Statement for the Record

On Behalf of the

American Bankers Association

Before the

U.S. Senate Committee on Banking, Housing, and Urban Affairs

May 9, 2024

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Building Success. Together.

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Chairman Brown, Ranking Member Scott, and distinguished Members of the Committee, the American Bankers Association[1] (ABA) appreciates the opportunity to submit a statement for the record for the May 9, 2024, hearing: "Consumer Protection: Examining Fees in Financial Services & Rental Housing."

The American market for financial services is fiercely competitive. It is competitive when compared with financial services markets in other advanced economies, and it is competitive when compared with other consumer-facing industries in the United States.[2] Banks, credit unions, credit card companies, mortgage lenders, fintechs, and other providers of consumer financial products and services compete aggressively on all aspects of their offerings—including fees. This ultra-competitive environment benefits consumers, who are free to choose from a wide variety of high-quality, convenient, innovative, and competitively priced products and services. Not surprisingly, consumers that obtain these products and services from banks are overwhelmingly satisfied. Nine in ten Americans with a bank account (87%) say they are "very satisfied" or "satisfied" with their primary bank, and 96% rate their bank's customer service as "excellent," "very good" or "good," according to a March 2024 survey conducted by Morning Consult on behalf of ABA.[3]

For over 50 years, Congress under both Democrats and Republicans has determined that the best way to promote competition and consumer choice – while also ensuring robust consumer protection – is through disclosure-based laws and regulations. For example, one of the express

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[1] The American Bankers Association is the voice of the nation's $23.7 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.

[2] Compared to other advanced economies—like Canada—that have highly concentrated and coordinated banking markets, the U.S. offers a fiercely competitive banking environment with relatively low levels of concentration. Lawrence Pruss, *The Differences Between Banking in the US and Canada*, Fin. Brand (Oct. 2, 2015), https://thefinancialbrand.com/54467/comparing-united-states-canadian-banking-systems/. For example, Canada, France and the Netherlands have top five-bank concentration at or above 85% while the United States has one of the lowest levels of bank concentration among advanced economies at 46%. Francisco Covas & Paul Calem, *Five Important Facts About the Competitiveness of the U.S. Banking Industry*, Bank Pol'y Inst. (Feb. 24, 2022), https://bpi.com/five-important-facts-about-thecompetitiveness-of-the-u-s-banking-industry/. Compared to other consumer-facing industry sectors in the U.S., such as department stores, airlines or telecommunication carriers, the banking industry is far less concentrated and far more competitive when looking at the share of total sales captured by the top four firms in each industry on a national basis. *Id.*

[3] Press Release, Am. Bankers Ass'n, ABA Unveils New Consumer Polling Data on Major Bank Policy Issues (Mar. 19, 2024), https://www.aba.com/about-us/press-room/press-releases/consumer-survey-major-bank-policy-issues.

purposes of the Truth in Lending Act (TILA), enacted in 1968, is to strengthen competition among providers of consumer credit through meaningful disclosure of credit terms.[4] Forty years later, Congress again recognized the value of disclosures when it enacted Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The legislative history of the Dodd-Frank Act makes clear that, first and foremost, "[t]he Bureau is authorized to act to ensure that consumers are provided with accurate, timely, and understandable information in order to make effective decisions about financial transactions."[5] In the other enumerated laws the Dodd-Frank Act made CFPB responsible for enforcing– such as the Truth in Savings Act and the Electronic Funds Transfer Act – Congress took the same approach to consumer protection. Each law reflects Congress' conclusion that "clear and conspicuous" disclosures promote informed use of products, which enhances competition and access to financial services.[6]

The CFPB, however, has initiated a series of blogs, circulars, advisory opinions, and rulemakings designed to upend this disclosure-based approach to consumer protection. As part of its participation in the Administration's campaign against so-called "junk fees," the CFPB has indicated that certain bank fees and pricing frameworks are "unfair"[7] or "abusive."[8] When a regulator classifies a fee or pricing framework as inherently "unfair" or "abusive," financial institutions cannot respond with enhanced disclosures. Instead, the threat of UDAAP enforcement may force financial institutions to cease charging the (legal and fully disclosed) fee the CFPB disfavors or to abandon the pricing framework that the CFPB deems too "complex." The end result may be one Congress considered — but rejected — in the Dodd-Frank Act: authorizing the CFPB to define "plain vanilla" financial products and services.[9]

In other cases – such as recent rulemakings on credit card late fees and overdraft fees – the Bureau seeks to impose price caps on the fees at levels far below banks' actual costs. Rather than enhancing consumer protection and promoting competition, both examples of market interference will result in less innovation, fewer choices and higher prices for consumers—to the detriment of financial inclusion. And, the CFPB's actions will reduce, not spur, competition as

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[4] *See* 15 U.S.C. § 1601(a).
[5] S. Rep. No. 111-176, at 164 (2010).
[6] Bolstering these disclosure-based frameworks, when a Federal banking agency or the CFPB determines that a particular disclosure is inadequate or features of a particular product or service presents risk to consumers, the regulator may use its authority to prevent unfair, deceptive, or abusive acts and practices (UDAP or UDAAP).
[7] As two examples, the CFPB has concluded that it is unfair to charge an overdraft fee when a transaction authorizes on positive funds, but settles on negative funds, and to charge a nonsufficient funds fee when a transaction is presented multiple times against insufficient funds in the customer's account is unfair. See Consumer Fin. Prot. Bureau, Consumer Financial Protection Circular 2022-06 (Oct. 26, 2022); *id.*, Supervisory Highlights Junk Fees Special Edition (Mar. 2023).
[8] Julie Margetta Morgan, CFPB, "More competition and less complexity: How the CFPB is working to lower prices in the credit card market," CFPB Blog (May 2, 20024). https://www.consumerfinance.gov/about-us/blog/more-competition-and-less-complexity-how-the-cfpb-is-working-to-lower-prices-in-the-credit-card-market/. In this blog post, the CFPB mischaracterizes credit cards in a way that implies that they take unreasonable advantage of consumers' lack of understanding, which are the ingredients of "abusiveness" in the Dodd-Frank Act's UDAAP provision.
[9] *See* Anne Flaherty, Associated Press, *Congress Wary of 'Plain Vanilla' Bank Proposal* (Sept. 22, 2009). As the Associated Press reported, a bipartisan group of Senators opposed the proposal, which they rightly viewed as "giv[ing] the government too much control in the marketplace" and "limit[ing] innovation." *Id.*

limitations on fees will drive further consolidation, particularly among community banks with fewer sources of income.

We urge Congress to take the following actions:

1. Conduct rigorous oversight of the CFPB's and the Federal banking agencies' unprecedented campaign against fees. Congress should hold the agencies accountable for making predetermined policy decisions before considering the facts or feedback from stakeholders, for selecting "data" based on expediency rather than quality, and for failing to consider the predictable negative effects of its actions on markets and consumers.[10]

2. Pass H. J. Res. 122 and S. J. Res. 70, the Resolution of Disapproval of the CFPB's rule on credit card late fees. These resolutions would utilize the Congressional Review Act to overturn a harmful CFPB rule that would reduce competition in the credit card market, increase the cost of credit, and result in more late payments, higher debt, lower credit scores, and reduced credit access for those who need it most.

3. Ask the GAO to study whether the CFPB's overdraft proposal will reduce consumers' access to overdraft and to low-cost, full-service deposit accounts, particularly for low to moderate income and underserved consumers. If the CFPB finalizes the proposal, Congress should pass a resolution under the Congressional Review Act to invalidate the rule.

I. **Overdraft Provides Needed Liquidity for Millions of Consumers**

ABA has long advocated for regulatory policies that ensure consumers have a wide range of options within the regulated banking industry to meet emergency expenses and to help customers address misalignments in deposits and payments. Consumers should be able to choose how best to meet their liquidity needs, whether through revolving credit, installment loans, or single payment loans, or through overdraft protection services. Regrettably, the Bureau issued a proposal in January 2024 that would effectively bring an end to an important form of short-term liquidity – overdraft services – for the consumers who need this service the most, all to advance the Administration's political campaign against "junk fees."[11] We have urged – and continue to urge – the Bureau to withdraw the proposal.[12]

Millions of consumers choose to use overdraft services to cover emergency expenses and other liquidity shortfalls. In recent years, depository institutions have listened to consumers'

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[10] Congress should conduct rigorous oversight also when the Federal banking agencies follow the CFPB's lead and engage in a campaign against fees, as described in this statement.

[11] *See* Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 13,852 (Feb. 23, 2024).

[12] *See* Letter from Am. Bankers Ass'n et al., to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau (Apr. 1, 2024), https://www.aba.com/advocacy/policy-analysis/ltr-overdraft-lending-nprm (letter from ABA and 52 state bankers associations urging the Bureau to withdraw the proposal).

preferences and developed a variety of overdraft programs that fairly and transparently respond to consumer needs, promote free choice, and encourage competition – as even CFPB Director Rohit Chopra and Acting Comptroller Michael Hsu have repeatedly acknowledged.[13] These innovations include sending low-balance alerts, linking the customer's checking account to another account, imposing *de minimis* thresholds and caps on total fees that the bank may charge per day, and providing overdraft "grace periods" during which a customer can make a deposit and avoid a fee. Additionally, some banks no longer charge overdraft or NSF fees at all, and many banks offer overdraft-free accounts that meet the Bank On initiative's National Account Standards. The Bureau's own research confirms that, as a result of banks' innovations, consumers are paying less in overdraft and NSF fees now than they did four years ago.[14]

Available evidence demonstrates that many consumers value overdraft services and use overdraft strategically to ensure that they can pay important expenses – such as rent, utilities, and medical bills – when they experience a shortfall in funds. For example, an analysis of transaction data from 11 banks found that the median size of items paid into overdraft is $370.[15] Another analysis of data from 14 financial institutions found that the average size of items paid into overdraft was $198.[16] Not surprisingly, a recent survey found that two-thirds of consumers (67%) find their bank's overdraft service valuable – as compared with only 16% who do not find it valuable – and 8 in 10 consumers (79%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining payment.[17] While no one likes to pay fees, 64% of consumers think it is reasonable for banks to charge a fee for an overdraft, as opposed to only 23% who think it's unreasonable.[18] And only a miniscule number of complaints submitted to the Bureau – 0.003% of the total – list "overdraft" as the issue or sub-issue of the complaint.[19]

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[13] *See Consumers First: Semi-Annual Report of the Consumer Fin. Prot. Bureau: Hearing Before the H. Comm. on Fin. Svcs.*, 117 Cong. (2022) (testimony of Rohit Chopra, Dir., Consumer Fin. Prot. Bureau) ("Institutions are starting to compete more aggressively on fees."); *The Consumer Fin. Prot. Bureau's Semi-Annual Report to Cong.: Hearing Before the Sen. Comm. on Banking, Hou., & Urban Affairs*, 117 Cong. (2022) (testimony of Rohit Chopra, Dir., Consumer Fin. Prot. Bureau) ("But what we are seeing is actually banks across the board are starting to compete on [overdraft]."); Remarks, Office of the Comptroller of the Currency, Acting Comptroller of the Currency Michael J. Hsu, Fairness and Effective Compliance Risk Management (Mar. 25, 2024) ("Since [late 2021], consumer overdraft related fee revenues generally have declined, . . . and overdraft program features have become more pro-consumer.").

[14] *See* Éva Nagypál, Consumer Fin. Prot. Bureau, Blog Post, Banks' Overdraft/NSF Fee Revenues Evolve Along with their Policies (2022) (finding that, on average, banks of all asset sizes experienced declines in their overdraft and NSF fee revenue between 2019 (the pre-pandemic baseline) and 2022).

[15] G. Michael Flores, *An Assessment of Usage of Overdraft Protection by American Consumers* 18 (2017) (*included as an attachment to* Am. Bankers Ass'n, *Small Dollar Credit: Millions of Small Needs Add Up to a Big Deal: Banks Should Be Allowed to Offer Customers Multiple Choices* (2017), https://www.aba.com/advocacy/policy-analysis/small-dollar-credit.

[16] Curinos, *Competition Drives Overdraft Disruption* 8 (2021). One midsize ABA member bank reported that the average dollar amount of an item paid into overdraft where a fee was charged was $312 in 2023.

[17] Press Release, Am. Bankers Ass'n, *ABA Unveils Consumer Survey Data on Debit Cards, Overdraft and Other Banking Issues in Play in Washington* (Mar. 20, 2024), https://www.aba.com/about-us/press-room/press-releases/consumer-survey-data-on-debit-cards-overdraft-and-other-banking-issues.

[18] *Id.*

[19] Of the 4,912,269 total complaints displaying in the Bureau's Consumer Complaint Database as of March 27, 2024, only 154 listed "overdraft" as part of the issue or sub-issue of the complaint.

The Bureau's overdraft proposal puts all the pro-consumer innovations implemented by banks at risk, despite identifying no market failure requiring additional regulation of overdraft services. The proposal reclassifies overdraft as "credit" and permits financial institutions to offer overdraft under the existing pro-consumer regulatory framework only if their overdraft fee is below a "breakeven" fee or a "benchmark" fee set by the Bureau. Charging a fee that exceeds the breakeven or benchmark fee would subject overdraft services to the requirements of the Truth in Lending Act (TILA) and Regulation Z. The operational costs combined with the compliance and litigation risks of the proposed new regulatory framework will drive banks to stop offering traditional overdraft services to the vast majority of customers. Those banks that continue offering overdraft may reduce or eliminate pro-consumer overdraft features such as grace periods and *de minimis* thresholds for charging an overdraft fee. In addition, the proposal is likely to reduce consumer access to low-cost, full-service deposit accounts; some consumers may be denied accounts and others may be offered accounts with higher minimum balances.[20]

We urge Congress, in conducting oversight of the CFPB, to examine how the proposal will lead banks to reduce consumers' access to overdraft services and to low-cost, full-service deposit accounts. If the CFPB finalizes the proposal, Congress should pass a resolution under the Congressional Review Act to invalidate the rule.

II. The CFPB Should Not Write Aggressive Rules to Address Largely Hypothetical Problems

In January 2024, the Bureau's crusade against "junk fees" resulted in a proposal to prohibit a fee that the Bureau admits is rarely charged, specifically an NSF fee for transactions that are instantaneously or near-instantaneously declined.[21] In issuing the proposal, the Bureau asserts that charging NSF fees for these transactions – which include one-time debit transactions, ATM transactions, and person-to-person transactions – is "abusive" under UDAAP. In doing so, the Bureau offers an aggressive, overreaching interpretation of its authority to prohibit abusive acts or practices that the Bureau will later apply to other financial services and products.

The proposal's analysis draws several outlandish conclusions, stating that consumers "lack awareness of the costs, risks and features" of their deposit accounts and that financial institutions are "taking unreasonable advantage" of consumers. The Bureau states that consumers' lack of awareness of their balance and spending is *reasonable,* even though the Bureau's own rules require NSF fees to be disclosed to consumers at account opening. Astonishingly, the Bureau states that a disclosure of the fee at point of sale would not remedy the situation because some consumers would not understand "even the most well-crafted disclosure." That statement vitiates over 50 years of federal policy premised on clear and timely disclosure as the means to protect consumers, preserve choice, and promote competition. Similarly, the Bureau claims institutions

[20] *See* Jennifer L. Dlugosz et al., Fed. Reserve Bank of N.Y., Staff Reports, Who Pays the Price? Overdraft Fee Ceilings and the Unbanked 22 (rev. July 2023), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr973.pdf?sc_lang=en (study concluding that "[w]hen constrained by fee caps, banks reduce overdraft coverage and deposit supply, causing more returned checks and a decline in account ownership among low-income households.").

[21] Fees for Instantaneously Declined Transactions, 89 Fed. Reg. 6,031 (proposed Jan. 31, 2024).

are taking *unreasonable* advantage of consumers, even though those same institutions provide consumers with tools, apps and alerts so that consumers can monitor their spending and balance in near-real time and better manage their accounts.

In addition, the Bureau makes several sweeping statements about fees that reflect an aggressive approach that Dodd Frank simply does not authorize. The CFPB characterizes these NSF fees as a windfall profit, suggesting that institutions can recover only their direct costs for an account with insufficient funds. Yet, the CFPB does not have generally authority to set fees or prices. In addition, the proposal suggests that institutions should recover these costs by charging a fee on all "successful transactions." The Bureau does not explain why consumers who maintain sufficient funds in their accounts should pay for consumers who attempt transactions with insufficient funds. Finally, the Bureau pronounces these NSF fees as "penalty fees," suggesting that they are unlawful, which is not correct. These fees, like others the Bureau has attacked, are deterrence fees that encourage sound account management.

We urge Congress, in conducting oversight of the CFPB, to press the CFPB to rescind the proposal. The Bureau should not write rules that exceed their authority, that are addressed to largely hypothetical problems. The Bureau should instead use its resources to educate consumers on how to manage their accounts, taking advantage of all the tools and apps available to them.

III. **The CFPB's Credit Card Late Rule Will Cause More Late Payments, Increased Debt, Reduced Credit Access, and Higher APRs For All Consumers**

In March 2024, the CFPB finalized a rule to lower the safe harbor for allowable credit card late fees from $31 to $8.[22] The CFPB's rule is inconsistent with the law and the Bureau's authority and uses faulty methodology and data to calculate economic costs, among other shortcomings. The rule will reduce competition in the credit card market, increase the cost of credit, and result in consumer harm in the forms of more late payments, higher debt, lower credit scores and reduced credit access for those who need it most.

Credit cards provide valuable consumer benefits including income- and consumption-smoothing, convenience, security, fraud protection, merchant dispute rights, credit-building opportunities, and cardholder benefits and rewards. The credit card market is highly competitive, with nearly 4,000 issuers offering credit card options designed to meet a wide range of consumer needs and preferences. Credit card issuers compete aggressively on terms, services, and products that benefit consumers at all income levels. Credit card terms and conditions are well known to and understood by consumers. Consumers receive disclosures of key terms, including late fees, in easy-to-read, consumer-tested formats. They receive clear and repeated disclosures about late fees in solicitations and applications, before and after account opening, and in monthly periodic statements.

[22] Credit Card Penalty Fees Final Rule (Regulation Z) (released Mar. 5, 2024), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees_final-rule_2024-01.pdf.

Credit card issuers want customers to pay on time, and making on-time payments puts consumers in the best financial position. Late fees are a proven deterrent that encourage on-time payments, help cover issuers' costs associated with late payments, and allow issuers to manage their risks and sustain their business of providing credit. Importantly, late fees provide incentives to manage finances and help customers to avoid defaults and delinquencies, which can have adverse consequences.

Despite the important functions credit card late fees serve, and the competitive and transparent market in which they exist, the CFPB issued a rule to lower the safe harbor cap on late fees based on politics instead of policy. The Bureau announced the proposed rule the week before President Biden's 2023 State of the Union address, in which he announced a foregone conclusion that the administration was "cutting credit card late fees by 75 percent, from $30 to $8."[23]

The final rule is not consistent with the requirements Congress set forth in the CARD Act, relies on faulty data, and exceeds the CFPB's authority. The CARD Act directs that any penalty fee for violating a cardholder agreement – including any late payment fee – "shall be reasonable and proportional to such omission or violation."[24] It mandates agency rulemaking to implement this provision by setting a standard based on factors including the cost incurred by the creditor from the cardholder's violation, deterrence of violations, and the conduct of the cardholder.[25] Regulation Z, implementing the CARD Act, allows a credit card issuer to charge a penalty fee if the issuer has "determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation" or if the fee does not exceed the dollar amount set forth in the rule's safe harbor provision.[26] This safe harbor functions as a *de facto* regulatory cap on fees – indeed, the CFPB was unable to identify any issuer that uses the cost-based standard instead of relying on the safe harbor.[27]

Although the CARD Act requires the regulation establishing standards for reasonable late fees to consider costs, deterrent effects, and cardholder conduct,[28] the final rule only examines estimated costs and fails to meaningfully consider deterrence or cardholder conduct in lowering the safe harbor late fee for larger issuers to $8.[29] The CFPB's final rule lowered Regulation Z's safe harbor for late fees to $8, albeit only for "larger credit card issuers," with at least one million open credit card accounts.[30] However, nothing in the CARD Act gives the CFPB authority to set different rules – that consider only some of the required statutory factors – for certain credit card issuers.

Not only does the CFPB's final rule fail to incorporate statutorily required factors other than costs, it does not allow banks to recover all of their costs for late payments. The rule's cost

[23] White House, State of the Union Address, https://www.whitehouse.gov/state-of-the-union2023/ (Feb. 7, 2023).
[24] 15 U.S.C. § 1665d.
[25] *Id.* § 1665d(b)-(c).
[26] 12 C.F.R. § 226.52(b)(1).
[27] *See* Credit Card Penalty Fees Final Rule at 10-11.
[28] 15 U.S.C. § 1665d(a)-(c).
[29] Credit Card Penalty Fees Final Rule at 123.
[30] *Id.* at 10-11.

estimates expressly exclude post-charge-off costs that derive from late payments.[31] Moreover, the final rule's cost estimates are based on data that does not capture the full costs of late credit card payments. The CFPB chose to use a non-public dataset the Federal Reserve designed and collected for stress-testing purposes, not for the purpose of gathering detailed cost data.[32] As a result, more than lacking deterrent value, the $8 late fee allowed under the new safe harbor does not even ensure larger issuers can recoup their full costs from late payments, in contravention of the law.

The final rule harms smaller issuers, as well. Because the CFPB directly lowered the safe harbor for larger issuers only, it summarily concluded the rule has no significant impact on smaller issuers.[33] However, this ignores that artificially lowering the late fees of the larger issuers in the highly competitive credit card market will place competitive pressures on smaller issuers. If smaller issuers are unable to compete without lowering their late fees to unsustainably low levels that cannot cover their full costs, they are more likely to exit the market, resulting in fewer options for consumers and a less competitive marketplace.

As ABA warned in comments throughout the rulemaking, the final rule will not only reduce competition and increase the cost of credit, but it will also likely cause increased incidence of late payments that will result in consumer harm in the forms of higher debt, lower credit scores and reduced credit access for those who need it most. The Bureau's misguided decision to cap credit card late fees far below banks' actual costs will force card issuers to reduce credit lines, tighten standards for new accounts and raise APRs for all consumers – even those who pay on time.

We are witnessing those warnings come to fruition today, even before the final rule has become effective, as issuers are making significant adjustments to compensate for the drastic change in allowable late fees.[34] ABA and other trade associations have challenged the CFPB's rule in court, seeking to stop the CFPB's unlawful and anti-consumer rule from going into effect.[35] If the rule becomes effective, it will only accelerate market changes and increase the unfortunate but predictable consequences for consumers.

We urge Congress to pass H. J. Res. 122 and S. J. Res. 70, a Resolution of Disapproval under the Congressional Review Act. Overturning the CFPB's harmful rule now would avert most of its harmful consequences to competition and consumers, including reducing credit access for those who need it most.

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[31] *Id*. at 123.
[32] *See id.* at 25.
[33] *Id*. at 266-267.
[34] *See* Lynne Marek, *PayPal, Bread Brace for Late Fee Cap*, Payments Dive (May 1, 2024), https://www.paymentsdive.com/news/paypal-bread-synchrony-brace-cfpb-late-fee-cap-payments/714838/; Polo Rocha, *Synchrony Hikes Interest Rates on Credit Cards to Offset Late-Fee Rule*, Am. Banker (Apr. 24 2024), https://www.americanbanker.com/news/synchrony-hikes-interest-rates-on-credit-cards-to-offset-late-fee-rule.
[35] *Chamber of Commerce v. CFPB*, Case No. 4:24-CV-213 (N.D. Tex. filed Apr. 5, 2024).

IV. The CFPB's Advisory Opinion on Section 1034(c) Fees Will Increase the Costs of Basic Banking Services, While Providing Little Consumer Benefit

In October 2023, the CFPB issued an "advisory opinion" interpreting subsection 1034(c) of the Dodd-Frank Act that went far beyond the statute's straightforward directive that banks and credit unions with over $10 billion in assets (covered financial institutions) timely comply with customers' requests for information about their account.[36] The advisory opinion prohibits covered financial institutions from charging fees for the additional costs of responding to certain customer requests, and regulates how banks provide customer service.

The CFPB asserts that it would violate subsection 1034(c) to impose conditions that "unreasonably impede" customers from receiving covered information – a standard not found anywhere in the statute. Further, the CFPB creates a blanket presumption that almost any fee charged for fulfilling a customer information request is unreasonable and therefore prohibited by 1034(c). The CFPB does not consider whether some fees may be reasonable to help banks offset the material and personnel costs of providing certain information, particularly information the consumer was already provided or can access for free through their online banking portal. This demonstrates that the CPFB is concerned less with ensuring access to information and more with supporting the Administration's campaign against "junk fees."[37]

The CFPB also failed to seek public comment before publishing the advisory opinion, as required by law. Because it creates new substantive legal obligations regarding fees and customer service, the advisory opinion should have been issued through notice-and-comment rulemaking pursuant to Administrative Procedure Act.[38] This would have required the CFPB to articulate the basis and purpose of the new requirements. And, it would have given all interested members of the public advance warning and the opportunity to question the facts and conclusions the Bureau relied upon, to identify unclear and contradictory requirements, and to offer important information about implementation challenges and unintended consequences. By issuing the advisory opinion without the benefit of this process, the CFPB has exacerbated regulatory uncertainty.

Financial institutions have significant questions about what the advisory opinion requires, even after it has already gone into effect. It is not clear what fees the CFPB would treat as covered by 1034(c) or when a fee meets the single exception the CFPB articulated to its blanket presumption against fees, i.e., when information was already "repeatedly" requested and provided to the customer. It is not clear, either what timeframe the CFPB considers reasonable for banks to respond to consumer requests.

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[36] *See generally,* CFPB Advisory Opinion: Consumer Information Requests to Large Banks and Credit Unions, 88 Fed. Reg. 71279 (Oct. 16, 2023); *see also* 12 U.S.C. 5534(c).

[37] *See e.g.,* White House Press Release: Biden-Harris Administration Announces Broad New Actions to Protect Consumers From Billions in Junk Fees (Oct. 11, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees/.

[38] *See* Administrative Procedure Act, 5 U.S.C. §§ 553, 551(4).

Because the advisory opinion will make it more expensive to provide consumer bank accounts, it will make it more difficult for many Americans to access basic banking services. Moreover, it generates little real consumer benefit. Most of the information the advisory opinion alludes to is already provided to consumers free of charge, either on statements and disclosures at account opening and periodically thereafter, or electronically via online and mobile banking. It is clear the CFPB did not understand how banks provide consumers with information or consider the effect the advisory opinion could have on consumers' access to basic banking services.

V. The CFPB Is Expanding Its Campaign Despite a Lack of Data, Reasonable Analysis, Or Understanding of the Facts

In pursuit of continued fodder for its "junk fees" campaign, the CFPB has signaled its intent to target additional valued and highly regulated products and services on a theory that they are too "complex" for consumers, despite a lack of data to support that conclusion. In recent months, the CFPB has published blog posts, reports, and supervisory guidance that present an inaccurate or incomplete picture of Health Savings Accounts, mortgage lenders' use of (CFPB-created) disclosures, and mortgage servicing. We urge the CFPB to reconsider its approach to these products.

a. Mortgage Borrowers Are Protected by Fee Disclosures that Are Well-Established, Comprehensive, and Effective

For more than 30 years, Federal law has required mortgage lenders to provide multiple disclosures to assist consumers applying and shopping for a mortgage. These disclosures were generally required to be given at application (or shortly thereafter) and shortly before closing the loan. Two different Federal agencies developed these disclosure forms separately under two Federal statutes: the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act of 1974 (RESPA). In 2015, the multiple forms were consolidated into one disclosure, now called the TILA-RESPA Integrated Disclosures (TRID). TRID requires creditors to provide a Loan Estimate of itemized loan and settlement costs three days after a consumer applies for a loan.[39] These disclosed costs must be accurate estimates and, as such, the consumer cannot be required to pay more at loan closing except in certain well-defined circumstances authorized by the CFPB.[40]

Yet on March 8, the Bureau published a blog post that blames certain mortgage origination fees, including appraisal and credit report fees, title insurance, and discount points, for the challenges some consumers experience with affording their mortgage payments.[41] The Bureau has criticized these fees even though the TRID rule includes several features to ensure consumers can take their Loan Estimate and shop for the best overall prices across multiple lenders. Among other limitations, creditors cannot impose any fees on consumers, except a "bona fide and reasonable"

[39] 12 C.F.R. § 1026.19(e)(1)(iii)(A).
[40] 12 C.F.R. § 1026.19(e)(3).
[41] Julie Margetta Morgan, Blog, Consumer Fin. Prot. Bureau, Junk Fees Are Driving Up Housing Costs. The CFPB Wants to Hear from You. (Mar. 8, 2024).

credit report fee, until after the consumer receives the initial Loan Estimate and communicates an intent to proceed with the transaction.

Encouraging consumers to shop for a mortgage that offers the best terms was the objective of the Bureau's design of the TRID disclosure forms. The disclosures were the product of extensive research, public comment, and consumer testing. Despite this robust process, the Bureau on April 30 published a separate blog post that criticizes "complex pricing structures" – i.e., lenders' typical (and CFPB-mandated) practice of listing each fee that a financial institution charges a customer.[42] The Bureau is expected to issue a request for information in the coming days or weeks, as a precursor to a rulemaking that would make substantial changes to the TRID disclosure framework.

Similarly, on April 24, the Bureau published an edition of *Supervisory Highlights*, accompanied by yet another blog post, that demonized and mischaracterized certain mortgage servicing fees.[43] Like mortgage origination disclosures, the Dodd-Frank Act directed the CFPB to promulgate rules that govern all aspects of mortgage servicing, including extensive and prescriptive rules on fees. In 2013, the Bureau issued comprehensive mortgage servicing rules under Regulation X, implementing the Real Estate Settlement Procedures Act (RESPA), and Regulation Z, implementing the Truth in Lending Act (TILA) (collectively, the 2013 Servicing Rules). Since 2013, the Bureau has issued numerous amendments and interpretive rules to the 2013 Servicing Rules, most recently, the sweeping revisions issued on October 16, 2016 (2016 Amendments), which went into effect in October 2017 and April 2018.[44]

In the years since these rules were promulgated, mortgage servicers have expended considerable resources to comply with them, and during the COVID-19 pandemic, servicers helped more than 8-million families stay in their homes. The industry takes pride in the important role that it plays in the mortgage market, particularly helping distressed borrowers avoid foreclosure and stay in their homes via more affordable and sustainable mortgage payments. Even as recently as last month, the CFPB acknowledged that the industry has kept foreclosure rates near all-time lows.[45] Nevertheless, the CFPB's blog uses anecdotes, not data, about specific servicing failures to paint an inaccurate narrative about an entire industry.

In sum, the fees and costs associated with mortgage originations and servicing are highly regulated under robust Federal regulations that mandate accurate itemizations, strict timing requirements on disclosures, prescriptions on certain adverse fees, and strong remedies for violations. Although ABA's members believe there are multiple targeted reforms and clarifications that would greatly enhance the legal framework for consumers and banks alike,

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[42] Blog Post, CFPB Publishes Research Finding Higher Price Complexity Leads Consumers to Pay More (Apr. 30, 2024).
[43] Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action to Stop Illegal Junk Fees in Mortgage Servicing (Apr. 24, 2024).
[44] Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160 (Oct. 16, 2016) [hereinafter 2013 Mortgage Rules].
[45] Consumer Fin. Prot. Bureau, Supervisory Highlights, Mortgage Servicing Edition, 1 (Apr. 2024), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-33_2024-04.pdf.

there is no justification for the Bureau's ongoing accusations that lenders are acting uncompetitively and charging excessive fees that offer no benefit to consumers. The existing legal protections for mortgage borrowers do not allow for harmful market behavior, and banks' record reflects faithful compliance to the law and their commitment to serve their communities.

b. Health Savings Account Fees Provide Significant Tax Savings and Other Benefits to Consumers

Health Savings Accounts (HSAs) provide significant tax savings on health care, particularly during periods of high inflation, and benefit consumers in a number of ways. On May 1, 2024, the CFPB issued a report that criticized HSAs for the fees charged by organizations that offer HSAs and an alleged lack of competition.[46] The CFPB's criticisms of HSAs are not data-driven or impartial, but appear to be premised on the CFPB's desire to advance its "junk fees" campaign rather than respond to how consumers use this product.

HSAs provide considerable benefit to consumers. HSA funds earn interest like other bank accounts and may be invested. The account is completely portable, just like an IRA. The funds in an HSA belong to the individual employee, not their employer and remain with the employee if the employee switches jobs. The unspent funds never expire at the end of the year and automatically roll over from one year to the next. Furthermore, HSAs provide additional "catch-up contributions" when an individual turns age 55.

HSA interest rates have been increasing in line with broader market trends, and consumers can still earn a reasonable return on their HSA balances. The CFPB's claim that HSAs cost "significantly more in fees than they earn in interest" does not accurately reflect the current market landscape. Consumers have multiple options for how the balances are invested, including keeping the balance in cash or investing the balance in low-cost mutual funds.

With more than 1,600 approved HSA administrators in the country, this strong and competitive marketplace allows consumers to choose the provider that best suits their financial needs, contrary to the CFPB's claims that HSA fees are complex and hold consumers captive.[47] Moreover, HSA customers clearly don't agree with the CFPB: there were approximately 36 million HSAs in the U.S. in 2023, yet the CFPB concedes there were only 189 complaints about HSAs filed in 2023 (and, in fact, even this may be an overstatement).[48] The dramatically low number of complaints speaks volumes about how this product meets U.S. consumer needs.

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[46] Issue Spotlight, Consumer Fin. Prot. Bureau, Health Savings Accounts (May 2024).

[47] CFPB, "Issue Spotlights: Health Savings Accounts" (May 2024), https://files.consumerfinance.gov/f/documents/cfpb_health-savings-account-issue-spotlight_2024-04.pdf; Rohit Chopra, "Statement of CFPB Director Rohit Chopra on Medical Financial Products" (May 1, 2024), https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-medical-financial-products/.

[48] *See* Issue Spotlights: Health Savings Accounts at 2 n.3. Searching the CFPB's complaint database using the same keywords as the CFPB did shows only 76 complaints in 2023, not 189.

CFPB's characterization of a "complex fee structure" is not accurate or reflective of the current state of the HSA market. The CFPB's report refers to various fees HSA providers charged in the past, such as monthly maintenance fees, paper statement fees, outbound transfer fees, and account closure fees. However, today, paper statement fees can be easily avoided by switching to electronic statements, and these other fees have been largely eliminated by most major HSA providers as a result of competition – dynamics not reflected in the CFPB's report.

Similarly, the CFPB's outdated mischaracterization of "obstacles and fees when seeing to switch" HSA account does not reflect reality. Today, consumers rarely if ever pay exit fees, outbound transfer fees, or account closure fees, and many HSA providers now offering free account closures and transfers. Past delays in account transfers between HSA providers have been resolved, mainly through improved processes and customer service.

In sum, the CFPB's attack on HSAs appears to be motivated by politics rather than reality. The CFPB should not move forward with any efforts to disrupt a competitive market for a product that offers consumers substantial benefits.

VI. The FDIC Has Disregarded Established Legal Requirements in Restricting Nonsufficient Funds Fees

Not to be left out of the campaign against "junk fees," the Federal banking agencies have disregarded established legal requirements for policymaking, particularly with respect to nonsufficient funds (NSF) fees. In 2021, the FDIC established new expectations — effectively changing existing law — regarding representment NSF fees[49] through a Financial Institution Letter issued in August 2022[50] (FIL) and revised in June 2023[51] (Revised FIL), thereby skirting the Administrative Procedure Act's (APA) requirements for issuing binding rules. ABA continues to urge the FDIC to rescind the FIL and Revised FIL.

No statute or regulation prohibits a bank from charging a representment NSF fee when it returns a transaction presented against insufficient funds in the customer's account. Moreover, Regulation DD requires banks to disclose the NSF fees they charge.[52] But in 2021, FDIC examiners — without warning — began scrutinizing account disclosures to determine whether

[49] When a merchant submits a check or ACH transaction initiated by a customer and the customer's account does not have sufficient funds to cover the payment, the bank may return the item to the merchant and charge an NSF fee. The fee covers the cost to process the return and serves as a penalty to encourage responsible deposit account management. A merchant has the right to resubmit the transaction to the bank with the expectation that the customer will have money in his account so that the transaction will be paid. If the account balance remains insufficient to pay the transaction, the bank may return it a second time and charge another NSF fee. A bank has no control over whether, or when, a merchant resubmits a transaction.

[50] Fed. Deposit Ins. Corp. (FDIC), Supervisory Guidance on Multiple Re-Presentment NSF Fees 3 (2022), https://www.fdic.gov/news/financial-institution-letters/2022/fil22040a.pdf [hereinafter, FIL].

[51] *Id.*, Supervisory Guidance on Multiple Re-Presentment NSF Fees (revised 2023), https://www.fdic.gov/news/financial-institution-letters/2023/fil23032a.pdf [hereinafter, Revised FIL].

[52] *See* Reg. DD, 12 C.F.R. § 230.4(a)(4) (requiring banks to disclose the "amount of any fee that may be imposed in connection with the account (or an explanation of how the fee will be determined) and the conditions under which the fee may be imposed").

they adequately (in the judgment of the examiner/agency) informed consumers that they could be charged representment NSF fees. If not, the FDIC began citing banks for engaging in a "deceptive" act or practice under section 5 of the FTC Act and required banks to conduct a manual, time-intensive "lookback" process to identify represented transactions in customers' accounts over a multi-year period.[53] The FDIC also made clear that following the FDIC's new disclosure requirements does not protect an institution from an "unfairness" claim by the FDIC.[54] An unfairness claim requires a finding that the act or practice "is not reasonably avoidable by consumers,"[55] but customers have ample opportunity to avoid multiple NSF fees through bank notifications and access to online banking and text alerts.

Thus, the FDIC concluded that legal and fully disclosed NSF fees could constitute UDAP violations, and then applied that conclusion retroactively. By avoiding the rulemaking process, the FDIC lost a valuable opportunity to obtain broad public feedback on the practical implications, costs, and benefits of the proposed policy change. This process encourages adoption of a regulatory framework that benefits both consumers and financial institutions as well as promotes public acceptance and the longevity of the regulatory policy change.[56]

Regrettably, the Office of the Comptroller of the Currency, the Federal Reserve Board of Governors, and the CFPB decided to follow the FDIC's lead and scrutinize banks' decisions to charge representment NSF Fees.[57] All three agencies went beyond the FDIC's focus on disclosures and began citing banks for unfairness violations. Last fall, an ABA member reported that its Federal Reserve examiner directed the bank to cease charging *all* representment NSF fees immediately.

We continue to urge the FDIC to rescind the FIL and Revise FIL. We urge the CFPB and the other Federal banking agencies to cease issuing UDAP violations for this lawful practice. In

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[53] The FDIC has cited banks for UDAP violations on the basis of the FIL and Revised FIL despite a prohibition in the agency's regulations against taking enforcement actions based on supervisory guidance." *See* 12 C.F.R. § pt. 302 (App. A).

[54] *See* FIL at 2.

[55] 15 U.S.C. § 45(n).

[56] For an in-depth exploration of the deficiencies of the FIL and Revised FIL, see Letter from Jonathan Thessin, Am. Bankers Ass'n, to Martin Gruenberg, Chair, Fed. Deposit Ins. Corp. (Feb. 12, 2024), https://www.aba.com/advocacy/policy-analysis/ltr-overdraft-lending-nprm.

[57] In March 2023, the Bureau issued a Supervisory Highlights publication that stated that examiners have found that banks engaged in unfair acts or practices in violation of section 1031 of the Dodd-Frank Act (UDAAP) by charging Representment NSF Fees. Consumer Fin. Prot. Bureau (Bureau), Supervisory Highlights: Junk Fees Special Edition, Issue 29, Winter 2023, at 5-6 (Mar. 2023), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf. In April 2023, the OCC issued a bulletin that similarly stated that the agency has issued findings that the practice of charging these fees "was unfair and deceptive." Office of the Comptroller of the Currency (OCC), Overdraft Protection Programs: Risk Management Practices, OCC Bulletin 2023-12, at 6 (2023), https://occ.gov/news-issuances/bulletins/2023/bulletin-2023-12.html. Finally, in September 2023, the Federal Reserve issued a "Compliance Spotlight" that stated that the agency's "examiners cited the assessment of NSF fees on represented transactions as an unfair practice in violation of section 5" of the FTC Act. Bd. of Govs. of the Fed. Reserve Sys. (Federal Reserve), Compliance Spotlight – Supervisory Observations on Representment Fees (2023), https://www.consumercomplianceoutlook.org/2023/second-issue/compliance-spotlight/.

conducting oversight, Congress should make the clear that the FDIC may not change existing law without engaging in the APA's notice-and-comment rulemaking process, should not apply new expectations retroactively, and should communicate with industry when contemplating changes to the agency's expectations.

Conclusion

The Administration should abandon its campaign against "junk fees." It has led regulatory agencies to jettison disclosure-based frameworks in favor of using UDAAP authority and price caps to target disfavored products. This impairs innovation, reduces consumer choice, decreases competition, increases prices, and restricts consumers' access to financial services.

We urge Congress to conduct rigorous oversight of the CFPB's and FDIC's unprecedented campaign against fees; pass H. J. Res. 122 and S. J. Res. 70, to overturn the CFPB's rule on credit card late fees; and examine how the CFPB's overdraft proposal will lead banks to limit consumers' access to overdraft and to low-cost deposit accounts. A return to disclosure- and market-based solutions will expand access to credit and liquidity, expand financial inclusion, and create a more prosperous economy for all.