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November 14, 2022

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

**RE: Consumer Financial Protection Compliance Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices and Consumer Financial Protection Circular 2022-06: Unanticipated Overdraft Fee Assessment Practices**

Dear Director Chopra:

By way of this correspondence, on behalf of the nation’s community banks, the Independent Community Bankers of America, (ICBA)<sup>1</sup> hereby submits this letter in response to the recently issued Consumer Financial Protection Bureau Compliance Bulletin 2022-06, *Unfair Returned Deposited Item Fee Assessment Practices*<sup>2</sup> (“Bulletin”) and Consumer Protection Circular, 2022-06 *Unanticipated Overdraft Fee Assessment Practices* (“Circular”).<sup>3</sup> ICBA believes that the Consumer Financial Protection Bureau (“CFPB”) actions undertaken by these statements purports to be rulemaking without the opportunity for notice and comment and mischaracterizes the services that community banks offer their customers.

**Unfair Returned Deposited Item Fee Assessment Practices (“Bulletin”)**

The Bulletin asserts that the fees charged to a consumer when a check deposited into a consumer’s account is returned by the check originator’s bank is “likely unfair.”<sup>4</sup> The Bulletin further alleges that the returned deposit item fees are not “well-tailored to recoup costs from the consumers actually responsible

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<sup>1</sup> *The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

*With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5.8 trillion in assets, over \$4.9 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at [www.icba.org](http://www.icba.org)*

<sup>2</sup> Consumer Financial Protection Bureau, Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices (Bulletin), available at: [https://files.consumerfinance.gov/f/documents/cfpb\\_returned-deposited-item-fee-assessment-practice\\_compliance-bulletin\\_2022-10.pdf](https://files.consumerfinance.gov/f/documents/cfpb_returned-deposited-item-fee-assessment-practice_compliance-bulletin_2022-10.pdf).

<sup>3</sup> Consumer Financial Protection Bureau, Bulletin 2022-06: Unanticipated overdraft fee assessment practices (Circular), available at: [Circular 2022-06 Unanticipated Overdraft Fee Assessment Practices \(consumerfinance.gov\)](https://www.consumerfinance.gov/bulletins/2022-06-unanticipated-overdraft-fee-assessment-practices/)

<sup>4</sup> Bulletin at 1.

for the costs to depository institutions of expected losses for the limited circumstances in which the institution cannot recoup funds made available to the depositor on a check that is later returned.”<sup>5</sup>

These statements demonstrate both a lack of technical understanding of deposit operations within a bank, including check clearing, as well as an effort to engage in substantive rulemaking. Accordingly, as with any rulemaking, the unintended consequences will be paramount.

When a check is deposited into a consumer’s account, the receiving bank will prescribe the period of time until the funds are available for withdrawal. In many cases, community banks will make such funds available for withdrawal before the check has “cleared” as a result of the relationship between the community bank and the customer. By giving the consumer access to the funds before the “check clears” the risk shifts from the customer to the community bank. The de minimis fees assessed are intended to provide some ability to recoup the losses that are incurred, including staff time for deposit operations staff, branch staff, BSA/AML staff, compliance staff, accounting staff, among others that must be notified and take action triggered by a “bad check” having been deposited, and in accordance with bank policy and procedures. Processing dishonored checks is not costless for banks, and if they are not permitted to recoup their costs in the form of returned deposited item fees, they may be less likely to offer checking services, including free checking. In short, they will replace fees for returned deposited items with an annual fee or higher account minimums, which will harm customers who do not deposit dishonored checks. The Bulletin states the fees for returned deposited item are in the range of \$10-\$19.<sup>6</sup> Interestingly, a recent study commissioned by the Massachusetts banking regulator found that “[t]he cost of processing deposit returned items ranged from \$1.43 to \$26.18 per item and that the median cost was \$7.11”.<sup>7</sup> The Massachusetts Division of Banks used this survey to support its decision to create a cap of \$7.11 per returned deposited item. Given the state’s outcome, we believe that a fee of \$10-\$19 per returned deposited item is reasonable and does not unfairly exceed the cost of the services provided.

### **Unanticipated Overdraft Fee Acceptance Practices (“Circular”)**

Similar to the Bulletin, the Circular provides that banks assessing overdraft fees may be engaging in unfair practices under the Consumer Financial Protection Act (CFPA) even if fee practices are otherwise in compliance with Regulation A and Regulation Z. The Circular further provides that “*unanticipated overdraft fees are likely to impose substantial injury on consumers that they cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.*”<sup>17</sup> Throughout the circular, the CFPB erroneously asserts that financial institutions cause substantial injury by assessing legally disclosed fees to customers using their overdraft services.

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<sup>5</sup> Bulletin at 5.

<sup>6</sup> Bulletin at 2.

<sup>7</sup> The Massachusetts state banking regulator conducted a survey of the cost to financial institutions created by returned deposited items. They concluded that “[t]he cost of processing deposit returned items ranged from \$1.43 to \$26.18 per item. The average cost to process a deposit return item was \$8.04 for banks and credit unions combined. Banks had an average cost of \$6.67 and credit unions had an average cost of \$8.49. The median cost of all institutions was \$7.11 per item.” The Massachusetts Division of Banks used this survey to support its decision to create a cap of \$7.11 per returned deposited item.

Commonwealth of Massachusetts, Office of Consumer Affairs and Business Regulation: Division of Banks, “Decision Establishing Certain Maximum Dishonored Check Fees at Massachusetts State Chartered Financial Institutions” (June 28, 2021), <https://www.mass.gov/doc/2021-deposit-return-item-fee-decision/download>.

Further similar to the Bulletin, the Circular illustrates a fundamental lack of understanding or appreciation for relationship banking. When a bank customer has insufficient funds to cover a payment and the bank permits clearance of the transaction, the risk of loss shifts to the bank. This is common for community banks that work with their customers in ensuring that certain critical payments – rent checks, mortgage, utility, or IRS payments – clear without being rejected for insufficient funds. According to a recent study,<sup>8</sup> consumers demonstrate a deep understanding of overdraft services.<sup>9</sup> The study also found that more than 60% of overdrafts come from consumers who intend to use the service;<sup>10</sup> more than 80% of overdraft transactions come from consumers who opted in to debit card overdraft programs for the purpose of covering payments;<sup>11</sup> and 62% of consumers see overdraft as a backstop to their transaction accounts, and they would reconsider their support of new regulation if the rules limited their access.<sup>12</sup> Such data not only demonstrate customer understanding, but also indicates that consumers do not consider overdraft protection as an “unwanted” service that has no value to them.<sup>13</sup>

### **Rulemaking Without Notice and Comment**

The CFPB asserts that its Bulletin and Circular are deemed a “general statement of policy under the Administrative Procedure Act (APA),” which would not require publishing a general notice of proposed rulemaking in the Federal Register or allowing for public comment. Both documents are mischaracterized as a “general statement of policy” and should instead be considered substantive rules, requiring public notice and comment.

The Bulletin and the Circular should be considered substantive rules because they meaningfully limit the discretion of Bureau examiners to conclude that 1) blanket policies of charging returned deposit item fees are not unfair, and 2) disclosed overdraft fees are not unanticipated nor unfair. Neither document declare such practices as categorically unfair, yet the language “likely unfair” leaves little room for examiner discretion and amounts to a change in substantive law. As was the DC Circuit said in *Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corporation*, “The mere existence of some discretion is not sufficient, although it is necessary, for a rule to be classified as a general statement of policy” and that, “[i]f it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is a binding rule of substantive law.”<sup>14</sup>

Had the CFPB allowed for public comment before promulgating its rule change, we would have raised the following concerns regarding its legality. Under the CFPA, the CFPB may not find any act or practice of a financial institution to be unfair unless: “(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”<sup>15</sup> Fees discussed in the

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<sup>8</sup> An annual online consumer research study on checking purchase behaviors of approximately 12,000 respondents; Curinos, *Competition Drives Overdraft Disruption*, p.4, (2021)

<sup>9</sup> Curinos, *Competition Drives Overdraft Disruption*, p.3 (2021).

<sup>10</sup> Ibid.

<sup>11</sup> Ibid

<sup>12</sup> Id. 12 & fig. 2.7

<sup>13</sup> [CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts | Consumer Financial Protection Bureau \(consumerfinance.gov\)](https://www.consumerfinance.gov/CFPB-Issues-Guidance-to-Help-Banks-Avoid-Charging-Illegal-Junk-Fees-on-Deposit-Accounts)

<sup>14</sup> *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666–67 (D.C. Cir. 1978).

<sup>15</sup> 12 USC 5531(c).

Bulletin and the Circular are neither substantial nor not reasonably unavoidable. Further, the disclosed fees are outweighed by the countervailing benefits discussed in our letter.

Accordingly, for the reasons set-forth above, we urge the Bureau to rescind its bulletin to ensure that examiners in the field are not taking steps to enforce the purported rules and issue a notice of proposed rulemaking concerning overdraft fees to allow for more public debate. We further invite you to meet with the nation's community bankers to discuss the practical implications of these and other CFPB rulemaking initiatives prior to publication. Community banks strive to serve customers on an individual basis and encourage sound financial management. Community banks leverage their personal knowledge of their customers to determine the best way to educate them on services and programs to suit their needs. Increased regulatory scrutiny has affected many aspects of how community banks deliver safe consumer products to customers yet, despite this regulatory landscape, many will try to continue offering the services to fulfill consumer demand.

ICBA appreciates your time and consideration of our comments and request. If you have any questions or would like additional information, please do not hesitate to contact me.

Sincerely,



Rebeca Romero Rainey  
President and CEO  
Independent Community Bankers of America®