Overdraft Final Rule Exceeds CFPB's Statutory Authority

In the final days of his tenure, CFPB Director Rohit Chopra issued a final rule regarding overdraft protection services that goes well beyond the agency's statutory authority. It declares discretionary overdraft services offered by banks and credit unions with more than $10 billion in assets to be "credit" regulated by the Truth in Lending Act and Regulation Z unless the overdraft fee is below a $5 price cap or below the institution's "breakeven" costs to operate its overdraft program. Director Chopra's final rule would apply TILA and Reg. Z to overdraft despite the fact that TILA's definition of "credit" unquestionably precludes this interpretation. Moreover, the final rule would impose substantive restrictions on overdraft – including price caps and the required creation of separate "credit" accounts – even though TILA is a disclosure statute that does not permit regulation of the terms of consumer credit products. Director Chopra's final rule would lead banks and credit unions to restrict, if not eliminate, access to overdraft, harming millions of consumers who have few, if any, other options for meeting short-term liquidity needs.

Final Rule Exceeds CFPB's Statutory Authority

The final rule exceeds the CFPB's statutory authority by:

Unlawfully classifying discretionary overdraft services as "credit" that can be regulated under the Truth in Lending Act (TILA) and its implementing regulation, Regulation Z. TILA expressly defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."

- Overdraft is not "credit" because bank deposit agreements do not give consumers the right to have an overdraft transaction paid ("to incur debt") or to defer payment—the bank retains discretion to pay (or not pay) the overdraft transaction. If the bank pays the transaction into overdraft, the overdrawn amount is due *immediately* to the bank—the consumer has no right to "defer payment." The Federal Reserve, which until 2010 had authority to issue regulations under TILA, and courts have consistently concluded that discretionary overdraft services are not extensions of "credit" under TILA.

  Despite this clear statutory text, the final rule unlawfully creates a new type of "credit" called "overdraft credit" that is subject to TILA and Reg. Z *unless* the bank charges a "true courtesy" overdraft fee that equals the "benchmark" fee of $5 set by the CFPB or reflects the institution's "breakeven" costs to operate its overdraft program, which bankers believe do not reflect the full costs of making overdraft available.

Unlawfully imposing price caps and other substantive restrictions that are inconsistent with TILA's purpose as a disclosure statute. Congress passed TILA to create a consumer protection regime grounded on clear disclosure and consumer choice—not regulation of the terms of consumer credit products.

- Yet the final rule goes far beyond mandating disclosure to impose substantive restrictions on bank overdraft services. These substantive restrictions include the fee cap of $5 on each overdraft. In addition, if the overdraft fee exceeds the $5 "benchmark" fee or the bank's "breakeven" fee, the rule prohibits the bank from treating the overdrawn amount as a negative balance on the customer's deposit account. Instead, the rule requires the bank to create a separate "credit" account each time the customer overdraws the account.

  Bankers uniformly state that they will not take on the operational costs and compliance and litigation risks of offering discretionary overdraft services under TILA/Reg. Z or of calculating the bank's breakeven costs. Instead, banks will be forced to choose between offering the product at the $5 benchmark fee or not offering the product at all.