October 22, 2024

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Consumer Financial Protection Circular 2024-05, Improper Overdraft Opt-In Practices (released Sept. 17, 2024)

Dear Director Chopra,

The American Bankers Association[1] (ABA), America's Credit Unions, Bank Policy Institute, Consumer Bankers Association, Independent Community Bankers of America, and U.S. Chamber of Commerce write in response to the Consumer Financial Protection Bureau's (Bureau or CFPB) Circular 2024-05, titled "Improper Overdraft Opt-In Practices," published on September 17, 2024 (Circular).[2] We are deeply concerned that, through the Circular, the Bureau has imposed new expectations on banks and credit unions with respect to their practices for recording and retaining their customers' "opt-in" to the institution's overdraft program for one-time point-of-sale (POS) debit card purchases and ATM transactions. These new expectations exceed the long-standing and well-established requirements of the Electronic Funds Transfer Act (EFTA) and Regulation E in violation of the Administrative Procedure Act (APA). We urge the Bureau to rescind the Circular.

In 2009 and 2010, the Federal Reserve adopted strong consumer protection rules governing overdraft services for one-time debit card POS purchases and ATM transactions.[3] Through amendments to Regulation E, the Federal Reserve requires financial institutions prior to charging an overdraft fee on a POS or ATM transaction to (1) provide the customer with a notice describing the institution's overdraft service, (2) provide the customer with the opportunity to opt in to overdraft for POS debit card or ATM transactions, (3) obtain the customer's opt-in, and (4) send a confirmation of the opt-in to the customer.[4] The amendments to Regulation E also give consumers the right to opt out of overdraft services at any time.[5]

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[1] A description of each trade association is listed in the Appendix.
[2] Consumer Financial Protection Circular 2024-05, Improper Overdraft Opt-In Practices (released Sept. 17, 2024) [hereinafter, Circular].
[3] Electronic Fund Transfers, 74 Fed. Reg. 59,033 (Nov. 17, 2009) [hereinafter, Opt-in Rule]; Electronic Fund Transfers, 75 Fed. Reg. 31,665 (June 4, 2010) [hereinafter, 2010 Supplemental Rule].
[4] Opt-in Rule, 74 Fed. Reg. at 59,052 (codified at 15 C.F.R. § 205.17(b)(1)).
[5] *Id.* at 59,053 (codified at 15 C.F.R. § 205.17(f)).

The Federal Reserve's objective was to ensure that bank customers received a consumer-tested disclosure and written confirmation of the customer's opt-in decision prior to being charged an overdraft fee.[6] The Federal Reserve did not impose specific requirements for the form of record that a customer must use to opt in to overdraft for these transactions – or for how the institution must memorialize that opt-in in its system. Indeed, the only mention of record retention in the 2009 Opt-in Rule is in the Board's Paperwork Reduction Act analysis, which states, "Institutions are required to retain records for 24 months, but this regulation does not specify types of records that must be retained."[7]

The Board intended for Regulation E's record retention provision to apply. It states in relevant part: "(1) Any person subject to the Act and this part shall retain evidence of compliance with the requirements imposed by the Act and this part for a period of not less than two years from the date disclosures are required to be made or action is required to be taken."[8]

Moreover, the official comment to Regulation E's record retention provision states that a "financial institution need not retain records that it has given disclosures and documentation to each consumer; it need only retain evidence demonstrating that its procedures reasonably ensure the consumers' receipt of required disclosures and documentation" prior to opting in to overdraft for POS debit card or ATM transactions.[9]

When the Dodd-Frank Act transferred responsibility for EFTA to the CFPB, the CFPB adopted Regulation E without change. Unsurprisingly, the interagency examination procedures for Regulation E do not specify the form of record that an institution must use to obtain a customer's opt-in or how the bank must memorialize the opt-in in its system. The procedures direct examiners only to ask institutions, "Does the financial institution maintain evidence of compliance with the requirements of the Electronic Fund Transfer Act and Regulation E for a period of two years?"[10]

If the Federal Reserve (and later the CFPB) intended to impose specific requirements for the recording and retention of customer opt-ins for each consumer, both agencies would have done so through rulemaking. Other consumer protection regulations impose specific record retention requirements. For example, Regulation B, which implements the Equal Credit Opportunity Act, requires institutions to "retain in original form or a copy" a consumer's credit application,

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[6] The Supplemental Rule underscores the Board's intent to provide consumers and the institutions that serve them with flexibility to opt in to overdraft protection when they needed it. In 2009, mobile banking was not widely used. Most customers (who had not already opted in to overdraft) had to call their institution to opt in to overdraft when seeking an ATM withdrawal or at the cash register about to make a purchase. Consequently, the Federal Reserve deliberately did not impose specific requirements for the form of record that a customer must use to opt in to overdraft for these transactions – or for how the institution must memorialize that opt-in in its system. *See* 2010 Supplemental Rule, 75 Fed. Reg. at 31,667 (requiring institutions to send the confirmation – but not requiring confirmation to be received by the customer – before institution can charge an overdraft fee for a POS debit card or ATM transaction, in order to "provid[e] consumers access to overdraft services expeditiously when requested").

[7] Opt-in Rule, 74 Fed. Reg. at 59,051.

[8] 12 C.F.R. § 1005.13(b)(1).

[9] *Id.* § 1005.13(b)(1) (cmt. 1).

[10] Examination Manual, Interagency Consumer Laws and Regulations, Electronic Fund Transfer Act, checklist 10 (2019), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_efta-exam-procedures-incl-remittances_2019-03.pdf.

notification to the customer of the institution's actions on the application, and the institution's statement of specific reasons for an adverse action, among other required documents.[11]

Despite the purposefully limited regulatory requirements for recording and retaining evidence of customer opt-ins, the Circular asserts that a bank or credit union can be in violation of EFTA and Regulation E if the institution does not have "proof that it obtained affirmative consent" to enroll the customer in the institution's overdraft program for POS debit card or ATM transactions.[12] The Bureau then listed "example[s]" of how it expects institutions to record the consumer's opt-in:

- "For consumers who opt into covered overdraft services in person or by postal mail, a copy of a form signed or initialed by the consumer indicating the consumer's affirmative consent to opting into covered overdraft services . . .
- "For consumers who opt into covered overdraft services over the phone, a recording of the phone call in which the consumer elected to opt into covered overdraft services . . .
- "For consumers who opt into covered overdraft services online or through a mobile app, a securely stored and unalterable 'electronic signature' . . . ."[13]

The Bureau can point to no provision in Regulation E (or elsewhere) to provide support for these new requirements. In a footnote, the Bureau repeats Regulation E's requirement that an institution must retain evidence of compliance with EFTA and Regulation E for a period of two years from the date the customer receives the required disclosure prior to opting in to overdraft for POS debit card and ATM transactions.[14] However, the Bureau describes this requirement as an "independent legal obligation" that "does not change the fact that the absence of records proving that an opt-in occurred is suggestive that a consumer did not opt in."[15] Thus, the Bureau ignores the binding regulatory text – which provides no requirement for how an institution must record and retain the customer's opt-in – before the Bureau states, without support, that it can require institutions to record and retain the customer's opt-in in a certain manner.

Through the Circular, the Bureau is attempting to establish new expectations, effectively changing existing law. The Bureau's new interpretation of Regulation E removes institutions' flexibility in recording and retaining customer's opt-ins and replaces that flexibility with the prescriptive requirements described above. By imposing "new obligations on regulated parties," the Circular is a legislative rule, which should have gone through notice-and-comment rulemaking.[16] Its issuance violated the Administrative Procedure Act.

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[11] 12 C.F.R. § 1002.12(b)(1).
[12] Circular, *supra* note 2, at 1.
[13] *Id.* at 3.
[14] *Id.* at 2 n.3.
[15] *Id.*
[16] *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015); *see also Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, C.J.) (touchstone of a legislative rule is that it imposes "legally binding obligations" on regulated entities); *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 & 946 n.4 (D.C. Cir. 1987) (per curiam) (holding that "if a statement has a present-day binding effect, it is legislative"). As recently as 2021, the Bureau affirmed that only a "law or regulation has the force and effect of law." Role of Supervisory Guidance, 86 Fed. Reg. 9,261, 9,268 (Feb. 12, 2021).

The issuance of a "circular," a document intended to advise other government agencies with enforcement authority of unlawful conduct identified by the issuing agency, suggests that these new expectations will be applied retrospectively – i.e., that regulators will initiate supervisory or enforcement actions against financial institutions that did not record the customer's opt-in in the manner described in the Circular or did not retain that record indefinitely.

As ABA stated in its white paper *Effective Agency Guidance*, the Bureau and other banking agencies should not announce new expectations regarding a financial institution's conduct – whether through guidance, rulemaking, or another agency action – and then criticize the institution for past practices that complied with the agency's expectations in place during the time period when the conduct occurred.[17] Instead, when setting new supervisory expectations, agencies should propose the new expectation, seek feedback (comment) from regulated entities on the new expectation (including potential costs and implementation challenges of the new expectation), and then finalize the new expectation. Once the new expectation is finalized, the Bureau and banking agencies should not apply the new expectation retrospectively. Regulated entities should be provided with sufficient time to modify their policies and procedures to align with the new expectation.

The Circular contravenes the existing requirements in Regulation E and was issued without conducting required notice-and-comment rulemaking. As such, the Bureau must rescind the Circular.

Sincerely,

American Bankers Association
America's Credit Unions
Bank Policy Institute
Consumer Bankers Association
Independent Community Bankers of America
U.S. Chamber of Commerce

Cc: The Honorable Michael J. Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency

The Honorable Michael S. Barr
Vice Chair for Supervision
Board of Governors of the Federal Reserve System

The Honorable Martin J. Gruenberg
Chairman
Federal Deposit Insurance Corporation

The Honorable Todd M. Harper
Chair
National Credit Union Administration

[17] *See* Am. Bankers Ass'n, *Effective Agency Guidance: Examining Bank Regulators' Guidance Practices* 11-12 (Feb. 6, 2024), https://www.aba.com/advocacy/policy-analysis/wp-effective-agency-guidance.

APPENDIX

The American Bankers Association is the voice of the nation's $23.9 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $18.8 trillion in deposits and extend $12.5 trillion in loans.

America's Credit Unions is the national trade association for consumers' best option for financial services: credit unions. America's Credit Unions advocates for policies that allow credit unions to effectively meet the needs of their over 140 million members nationwide.

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

The Consumer Bankers Association (CBA) is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

The Independent Community Bankers of America® has one mission: to create and promote an environment where community banks flourish. We power the potential of the nation's community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America's community banks leverage their relationship based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers' financial goals and dreams. For more information, visit ICBA's website at icba.org.

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness's (CCMC) mission is to advance America's global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. CCMC advocates on behalf of American businesses to ensure that legislation and regulation strengthen our capital markets allowing businesses—from the local flower shop to a multinational manufacturer—to mitigate risks, manage liquidity, access credit, and raise capital.