2011 by the FRB was that other forms of regulation under Regulation E were better suited to protecting consumers from harm.[119] At that time, the Regulation E opt-in rules were new.

However, the CFPB now has had over a decade of experience with overdrafts and their abuses, and has amply explained in the Supplementary Information the need for additional protections that are not provided by the current provisions of Regulation E. As discussed in Section 2.5 above, consumers would benefit from applying the Credit CARD Act protections to overdraft credit, and the CFPB is not compelled to retain the nonstatutory exemption added by the FRB.

Congress intended the protections of the Credit CARD Act to apply broadly to cards that can be used to purchase goods and services on credit. Debit cards that access overdraft credit operate just like a traditional credit card and fit the definition of "credit card" under the CARD Act. The Regulation E framework no longer sufficiently protects consumers. Applying the protections of the Credit CARD Act is within the CFPB's authority and consistent with the protections that Congress intended for cards that access credit.

5.7.2 Hybrid debit-credit cards access open-end consumer credit plans.

Covered overdraft credit is a form of open-end credit. Thus, a debit card that accesses covered overdraft credit fits appropriately under the categorization of a "credit card under an open-end (not home-secured) consumer credit plan." We support and agree with the CFPB's analysis on this point.[120] In summary:

- Under TILA and Regulation Z, an open-end credit plan is one that reasonably contemplates repeated transactions,
- where the creditor may impose a finance charge from time to time on an unpaid balance, and
- the credit line is replenishing, *i.e.*, the amount of credit that may be extended during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.[121]

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[118] Official Interpretations of Reg. Z, § 1026.2(a)(15)-2.ii.A.

[119] 75 Fed. Reg. at 7664.

[120] 89 Fed. Reg. at 13861-13863.

[121] 15 U.S.C. § 1602(j); 12 C.F.R. § 1026.2(a)(20).

Covered overdraft credit meets each of these criteria.

- Banks that extend overdraft credit contemplate that the consumer may engage in repeat overdrafts. As the CFPB has found, nine percent of accounts have 10 or more overdrafts per year,[122] which certainly qualify as repeat transactions.

- As discussed in Section 5.4, overdraft fees are appropriately viewed as finance charges. A financial institution that imposes such a fee on an unpaid overdraft is imposing a finance charge from time to time on an unpaid balance.

- As the CFPB noted, consumers can generally incur overdrafts up to a pre-set (but not always disclosed) limit; once a consumer repays the overdraft(s) and the associated fee(s), they can incur future overdrafts up to that same or a revised limit. In fact, as discussed in Section 1.2, some consumers come to understand and rely on those undisclosed limits, and financial institutions have been cited for deceptive practices when they changed their overdraft limits, or the methodology used to determine them, without disclosing the change to consumers.

The CFPB in the Supplementary Information noted that an open-end credit plan must include three other elements: (1) it must constitute credit; (2) there must be a plan; and (3) there must be a creditor.[123] The issue of "credit" is discussed in Section 5.3. The existence of a plan is discussed in our comments to the proposed new Official Interpretation to Reg. Z, § 1026.2(a)(20)-2.iv in Section 12.5.1. Under the proposed rule, very large financial institutions that extend covered overdraft credit would clearly be "creditors" because they regularly extend consumer credit subject to a finance charge, and the obligation is payable to them by agreement.[124]

Thus, covered overdraft credit is an "open-end credit plan" and a debit card that accesses it qualifies as a "credit card under an open-end (not home-secured) consumer credit plan" under the Credit CARD Act. Referring to such a card as a hybrid debt-credit card makes perfect sense.

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[122] CFPB, Data Point: Frequent Overdrafters 5, August 2017, https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf.

[123] 89 Fed. Reg. at 13861-62.

[124] 12 C.F.R. § 1026.2(a)(17)(i).

6. Overdraft fees above breakeven costs are finance charges that should trigger TILA requirements.

6.1 Overview of the proposed finance charge treatment of overdraft fees.

A finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed as an incident to, or a condition of, the extension of credit.[125] Though overdraft services extend credit, and an overdraft fee is clearly the cost of, and incident to, that credit, Regulation Z exempts overdraft fees from the finance charge definition. That exemption is not in the statute, but instead was adopted by the FRB in Regulation Z.

As described in preceding sections, the TILA exemption enabled by the finance charge exemption has exploded far beyond its original context and purpose. It has grown into a large loophole that encourages abusive overdraft fee practices that harm consumers and deprive them of the protections that Congress intended for credit. Thus, for the reasons detailed above, we strongly support the decision to narrow the finance charge exemption for overdraft fees to bring more overdraft credit within TILA.

The CFPB proposes to amend the definition of a finance charge under the Truth in Lending Act to only cover overdraft programs where very large financial institutions are charging more than a breakeven amount. This approach is reasonable for the reasons discussed below, given that any exemption to the definition of a finance charge is discretionary and the CFPB has the statutory authority to make exemptions, differentiations, and classifications.

For overdraft credit to remain exempt from Regulation Z, the CFPB has proposed to give very large financial institutions the choice of charging either a breakeven fee based on its actual costs or a benchmark fee that may be charged regardless of the institution's actual costs. We support the proposal to offer these two choices. Setting a benchmark fee will simplify compliance and reduce costs and complexity for financial institutions. Allowing financial institutions the option of a utilizing a higher breakeven fee when they can justify the amount of their actual costs will ensure that institutions have an option to recover their costs if for some reason their costs are higher than typical of other institutions.

6.2 The breakeven standard is an appropriate line between fees that are treated as finance charges and those that are exempt.

As mentioned in Section 5.1, the CFPB has the authority to differentiate, classify, and grant exceptions in its regulations when doing so is necessary or proper to effectuate TILA's

[125] 12 C.F.R. § 1026.4(a).

purposes.[126] Thus, TILA gives the CFPB the authority to draw lines to differentiate between fees that are deemed to be finance charges covered by the Act and those that are exempt.

Section 5.4 explains why overdraft fees are finance charges. Although the FRB chose to grant a wholesale exemption for overdraft fees over 50 years ago in a radically different world, the CFPB is not obligated to continue that exemption in perpetuity. The exemption no longer effectuates TILA's purposes, but instead does the exact opposite— it exempts a large class of credit that did not exist in 1968 from the protections that Congress has mandated for credit. Consumers are being harmed by the exemption and are not receiving the credit protections they both need and are entitled to.

Just as the CFPB does not need to continue to exempt all overdraft fees from Regulation Z, it also does not need to swing 100 percent back in the other direction, treating all overdraft fees as finance charges. As opponents of the proposed rule will argue, there are some benefits to the Regulation Z exemption, and TILA protections are not critical for every possible overdraft situation. Even though all overdraft fees meet the statutory definition of finance charge, the CFPB is not obliged to eliminate the exemption entirely. The CFPB has the statutory authority to make differentiations by bringing overdraft fees into TILA where TILA's protections would be especially important, while allowing some latitude in situations that pose less risk to consumers.

The approach the CFPB takes in its proposed rule, drawing the line between fees that merely cover costs and those that exceed costs and drive profits, makes sense. Where a very large financial institution is not making a profit and simply recovering the cost of the overdraft, the use of the breakeven fee eliminates incentives for abusive and predatory practices. This approach will therefore deter very large financial institutions from continuing or adopting practices that push people into overdrafting and incurring high fees.

Drawing the finance charge line between fees above and below breakeven costs will return the overdraft fee exemption to its original purpose of exempting true, occasional courtesy services. A credit product that produces large amounts of revenue and profits, that is provided to many people who do not want the service, and that leads to back-end manipulations that increase the number of overdrafts and fees in ways consumers cannot control is not a courtesy.[127] Many consumers overdraft by mistake.[128] It is one thing to cover those overdrafts at cost. But when those overdrafts become a profit center, applying Regulation Z will promote the informed use of credit, help consumers understand that they are entering into a contract for a credit product, and enable consumers to knowingly assess other more affordable options.

The CFPB's approach also makes sense given consumer experience with overdraft and TILA's primary purpose: credit that comes with higher costs needs stronger protections. Once a very

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[126] *See* 15 U.S.C. § 1604(a).

[127] 89 Fed. Reg. at 13868.

[128] *See* 89 Fed. Reg. at 13891 n.251 (citing studies); 2023 Making Ends Meet Survey, *supra*.

large financial institution seeks to profit from an overdraft program, offering overdraft credit above the breakeven amount, it is important for consumers to have all of TILA's protections, including: APR disclosures; rules to ensure use of credit is voluntary; periodic statements; options for when and how to repay; and, for credit accessed through a card, assessment of ability to repay and chargeback rights, among other protections.

The approach makes sense from the point of view of price disclosures: modest fees for ancillary services that only cover costs and are not part of the core revenue model will not be used as vehicles for distorting the pricing of bank accounts. For example, financial institutions charge fees for a range of extra services, including wire transfers, remittances, stopping payment, extra statement copies, and cashier's checks. But those fees are not primary drivers of revenue that sustain the basic bank account service, and they do not distort and hide the ordinary cost of a bank account. If fees for non-covered overdraft services are limited to costs, they too will be a modest cost of an add-on service but not a core component of the cost of a bank account for millions of consumers.

It also makes sense from the perspective of equity, fair lending, and the CFPB's mission to protect consumers, especially the most vulnerable. The burden of overdraft fees falls most heavily on communities of color that have long been disadvantaged. That burden is especially outrageous when it is used to drive profits and support banking services that other more advantaged communities get for free or at lower cost. Limiting non-covered overdraft fees to breakeven costs helps to alleviate disparate impacts and ensures that when higher costs are charged, appropriate and necessary protections for credit are employed.

6.3 The benchmark fee should be $3.

Under proposed § 1026.62(d)(1)(ii), a very large financial institution is permitted to charge a "benchmark fee" that will be presumed to represent a reasonable amount for its costs for overdraft credit. The CFPB is considering four alternatives for this benchmark fee— $3, $6, $7, and $14. We urge the CFPB to set the benchmark fee at $3.

As a preliminary matter, we support the CFPB's proposal to calculate the benchmark fee based on the data that it collected from eight very large financial institutions. As the CFPB notes, those eight institutions account for over 30% of the assets of the very large financial institutions and represent a diverse set of geographic footprints, asset sizes, and business models.[129] The CFPB then used the data from the five institutions that yield sufficient data to analyze. The approach of basing the fee on the costs of a large cross section of the market of the covered asset accounts is reasonable. There is no reason to think that the other very large financial institutions will have markedly different cost structures, and even if they do, they have the option of using a higher breakeven fee that they justify based on their actual costs.

[129] *See* 89 Fed. Reg. at 13870-71.

We also support the components that the CFPB considered to come up with the benchmark fee: the sum of the estimates of charge-offs, cost of funds, and operational costs per overdraft transaction. We agree that those are the appropriate components, as they are the direct costs of overdraft transactions. As discussed in Section 6.4 below, it is not appropriate for general operating and overdraft costs and more indirect costs to be included in assessing the costs of an overdraft transaction.

The CFPB was also very generous in the allowance it provided for cost of funds and operational costs. For cost of funds, the CFPB assumed 5% annual interest on $120 for one month. Yet the median overdraft transaction is $50, repaid in three days.[130] And today's interest rates are high and are likely to go down. Similarly, for operational costs, the CFPB assumed that 10% of transactions would require 10 minutes of a customer service representative's time, and 20% of those would require 10 minutes of a supervisor's time. We find it unlikely that anything close to 10% of transactions result in customer service costs. Most consumers will not call, and when they do, they may be calling about multiple fees, not a single fee. Similarly, we highly doubt that many consumers make it to a supervisor, and certainly not 20%.

To calculate charge-offs, the CFPB used the same general formula to calculate all four of the proposed alternative benchmark fees, though it relied on different data points to arrive at each of the four alternatives. Two differences, used in different combinations, yield those four outcomes: (1) whether the charge-offs are based on the average of five institutions in the CFPB's sample size that produced sufficient data to analyze, or only the one with the highest charge-offs, and (2) whether the denominator includes only transactions that incurred a fee, or whether it included all transactions, including those with waived fees (whether the fee was waived individually by discretion, or whether the transaction fell into a category, such as a grace period, for which fees are not charged).

For the $3 amount, the CFPB divided the total charge-off losses for the five institutions in its sample size by the number of both non-covered overdraft transactions that resulted in an overdraft fee and non-covered overdraft transactions that did not result in an overdraft fee. For the $6 fee, the CFPB used the five-institution average but counted only non-covered overdraft transactions that resulted in an overdraft fee, excluding the waived transactions. For the $7 fee, the CFPB took the same approach as the $3 fee, but it used the charge-offs of the financial institution with the highest charge-off losses. For the $14 fee, the CFPB used the same approach as the $7 fee (i.e., identifying the financial institution in its sample with the highest charge-off losses), but it counted only non-covered overdraft transactions that resulted in an overdraft fee and excluded waived transactions.

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[130] CFPB, *Discretionary Overdraft and NSF Practices at Very Large Financial Institutions* at 8 (Jan. 2024), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-practices-very-large-financial-institutions_2024-01.pdf (CFPB 2024 Overdraft NSF Report).

We believe that the formula that yields the $3 fee reflects the appropriate combination of factors to utilize in determining the benchmark fee. First, the figure for charge-off losses should be based on an average, not a single institution with the highest charge-offs. Second, all overdraft transactions should be counted, not merely those that result in a fee.

- High or average charge-offs

The benchmark fee should not be based on the excessive, outlier charge-offs of a single financial institution (the $7 or $14 proposed fee). Financial institutions make choices that lead to higher or lower charge-offs.

A charge-off reflects a consumer who has lost their bank account, ended up with a negative checking account screening agency report, and will likely have difficulty getting another account. A financial institution that has high charge-offs, pushing a lot of consumers out of their accounts, is likely engaging in the predatory practices described above and is not helping its customers to avoid overdraft fees. The CFPB should not reward that behavior.

Moreover, the proposed rule will reduce incentives to engage in such practices and will likely reduce charge-offs and lost bank accounts. Thus, it is inappropriate to calculate the benchmark fee based on today's costs, frozen in time, of one financial institution that has high charge-offs because it is likely engaging in practices that will change under the proposed rule.

- All overdraft transactions or those incurring a fee

The benchmark fee should not be calculated by excluding overdraft transactions that did not incur fees from the denominator used to determine the average (the $6 or $14 proposed fee). Overdraft transactions that did not generate fees could still generate charge-offs. Authorize positive-settle negative transactions can lead to a negative balance that is never brought positive and is ultimately charged off. In some cases, overdraft transactions with no fees are even more likely to lead to charge-offs. For example, fees will not be charged once the number of overdraft transactions exceeds the institution's maximum number of overdraft fees per day. Yet a consumer who is maxing out on overdraft fees will have a much more difficult time bringing their account positive.

Fees may also be waived based on discretionary decisions. Those discretionary waivers are less likely to be granted to frequent overdrafters who are more likely to incur overdraft fees— for example, lower income consumers and communities of color. Yet these consumers will be most impacted and more likely to be charged whatever breakeven fee is authorized. In other words, excluding overdraft transactions for better off consumers whose fees were waived will result in disparate impacts that harm protected groups.

If a formula is used that excludes overdraft transactions with no fee, then the benchmark fee itself will be higher. Higher fees will cause more harm to consumers, generate more charge-offs, and lead to more evasions than a lower fee. Rather than deterring overdrafts, high fees increase them by giving institutions a profit incentive to push people into overdrafting. High fees also exacerbate the income-expense gap and unpredictability that cause overdrafts and make it harder to bring accounts positive. Thus, a lower fee will serve the purposes of the proposed rule by limiting the fees that can be excluded from the credit protections that consumers deserve.

Some financial institutions have shown that they can continue to provide overdraft coverage without charging any fees. If a very large financial institution has costs higher than those reflected by the benchmark fee, it can use the “breakeven fee” that reflects their own costs.

6.4 We support the CFPB’s proposed components for calculating costs and charge-off losses for the benchmark and breakeven standard.

In the proposed rule, the CFPB outlined a method for a very large institution that chooses not to use the benchmark fee to calculate its costs and charge-off losses to determine its breakeven fee. The CFPB’s proposed method requires a very large financial institution to determine the “total direct costs and charge-off losses” for providing non-covered overdraft credit to all accounts open at any point during the previous 12 months and then divide that figure by the total number of non-covered overdraft transactions attributable to those accounts occurring the previous 12 months. In considering what “total direct costs and charge-off losses” a very large financial institution can include, the CFPB explained that these must be “specifically traceable” to the non-covered overdraft credit. The costs and charge-off losses that would be “specifically traceable” include a very large financial institution’s cost of funds for providing non-covered overdraft credit, its charge-off losses for non-covered overdraft credit, and any operational costs that are directly attributable to its non-covered overdraft program.

We support this proposed formula and affirm that a very large financial institution should only be able to charge more than the benchmark fee set by the CFPB if the institution’s costs or charge-off losses are “specifically traceable” to an overdraft transaction. Allowing an institution to bundle in other costs will enable it to make overdraft fees a profit center that generate revenues used to cover general overhead or other costs. That result would lead to the same perverse incentives that have resulted in today’s problems.

In the Supplementary Information to the proposed rule, the CFPB provided an example of costs that could be directly attributable/specifically traceable to an overdraft transaction: direct costs from customer service calls that are specifically tagged as relating to non-covered overdraft credit would be specifically traceable.

Recommendation: It would be helpful if the CFPB would add a comment to the Official Interpretations providing that example. The CFPB should also add a comment about the treatment of customer service calls if its call center does not use issue tagging and cannot determine how many calls related to non-covered overdraft credit. The financial institution should not be allowed to allocate a portion of its call center expenses to overdraft transactions if it does not have a basis to know what that portion is.

The Supplementary Information to the proposed rule also explains that the CFPB has preliminarily determined that certain costs and charge-off losses would not be directly attributable/specifically traceable to an overdraft transaction. Those include general overhead costs and charge-off losses resulting from unauthorized use, EFT errors, billing errors, returned deposit items, or rescinded provisional credit.

We agree that these costs and charge-off losses should not be included in the formula to calculate a very large financial institution's breakeven fee. It is appropriate to exclude costs that have no direct relationship to processing and paying an overdraft transaction or the costs of running a non-covered overdraft credit program. Allowing those costs to be included would risk padding the fee and enabling it to become a profit center.

Recommendation: The CFPB should add comments to the Official Interpretations with examples of costs that are not specifically traceable to non-covered overdraft credit.

Finally, the Supplementary Information to the proposed rule states that a very large financial institution has discretion on whether to include non-covered overdraft transactions that do not incur fees, "including those that do not incur fees consistent with fee waiver policies… for which the financial institution either refunded or did not assess any fee or charge."[131]

As discussed in Section 4.2, the CFPB should not base the benchmark fee on the exclusion of any accounts where fees are waived because it will distort the price/cost of the benchmark fee, lead to more charge-offs, and put the burden of shouldering that cost onto struggling families who do not benefit from having their overdraft fees waived. Similarly, the calculation of the breakeven fee should also be based on all non-covered overdraft transactions and should not exclude transactions for which the fee was waived or refunded.

At a minimum, the breakeven fee should require the same calculation methodology that the CFPB finalizes for the benchmark fee. The two should be apples-to-apples equivalents. Whatever denominator the CFPB ultimately uses for the benchmark fee (all overdraft transactions or only those that yield fees) should be the same for the breakeven fee. If the CFPB determines that excluding overdraft transactions with waived fees will burden consumers charged fees with too high a share of overall costs, that decision should apply to institutions that use the breakeven fee also. Otherwise very large financial institutions will have an incentive not to use the benchmark fee because they can calculate a higher amount for the breakeven fee due to the disparate treatment for the denominator.

Recommendation: Require all overdraft transactions, not just those with fees, to be included in calculating the breakeven fee.

The CFPB requests comment on whether to allow a very large financial institution to calculate costs and charge-off losses within subsets of its depository account portfolio, such as account relationship tiers or average account balance ranges. We oppose that approach. It would give

[131] 89 Fed. Reg. at 13870.

financial institutions the incentive to engage in manipulations that increase the fees for the most vulnerable consumers and deprive them of the protections needed for credit.

6.5 Fees and other charges triggered by overdrafts are finance charges regardless of the form they take.

Proposed § 1026.62(d)(1) states that, in assessing whether its overdraft charges exceed the breakeven or benchmark fee, a very large financial institution must consider "any charge or combination of charges to pay [an overdraft] transaction." The preamble explains that this would include all revenue received in connection with an overdraft transaction, including any extended or sustained overdraft fees, any interest charges on outstanding overdraft balances, and any other payments a very large financial institution receives in connection with an overdraft transaction(s).[132]

We support this definition and approach. A financial institution should not be allowed to evade the rule by changing or hiding the form of its overdraft fees. Any charges that the consumer pays that are incident to overdraft credit are potentially finance charges and are revenue for the institution. The form of the charge should not matter.

Recommendation: The CFPB should add comments giving the above explanation and examples of types of charges or combination of charges that must be included to calculate the total overdraft charge: all revenue received in connection with an overdraft transaction, including any extended or sustained overdraft fees, any interest charges on outstanding overdraft balances, and any other payments a very large financial institution receives in connection with an overdraft transaction(s). As described in Section 12.9 below in the section-by-section analysis, the CFPB also needs an adjustment to the existing comment that currently excludes interest on overdraft balances from the finance charge definition.

Recommendation: In addition, the CFPB should add comments with additional examples of charges that would need to be included to assess whether the combination of charges exceeds the breakeven or benchmark fee. The CFPB has noted, for example, that "nearly all service, transaction, activity, and carry charges imposed on covered asset accounts, including in particular, fees commonly known as 'transfer fees' for moving funds from overdraft lines of credit to covered asset accounts, would be 'finance charges' under the Regulation Z unless subject to another exclusion or limitation."[133] The CFPB should add a comment explaining that a transfer fee from any credit account – whether an overdraft line of credit or a credit card – would be a charge that needs to be included as a charge or combination of charges to pay an overdraft transaction.

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[132] 89 Fed. Reg. at 13869.

[133] 89 Fed. Reg. at 13865.

7. It is appropriate for the CFPB to limit the proposed rule to very large financial institutions, but the CFPB should do a future rulemaking for smaller institutions.

The CFPB has chosen to limit the proposed rule to very large financial institutions with more than $10 billion in assets. The Bureau has the authority to differentiate, classify, and grant exceptions in its regulations when doing so is necessary or proper to effectuate TILA's purposes.[134] The CFPB has identified several reasons for the proposed scope, and we agree that it is appropriate for this proposed rule to apply to very large financial institutions. At the same time, we urge the CFPB to plan a future rulemaking that would apply to smaller institutions.

The CFPB notes that Congress gave the CFPB primary supervision authority over very large financial institutions with over $10 billion in assets. While the CFPB certainly has the authority to apply regulations to institutions that it does not supervise, the Bureau has the most knowledge about the operations of those very large institutions. When making a significant change like the proposed rule, it is helpful to have a good understanding of the context for that change. The CFPB's experience supervising very large financial institutions helps to inform its assessment of the benefits and costs of the proposal and the likely changes that the proposed rule will trigger.

By limiting the rule to very large financial institutions, the CFPB can have more confidence that the data it collected from very large institutions to propose the benchmark fees is reflective of other institutions that are comparable in size. There is a smaller set of very large institutions compared to the number of smaller institutions. There is also more uniformity among very large financial institutions than the broader and more diverse market of smaller institutions, which themselves will range enormously in size, from a few million in assets to $9.9 billion.

We agree that consumers would benefit from applying the proposed rule to very large financial institutions. Most consumers have accounts at very large financial institutions, which charge over two-thirds of overdraft fees.[135] In 2022, Wells Fargo and JP Morgan Chase alone accounted for one-third of reported overdraft revenue. While consumers would also benefit if the rule were applied to smaller institutions, the CFPB is not required to address the entirety of a problem before tackling part of it.

Because very large financial institutions have made large profits, they are well positioned to absorb a reduction in overdraft revenue. These large institutions have the resources and technology to easily adjust their product offerings— in fact, some have already done so voluntarily.[136] On the other hand, many of the top 20 banks have made only modest

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[134] 15 U.S.C. § 1604(a).

[135] https://files.consumerfinance.gov/f/documents/cfpb_overdraft-credit-very-large-financial-institutions_fact-sheet_2024-01.pdf.

[136] Bank of America, Press Release, Bank of America Announces Sweeping Changes to Overdraft Services in 2022, Including Eliminating Non-Sufficient Funds Fees and Reducing Overdraft Fees (Jan.

improvements to their overdraft programs. All these changes are voluntary, however, which means they can be reversed. Many other financial institutions that are in the group of 175 very large financial institutions, but are less in the spotlight, have a long way to go to address the problem of overdraft fees, necessitating this rulemaking.

Some smaller institutions are far more dependent on overdraft fee revenue than very large financial institutions. That dependency is not a justification for abusing consumers, but it does mean that the CFPB needs to take more care before requiring major changes. And it may take those institutions longer to prepare and adjust to change. By first applying the proposed rule to very large institutions, the CFPB can study how the rule works in practice, how very large financial institutions react, whether any try to evade the rule, and how consumers and the market respond. Those lessons will serve the CFPB well as it considers making changes in the treatment of overdraft fees for smaller institutions.

We also understand that it may take more time for the CFPB to collect the data it needs to propose a similar rule for smaller financial institutions. The size of the benchmark fee needed to be a good approximation of costs could differ for smaller institutions. The data the CFPB has collected to date is exclusively from very large financial institutions and may not be reflective of the costs of smaller institutions. Especially considering the dependency of some smaller institutions on overdraft fee revenue, the CFPB will need more time to assess what costs smaller institutions incur that will need to be covered if they are to be able to provide overdraft services without doing so at a loss.

But eventually unfair and abusive overdraft fee practices must end everywhere. We urge the CFPB to do more than "monitor" the overdraft practices at smaller institutions. We urge the CFPB to begin collecting data and plan for a future rulemaking.[137]

11, 2022), https://newsroom.bankofamerica.com/content/newsroom/press-releases/2022/01/bank-of-america-announces-sweeping-changes-to-overdraft-services.html.

[137] The CFPB should certainly reject any suggestion that it should have engaged in small business review panels before embarking on a rule from which small businesses are completely excluded. The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) only applies when a rule "will have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 609(a). This rule will have no impact on small entities. Any indirect impact due to broader market forces are completely speculative, are driven by many outside developments beyond this rule, and do not meet the standard that the rule "will" have a significant economic impact. Moreover, the CFPB has noted that many large financial institutions have already substantially reduced overdraft fees, causing no major shift in deposits from small to very large financial institutions, even though most small institutions have not made similar changes.

In addition, the purpose of small business panels is to consider how a rule should be modified to mitigate the impact on small businesses or make it easier for them to comply. The most extreme form of that modification – exempting them completely – has already been done.

Size is no excuse for exploiting struggling consumers. Some smaller financial institutions have overdraft policies that harm vulnerable consumers with aggressive overdraft fee practices.[138] A recent report on overdraft and NSF revenue at institutions chartered in California shows that some derive well under 1% of their income from overdraft and NSF fees, while others are far higher, from 5% to 10% or more.[139]

While the voluntary steps some of these smaller and mid-size institutions have taken may provide some relief to some consumers,[140] only legally binding public policy can sufficiently protect all consumers from predatory overdraft practices. Half measures and voluntary changes that are not broadly adopted by other financial institutions are insufficient.

It is understandable that the CFPB may need more time to come up with a reasonable benchmark fee for smaller institutions or to work with bank regulators to ensure that smaller institutions that are dependent on overdraft fees have a plan to remain safe and sound as they transition to change their overdraft practices. However, eventually, overdraft programs at smaller institutions that charge more than the amount needed to cover the cost of the overdraft should also be subject to the protections required for credit under the Truth in Lending Act and Regulation Z.

8. Limit overdraft fees under Regulation E to one per episode and six per year.

In addition to limiting fees that are excluded from the finance charge definition to breakeven costs, the CFPB should also impose limits on the frequency of those fees. Frequency limits are important to fulfill TILA's purposes, to be faithful to the original purpose of the overdraft fee exception, to prevent evasions, and to limit the harm to consumers.

Recommendation: The CFPB should limit the number of overdraft fees that very large financial institutions can charge under Regulation E to no more than one per overdraft episode and six per year.

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[138] Aaron Klein, Brookings, "A few small banks have become overdraft giants," (Mar. 1, 2021), https://www.brookings.edu/opinions/a-few-small-banks-have-become-overdraft-giants/; Polo Rocha, American Banker, "Small banks face bigger threat to overdraft fees this time around," (July 27, 2021), https://www.americanbanker.com/news/small-banks-face-bigger-threat-to-overdraft-fees-this-time-around#:~:text=Banks%20with%20assets%20of%20%2410,with%20assets%20over%20%2410%20billion.

[139] *See* CA DFPI, Annual Report of Income from Fees on Nonsufficient Funds and Overdraft Charges (March 2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/04/Annual-Report-of-Income-from-Fees-on-Nonsufficient-Funds-and-Overdraft-Charges_2023.pdf.

[140] *See* New York Department of Financial Services ("NYDFS") Report on Overdraft, Non-sufficient Funds, and Similar Fee Practices of New York-Regulated Depository Institutions at 9 (July 14, 2023), https://www.dfs.ny.gov/system/files/documents/2023/07/rpt_20230714_consumer_fee_practices_nys.pdf.

The exceptions to TILA should be kept at a minimum to ensure that consumers receive the disclosures and other protections that Congress intended when consumers are offered credit. The overdraft fee exception is based on an occasional courtesy, not a routine way of offering credit. To return the exception to that narrow context, the fees must be imposed only occasionally, not every month.

Frequency limits are especially important if the CFPB decides on a benchmark fee above $3. The closer it comes to $14, the more essential it is to limit the number of fees, as the fee will exceed costs for many banks. If the fees become a profit center, financial institutions will have an incentive to maintain or return to manipulations to induce people into overdrafting and incurring multiple fees. The costs would also multiply for consumers. The CFPB found that nearly one in five consumers who have opted in to overdraft coverage on debit card and ATM transactions incurred more than 10 overdraft fees a year.[141] That could exceed $140 a year if the fee is $14.

It is also critical to prevent a single overdraft event from triggering multiple fees. Consumers have no control over the order in which transactions are processed, nor their speed, and as a result, multiple overdraft fees may be assessed on a single day or before a consumer has the opportunity to bring an account positive. Account holders struggling to keep their account positive often do not have the capacity to pay multiple fees, and this practice causes them a harm they cannot reasonably avoid. The greater the number and amount of fees, the greater the chances that the consumer will not recover and that the consumer will lose their bank account.

9. The CFPB should prevent evasions by fintechs and prepaid card companies.

9.1 Overview of the importance of preventing nonbank overdraft fee evasions.

The CFPB's overly narrow definition of "very large financial institution," in the proposed rule, combined with the widespread evasions of the overdraft fee provisions of the prepaid rule, leaves a potentially large loophole in the proposed rule. The CFPB must close that loophole.

A wide number of nonbank entities such as Chime, Current, Aspiration, MoneyLion, and NetSpend offer nonbank bank accounts that purport not to be prepaid accounts. The accounts are structured as individual bank accounts with partner banks, but the accounts are designed, marketed, offered, and serviced by nonbanks. These are essentially "rent-a-bank" deposit accounts.

While the partner banks would be subject to the overdraft fee rule if they had over $10 billion in assets, these nonbanks split up the deposits among multiple banks to avoid the interchange fee

[141] CFPB, Press Release, CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges (July 31, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-small-debit-purchases-lead-to-expensive-overdraft-charges/.

limits of Regulation II under the Durbin amendment. That same manipulation will enable evasion of the proposed overdraft rule if the CFPB does not stop it.

The best approach is for the CFPB to address the ambiguity in the prepaid account rule and make clear that any account offered by a nonbank, even if tied to a bank account, is a prepaid account subject to the prepaid rule's overdraft requirements. As discussed above, these nonbank bank accounts are most similar to prepaid accounts, target a similar demographic, and need the protections of the prepaid account rule. The smaller banks that partner on these accounts are much more akin to prepaid card issuers than to the smaller banks and credit unions that offer true checking accounts, which the CFPB is exempting from this rule. Clarifying the prepaid rule would serve the purposes of that rule and eliminate a loophole that has all but completely swallowed that rule.

If the CFPB declines to clarify the prepaid rule, the agency should expand the definition of "very large financial institution" by using the Regulation E definition of "financial institution" (which is broader than depository institutions) and by encompassing nonbanks that offer and service an account in partnership with a depository institution.

In addition, and as discussed in Section 9.7.2, the CFPB should make clear that the definition of "finance charge" encompasses purportedly voluntary fees such as "tips" and "donations."

9.2 Prepaid card companies are charging overdraft fees prohibited by the prepaid rule.

Prior to the enactment of the prepaid rule, a small fraction of prepaid cards had overdraft fees. After reviewing 40 prepaid card account agreements from the 11 largest prepaid card companies, the CFPB found that only three agreements offered overdraft services that could trigger a fee.[142]

Overdraft fees were primarily charged on prepaid cards sold by payday lenders.[143] These cards were designed to facilitate payday loans and to collect both overdraft and other fees triggered when unaffordable loan payments hit.[144] As abusive as overdraft fees are on traditional bank accounts, they were even more of an outrage on prepaid cards, which are aimed directly at the consumers who struggle with overdraft fees and are often excluded from traditional bank accounts.

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[142] Consumer Financial Protection Bureau, Study of Prepaid Account Agreements 25 (Nov. 2014).

[143] *See* Lauren Saunders, National Consumer Law Center, Payday Lender Prepaid Cards: Overdraft and Junk Fees Hit Cash-Strapped Families Coming and Going (July 2015), https://www.nclc.org/issues/payday-lender-prepaid-cards.html.

[144] *Id.*

The CFPB's prepaid rules under both Regulation E and Regulation Z, while not completely banning overdraft fees on prepaid cards, made important changes to protect these vulnerable consumers. Issuers that offer overdraft features must disclose that fact on the package or online in a prominent form. Hybrid prepaid-credit cards with overdraft or credit features must comply with credit card and "fee harvester" rules, including requirements to determine ability to repay, to limit total overdraft fees in the first year to no more than 25% of the credit line extended, and to give the consumer a choice of whether to permit automatic repayment.

Unfortunately, prepaid card companies simply found an evasion by coming out with new accounts that they apparently claim are checking accounts exempt from the prepaid rule,[145] despite the fact that they have no checks. NetSpend was among the small group of prepaid card providers that charged overdraft fees. In order to evade the overdraft fee limits of the prepaid rule and keep charging overdraft fees, NetSpend developed an account (with various names, including the ACE Flare Account), that it claims is not a prepaid account and that has overdraft services and fees.[146] NetSpend appears to be steering its prepaid card customers towards the Flare Account, limiting features on the prepaid account, which can access only $100 in no-fee cash withdrawals from ACE locations compared to $400 on the Flare Account.[147]

NetSpend not only found a way to keep charging overdraft fees, but it also increased them. Previously, NetSpend prepaid accounts were limited to three $15 fees per month ($45 maximum per month). The new NetSpend ACE "Flare Account" sold by the payday lender ACE Cash Express now can incur up to five $20 fees per month ($100 maximum per month).[148]

The CFPB should not countenance these evasions. These accounts are simply a form of prepaid account.

9.3 Fintech nonbank banking apps have overdraft features that target vulnerable consumers.

The same evasion that has allowed NetSpend to transform its overdraft-laden prepaid cards into debit cards is being used by other nonbanks to offer accounts that also do not comply with the

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[145] *See* Reg. E, 12 C.F.R. § 1005.2(b)(3)(i)(D)(1).

[146] *See* Press Release, National Consumer Law Center, NetSpend Plans Evasions of CFPB Prepaid Rules to Preserve $80 Million in Overdraft Fees (Oct. 28, 2016), https://www.nclc.org/media-center/netspend-plans-evasions-of-cfpb.html. NetSpend offers the its debit cards through various outlets, especially payday lenders. *See* https://www.acecashexpress.com/cards/ ("The ACE Flare® Account by MetaBank®") (last visited Mar. 14, 2024); https://www.flareaccount.com/ ("The ACE Flare® Account is a deposit account established by MetaBank®, National Association, Member FDIC. Netspend is a service provider to MetaBank.") (last visited Mar. 14, 2024).

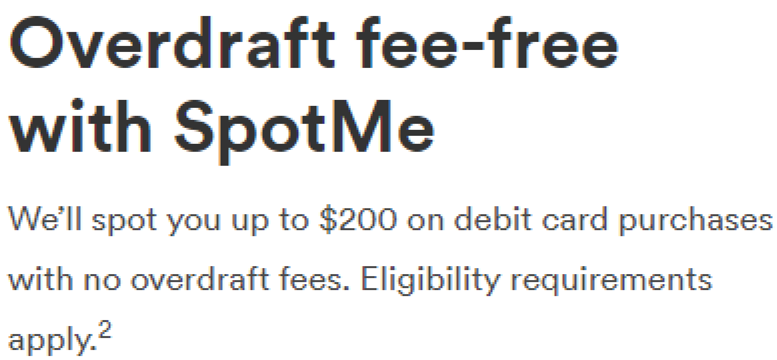
[147] *See* https://www.flareaccount.com/compare-cards/ (last visited Mar. 14, 2024).

[148] *See* https://www.flareaccount.com/ (last visited Mar. 14, 2024).

prepaid rule. Like prepaid accounts, nonbank banking apps target vulnerable unbanked and underbanked consumers who have had trouble with overdraft fees.

These fintechs are not banks.[149] Instead, they partner with a bank to offer banking services through an app and associated debit card. These nonbank banking apps are essentially a form of prepaid account— an account designed by, obtained through, and serviced by an entity that is not a bank and cannot directly offer deposit accounts. That is essentially what a prepaid account is and how the prepaid card market began— as a way for nonbank companies to offer debit cards and deposit accounts.

These fintechs target the same consumers who struggle with overdrafts and were the topic of the prepaid rule. Their marketing even focuses on the ability to overdraft. For example, Chime's home page advertises that a consumer can "overdraft fee-free."[150]



There is no mention of payment of "tips" anywhere on the home page. The SpotMe page compares the "$0" Chime SpotMe fees to a $30 traditional overdraft fee and encourages people to "pay it forward" to "keep SpotMe fee-free for our members!" [151]

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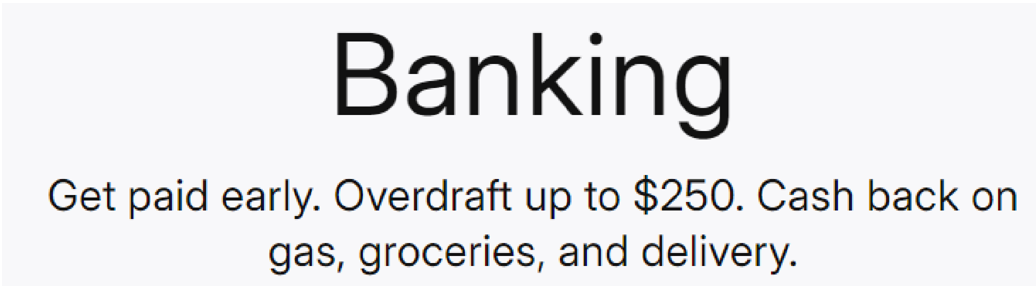
[149] Chime, for example, was forced to stop calling itself a bank in response to state enforcement actions. *See* Anna Hrushka, BankingDive, California Regulator Orders Chime to Stop Calling Itself a Bank (May 6, 2021), https://www.bankingdive.com/news/california-regulator-orders-chime-to-stop-calling-itself-a-bank/599710/; Illinois Department of Financial and Professional Regulation, Settlement Agreement and Consent Order, In re Chime Financial, Inc., No. 2021-DB-01 (Mar. 25, 2021), https://idfpr.illinois.gov/content/dam/soi/en/web/idfpr/banks/cbt/enforcement/2021/2021-03-25-chime-il-settlement-agreement-and-consent-order.pdf.

[150] *See* https://www.chime.com/ (last visited Mar. 13, 2024).

[151] https://www.chime.com/spotme/ (last visited Mar. 4, 2024).

Albert's home page also targets struggling consumers, advertising "overdraft up to $250."[152]



To be eligible for overdraft coverage, Albert requires a "Genius" subscription of $14.99 per month unless the consumer is willing to pay for an entire year at a rate of $12.99 per month.[153] Albert also solicits "tips," though it is not clear if that is in connection with overdrafts.[154]

Other companies do not currently structure their credit in a way that is directly triggered by overdrafts, but they use similar marketing and target the same audience:

- Dave's home page advertises "5M Dave members have taken 71M advances to avoid $2.5B in overdraft fees,"[155] and its Spending Account page proclaims: "Be in control of how you spend, manage, and deposit money—with no overdraft or minimum deposit fees."[156] But Dave urges users to pay a tip.[157]

- MoneyLion offers "instant cash advances up to $500" with "no mandatory fees,"[158] and also collects "tips."[159]

If the CFPB does not amend the definition of very large financial institution in its proposed rule, these banking/cash advance apps could have an incentive to use the loophole for overdraft services by splitting their deposits among financial institutions that are not "very large." This is especially true if the CFPB clarifies that their cash advances, as well as "earned wage access

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[152] https://albert.com/ (last visited Mar. 13, 2024).

[153] https://albert.com/ (last visited Mar. 13, 2024).

[154] https://help.albert.com/hc/en-us/articles/16768060313111-Albert-s-Terms-of-Use (last visited Mar. 13, 2024).

[155] https://dave.com/ (last visited Mar. 13, 2024).

[156] https://dave.com/spending-account (last visited Mar. 13, 2024).

[157] https://dave.com/extra-cash-advances (last visited Mar. 13, 2024).

[158] https://www.moneylion.com/personal-finance-products-and-services/ (last visited Mar. 13, 2024).

[159] https://www.moneylion.com/terms-and-conditions/ (last visited Mar. 13, 2024).

services," are credit covered by TILA. To avoid TILA coverage, these companies could restructure their cash advances into being triggered by overdrafts.

As discussed in Section 9.7 below, tips are the cost of credit and companies use a variety of means to impose those costs on consumers. These "tips" should be viewed as overdraft fees.

9.4 Nonbank banking accounts fit the definition of "prepaid account" and the CFPB should clarify that they are subject to the Prepaid Rule.

Asset accounts offered by nonbank companies should be considered prepaid accounts covered by the prepaid rule. These rules are designed for vulnerable unbanked and underbanked consumers who have had trouble with overdraft fees on traditional accounts.

Nonbank deposit accounts meet the core definition of "prepaid account." They are capable of being loaded with funds and have the primary function of conducting transactions with multiple unaffiliated merchants or at ATMs."[160]

The only question, then, is whether these products fall into the "checking account" exemption from the definition of "prepaid account."[161] Because nonbanks cannot offer checking accounts and most of these accounts do not have checks, they do not fall into this exemption.[162] Moreover, the CFPB made clear when promulgating the prepaid rule that even offering a form of preauthorized check would not take an account out of the prepaid account definition.[163] The checking account exemption was intended for traditional check-based checking accounts, not apps offered by nonbank companies.

The CFPB created confusion, however, by stating in a small entity compliance guide that "checkless checking" accounts are checking accounts exempt from the prepaid rule.[164] That exception is not supported by the prepaid accounts regulation or the discussion in the course of the rulemaking, and is not explained in the small entity compliance guide. To the extent that "checkless checking" accounts are exempt, the CFPB was referring to safe bank accounts

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[160] 12 C.F.R. § 1005.2(b)(3)(i)(D)(1), (2).

[161] 12 C.F.R. § 1005.2(b)(3)(i)(D)(3) (also excluding share draft accounts and negotiable order of withdrawal accounts).

[162] See 12 C.F.R. § 1005.2(b)(3)(i)(D)(1) (exempting checking accounts from the prepaid rule). See National Consumer Law Center, Consumer Banking & Payments Law § 7.2.3.2.5 (6th ed. 2018), updated at www.nclc.org/library (explaining the history of the exemption and why accounts without checks should be viewed as prepaid accounts, especially if they have overdraft fees).

[163] *See* CFPB, Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), Final Rule, 81 Fed. Reg. 83934, 83974 (Nov. 22, 2016) (stating "the Bureau does not consider the capability to issue preauthorized checks to qualify an account as checking, share draft, or NOW accounts").

[164] CFPB, Prepaid Rule, Small Entity Compliance Guide at 19 (updated Apr. 2019).

offered directly by financial institutions that do not have overdraft fees or credit features.[165] The small entity compliance guide could not and did not open a glaring loophole for prepaid companies and other nonbanks to evade overdraft fee and credit feature provisions of the rule.

There are many reasons to treat deposit accounts offered by nonbank companies as prepaid accounts and as different from bank accounts offered directly by banks:

- Only banks can accept deposits.[166]
- Unlike nonbank companies, all banks are required to have direct federal supervision, both for consumer protection and safety and soundness.[167]
- Only banks get FDIC insurance. Funds that nonbanks accept for deposit into a prepaid account/banking app are not insured until they get to the bank.[168]
- Most banks have branches where consumers can open an account and ask questions.
- Most banks have robust live telephone customer service, unlike fintechs that rely on automated channels that are inadequate when there is a problem.[169]
- There is a long history of problems associated with nonbank deposit accounts (like prepaid cards) such as frozen accounts that leave people unable to access their money.[170]

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[165] *See* Fed. Deposit Ins. Corp., Consumer Protection, FDIC Model Safe Accounts Template (Apr. 2012), https://www.fdic.gov/consumers/template/template.pdf.

[166] 12 U.S.C. 378(a).

[167] The CFPB has proposed a larger participant rule that would bring some nonbank companies within the CFPB's consumer protection supervision but not all of them. *See* NCLC et al, Comments on the CFPB's Proposed Rule to Define a Market for General-Use Digital Consumer Payment Applications (Jan. 8, 2024), https://www.nclc.org/resources/comments-on-the-cfpbs-proposed-rule-to-define-a-market-for-general-use-digital-consumer-payment-applications/. Moreover, even with CFPB supervision, the companies would still not be supervised for safety and soundness.

[168] *See* Federal Deposit Insurance Corp., Banking with Apps (Nov. 2020), https://www.fdic.gov/resources/consumers/consumer-news/2020-11.html.

[169] *See* Octavio Blanco, *The Big Problem With Online Banks—and What to Do About It*, Consumer Reports (July 29, 2021), https://www.consumerreports.org/online-banks/the-big-problem-with-online-banks-customer-service-a5640545842/.

[170] *See* Federal Trade Commission, Press Release, Mobile Banking App Settles FTC Allegations That It Misled Users About Access to Funds and Interest Rates (Mar. 29, 2021) (Beam Financial), https://www.ftc.gov/news-events/news/press-releases/2021/03/mobile-banking-app-settles-ftc-allegations-it-misled-users-about-access-funds-interest-rates; Andrew Griffin, *Revolut Down: Online Bank Hit by Major Issues on Black Friday*, Independent (July 26, 2021), https://www.independent.co.uk/life-style/gadgets-and-tech/revolut-down-black-friday-not-working-payment-card-b1964940.html; Carlson Kessler, ProPublica, A Banking App Has Been Suddenly Closing Accounts, Sometimes Not Returning Customers' Money (July 6, 2021), https://www.propublica.org/article/chime; Kevin Wack & Kate Berry,

- Nonbanks are targeting vulnerable consumers ignored by banks, just like prepaid card companies do.
- Unlike checkless checking accounts, these nonbank banking accounts impose costs when a consumer overdrafts.

Thus, the CFPB should add a comment to Regulation E § 1005.2(b)(3)(i) clarifying that the “checking account” exemption applies only to accounts that both (1) are offered directly by financial institutions and (2) either (a) have checks or (b) are accounts that are designed not to overdraft and therefore not an evasion of the prepaid rule because they do not have overdraft fees, nonsufficient funds fees, or other costs incidental to overdrafts.

Closing the nonbank, checkless “checking account” loophole would ensure that costly overdraft services offered by nonbank debit cards and banking apps do not escape both the overdraft provisions of the prepaid rule and those of the proposed overdraft rule. For all the reasons that we explained in the prepaid rulemaking,[171] consumers who use these accounts would benefit from the overdraft and credit provisions of the prepaid rule. In addition, other provisions of the prepaid rule, including its clear fee disclosure requirements, information access rules, and other protections, would also benefit users of nonbank banking apps and debit cards.

Clarifying the prepaid rule is also the preferable approach because it would extend overdraft protection to accounts issued by smaller institutions that will not meet the definition of “very large financial institution” but that should already be complying with the prepaid rule. Before a small group of banks started allowing demand deposit account BIN numbers to be used by nonbanks, these accounts would clearly have been viewed as prepaid cards.

These nonbank banking accounts are very different from the traditional small bank and credit union checking accounts that the CFPB is not yet ready to address in this rulemaking. The anonymous banks behind accounts offered in the name of and managed by nonbanks are no different from the bank issuers of nonbank prepaid accounts. The nonbank banking sector is also new and still developing, and the CFPB has a chance to prevent overdraft fee problems before they become as entrenched and widespread as they are with traditional bank accounts.

Prepaid Card Debacles, from BofA to the Kardashians, American Banker, Feb. 27, 2022, https://www.americanbanker.com/list/prepaid-card-debacles-from-bofa-to-the-kardashians.

[171] We incorporate by reference NCLC, Comments on Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), Docket No. CFPB-2014-0031, RIN 3170-AA22 (March 23, 2015), https://www.nclc.org/wp-content/uploads/2022/10/nclc_prepaid_card_npr_comments-032315.pdf.

9.5 The CFPB should encourage the Federal Reserve Board to address fintech evasions and overdraft fees in its debit card interchange fees rulemaking.

The CFPB can also encourage greater availability of accounts without overdraft fees through the Federal Reserve Board's current Regulation II rulemaking implementing the "Durbin Amendment" to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. First, the FRB can provide an incentive for banks to issue overdraft fee-free accounts that comply with the EFTA's prepaid rule by expanding the Regulation II definition of the prepaid cards that are exempt from the interchange fee cap. Second, the FRB can prevent large fintechs from evading the interchange fee rules by splitting their deposits among multiple banks.

The Durbin Amendment exempts prepaid cards from its interchange fee limits.[172] Under the Amendment, to be exempt, the prepaid card must not have any overdraft or shortage fees and cannot charge a fee for the first in-network ATM fee each month.

In its final rule implementing the Durbin Amendment, however, the FRB added additional restrictions that are not in the statute and were not in the proposed rule. These restrictions limit the functionality a prepaid card can have in order be exempt. The final rule permits a prepaid card account to be eligible for an exemption from the interchange fee cap only if the card is the sole means of accessing the account.[173] The card may not permit person-to-person money transfers, transfers to savings accounts, online bill payment features, or pre-funded checks. These are all important features for the low-income consumers who use prepaid cards.

At the time that Regulation II was adopted, the CFPB had not yet issued the prepaid rule, and there was no existing definition of prepaid card. Now that the CFPB has defined "prepaid accounts," the FRB should adopt that definition. That would encourage big banks to issue prepaid cards with no overdraft fees but fully functional features while enabling them to support the cards with higher interchange fees.

Better yet, the CFPB should encourage the FRB to define as a "prepaid card" any account that is effectively prepaid because it is designed not to overdraft and has no overdraft or NSF fees. The line between "checkless checking" and a prepaid account is a blurry one, as discussed above. Whether an account is structured as an individual demand deposit account or as a subaccount of a master account, the two accounts can function identically from the consumer's point of view.

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[172] Reg. II, 12 C.F.R. § 235.5(c).

[173] Reg. II, 12 C.F.R. § 235.5(c)(1).

In addition, the FRB should stop big tech accounts from evading the Durbin Amendment interchange fee caps by splitting deposits among multiple banks, as discussed in Section 9.4 above. The Clearing House has requested clarifications to stop those evasions.[174]

Together, these two changes would make it easier for large financial institutions to offer accounts without overdraft fees and would require large fintechs to comply with the prepaid rule, including the Regulation Z provisions, if they wish to benefit from higher interchange fee revenue.

9.6 Alternatively, the CFPB should amend the definition of "very large financial institution" to encompass nonbank accounts.

If the CFPB declines to bring nonbank banking services within the prepaid rule, then it must amend the proposed overdraft rule to ensure that bank accounts offered by very large nonbanks are covered. Otherwise, there will be a gaping hole in overdraft protection.

To take advantage of the smaller institution exemption from the Regulation II interchange fee limits, debit cards that access nonbank banking accounts are invariably issued by financial institutions under $10 billion in assets. For example, Netspend's Flare Account debit cards are issued by Pathward Bank, which has about $8 billion in assets.

But some of these fintechs are getting larger, or aspire to become large, managing assets that would exceed $10 billion. Therefore, they avoid triggering the Durbin Amendment's interchange fee limits by splitting its deposits among several financial institutions. Chime, for example, splits its deposits among the Bancorp Bank, N.A. and Stride Bank, N.A. These split deposits could easily be used to evade the overdraft rule as well.

The proposed definition of "very large financial institution" in the overdraft fee rule is: "an insured depository institution or an insured credit union that has total assets of more than $10,000,000,000 and any affiliate thereof …"[175] This definition excludes nonbanks like Chime, as their deposits are held in smaller institutions below that threshold.

Recommendations:

To prevent this loophole, the CFPB should make several changes.

First, the CFPB should add a definition of "financial institution," to Regulation Z, incorporating the Regulation E definition, which encompasses nonbank entities that either hold asset

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[174] The Clearing House, Comment Letter to the Board of Governors on Partnerships Between Small Banks and Large Fintech Companies That Appear to Circumvent Reg. II (Oct. 23, 2023), https://www.theclearinghouse.org/advocacy/Articles/2020/10/TCH_Comments_Reg_II_Circumvention_Letter_10_23_2020.

[175] Proposed § 1026.62(b)(8).

accounts or issue access devices to access those accounts.[176] Indeed, incorporating Regulation E's definition into Regulation Z would make sense, as Regulation Z does not have its own definition of "financial institution,"[177] and yet that term is used in the proposed overdraft rule. For example, the proposed rule defines "Overdraft credit" as:

> (2) Overdraft credit is any consumer credit extended by ***a financial institution*** to pay a transaction from a checking or other transaction account (other than a prepaid account as defined in § 1026.61) held at the ***financial institution*** when the consumer has insufficient or unavailable funds in that account. The term overdraft credit includes, but is not limited to, any such consumer credit extended through a transfer from a credit card account or overdraft line of credit. The term does not include credit exempt from this part pursuant to § 1026.3.[178]

Second, the definition of "very large financial institution" in proposed § 1026.62(b)(8) should be amended as follows:

> *Very Large Financial Institution* means <u>(i) </u>an insured depository institution or an insured credit union that has total assets of more than $10,000,000,000 and any affiliate thereof, as determined under 12 U.S.C. 5515(a)<u> or (ii) a financial institution, as defined in § 1005.2(i), that holds, manages or services accounts holding total assets over $10,000,000,000</u>.

Third, as discussed in Section 12.1 and to avoid confusion, the CFPB should use the term "asset account" as defined in Regulation E rather than "deposit account," "checking account" or "transaction account." These terms are used inconsistently and without definitions in the proposed rule, as indicated in the Section-by-Section analysis below.

9.7 So-called "tips" solicited for overdraft coverage are finance charges.

9.7.1 Fintechs use dark patterns and other means to compel consumers to tip.

Despite claiming that tips are voluntary, fintech companies use various strategies and powerful psychological and behavioral tools to make it difficult not to tip or to make people feel compelled to tip. They employ dark patterns in the way they design their interfaces, treat consumers who do not tip differently (despite implying they will not), play on emotional pitches, and count on people's expectations that they do, in fact, need to tip.

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[176] 12 C.F.R. § 1005.2(i).

[177] The only definition of which we are aware is in 12 C.F.R. § 1026.10(b)(3)(ii) regarding in-person payments on credit cards, which for purposes of that section only defines "financial institution" as "a bank, savings association, or credit union."

[178] Proposed § 1026.62(a)(2).

Just as payday lenders advertise fees that seem small but exploit consumers who end up getting caught in a debt trap, the tipping model takes advantage of consumers' lack of awareness of how the tips add up and how the price easily gets into the territory of payday loan pricing. The supposedly voluntary nature of the tips makes it easier to get sucked into a cycle of debt. As one borrower described:

> Earnin didn't charge Raines a fee, but asked that he "tip" a few dollars on each loan, with no penalty if he chose not to. It seemed simple. But nine months later, what was originally a stopgap measure has become a crutch.
>
> "You borrow $100, tip $9, and repeat," Raines, a highway-maintenance worker in Missouri, told me. "Well, then you do that for a bit and they raise the limit, which you probably borrow, and now you are in a cycle of get paid and borrow, get paid and borrow." Raines said he now borrows about $400 each pay cycle.[179]

Most borrowers likely have no idea the high rate of interest they are paying:

> One former Earnin user, Nisha Breale, 21, who lives in Statesboro, Georgia—another state where payday lending is illegal—said she hadn't fully realized that, when converted to an annual percentage interest rate, what seemed like a small $5 tip on a $100 advance payment (repayable 14 days later) was actually equivalent to a 130% APR.
>
> "I definitely didn't think about the payback time and the interest," Breale, a student at Georgia Southern University, said. "They just portray it as being so simple and so easy."[180]

A review of the Dave app noted "overall, it was a little too easy to give an optional tip that's equivalent to a higher APR," with a default of a 10% tip that was 280.76% APR on a $75 advance for 13 days.[181]

Fintech companies employ various strategies to make it difficult not to tip or to make the consumer feel compelled to tip. Some users may manage to use tip-based services for free. But for-profit enterprises counting on tips as a profit center, with investors who need a significant return on investment, will not put up with a lot of non-paying users.

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[179] Sidney Fussell, *The New Payday Lender Looks a Lot Like the Old Payday Lender*, The Atlantic (Dec. 18, 2019), https://www.theatlantic.com/technology/archive/2019/12/online-banking-lending-earnin-tip/603304/.

[180] Cyrus Farivar, NBC News, *Millions Use Earnin to Get Cash Before Payday. Critics Say the App Is Taking Advantage of Them* (July 26, 2019), https://www.nbcnews.com/tech/internet/millions-use-earnin-get-cash-payday-critics-say-app-taking-n1034071.

[181] Alex Nicoll, Insider, *I Tried Out Dave, the Mark Cuban-Backed App That Wants to Kill Bank Overdrafts–and I Keep Thinking About 1 Oddly Manipulative Feature* (June 27, 2019), https://www.businessinsider.com/review-of-dave-mark-cubans-overdraft-killing-app-2019-6.

EarnIn users reported having their access to advances restricted if they did not tip enough.[182] EarnIn changed that practice after regulators started investigating.[183]

Companies can discriminate against consumers who do not tip despite messages that imply they will not. There is a world of dark patterns and other manipulations that companies can engage in besides directly restricting eligibility for advances or overdraft protection.

For example, EarnIn inserted language deep in the fine print stating that, if the consumer did not tip enough, EarnIn would quietly turn off the low balance alerts that let consumers know they could seek an advance to avoid an overdraft. The consumers could manually turn them back on each time, but they would have to know what was happening and go into the setting to change them.

> *Balance Shield*
> Allows you to set an alert to have Earnin send you a notification when your Bank Account falls below an amount that you set ($0–$400) to help you monitor your Bank Account's balance. Balance Shield also incorporates Cash Out, by automatically setting a cash out of up to $100 when your Bank Account balance has fallen below $100. Note, that a Balance Shield Cash Out is subject to your available earned wages, your Daily Max and Pay Period Max requirements. You are responsible for monitoring your Daily Max and Pay Period Max to ensure that the Cash Out application of Balance Shield is available to you. We may limit the amount we send you for Balance Shield Cash Out at any given time or over a period of time. We may also decline to offer Balance Shield to you at any time, without prior notice, if we reasonably believe such refusal is necessary or advisable for legal or security reasons, or to protect the Services.
>
> Balance Shield alerts can stay on indefinitely until you turn them off. There is no fee or charge to use Balance Shield alerts. Generally, Balance Shield Cash Out will need to be turned on manually after each Balance Shield Cash Out, however, setting a voluntary tip ($1.50–$14.50) triggers Earnin to automatically keep Balance Shield Cash Out on even after a Balance Shield Cash Out. If you choose to enable Balance Shield Cash Out to activate automatically, Balance Shield Cash Out will stay on indefinitely until you turn it

[182] Kevin Dugan, *Cash-Advance App Earnin Gets Subpoenaed by NY Regulator: Source*, New York Post, Mar. 28, 2019 ("Earnin encouraged users to leave a tip of anywhere between zero and $14 on a $100 weekly loan. Users who don't leave a tip appear to have their credit restricted. Meanwhile, a $14 tip would equate to a 730-percent APR—nearly 30 times higher than New York's 25 percent cap."), https://nypost.com/2019/03/28/cash-advance-app-earnin-gets-subpoenaed-by-ny-regulator-source/.

[183] Kevin Dugan, New York Post, Cash-advance app Earnin changes its tune amid NY probe (Sept. 3, 2019) (Earnin "quietly disabled a controversial feature for New York users that links the size of its loans to voluntary 'tips,' according to sources close to the situation), https://nypost.com/2019/09/01/cash-advance-app-earnin-changes-its-tune-amid-nys-probe/.

> off, and will automatically debit your account for the amount and tip you have set. Earnin will send you an annual reminder that Balance Shield is turned on.[184]

In other words, if a consumer used the alerts but did not tip, the alerts would be automatically turned off while EarnIn would simultaneously minimize advances to those consumers.

After this practice was disclosed in congressional testimony,[185] EarnIn removed that language from its agreement.

Furthermore, tip amounts are typically inserted by default, with interfaces that encourage quick action without thought about the default tip. They may have less prominent, grayed out, awkward or cumbersome methods to undo the tip. One article described that Dave included a 10% default tip and did not let the default to be set to zero; a user who set a default of 0 would find it reset to 10%.[186] An Earnin user reported being completely unable to undo the default tip, even after deleting the app and reinstalling it.[187] An article about SoLo noted that "the only way to avoid [a tip] is through a toggle in SoLo's settings menu, which must be reactivated for each request. There's no way to opt out of donations while making the request itself."[188]

Apps also send psychological signals that make it difficult not to tip, indicating that you are a bad person or the service won't be able to survive if you don't. They take advantage of our tipping culture (no one feels that a tip is truly optional at a restaurant) and emphasize that tips are expected. Apps solicit "donations" or promise to provide meals or plant trees if the consumer

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[184] "There is no fee or charge to use Balance Shield alerts. Generally, Balance Shield Cash Out will need to be turned on manually after each Balance Shield Cash Out, however, setting a voluntary tip ($1.50–$14.50) triggers Earnin to automatically keep Balance Shield Cash Out on even after a Balance Shield Cash Out." Earnin, Terms and Privacy (visited Sept. 22, 2021).

[185] NCLC et al. Comments to CFPB re Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products, Docket No.: CFPB–2022–0003 at 49-50 (Feb. 2, 2022), https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22.pdf#page=49.

[186] Alex Nicoll, Insider, *I Tried Out Dave, the Mark Cuban-Backed App That Wants to Kill Bank Overdrafts–and I Keep Thinking About 1 Oddly Manipulative Feature* (June 27, 2019), https://www.businessinsider.com/review-of-dave-mark-cubans-overdraft-killing-app-2019-6.

[187] Woodstock Institute, Telephone Conversation with Brent Adams.

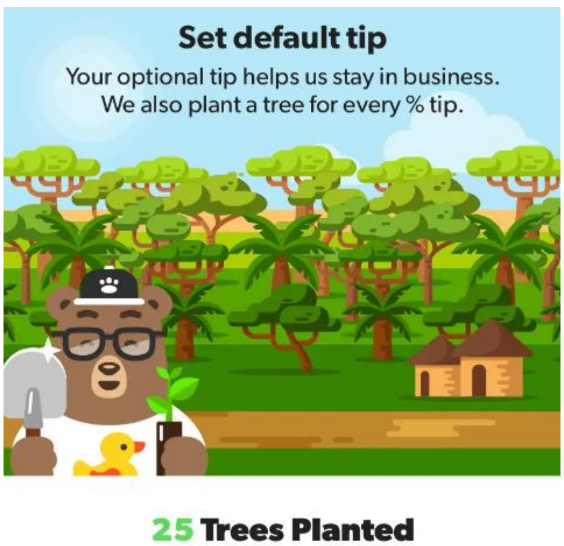
[188] Fast Company, *These 2 Black Founders Aim to Offer a Fairer Alternative to Payday Loans* (Feb. 18, 2021) ("When requesting a loan, for instance, SoLo asks borrowers to choose a "donation" to the app on top of their tip to the lender, starting at 7% or $3.50 for new borrowers seeking $50 loans. Technically, the donation is optional, but the only way to avoid it is through a toggle in SoLo's settings menu, which must be reactivated for each request. There's no way to opt out of donations while making the request itself. Industry watchdogs have also raised concerns about the tipping model. While SoLo's tips are also voluntary, and about 7% of loans funded on the platform involve no tipping at all, the app notes that loans are much more likely to be funded when users tip the maximum amount. Between tips and donations, users may end up paying a rate that's not much more favorable than payday loans, even if the model for late payments is less predatory."), https://www.fastcompany.com/90605796/payday-loan-alternative-solo-funds.

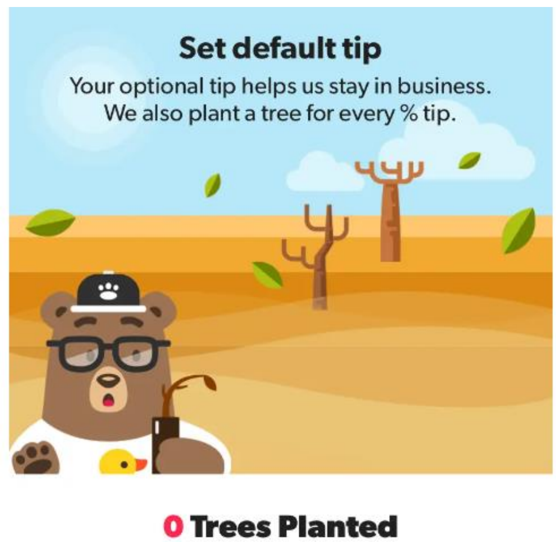
tips, but only a fraction of the funds are contributed.[189] Disingenuous statements encourage borrowers to "pay it forward" and to support a "community,"[190] ignoring the large companies and wealthy hedge fund investors who profit from the "tips."

Companies also exploit the psychological phenomenon of "reciprocity," i.e., that most people will feel compelled to give a tip and do not recognize actions designed to activate "obligatory giving."[191]

One reporter found that on the Dave app, if you change your default tip to 25%, you can see there are many more trees in the background, and Dave looks happy.[192]

But "With no tip, the background has become a desert. Dave, holding a dead plant, looks clearly upset."[193]





[189] Laurence Darmiento, Los Angeles Times, His app lends money for free. But it will probably cost you (May 18, 2022), https://www.latimes.com/business/story/2022-05-18/dave-inc-jason-wilk-cash-advance-app#:~:text=The%20fast%2Dgrowing%20West%20Hollywood,and%20monetary%20tips%20from%20users.&text=Brendan%20Goad%20is%20just%20the,most%20important%2C%20short%20on%20cash.

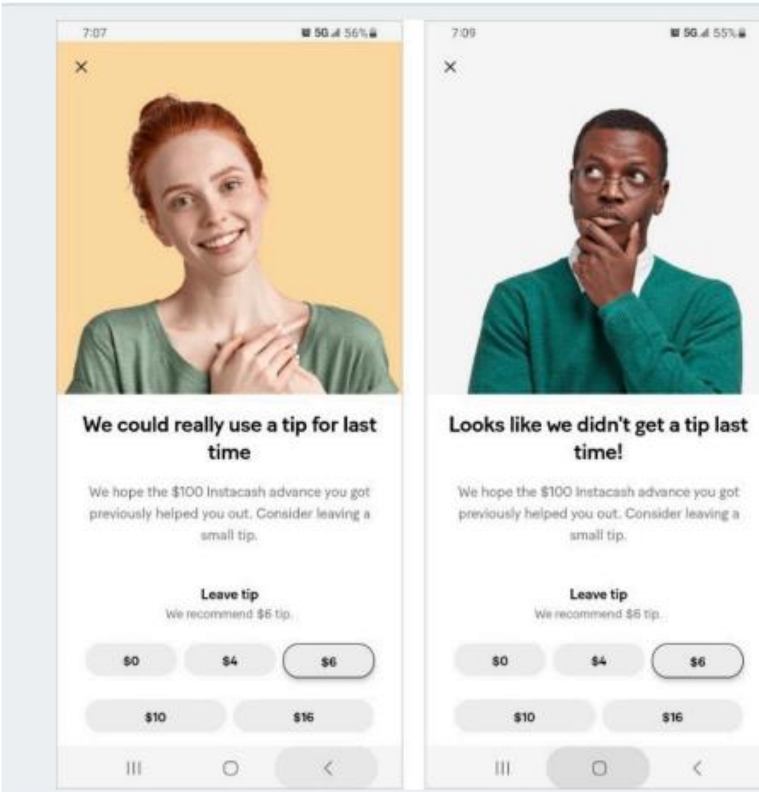
[190] *See* https://www.chime.com/spotme/ (last visited Apr. 25, 2022).

[191] *See* Linda & Charlie Bloom, *Honoring the Rule of Reciprocation*, Psychology Today (Oct. 10, 2015), https://www.psychologytoday.com/us/blog/stronger-the-broken-places/201510/honoring-the-rule-reciprocation.

[192] Alex Nicoll, Business Insider, *I Tried Out Dave, the Mark Cuban-Backed App That Wants to Kill Bank Overdrafts–and I Keep Thinking About 1 Oddly Manipulative Feature* (June 27, 2019), https://www.businessinsider.com/review-of-dave-mark-cubans-overdraft-killing-app-2019-6.

[193] *Id.*

On MoneyLion, if you don't tip, the next time you want an advance you first have to confront a screen that pushes you to tip for the last time.[194] There is no direct message that they will not keep lending to you if you never tip, but between the play on your emotions and your fears about what will happen if you don't tip, the messages to tip can be hard to resist.



We do not and cannot know what repercussions could flow from the infinite creative minds of fintechs – and neither do consumers, who may feel that there will be consequences if they do not tip enough. Even without direct messages or policies to disadvantage low tippers, consumers may believe they must make ample tips, or they will be cut off—a threat to people who are caught in a cycle of debt.

Regulators cannot be expected to constantly monitor the subtle and not so subtle back-end ways that companies will employ so that their customers tip. When caught using practices to coerce tips, companies may change their policies and then devise new ways to ensure they get paid.

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[194] *See* Andrew Kushner et al., Center for Responsible Lending, Paying to be Paid: Consumer Protections Needed for Earned Wage Advances and Other Fintech Cash Advances at 5 (Oct 2023), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-ewa-brief-oct2023.pdf.

9.7.2 "Tips" meet the definition of "finance charge."

The CFPB should ensure that the proposed overdraft fee rules cannot be evaded by use of purportedly voluntary "tips" that claim not be finance charges and are not included in the combination of charges used to calculate whether charges are above or below the breakeven or benchmark fee. "Tips" already meet the definition of finance charge and should be covered by the proposed rule. But it would be helpful and assist with compliance if the CFPB would make that coverage explicit.

As discussed above, it is questionable whether tips should be viewed as voluntary. As one study noted, "policy considerations suggest that treating tips as finance charges may be the most feasible for consumer protection. Frequently changing app interfaces may be burdensome for regulators to monitor, making it a challenge to police companies to ensure that charges are purely voluntary."[195]

Moreover, when a tip is added by default, which the consumer must undo, there is especially strong precedent to view it as compulsory. The "compulsory use" provision of the Electronic Fund Transfer Act prohibits a person from conditioning the extension of credit on repayment by preauthorized electronic fund transfers.[196] It violates the compulsory use ban and is a condition of credit if a creditor requires the consumer to authorize electronic payment as a default method, even if the contract permits the consumer to opt out or to use other forms of payment.[197]

But even if tips are viewed as voluntary, they can still be finance charges. The core TILA definition of a finance charge is a charge that is "payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit."[198] There are exclusions from that definition, such as charges payable in a comparable cash transaction and closing costs if the creditor does not require the charges or

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[195] Marshall Lux & Cherie Chung, Harvard Kennedy School, Earned Wage Access: An Innovation in Financial Inclusion? at 36 (June 2023), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/214_AWP_final_2.pdf.

[196] 15 U.S.C. § 1693k

[197] *See* de la Torre v. CashCall, Inc., 56 F. Supp. 3d 1073, 1089 (N.D. Cal. 2014) (concluding that a violation of EFTA occurs "at the moment of conditioning—that is, the moment the creditor requires a consumer to authorize EFT as a condition of extending credit to the consumer"), *vacated on other grounds*, 2014 WL 7277377 (N.D. Cal. Dec. 22, 2014), *vacated and remanded on other grounds*, 904 F.3d 866 (9th Cir. 2018); Fed. Trade Comm'n v. Payday Fin., L.L.C., 989 F. Supp. 2d 799 (D.S.D. 2013) (lender violated compulsory use provision because loan was conditioned on agreement to repay by EFT despite right to cancel EFT payments even before first payment); Pinkett v. First Citizens Bank, 2010 WL 1910520 (N.D. Ill. May 10, 2010); O'Donovan v. CashCall, Inc., 2009 WL 1833990 (N.D. Cal. June 24, 2009) (finding violation of EFTA despite fact that borrowers could cancel authorization before the first payment); W. Va. ex rel. McGraw v. CashCall, Inc., No. 08-C-1964 (W.V. Cir. Ct. Sept. 10, 2012) (same), http://www.nclc.org/images/pdf/unreported/cashcall_phase_I_debt_collection_decision.pdf, *In re* Integrity Advance, L.L.C., CFPB No. 2015-CFPB-0029 (Jan. 11, 2021), https://files.consumerfinance.gov/f/documents/cfpb_2015-cfpb-0029_document-308_2021-01.pdf.

[198] 15 U.S.C. § 1605(a).

services provided. But if a charge meets the core definition and does not fall within an exception, it is a finance charge.

A "tip" is "payable directly or indirectly by the person to whom the credit is extended." The consumer directly pays the tip.

A "tip" is also "imposed directly or indirectly by the creditor as an incident to the extension of credit." It is imposed by the request for the tip and by the contract agreement that allows the creditor to impose and collect the tip by offset or other means. It is imposed indirectly by the means a fintech uses to make the individual feel compelled to tip.

The Regulation Z definition of finance charge even more clearly covers "tips":

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.[199]

Tips for overdraft credit are "the cost of consumer credit as a dollar amount." When a consumer pays a tip, that is the cost of that overdraft. The tip does not cover any other service nor is it a gratuity for a human being who provided good service.

Regulation Z makes clear that a finance charge can be imposed "as an incident to" OR "as a condition of" the extension of credit. A charge that is required is a "condition" of the credit. A charge that is voluntary is "an incident to" the credit. The House Report for TILA makes clear that Congress wanted all charges connected with the credit extension included in the finance charge.[200] The FRB interpreted "incident to" as meaning "in connection with" and "part of the cost of credit."[201] Certainly, tips solicited and paid for overdraft credit are incident to that credit.

It is a longstanding interpretation of TILA that charges that are voluntary can still be finance charges. As the FRB said:

> The Board has generally taken a case-by-case approach in determining whether particular fees are "finance charges," and does not interpret Regulation Z to automatically exclude all "voluntary" charges from the finance charge. As a practical matter, most voluntary fees are excluded from the finance charge under the separate exclusion for charges that are payable in a comparable cash transaction, such as fees

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199 12 C.F.R. § 1026.4(a).

200 H.R. Rep. No. 1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1971, 1980, available as online companion material to this treatise (under Primary Sources, TILA Enactment). *Cf.* Black's Law Dictionary 839 (9th ed. 2009) (defining "incident" as "[d]ependent upon, subordinate to, arising out of, or otherwise connected with something else, usually of greater importance"), https://library.nclc.org/companion-material/house-report-no-1040.

201 61 Fed. Reg. 49237, 49239 (Sept. 19, 1996).

> for optional maintenance agreements or fees paid to process motor vehicle registrations. In the case of debt cancellation agreements, however, the voluntary nature of the arrangement does not alter the fact that debt cancellation coverage is a feature of the loan affecting the total price paid for the credit. Thus, even though a lender may not require a particular loan feature, the feature may become a term of the credit if it is included. For example, borrowers obtaining variable rate loans may have an option to convert the loan to a fixed interest rate at a subsequent date. Even though the lender does not require that particular feature, when it is included for an additional charge (either paid separately at closing or paid in the form of a higher interest rate or points), that amount properly represents part of the finance charge for that particular loan, even though less costly loans may be available without that feature. This is also the case with debt cancellation coverage, which alters the fundamental nature of the borrower's repayment obligation. Although the same loan may be available without that feature, with respect to a loan that has been structured in this manner, the debt cancellation fee is one that has been imposed as an incident to that particular extension of credit. The same rationale applies to premiums for voluntary credit insurance, which generally are finance charges under TILA but may be excluded if specified disclosures are given.[202]

Like the other voluntary charges that the FRB described, tips for overdraft credit affect the total price and become a term of the credit and the cost to repay that credit when they are included. They "represent part of the finance charge for that particular loan, even though less costly loans may be available" without paying tips.

As the FRB described, voluntary charges meet the definition of finance charge, and are excluded only if they fall within other specific exclusions, such as for those paid in a comparable cash transaction or for charges that meet certain conditions, like credit insurance if specified disclosures are given. There are no exclusions that cover voluntary payments for overdraft coverage. There is no comparable cash transaction to a tip paid for overdraft credit, and none of the other specific finance charge exemptions that address some types of voluntary charges applies.[203]

The "tips" evasion is new and has not yet generated caselaw of which we are aware. However, three attorney generals have entered into consent decrees with SoLo Funds arising out of allegations that purportedly voluntary "tips" collected for payday loans were a form of interest covered under state lending laws.[204]

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[202] 61 Fed. Reg. 49237, 49239 (Sept. 19, 1996). See also Pendleton v. American Title Brokers, 754 F. Supp. 860 (S.D. Ala. 1991) (cost of leaseback was a finance charge even though leaseback was not required in order to obtain the credit).

[203] See Reg. Z, § 1026.4(d).

[204] See NCLC, Press Release, CA, CT, DC Issue Orders Against Fintech Payday Loans that Solicit "Tips" (May 18, 2023) (providing links to consent decrees).

Viewing voluntary "tips" as finance charges is comparable to viewing courtesy overdraft services as credit, and the resulting fees as finance charges, even if there is no binding agreement to extend credit. In both situations, the existence of discretion does not change the fact that credit was actually extended or that fees were actually paid. Allowing voluntary "tips" to evade finance charge rules would lead to a large loophole, just as excluding courtesy overdraft services has. In both situations, the loophole leads to manipulations that bely the fact that the core transaction is an extension of credit in exchange for a fee.

Including tips and any other voluntary charges (such as a "donation") in the finance charge is consistent with the proposed rule's methodology for calculating the breakeven amount under proposed § 1026.62(d). The CFPB stated:

> For purposes of proposed § 1026.62(d)(1), a ''combination of charges'' would include all revenue ***received*** in connection with an overdraft transaction when determining whether the charges for that transaction exceed its average costs and charge-off losses for providing non-covered overdraft credit, including any extended or sustained overdraft fees, any interest charges on outstanding overdraft balances, and ***any other payments the very large financial institution receives in connection with an overdraft transaction or transactions.***[205]

Tips are payments that consumers make and that institutions receive in connection with an overdraft transaction or transactions.

Including "tips" as a finance charge is also consistent with the view of most courts that voluntary payment of usurious interest is not a defense to usury charges.[206] Courts have recognized that strong policy reasons argue against allowing a voluntariness defense, as it would undermine the purpose of usury laws.[207] The same is true here, as allowing above breakeven fees to be collected in the form of "tips" without following the disclosure and other requirements of TILA would undermine the CFPB's goals in requiring costly overdraft credit to comply with the federal protections required by TILA.

9.8 The CFPB should make clear that overdraft credit is "credit" even if the financial institution limits its recourse to collect.

As discussed in Section 12.2 in the section-by-section comments, we recommend adjustments to the language of proposed Comment 4 to § 1026.2(a)(4) on the definition of credit. That comment currently requires "a contractual obligation to repay." However, earned wage

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[205] 89 Fed. Reg. at 13869 (emphasis added).

[206] *See* National Consumer Law Center, Consumer Credit Regulation § 7.7.6.3 (3d ed. 2020), updated at library.nclc.org (collecting cases*). See also id*. § 4.2.2 (discussing why "tips" are interest or finance charges under state usury laws).

[207] See id.

advances and fintech cash advances have claimed that they do not offer credit because their advances are supposedly "nonrecourse," and the consumer does not have an absolute, enforceable obligation to repay. The CFPB must ensure that similar evasions are not used to evade this rule.

10. Other important changes needed to make the Proposed Rule effective.

10.1 The CFPB should fix the loopholes in the APR for open-end credit.

One of the important benefits of requiring above breakeven overdraft credit to be regulated under Regulation Z is price transparency. Instead of being charged back-end overdraft fees, people would receive the cost of credit disclosure with the annual percentage rate (APR) that can be compared to other credit options. Hopefully banks will price overdraft lines of credit the way they do today for those that offer them, primarily or exclusively through a periodic interest rate that will be reflected in the APR.

Unfortunately, loopholes in the Regulation Z rules for disclosing an APR for open-end credit make it possible to severely distort the APR or avoid disclosing one at all. Currently, the only APR disclosure required for credit cards and other open-end credit under Regulation Z is an APR consisting solely of periodic interest.[208] This APR does not include any fees, even if they are finance charges. This is despite the fact that TILA specifically and explicitly requires disclosure of a fee-inclusive or "effective" APR.[209] Prior to its elimination, this effective APR was disclosed on periodic statements and included the impact of fees that were finance charges (e.g., cash advance fees).[210]

As we have explained in previous comments, many high-cost lenders use fees to distort or evade APR disclosures.[211] Here are examples of deceptive or nonexistent APR disclosures:

- First Premier Bank charges 36% periodic interest and discloses a 36% APR on its line of credit. But a fee inclusive APR should include the $95 pre-account opening fee charged

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[208] 12 C.F.R. § 1026.14(b).

[209] 15 U.S.C. § 1606.

[210] *See generally* Elizabeth Renuart & Diane E. Thompson, The Truth, the Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth in Lending, 25 Yale J. on Reg. 181 (2008).

[211] *See* NCLC et al, Comments of Five Organizations Focused on Protecting Consumers; Docket No. CFPB2023-0018, https://www.nclc.org/wp-content/uploads/2023/07/Consumer-Coalition-Comment-on-Abusive-Practices_FINAL-Lauren-Saunders.pdf; Statement of Policy Regarding Prohibition on Abusive Acts or Practices at 3-6 (July 3, 2023); NCLC et al. Comments to CFPB re Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products, Docket No.: CFPB–2022–0003 at 35-39 (Feb. 2, 2022), https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22.pdf#page=49.

by First Premier and other fees that result in a 416% APR as calculated under 15 U.S.C. § 1606(a)(2) based on a $300 credit line if the line is fully used.[212]

- Bank and deposit account payday loans, including deposit advance products and newer forms of cash advances on nonbank banking apps from fintechs often disclose no APR.[213] For example, Fifth Third Bank does not disclose an APR on its MyAdvance payday loan, which has a 5% fee.[214] Banking advances can also carry other fees that should be considered finance charges, including “tips” and inflated expedite fees.[215]

- Elevate does not disclose any APR on its Elastic line of credit, and the sample payment schedule even obscures the number of payments. Its website displays a 10% monthly cash advance fee (or 5% bimonthly) as well as a carried balance fee ranging from $5 to $350 depending on the balance carried forward and the billing cycle.[216] But in its SEC filings, Elevate states that the effective APR for a $2,500 draw on Elastic is 107%.[217]

- CreditFresh is a product with a very similar pricing structure as Elevate. It also does not appear to disclose any APR on its website.[218]

The current rules lead to completely deceptive disclosures.

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[212] First Premier, Disclosures (last visited Mar. 15, 2024), https://www.premiercardoffer.net/OfferDetails/View?OfferSet=true&mkt=307&submkt=4042. The APR would be even higher if the effective APR included the annual fee, ranging from $50 to $125, which is currently not considered a finance charge under Regulation Z. For a $300 line of credit, there is a $75 fee that would result in an effective APR of 955% if included for the month in which the account was opened.

[213] In the past, banks offering deposit advance products also disclosed a sample APR that assumed a thirty-day repayment period, when in fact most loans were repaid in fewer than fourteen days upon the next paycheck deposit. Thus, the sample APR reported was less than half what it should have been.

[214] *See* Fifth Third Bank, MyAdvance™ (last visited Mar. 15, 2024), https://www.53.com/content/fifth-third/en/personal-banking/bank/my-advance.html.

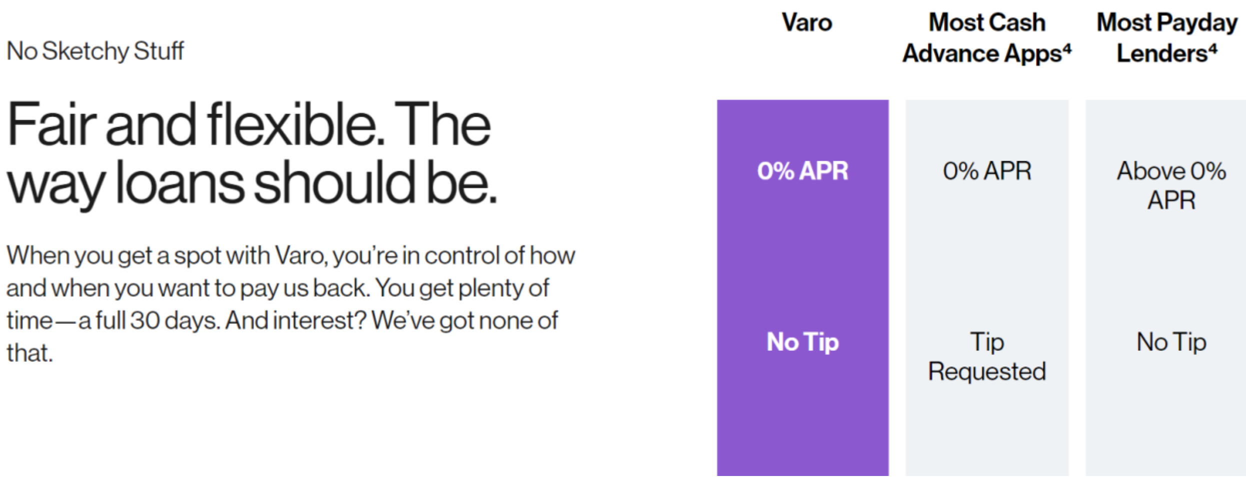
[215] *See* Section **Error! Reference source not found.**, *infra*.

[216] Elastic, What It Costs (last visited Mar. 15, 2024), https://www.elastic.com/what-it-costs/.

[217] *See* Elevate Credit, Inc., SEC Form 10-K for the Fiscal Year Ended Dec. 31, 2021, at 48, https://www.sec.gov/ix?doc=/Archives/edgar/data/1651094/000165109422000021/elvt-20211231.htm.

[218] CreditFresh, Cost of Credit (last visited Mar. 15, 2024), https://www.creditfresh.com/line-of-credit/cost-of-credit/.

For example, Varo boasts 0% APR and claims “interest? We’ve got none of that.” Yet it charges a fee that varies based on the amount advanced, costing $40 for a $500 advance for a 30-day loan.[219] That is actually a 96% APR.



Under current rules, it would be possible to replicate many aspects of today’s high overdraft fees without providing any APR disclosure. A bank could require overdrafts to be repaid in lump sum once a month, with a $35 fee for each draw on the overdraft credit line. Banks could also add high overdraft transfer fees on credit cards that are linked to deposit accounts. The cost of these forms of overdraft credit would be extremely difficult to compare to other credit options.

To fix the existing problems in the open-end credit marketplace and to prevent new ones from emerging for overdraft lines of credit, the CFPB should revise the rules for disclosing open-end APRs. The CFPB should revise the advertising APR to reflect the cost of fees and the resulting APR under certain assumptions, such as that the consumer fully utilizes the median credit line granted at the outset, does not make additional draws, and makes the minimum payment.

The CFPB should also reinstate an improved effective APR on statements. Indeed, in its 2013 Credit Card Market report, the CFPB developed a measure somewhat similar to the effective APR for its own research purposes, a “Total Cost of Credit.”[220] The CFPB has used this Total Cost of Credit in all of its subsequent biannual reports as required by the Credit CARD Act.[221]

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[219] *See* Varo Money, Varo Advance (last visited Mar. 15, 2024), https://www.varomoney.com/cash-advance/.

[220] Consumer Financial Protection Bureau, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market 19, 32–33 (Oct. 1, 2013) (CARD Act Report), http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

[221] Consumer Financial Protection Bureau, The Consumer Credit Card Market (Aug. 2019), https://www.consumerfinance.gov/data-research/research-reports/the-consumer-credit-market-2019; Consumer Financial Protection Bureau, The Consumer Credit Card Market (Dec. 2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf;

The CFPB's Total Cost of Credit measure attempts to capture an "all-in" price tag for purposes of evaluating the effect of the CARD Act on the credit card market, including the cost of credit.[222] A similar measure could be developed for credit card and other open-end credit disclosures. For example, the CFPB could require an effective APR for periodic statements that consists of a rolling 12-month average of the calculation in 15 U.S.C. § 1606(a)(2). A rolling average would address the phenomenon of a high effective APR in the month that a fee is imposed, which was what sometimes led to consumer confusion before the effective APR was eliminated. For an account that has been opened for less than twelve months, this rolling effective APR could be pro-rated.

10.2 The CFPB should require overdraft disclosures under Regulation Z and Regulation E in certain languages other than English.

In its proposed rule, the CFPB indicated it seeks comment on whether any specific disclosure requirements should be clarified and on whether any adjustments should be made to existing disclosure requirements to help better promote the informed use of covered overdraft credit. We urge the CFPB to consider amending Regulations E and Z to incorporate mandatory language access in required, essential disclosures.

About 25.5 million individuals in the United States, roughly 8.2% of the U.S. population over the age of five, are limited English proficient ("LEP"), meaning they have a limited ability to read, write, speak, or understand English.[223] Nearly two-thirds of this population is Spanish-speaking.[224] This sizable portion of the U.S. population faces many unique challenges in participating in our financial system, including understanding and completing key financial documents, managing bank accounts, resolving problems with financial products and institutions, and accessing financial education and money management tools.[225]

Consumer Financial Protection Bureau, The Consumer Credit Card Market (Dec. 2015), https://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

[222] Consumer Financial Protection Bureau, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market § 2.3 (Oct. 1, 2013), http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

[223] American Community Survey DP02 – Selected Social Characteristics in the United States, "Languages Spoken at Home." https://data.census.gov/table/ACSDP5Y2021.DP02?hidePreview=true

[224] Id.

[225] Consumer Fin. Prot. Bureau, Statement Regarding the Provision of Financial Products and Services to Consumers with Limited English Proficiency, 4 (Jan. 2021), https://www.nclc.org/wpcontent/uploads/2023/02/Comments-WH-Financial-Access-Subcommittee-on-Language-Access.pdf; Consumer Fin. Prot. Bureau, Spotlight on serving limited English proficient consumers: Language access in the consumer financial marketplace (Nov. 2017), https://www.consumerfinance.gov/dataresearch/research-reports/spotlight-servinglimited-english-proficient-consumers/; Federal Deposit Insurance Corporation, 2013 FDIC National Survey of Banked and Underbanked Households, 16-17 (Oct. 2014), https://www.fdic.gov/householdsurvey/2013report.pdf (finding that 34.9 percent of households where Spanish is the only language spoken are "unbanked,"

LEP consumers also frequently live within the margins of our financial system for reasons separate from these language barriers. LEP individuals are nearly twice as likely to live in a household with an annual income below the federal poverty line relative to English-proficient persons, and they are overwhelmingly foreign born.[226]

These added barriers frequently result in both concrete and perceived exclusion from mainstream financial products and services. It also makes LEP consumers susceptible to predatory financial products and confusion about how the products work.

Thus, the central purpose behind the disclosure requirements under TILA, the EFTA, and other statutes is especially salient for LEP consumers. They need the tools to engage in comparison shopping between different providers and products and to understand the products they are getting, how the products work, and the choices they have.

Among the disclosures relevant to overdraft fees and the proposed rule are the Regulation E opt-in notices, the fee disclosures under Regulation E, the finance charge and APR disclosures under Regulation Z, and the error resolution disclosures under both regulations. As we discussed earlier in these comments, disclosures by themselves are no substitute for substantive consumer protections. Yet, they are nonetheless an important tool to ensure that consumers receive the information necessary to enforce their substantive rights and act in their best interests to the greatest extent possible.

While Regulation Z currently allows financial institutions to provide required disclosures in languages other than English,[227] merely allowing translations does not ensure that financial institutions will provide them. The CFPB should take concrete steps to ensure that these disclosures are accessible to LEP consumers.

We recommend that the Bureau effectuate this change by incorporating language access into the Bureau's definition of "clear and conspicuous" in its official interpretation of Regulation Z §1026.5(a) and of the "clear and readily understandable" standard under Regulation E, § 1005.4(a)(1). Put simply, if a disclosure could be reliably and predictably misunderstood by one in twelve consumers, that disclosure should not be considered effective. At a minimum, essential disclosures conveying key credit and deposit account terms, consumer rights under federal law, and any changes to those terms or rights, *(i.e.* those provided in the account opening disclosures, periodic statements, and change-in-terms notices), should be provided in both English and Spanish to *all* consumers.

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compared to just 7.1 percent of households where Spanish is not the only language spoken); U.S. Government Accountability Office, Factors Affecting the Financial Literacy of Individuals with Limited English Proficiency, GAO-10-518 (May 2010), http://www.gao.gov/assets/310/304561.pdf.

[226] Jie Zong and Jeanne Batalova, The Limited English Proficient Population in the United States, Migration Policy Institute (July 8, 2015), www.migrationpolicy.org.

[227] 12 C.F.R. §1026.27

In addition, translated disclosures should be made readily available to consumers that speak other languages commonly spoken among LEP individuals in the United States. This could be facilitated through brief "tagline" disclosures at the bottom of English-language notices and disclosures explaining the nature of the disclosure and a link to the disclosure in other languages. To help ensure that these translated disclosures are complete and accurate, we recommend that the Bureau publish translated versions of essential model forms, disclosures, and notices in the eight most spoken languages among LEP individuals.

We also suggest incorporating similar language accessibility into the opt-in disclosure requirements under Regulation E for non-covered overdraft credit. Regulation E currently requires that financial institutions provide consumers with a "reasonable opportunity" to affirmatively consent to the overdraft service for ATM and one-time debit card transactions.[228] Yet, when an institution only provides this disclosure in English, it denies LEP consumers a reasonable opportunity to provide their affirmative consent. The Bureau should clarify that, at a minimum, very large financial institutions must provide a mechanism to deliver this disclosure in Spanish, either through a tagline notice or through a fully bilingual opt-in disclosure.

11. Additional section-by-section comments: Regulation E

11.1 Compulsory Use of Preauthorized Transfers: § 1005.10(e)

The EFTA and Regulation E prohibit a creditor from requiring a consumer to repay credit by preauthorized electronic fund transfer. Regulation E, however, has an exception that is not in the statute for overdraft lines of credit.[229]

The CFPB has the authority to eliminate this nonstatutory exception, and we support the proposal to do so for covered overdraft credit extended by very large financial institutions. That is, very large financial institutions that extend overdraft credit would not be able to require consumers to repay the credit by preauthorized electronic fund transfer.

The same purposes served by § 1005.10(e) generally are served by extending it to covered overdraft credit by very large financial institutions. Giving consumers control over how and when to repay overdraft credit will protect consumers and help them to manage their finances, enabling them to choose which bills to pay and when and how to pay them in the same way that they can do for other types of credit. The proposed rule will also give financial institutions an incentive to consider the consumer's ability to pay and not merely the ability to collect using a preauthorization that might leave the consumer without funds to pay their bills.

The FRB's early 1980s exception for overdraft lines of credit was motivated in part by concerns that the costs of providing a non-automatic payment option was substantial. But as the CFPB

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[228] 12 C.F.R. §1005.17(b)(2).

[229] 12 C.F.R. § 1005.10(e)(1).

notes,[230] new technologies developed in the last 50 years, including the internet and the spread of smartphones, enable other low-cost payment options and make it easy to communicate with consumers to request and receive payments. Sending a check in the mail is no longer the primary alternative to mandatory preauthorized electronic fund transfers.

The compulsory use ban has not inhibited a substantial credit card market. Applying it to covered overdraft credit by very large financial institutions should not prevent a responsible market for overdraft lines of credit. As the CFPB observes, overdraft lines of credit are not common today,[231] but the proposed rules will provide strong incentives for such credit lines, as they will be the primary way that very large financial institutions can charge above breakeven fees for overdraft credit.

Financial institutions would retain the ability to offer “a reduced annual percentage rate or other cost-related incentive for an automatic repayment feature.”[232] We urge the CFPB to clarify that creditors cannot use coercive incentives to obtain “consent” for preauthorized payments. For example, a substantially higher price for non-automatic payment should violate Regulation E. In addition, an incentive that is not “cost-related” is not authorized by Regulation E.

11.2 Definition of “Overdraft Services”: § 1005.17(a) Comment 2

We support proposed Comment 2 to Regulation E § 17(a) defining “overdraft services.” The proposed comment clearly explains the distinction between “overdraft services,” which are regulated by Regulation E, and “covered overdraft credit,” which is subject to Regulation Z. Extending TILA’s protections to overdraft credit with above breakeven fees will have important benefits for consumers.

12. Additional section-by-section comments: Regulation Z

12.1 Add definitions of “financial institution” and “asset account” using the Regulation E definitions.

As discussed in Section 9.6, the CFPB should add a definition of “financial institution,” which does not appear in Regulation Z. For purposes of the Overdraft Credit section of Regulation Z in proposed § 1026.62, that definition should follow the Regulation E definition, encompassing both depository institutions and nonbanks that hold consumer asset accounts or issue access devices.

The CFPB should use the term “asset account” throughout these regulations rather than “checking or other transaction account” or “deposit account,” and should define “asset account”

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[230] 89 Fed. Reg. at 13883.

[231] *Id.* at note 223.

[232] Official Interpretation to Reg. E § 1005.10(e)(1)-1.

as an “account” within the meaning of Regulation E. Using the term “asset account” is particularly appropriate as it is used within the defined term “covered asset account” in proposed § 1026.62(b)(2), as discussed below.

The phrases “checking account,” “transaction account” and “deposit account” are not defined and could present problems. There is no established regulatory framework or caselaw for those phrases. “Transaction account” could mean an account that does not hold funds but is merely a pass-through account or wallet used for sending funds.

In addition, “checking or other transaction account” could exclude accounts such as savings accounts and money market accounts that could have overdraft features. The Regulation DD transaction limits on savings accounts no longer exist, and we understand that there are savings accounts that are for all practical purposes demand deposit accounts, with no deposit, withdrawal, or usage limits. We have been told of one institution, for example, that chose to structure an account on a savings platform due to fee differences from their core provider for certain features.

The EFTA’s “account” definition has an established history, and the EFTA is the appropriate place to flesh out what an asset account is.

12.2 Definition of “credit”: § 1026.2(a)(14) – Comment 4

Proposed comment 4 to the definition of “credit” in § 1026.2(a)(14) states:

> *Overdraft credit.* Funds extended by a financial institution to a consumer to pay transactions that overdraw a checking or other transaction account held at the financial institution are credit whenever the consumer has a contractual obligation to repay the funds.

We support adding a comment to the definition of “credit” explaining that overdraft credit is credit even if the financial institution has not committed in writing to extend credit, for the reasons explained in Section 5.3 above. However, we have a few suggestions.

First, we recommend adding “a contractual <u>agreement or</u> obligation to repay.” The evasions we have seen by earned wage advances and other fintech cash advances show that it possible to manipulate whether something is “voluntary” or required, and whether there is an enforceable obligation to repay. Financial institutions could manipulate the “obligation” requirement, for example, by giving the consumer the right to cancel authorization for repayment. The financial institution could also limit its means of recourse if the credit is not repaid, i.e., by promising not to sue or use debt buyers, thereby claiming that there is no obligation to repay. For example, the fintech Current limits its recourse, and others could codify their practices even further in order to claim that there is no enforceable "obligation" to repay.[233]

Second, the comment could be read to require that the financial institution which extended the credit be the same financial institution that holds the checking or other transaction account. However, it is possible that the overdraft credit could be extended by a different entity. For example, a nonbank in partnership with a bank could extend the credit, or a nonbank could issue an access device for an asset account that it does not hold and extend credit using that access device. It should not be a requirement that the extension of credit and the asset account be held at the same institution, even though most of the time that will be the case. It is possible that credit extended in this situation could continue to claim to be exempt overdraft services.

Third, as discussed in Section 12.1 above," the regulation and commentary should consistently use the term "asset account" rather than "a checking or other transaction account."

Recommendation: We suggest that this comment be re-written to say:

> *Overdraft credit.* Funds extended by a financial institution to a consumer to pay transactions that overdraw ~~a checking or other transaction~~ an asset account held at ~~the~~ a financial institution are credit whenever the consumer has a contractual agreement or obligation to repay the funds, regardless of whether the financial institution has agreed to limit its means of recourse if the consumer does not repay.

12.3 Definition of "card issuer": § 1026.2(a)(7)

Existing Comment 2(a)(7)–1.ii explains when a partner of a prepaid card issuer with a credit feature is considered to be that person's agent and thus a card issuer with respect to a hybrid prepaid-credit card. A similar comment should be added regarding agents of hybrid debit-credit cards. That is especially important given the rise of nonbank banking apps with overdraft features, as discussed in Section 9.3 above.

Recommendation: Add Comment 2(a)(7)-1.iii to read:

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[233] Current's terms and conditions for use of Overdrive (which allows ovedrafts) say: "F. Our Rights to Repayment You represent and warrant that you authorize us to claim funds due to us (to cure any negative balance) under these Terms. If we are unable to cure the negative balance from your Account, you may be prohibited from obtaining another product from us. We will not place the amount advanced as a debt with or sell it to a third party or report any failure to repay to a consumer reporting agency if the advance is not repaid on the scheduled date.

However, we may engage in debt collection activities. For avoidance of doubt, failure to repay a negative balance will not affect your credit. Neither Bank nor Current will furnish information about you to credit reporting agencies. However, we will use additional legal options available to us in order to collect the money you owe us." See https://cdn.current.com/choice_account_agreement.pdf.

> **ii.** Under § 1026.2(a)(7), with respect to overdraft credit accessible by a hybrid debit-credit card, where the overdraft credit is offered by an affiliate or business partner of the issuer of the card, as those terms are defined in § 1026.62, the affiliate or business partner offering the overdraft credit is an agent of the card issuer and thus is itself a card issuer with respect to the hybrid debit-credit card.

12.4 Definition of "credit card": § 1026.2(a)(15) – Comments 2.i.A, 2.i.B, 2.ii.A

We support the changes made to comments 2.i.A, 2.i.B and 2.ii.A to § 1026.2(a)(15) defining "credit card." Those amendments make clear that cards that access covered overdraft credit are credit cards, with no exception for occasional inadvertent overdrafts.

12.5 Definition of "open-end credit": § 1026.2(a)(20)

12.5.1 Comment § 1026.2(a)(20)-2.iv – meaning of "plan" with respect to covered overdraft credit

The CFPB has proposed adding new Comment § 1026.2(a)(20)-2.iv regarding what constitutes an open-end "plan." This new comment specifically addresses covered overdraft credit. We support the addition of new Comment § 1026.2(a)(20)-2.iv. We especially support the language stating that the creditor need not agree in writing to extend the overdraft credit or retains discretion not to extend the credit.

Similar to our recommendation with respect to § 1026.2(a)(14) – Comment 4, we recommend that the language in Comment § 1026.2(a)(20)-2.iv be changed from "obligated contractually" to pay to "obligated or contractually agrees to pay," for the reasons stated in Section 12.2 above.

We also recommend that the comment be clarified to note that the "certain amount of credit" limit need not be disclosed for the program to constitute a plan.

Recommendation**:** Amend Comment § 1026.2(a)(20)-2.iv to read:

> **iv.** With respect to covered overdraft credit as defined in § 1026.62, a plan means a program where the consumer is obligated to or contractually agrees to repay any credit extended by the creditor. Such a program constitutes a plan notwithstanding that, for example, the creditor has not agreed in writing to extend credit for those transactions, the creditor retains discretion not to extend credit for those transactions, or the creditor does not extend credit for those transactions once the consumer has exceeded a certain amount of credit, whether or not such amount is disclosed.

12.5.2 Comment § 1026.2(a)(20) - 4.iii - “finance charge from time to time on an outstanding unpaid balance”

The CFPB has proposed adding new Comment § 1026.2(a)(20)-4.iiii regarding what constitutes a “finance charge from time to time on an outstanding unpaid balance” for the purposes of determining whether credit is open-end or closed-end. This new comment specifically addresses overdraft fees. We support the addition of new Comment § 1026.2(a)(20)-4.iiii.

We especially support the statement that there is a finance charge from time to time on the outstanding balance of a plan regardless of whether the charge is on the deposit account or separate credit account. We also support the statement that the condition is met if there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated. This is almost always the situation with overdraft credit, where the amount financed is the amount of any overdraft, which is never precalculated from the inception of the plan.

As discussed in Section 12.1 we recommend that that the term “deposit account” be changed to “asset account.”

Recommendation**:** Revise Comment § 1026.2(a)(20)-4.iiii to read:

> **iii.** Regardless of whether the financial institution assesses such charges on the ~~deposit~~ asset account itself or a separate credit account, any service, transaction, activity, or carrying charges imposed by a financial institution for paying a transaction that overdraws a consumer’s ~~deposit~~ asset account held at the financial institution are finance charges unless they are excluded from the definition of finance charge by § 1026.4(c). See § 1026.4(a), (b)(12), and (c). Additionally, such charges would constitute finance charges imposed from time to time on an outstanding unpaid balance, as described in § 1026.2(a)(20), if there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated.

12.6 Examples of finance charges (in general): § 1026.4(b)(2)

We support the proposal to exclude covered asset accounts from § 1026.4(b)(2) and instead to address them in new § 1026.4(12) with a narrower exception for comparable cash transactions, for the reasons discussed in the next section.

We have suggestions for some of the comments to this provision.

Recommendation: In Comment § 1026.4(b)(2)-1, we suggest deleting the following language in proposed Comment 1, which appears superfluous and confusing. (We also suggest using the term “asset account”):

> **1.** ~~Checking or transaction~~ Asset account charges. A charge imposed in connection with a credit feature on ~~a checking or transaction~~ an asset account (other than a prepaid

> account as defined in § 1026.61 or a covered asset account as that term is defined in § 1026.62) is a finance charge under § 1026.4(b)(2) to the extent the charge exceeds the charge for a similar account without a credit feature ~~and the charge is not addressed by § 1026.4(b)(12)~~. If a charge for an account with a credit feature does not exceed the charge for an account without a credit feature, the charge is not a finance charge under § 1026.4(b)(2).

Proposed § 1026.4(b)(12) applies only to covered asset accounts, which would be excluded from this comment.

Recommendation: We suggest modifying the language in existing example Comment 1.ii to remove the following language:

> **ii.** A $5 service charge is imposed for each item that results in an overdraft on an account with an overdraft line of credit, while a $25 service charge is imposed for ~~paying or~~ returning each item on a similar account without a credit feature; the $5 charge is not a finance charge.

Without this change, this example implies that a comparable account that allows an overdraft, *i.e.*, "paying" the item, is an account "without a credit feature." That would conflict with new Reg. Z, § 1026.62(a)(2) and new Comment 4 to § 1026.2(a)(4).

12.7 Examples of finance charges on covered asset accounts and the comparable cash transactions exception: § 1026.4(b)(12)

We support new proposed § 1026.4(b)(12) and in particular the proposal to narrow the nonstatutory comparable cash transaction exception to the definition of finance charge. That proposal will promote transparency in the cost of credit and prevent evasions.

Subsections (i) and (ii) bring within the definition of "finance charge" any service, transaction, activity, or carrying charge imposed on:

- **(i)** the separate credit account that is required by proposed § 1026.62(c) for overdraft credit with above breakeven fees, and
- **(ii)** covered asset accounts, if the charge exceeds comparable charges on accounts without overdraft credit.

Subsection (i) is obvious: service, transaction, activity or carrying charges on credit accounts are finance charges. Those fees are imposed on a credit account and thus are clearly incident to credit. That is true today and would be true if banks restructure their overdraft services as lines of credit. As the CFPB has described, it would not be meaningful to compare fees on a credit account to those on a noncredit account and comparisons would depend on what types of accounts an institution offered.[234]

Subsection (ii) is the same rule that applies today to other asset accounts through § 1026.4(b)(2).

The CFPB has proposed the additional important addition of §§ 1026.4(b)(12)(iii)(A) through (E), which narrow the exception for charges in comparable cash transactions in subsection (ii). We support that addition.

The CFPB has the authority to restrict the comparable cash transaction provision or even to eliminate it completely, and perhaps it should. The comparable cash exception is highly confusing, often involving extremely complicated scenarios. Charges for credit are part of the cost of the credit, are incidental to that credit, and thus meet the definition of finance charges, even if there are comparable charges in another non-credit context.

The purpose of the rule bringing within the finance charge amounts exceeding charges in a comparable cash transaction, as in current § 1026.4(b)(2) and § 1026.4(b)(12)(ii), is not to clearly exclude credit-related costs from the finance charge. Rather, it is to bring into the finance charge definition hidden credit charges that are designed to appear not to be finance charges.

Unfortunately, the comparable cash transactions provision has been misused and has permitted financial institutions to hide their finance charges by making them analogous to other asset account fees, primarily nonsufficient funds (NSF) fees. Creditors have also excluded amounts using the comparable cash transaction exception where there really is no comparable transaction.

For example, refund anticipation loan creditors excluded from the APR an amount they claimed was the fee for a “refund transfer” as the comparable cash transaction.[235]

In another example, after Arizona voters upheld the state’s 36% usury cap, the payday lender CheckSmart began offering prepaid cards with overdraft “protection” with fees designed as disguised interest.[236] First, CheckSmart charged a fee of 15% of the negative balance. The overdrafts were virtually identical to a $15 per $100 payday loan. Second, CheckSmart also used “transfer” fees on the prepaid card to disguise the cost of a linked line of credit. The cost of the credit line was purportedly 35.9% APR. But the prepaid card charged a “convenience transfer fee” of $3.50 per $28.50 advance. Thus, it cost $3.50 plus interest to yield net credit of

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[234] See 89 Fed. Reg. at 13865.

[235] National Consumer Law Center, Truth in Lending § 3.6.5.3.2 (11th ed. 2023), updated at http://www.nclc.org/library.

[236] Comments of National Consumer Law Center (on behalf of its low-income clients) to CFPB re Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), Docket No. CFPB-2014-0031, RIN 3170-AA22 at 21 (Mar. 23, 2015), https://www.nclc.org/wp-content/uploads/2022/10/nclc_prepaid_card_npr_comments-032315.pdf.

$25, the equivalent of $14 per $100 plus interest. The annual rate for a 14-day loan was 390% to 401%. These 400% loans were offered in states that have usury caps of 28% to 36%. The cost of the credit was not acknowledged as a finance charge but instead was charged as a “fee” on the prepaid card account.

Moreover, the CFPB is wise to anticipate other types of fees beyond NSF fees that financial institutions might impose on asset accounts to evade the finance charge rules. As the CFPB describes, limits on the comparable cash transaction rule were important to prevent evasions of credit feature requirements of the prepaid rule and are important to prevent evasions of the current proposed rule.[237]

Thus, we support proposed § 1026.4(b)(12)(iii)(A) through (E), which provide clarity that covered asset accounts cannot deduct the following fees from their overdraft fees to avoid finance charge treatment.[238]

> **(A)** A charge for authorizing or paying a transaction that overdraws the checking or other *transaction account.* Clearly, such fees would be the price of, and incident to, credit.
>
> **(B)** *A charge for declining to authorize or pay a transaction*, or **(C)** *a charge for returning a transaction unpaid*. A fee charged for overdraft credit is the cost of credit, incident to that credit, regardless of whether the institution charges NSF fees or declined transaction fees when credit is refused. Returning an item unpaid is simply not a comparable transaction to paying it as an overdraft – one transaction is credit and the fee is the cost of that credit; the other transaction is not credit and the fee serves a different purpose. Financial institutions thankfully have been eliminating NSF fees, which fall on the most struggling consumers. Allowing NSF fees to be deducted from overdraft fees would provide an incentive to reimpose or keep those fees and would harm consumers.
>
> **(D)** A charge for transferring funds into the checking or other transaction account from *any credit account* or **(E)** a *charge for transferring funds into the checking or other transaction account from any other asset account.* Those transfer fees are themselves the cost of covering overdrafts, and of providing credit if the transfer is from a credit account. Here again, financial institutions have been eliminating transfer fees from savings accounts, and transfers from savings are one of the best ways of covering overdrafts. Financial institutions should not be encouraged to reimpose those fees, and the existence of transfer fees does not change the cost of overdraft fees.

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[237] *See* 89 Fed. Reg. at 13864.

[238] As discussed above, the phrase “checking or other asset account” should be replaced by “asset account” in these examples.

The charges listed in (A), (B), (C) and (D) are not associated with cash transactions. They are associated with credit transactions (A and D) or the decision to refuse a credit transaction (B and C), but not with a cash transaction.

We also strongly agree with the CFPB that it would promote evasions to allow savings transfer fees to be deducted from credit transaction fees for covered overdraft credit and therefore to evade finance charge treatment. A charge for overdraft credit reflects the cost of that credit, and it is appropriate for the full amount of that fee to be viewed as a finance charge even if the institution charges other fees in noncredit situations. That policy is already reflected in current Comment 4(a)-4, which says that "any transaction charge imposed on a cardholder by a card issuer is a finance charge, regardless of whether the issuer imposes the same, greater, or lesser charge on withdrawals of funds from an asset account such as a checking or savings account." For example, TILA already applies finance charge treatment to fees charged by card issuers for cash advances at ATMs even if those fees are comparable to ATM fees for cash withdrawals from bank accounts.[239] The fact that a transfer fee is charged to an asset account does not change its nature as a finance charge if it is a fee to access credit.

In addition, and as the CFPB describes, the consumers who incur the most overdraft fees are unlikely to have significant linked savings or other asset accounts that can be used to cover overdrafts. It is immaterial to them whether the institution charges savings transfer fees that they are unlikely to incur. The fees are not comparable, and even to the extent they are, it remains true that the credit transfer fee is a fee incident to credit, just as an ATM fee to access a credit card cash advance is a finance charge, regardless of what other fees might be charged in noncredit situations.

Narrowing the comparable cash transaction exclusion from the finance charge definition is also important to reinforce the CFPB's appropriate proposal to require above breakeven overdraft credit to be offered through a separate credit account, as discussed in Section 12.22 below. The separate credit account requirement is triggered by the definition of "covered overdraft credit," which is credit subject to a finance charge or payable in more than four installments.

Thus, by ensuring that the costs of overdraft credit are deemed to be finance charges and cannot be evaded through junk fees on the asset account, the CFPB is ensuring that the costs of credit will be charged transparently on a credit account. That goal furthers TILA's purposes and promotes transparency and competition.

12.8 Comments with examples of finance charges needed for § 1026.4(b)(12)

The commentary includes comments giving examples of finance charges, but the CFPB has not proposed any comments to proposed § 1026.4(b)(12) giving examples of finance charges. We believe that comments should be added for clarity.

[239] *See* Comment 4(a)-4.i, adopted by 74 Fed. Reg. 5263 (Jan. 29, 2009).

For example, the CFPB states that, under the proposal, "nearly all service, transaction, activity, and carrying charges imposed on covered asset accounts, including, in particular, fees commonly known as 'transfer fees' for moving funds from overdraft lines of credit to covered asset accounts, would be 'finance charges' under Regulation Z unless subject to another exclusion or limitation."[240]

Yet neither the regulation nor the Comments directly say that transfer fees are finance charges. Instead, proposed § 1026.4(b)(12)(iii)(D) only says that those fees are not comparable cash transaction fees that can reduce other fees. The CFPB should also make clear that an overdraft transfer fee from any credit account – whether an overdraft line of credit or a traditional credit card – can be a finance charge.

Recommendation: The CFPB should add a comment explaining that fees charged on covered asset accounts for transferring funds from a credit account to the asset account to cover overdraft fees are finance charges if those fees, alone or in combination with other charges, exceed the breakeven or benchmark fee.

Recommendation: We also recommend including an example comparing the monthly account fees of two accounts that differ in whether they have a credit feature or not, such that the difference in the fees is a finance charge. As discussed in Section 12.10 below, we suggest eliminating the participation fee exception for covered asset accounts just as the CFPB has done for prepaid accounts.

12.9 Charges excluded from finance charge – overdraft fees: § 1026.4(c)(3)

For the reasons explained in Sections 5.4 and 6.2 above, we support the proposed addition to § 1026.4(c)(3) excluding above breakeven overdraft credit from the finance charge exception for overdraft charges if the financial institution has not agreed in writing to pay overdrawn items.

Comment § 1026.4(c)(3)-1 addresses interest on an overdraft balance, exempting it from finance charge treatment if there is no agreement to pay overdraft items.

Recommendation: This comment needs an exclusion for covered asset accounts, just as it has one for prepaid accounts, as follows:

> **1.** Assessing interest on an overdraft balance. Except with respect to credit offered in connection with a prepaid account as defined in § 1026.61, a charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items. <u>This</u>

[240] 89 Fed. Reg. at 13865.

comment does not apply to a covered asset account as defined in § 1062.62(b)(2) with above breakeven credit as defined in § 1026.62.

12.10 Charges excluded from finance charge – participation fees: § 1026.4(c)(4)

The CFPB has not proposed any changes to § 1026.4(c)(4), which exempts fees for participating in a credit plan from the finance charge definition. But that exemption does not apply to hybrid prepaid-credit cards. The CFPB should also limit the exemption for covered asset accounts to prevent evasions of the type that we are already seeing in cash advance apps.

As the CFPB explained in the prepaid rule, the definition of "finance charge" is broad enough to encompass participation fees, as those fees are incident to credit, and without paying the fees, the consumer would not have use of the credit.[241] The exemption was adopted by the FRB; it is not in the statute. The Bureau included participation fees in the finance charge for prepaid accounts because the fees could represent significant credit-related costs to consumers, and the credit could escape the protections under Regulation Z if it carried participation fees but no interest or transaction fees.[242]

The same is true for covered asset accounts. For example, a financial institution could evade this rule by offering overdraft coverage, structured as a negative balance and repaid by offset, for $30 per month instead of charging per transaction overdraft fees.

Thus, we recommend that participation fees charged for overdraft lines of credit linked to covered asset accounts be considered finance charges.

In addition, participation fees charged on a covered asset account should be finance charges if the charges exceed the participation fees for a comparable account without a credit feature. This evasion is already in the market today.

For example, Brigit offers a free app, but allows consumers to access cash advance features only when they sign up for an $8.99 per month "Plus" subscription, or a $14.99 monthly fee for the Premium plan with free express delivery of the advances.[243] Clearly, the cash advances are the primary feature that would induce people to sign up for the Plus or Premium plan, and that feature is highlighted prominently on the home page.[244] The Federal Trade Commission brought

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[241] 89 Fed. Reg. at 84189

[242] *Id.*

[243] https://www.hellobrigit.com/pricing (last visited Mar. 13, 2024).

[244] https://www.hellobrigit.com/ (last visited Mar. 13, 2024).

an enforcement action against Brigit for making it difficult for people to cancel that subscription and for providing less credit than people expected.[245]

Normally, under the rules governing fees that exceed comparable cash transactions, that differentiated monthly fee would be a finance charge. However, the participation fee rules could take them out, as described in existing comment § 1026.4(b)(2)-1.i:

> A $5 service charge is imposed on an account with an overdraft line of credit (where the institution has agreed in writing to pay an overdraft), while a $3 service charge is imposed on an account without a credit feature; the $2 difference is a finance charge. (If the difference is not related to account activity, however, it may be excludable as a participation fee. See the commentary to § 1026.4(c)(4).))

Recommendation: Amend § 1026.4(c)(4) to read:

> **(4)** Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis. This paragraph does not apply to a fee to participate in a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in § 1026.61, regardless of whether this fee is imposed on the credit feature or on the asset feature of the prepaid account. <u>This paragraph also does not apply to a fee to participate in overdraft credit accessible through a covered asset account, whether the fee is imposed on the credit feature or the asset feature of the asset account.</u>

In addition, as noted above, the CFPB should add a comment to proposed § 1026.4(b)(12) with an example showing how such participation fees can be finance charges.

12.11 Special credit card protections: § 1026.12

We support proposed Comment § 1026.12-1, which clarifies that hybrid debit-credit cards are subject to the same special TILA protections that other credit cards receive. As discussed in Section 2.4 above and in the following sections, those protections are equally important for consumers who use overdraft credit on hybrid debit-credit cards.

12.12 Issuance of credit cards: § 1026.12(a)

Existing § 1026.12(a) provides that credit cards may not be issued except in response to a request or as a renewal or substitute for an existing card. We support proposed Comment 1 to that section, which clarifies that the same rule applies to hybrid debit-credit cards.

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[245] FTC, Press Release, FTC Action Leads to $18 Million in Refunds for Brigit Consumers Harmed by Deceptive Promises About Cash Advances, Hidden Fees, and Blocked Cancellation (Nov. 2, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-action-leads-18-million-refunds-brigit-consumers-harmed-deceptive-promises-about-cash-advances?utm_source=govdelivery.

The issuance rule promotes TILA's purposes of ensuring the informed use of credit and prevents creditors from pushing credit on people that they may not want. Unwanted or unsolicited credit could lead to problems managing finances, damage to credit reports, debt collection harassment, and other harms. Ensuring the informed and desired use of overdraft credit is important for hybrid debit-credit cards just as it is for other credit cards.

For the same reasons, we support proposed Comment § 1026.12(a)(1)-2.iii, which clarifies that adding covered overdraft credit to a non-credit card makes that card into a credit card and constitutes issuing the card. Consumers should not have overdraft credit features added to their asset accounts without their request.

12.13 Claims and defenses: § 1026.12(c)

We support the proposed changes to comments to § 1026.12(c) clarifying that TILA's claims and defenses protections apply to hybrid debit-credit cards, as discussed above.

We support removing hybrid debit-credit cards from the exemption in Comment § 1026.12(c)-3 for debit cards with overdraft credit plans. That exemption is not in the TILA statute, and the CFPB has the authority to remove or narrow it. It was added in 1981 by the FRB, noting operational problems cited by commentators if they had to apply the claims and defenses provisions to debit card-linked overdraft credit plans.

However, financial institutions have far greater tools today to address operational issues than they did over 40 years ago. Operational changes will be required in any event to implement the proposed rule, and compliance with the claims and defenses provisions can be built in as those changes are implemented. In particular, the very large financial institutions to which this rule would apply have significant technology and resources to implement operational changes, and many of them are major credit card issuers themselves.

12.14 Limitations on increasing APR, fees, charges: § 1026.55

We support proposed Comment § 1026.55(a)-5, which clarifies that, as with other credit cards, issuers of hybrid debit-credit cards may not increase the annual percentage rate (APR), fees or charges except under the situations allowed by § 1026.55(b). Those situations include, with limitations, the expiration of a promotional rate, variable rates, prospective increases made with advance notice, accounts that are 60-days delinquent, the end of or noncompliance with a workout or temporary hardship arrangement, and the expiration of servicemember protections.

The provisions of § 1026.55 were added by the Credit CARD Act of 2009 and were core protections added because of the serious consumer harm in the credit card market. Much of the anger that drove credit card reform stemmed from precipitous and arbitrary interest rate increases. Credit cards were nearly the only type of loan for which the lender could dramatically increase the interest rate after the loan was taken out, for any reason and at any time. Those increases were not only unfair, but they also made it harder for struggling consumers to repay their credit card debt and were counterproductive.

Consumers need these same protections against precipitous or retroactive increases in interest and fees on overdraft lines of credit and other covered overdraft credit. TILA provides numerous exceptions allowing fee and interest increases. But it puts limits to attempt to prevent card issuers from deceiving consumers, taking advantage of them by applying increases to debt already incurred over which consumers have no control, or making it impossible for them to climb out of a debt hole. All those purposes are served by limiting APR and fee increases on hybrid debit-credit cards, whether those increases occur on the credit account or the covered asset account, as indicated in proposed Comment § 1026.55(a)-5.

12.15 College student credit cards: § 1026.57

We support the proposed changes to Comment § 1026.57(a)(1)-1, which clarifies that hybrid debit-credit cards are covered by TILA's protection for credit cards offered to college students. Those protections include a prohibition on inducements to open accounts, public disclosure of card issuer agreements with colleges, and annual reports to the CFPB.

The college student provisions were added by the Credit CARD Act after Congress observed extensive harm to young persons who were being pushed to take on credit at a vulnerable age and time in their lives and ended up being saddled with unaffordable debt, at times with tragic consequences including suicide. College students should not be pushed into incurring overdraft debt on hybrid debit-credit cards any more than they should on traditional credit cards.

Proposed Comment § 1026.57(a)(1)-1 explains that covered overdraft credit accessed by a card is excluded from the definition of "college student credit card" unless it is offered by a very large financial institution. In other words, very large financial institutions that offer hybrid debit-credit cards are required to comply with the college student credit card protections of TILA. As discussed in Section 5.6, hybrid debit-credit cards meet the definition of credit card for TILA's general purposes, and they also meet the definition of college student credit card as well.

12.16 Credit and charge card applications and solicitations: § 1026.60

For the reasons discussed in Section 2.3 above, we support the proposed changes to § 1026.60 that bring hybrid debit-credit cards within the rules governing credit and charge card applications and solicitations. TILA's core credit card disclosure requirements for applications and solicitations are contained in § 1026.60. These include fee and APR disclosures, when those rates are different, *i.e.,* penalty rates, and the clear summary in the "Schumer box," the tabular format.

These disclosure requirements implement the Fair Credit and Charge Card Disclosure Act of 1988. That law applies broadly to all credit card accounts under an open-end plan with no exceptions. The FRB's implementing regulations adopted an exemption, which was not in the statute, for overdraft lines of credit tied to debit cards. The CPFB has the authority to limit that nonstatutory exemption by bringing in hybrid debit-credit cards.

Consumers who are being solicited, or are applying for, hybrid debit-credit cards will benefit from the clear and complete disclosures required by § 1026.60. As the CFPB notes, the use of debit cards, including those that access credit, is far more common today than it was in 1988.[246] Extending the application and solicitation protections to hybrid debit-credit cards will promote the purpose of those provisions to promote the meaningful disclosure of credit card terms, the informed use of credit, and more uniform disclosures that can be compared across different credit options.

12.17 Definition of "overdraft credit": § 1026.62(a)(2)

The CFPB has proposed to define "overdraft credit" as:

> *Overdraft credit* is any consumer credit extended by a financial institution to pay a transaction from a checking or other transaction account (other than a prepaid account as defined in § 1026.61) held at the financial institution when the consumer has insufficient or unavailable funds in that account. The term overdraft credit includes, but is not limited to, any such consumer credit extended through a transfer from a credit card account or overdraft line of credit. The term does not include credit exempt from this part pursuant to § 1026.3.

We generally support this definition. As discussed in Section 5.3 above, overdraft credit is credit even if it is extended in the form of overdraft services and even if, due to other definitions and limitations (i.e., the definition of "noncovered overdraft credit"), it will remain exempt from Regulation Z under this rulemaking.

We agree that the term "overdraft credit" should include credit extended to pay an overdrawn transaction no matter what form that credit extension takes, including through a transfer from a credit card account or an overdraft line of credit.

For clarity, we suggest that "overdraft services" be specifically referenced in this definition.

For the reasons discussed in Section 12.2 above, it is possible that the credit could be extended by a different entity than the financial institution that holds the account. Also, as discussed in Section 12.1 above, "checking or other transaction account" should be replaced by "asset account."

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[246] 89 Fed. Reg. at 13881.

Recommendation: We suggest revising the definition of "overdraft credit" to say:

> *Overdraft credit* is any consumer credit extended by a financial institution to pay a transaction from ~~a checking or other transaction~~ <u>an asset</u> account (other than a prepaid account as defined in § 1026.61) held at ~~the~~ <u>a</u> financial institution when the consumer has insufficient or unavailable funds in that account. The term overdraft credit includes, but is not limited to, any such consumer credit extended through a transfer from a credit card account or overdraft line of credit<u>, as well as overdraft services as defined in § 1005.17(a)</u>. The term does not include credit exempt from this part pursuant to § 1026.3.

12.18 Definition of "covered asset account": § 1026.62(b)(2)

The CFPB has proposed to define "covered asset account" as follows:

> Covered Asset Account means a checking or other transaction account (other than a prepaid account as defined in § 1026.61) provided by a very large financial institution that is tied to overdraft credit provided by the very large financial institution.

We generally support this definition, with some suggestions.

The phrase "tied to" is somewhat unclear. Perhaps a better phrase would be "through which overdraft credit is extended."

Also, as discussed in the context of the definition of "credit" and "overdraft credit," the financial institution that holds the asset account might not be the same one as the one that extends the credit.

Recommendation: We suggest revising the definition of "covered asset account" to read:

> Covered Asset Account means ~~a checking or other transaction~~ <u>an asset</u> account (other than a prepaid account as defined in § 1026.61) provided by a very large financial institution that is tied to overdraft credit ~~provided by the very large financial institution~~.

12.19 "Covered overdraft credit account": § 1026.62(b)(4)

The proposed rule defines "covered overdraft credit account" as "a credit account through which a financial institution extends or can extend covered overdraft credit. For example, the term includes any line of credit, credit card account, credit feature, credit plan, or credit subaccount through which the financial institution extends or can extend covered overdraft credit."

We support that definition and example. We especially support making clear that an account is a covered overdraft credit account regardless of the manner in which the credit is extended. What matters is that the account can be used to access overdraft credit, not the technicalities of how it is set up. A narrower rule would encourage evasions.

12.20 “Hybrid debit-credit card”: § 1026.62(b)(5)

As discussed above, we agree that debit cards that access covered overdraft credit are a form of credit card, a hybrid debit-credit card. Acknowledging that debit cards can have hybrid credit functions that must comply with TILA Is consistent with longstanding TILA interpretations and TILA’s purposes, including both the prepaid rule and earlier interpretations.

12.21 “Very large financial institution”: § 1026.62(b)(8)

As discussed in Section 9.6 above, we suggest some changes to the definition of “very large financial institution” to reach large nonbanks that provide asset accounts and to prevent evasions through partnerships or other devices where the overdraft credit and the asset account may not be offered by the same entity.

12.22 Structure of covered overdraft credit: § 1026.62(c)

For the reasons discussed in Section 2.3.3 above, we support prohibiting very large financial institutions from structuring covered overdraft credit as a negative balance on a checking or other transaction account and instead requiring them to structure the credit as a separate credit account. Doing so will promote the informed use of credit, enable consumers to better manage their finances, and facilitate all the important TILA protections described above.

Conclusion

Overdraft fee abuses have plagued bank accounts for far too long. They harm consumers, exacerbate racial injustices, and push people out of the banking system. The proposed rule is faithful to the purpose, authority, and text of our laws governing credit. The CFPB has the clear authority, data, complaints, supervision, and enforcement experience that solidly support the proposed rule. We urge the CFPB to finalize it as quickly as possible.

Thank you for the opportunity to submit these comments. With questions, please contact Carla Sanchez-Adams at csanchezadams@nclc.org or Lauren Saunders at lsaunders@nclc.org.