American Bankers Association

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CBA CONSUMER BANKERS ASSOCIATION

February 7, 2024

Via Regulations.gov

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Mail Stop H-144 (Annex J)
Washington, DC 20580

Re: Notice of Proposed Rulemaking and Request for Public Comment, Trade Regulation Rule on Unfair or Deceptive Fees, R207011, 88 Fed. Reg. 77,420 (November 9, 2023)

To Whom It May Concern:

The American Bankers Association[1] and the Consumer Bankers Association[2] (together, "the Associations") appreciate the opportunity to comment on the Federal Trade Commission's ("FTC") notice of proposed rulemaking ("NPRM") on Unfair or Deceptive Fees ("the Proposed Rule").[3] Both the Associations support the FTC's objective of ensuring that consumers understand the prices and fees associated with products and services that they buy. But the Associations have significant concerns regarding the scope of the Proposed Rule and its potential effects on our members and their customers. The Proposed Rule, as applied to the Association's members, risks creating substantial confusion about the cost of financial products and exceeds the FTC's statutory jurisdiction.

As an initial matter, the definition of "Business" to which the Proposed Rule extends should be conformed to the boundaries of the FTC's authority and thus expressly exclude banks and savings and loan institutions. Section 5(a)(2) of the FTC Act explicitly exempts these depository institutions—including all of the Associations' members—from the FTC's jurisdiction. Further, the Proposed Rule's potential application to financial services creates a substantial risk of overlap and conflict with other specific statutes and regulations that already

[1] The American Bankers Association is the voice of the nation's $23.6 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.4 trillion in deposits and extend $12 trillion in loans.

[2] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and supercommunity banks that collectively hold two-thirds of the total assets of depository institutions.

[3] Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77,420 (proposed Nov. 9, 2023) (to be codified at 16 C.F.R. pt. 464).

govern the disclosure of fees associated with financial products. The Proposed Rules would create confusion and increased risk of errors for both consumers and industry participants for mortgages, credit cards, student loans, auto loans, prepaid cards, deposit accounts, and other financial products which already are subject to specific, mandatory price disclosure regimes tailored to these products under other federal statutes, in addition to state laws. The FTC should exclude these consumer financial products and services from the scope of the rule. Lastly, in conformity with the governing statute, the Associations hereby request an informal hearing to orally present our concerns. The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act *requires* the FTC to hold a hearing—which the FTC has not yet done—before promulgating a final rule.

I. The Scope of the Proposed Rule Exceeds the FTC's Authority Under Section 5 of the FTC Act

The FTC's authority to prohibit unfair or deceptive acts or practices in or affecting commerce is governed by Section 5 of the FTC Act.[4] This authority, while broad, is not unlimited. The statute specifically exempts several categories of businesses from the FTC's jurisdiction, including most depository institutions.[5] The relevant language in the statute is unequivocal:

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.[6]

Despite these explicit limitations on the FTC's jurisdiction, the Proposed Rule would apply to any "individual, corporation, partnership, association, or any other entity that offers goods or services…"[7] This broad application exceeds the FTC's authority to prohibit unfair or deceptive practices under Section 5, and the definition should be amended—consistent with other FTC trade regulation rules—to apply only to any such person "within the jurisdiction of the Federal Trade Commission."

The FTC acknowledges the limits to its jurisdiction, and notes in the Proposed Rule that it received several questions about jurisdiction in comments to its corresponding Advance Notice of Proposed Rulemaking.[8] But the FTC's response focuses only on its future enforcement of the Proposed Rule:

> Several commenters raised questions about jurisdiction. The Commission's *enforcement* of the proposed rule is subject to all existing limitations of the law:

[4] 15 U.S.C. § 45(a)(2).
[5] *Id.*
[6] *Id.*
[7] 88 Fed. Reg. at 77,483. Certain motor vehicle dealers are exempt from the Proposed Rule. *Id.*
[8] *See id.* at 77,438; *see also id.* at 77,433, n. 158 ("[T]he Commission generally does not have jurisdiction over banks and Federal credit unions for purposes of Section 5(a)…")

> of unfair or deceptive acts or practices under the FTC Act; of the FTC's jurisdiction; and of the U.S. Constitution—the Commission cannot bring a complaint *to enforce* the rule if the complaint would exceed the Commission's jurisdiction or offend the Constitution.[9]

This focus on enforcement is misplaced. It ignores the fact that the jurisdictional limits under Section 5 of the FTC Act apply to the entirety of the FTC's exercise of its powers, including its rulemaking authority under Section 18. Any other interpretation would be inconsistent with the statutory text, FTC practice, and the history of Section 18.

With respect to the statutory text, nothing in Section 18 purports to grant the FTC wider jurisdiction than the core limitations on the agency's powers in Section 5(a)(2). Section 18's grant of rulemaking authority to "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" is instead one of the *means* by which Congress has permitted the FTC to carry out the broader statutory command in Section 5(a)(2) "to prevent persons, partnerships, or corporations, except banks . . . from using . . . deceptive acts or practices in or affecting commerce."

The history of the statute makes this reading even clearer. Before the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[10] subsection (f) of Section 18 articulated a process by which the banking regulators could issue parallel consumer protection regulations, mirroring those issued by the FTC, that would be applicable to banks unless the agencies concluded that the rule would conflict with other financial regulatory objectives. Under that structure, it was uncontroversial that "[b]anks . . . are not subject to the FTC's regulatory jurisdiction" under Section 18, except insofar as the banking agencies promulgated parallel rules.[11] Thus the FTC limited the scope of its Section 18 "Credit Practices Rule" to businesses "within the jurisdiction of" the FTC.[12]

Indeed, the statutory requirement for parallel regulatory action by the banking agencies would make little sense if the FTC had the power to issue regulations applicable to banks in the first instance. In 2010, the Dodd-Frank Act essentially struck subsection (f) altogether in favor of consolidating with the CFPB new and far broader rulemaking power to define and proscribe unfair, deceptive, and abusive acts and practices relating to the consumer financial services market.[13] But crucially the law did nothing to expand the FTC's Section 18 power. The FTC thus has no greater power to issue trade regulation rules defining unfair and deceptive acts and practices applicable to banks after the Dodd-Frank Act than before. The Dodd-Frank Act reserves to the CFPB exclusive authority to promulgate rules defining unfair and deceptive practices applicable to banks.

Therefore, the Associations respectfully ask that the FTC clarify in the final rule that the regulation is limited to persons "within the jurisdiction of" the FTC and thus expressly exclude

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[9] *See* 88 Fed. Reg. at 77,438 (emphasis added).
[10] Pub. L. No. 111-203, 124 Stat. 1376 ("Dodd-Frank Act").
[11] *Am. Fin. Serv. Ass'n v. FTC*, 767 F.2d 957, 962 n.2 (D.C. Cir. 1985).
[12] *See* 16 C.F.R. § 444.1(a), (b).
[13] *See* Dodd-Frank Act § 1092, 124 Stat. at 2094-95; *see also* 12 U.S.C. § 5512(b).

banks, savings associations, and federal credit unions from its reach, consistent with the outer constraints on the FTC's authority.

II. The Proposed Rule Creates Substantial Risk of Confusion in Consumer Financial Services Markets

Congress has subjected virtually all consumer financial services products are subject to detailed and prescriptive pricing disclosure requirements, across a range of different statutes and intricate regulations that financial regulators have carefully tailored to specific financial products. For example, consumer-purpose credit products are governed by the Truth in Lending Act ("TILA") and the CFPB's Regulation Z. Residential mortgages carry an additional set of pricing disclosures, set forth in granular detail in both Regulation Z and the CFPB's Regulation X, implementing the Real Estate Settlement Procedures Act ("RESPA"). Credit cards and private education loans are similarly addressed with specificity in subparts of Regulation Z. Price and fee disclosures for deposit accounts are set forth in the Truth in Saving Act ("TISA") and CFPB Regulation DD, in addition to CFPB Regulation E' s overdraft provisions.[14] Prepaid cards and remittance transfers have separate, precise disclosure regimes in Regulation E, as authorized by the Electronic Fund Transfer Act ("EFTA"). The Consumer Leasing Act ("CLA") and CFPB Regulation M set disclosure standards for leases that closely parallel Regulation Z's disclosures for credit transactions.

Each of these statutes and regulations makes specific provision for disclosing the "price" of the financial credit or asset account involved. In the context of financial products, that disclosure inherently requires trade-offs and assumptions, which the CFPB, and the Federal Reserve Board of Governors ("FRB") before the CFPB, have carefully calibrated over many years. Thus, in the credit context, the FRB created (and the CFPB has continued) both a precise definition of "finance charge" as well as a complex calculation for the annual percentage rate (APR) to help distill up-front fees, certain contingent future fees, and recurring interest rate expense into a single number. In many contexts, those figures must be "more conspicuous than any other disclosure" under Regulation Z.[15] In the case of Regulation Z—as well Regulations E, M, and the TILA-RESPA Integrated Disclosures—the governing agencies conducted extensive consumer testing of their pricing disclosures and engaged in separate notice-and-comment rulemaking to gather and consider consumer and industry input.[16]

The Proposed Rule, if applied to consumer financial products without regard to the requirements of the other statues and regulations, would sweep away that careful balance in favor of a undifferentiated rule that requires every business, for every product, to disclose clearly and conspicuously the "Total Price" of the product or service—*more* prominently than any other pricing information. Because "Total Price" is defined to mean the "*maximum* total of all fees or charges a consumer must pay for a good or service and any mandatory Ancillary Good or Service," excluding only shipping fees and government-imposed charges,[17] that mandatory

[14] 12 C.F.R. § 1005.17.
[15] 12 C.F.R. §§ 1026.5(a)(2)(ii), 1026.17(a)(2).
[16] See, e.g., 77 Fed. Reg. 6,194, 6,200–01 (Feb. 7, 2012) (Regulation E remittance transfer disclosures); 74 Fed. Reg. 59,033, 59,036 (Regulation E overdraft disclosures).
[17] 88 Fed. Reg. at 77,484 (emphasis added).

disclosure risks substantial conflict with existing financial regulatory disclosure regimes. For example, Regulation Z requires disclosure of the "finance charge," the "total of payments," and the "total sale price." Adding the "Total Price" to these disclosures will undoubtedly lead to consumer confusion. Furthermore, most fees associated with financial products are contingent and vary based on consumer choices and behavior post-origination. The Proposed Rule is silent as to how to calculate the "Total Price" in the face of charges like late fees, product usage fees, variable interest rates, and fees and interest assessed on variable balances. Superimposing the Proposed Rule's requirements in these circumstances inevitably would create substantial confusion for consumers and business alike.

Indeed, in many cases, compliance with both the existing financial regulatory regimes and the Proposed Rule is impossible. For example, it is impossible to satisfy requirements that both the finance charge and APR disclosures required by Regulation Z *and* the Total Price required by the Proposed Rule be "most conspicuous" or "more prominent[]" than any other. Nor is there any reason to conclude, on the face of the Proposed Rule, that the FTC intends for the Regulation Z requirements to satisfy the "Total Price" requirement. The Total Price requires disclosure of the "maximum" fee, with only two narrow exceptions. TILA and Regulation Z create several categories of fees that are not included in the finance charge, such as application fees,[18] unanticipated late fees,[19] and a variety of third-party fees in connection with mortgage transactions (for example, appraisal fees and title insurance fees).[20] And Regulation Z includes a framework for making assumptions about changes in interest rates on variable-rate products beyond simply assuming that the consumer will incur the "maximum" charge possible.[21] Adding "Total Price," based on different assumptions, to these required Regulation Z disclosures would undermine both the purposes of Regulation Z and of the Proposed Rule itself; consumers faced with competing price disclosures calculated using different assumptions would be *less* able to discern the true cost of credit.

Likewise, when the CFPB created its mandatory disclosure framework for prepaid card fees, the agency carefully balanced numerous factors to reach a structure that the agency concluded accurately conveyed the comparative expense of different card products to consumers. The CFPB conducted extensive consumer testing, both pre-proposal and post-proposal, for usability and comprehension of prepaid account disclosure forms to inform the CFPB's design and development of the model and sample forms included in the final rule.[22] Research included multiple informal focus groups and rounds of one-on-one cognitive interviews "to see how consumers interact with the prototype forms developed by the CFPB and use them in comparison shopping exercises."[23] In both pre- and post-proposal consumer testing, the CFPB's survey firm asked participants questions to assess how well they were able to comprehend the fees and other information included on prototype forms. In some cases, the firm also asked participants to engage in shopping exercises to compare fee information printed on different prototype forms.[24]

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[18] *See* 12 C.F.R. § 1026.4(c)(1).
[19] *See id.* § 1026.4(c)(2)
[20] *See id.* § 1026.4(c)(7)(i)-(v).
[21] *See, e.g.*, 12 C.F.R. § 1026.17(c)(1); CFPB Official Commentary to Regulation Z, 12 C.F.R. pt. 1026, Supp. I, ¶ 17(c)(1)-8, -10.
[22] 81 Fed. Reg. at 83,954.
[23] *Id.*
[24] 81 Fed. Reg. at 83,954–55; *see also* ICF Int'l, Summary of Findings: Design and Testing of Prepaid

Those meticulously-designed, well-tested disclosures would be undermined by a requirement that the "Total Price" be disclosed in a manner that is more prominent than the entire Regulation E framework.

The TILA-RESPA Integrated Disclosures ("TRID") governing the cost of mortgages provide an equally compelling example. Sections 1098 and 1100A of the Dodd-Frank Act directed the CFPB to develop unified mortgage pricing disclosures "to aid the borrower . . . in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures."[25] The amended statutes require that the CFPB's disclosures "conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement."[26] The CFPB invested well over a year in developing a disclosure framework that satisfied these standards: as the nearly 636-page Federal Register notice promulgating the final rules explains,

> the [CFPB] engaged in extensive consumer and industry research, analysis of public comment, and public outreach for more than a year. After issuing the proposal, the [CFPB] conducted a large-scale quantitative validation study of its integrated disclosures with 858 consumers, which concluded that the [CFPB]'s integrated disclosures had on average statistically significant better performance than the current disclosures under TILA and RESPA. . . . The forms use clear language and design to make it easier for consumers to locate key information, such as interest rate, monthly payments, and costs to close the loan. The forms also provide more information to help consumers decide whether they can afford the loan and to compare the cost of different loan offers, including the cost of the loans over time.[27]

The simplified TRID disclosure requires a loan estimate with key aspects of the price broken out, including interest rate,[28] APR,[29] total payments over five years (regardless of the term of the loan),[30] prepayment penalties,[31] mortgage insurance,[32] escrows,[33] a summary of closing costs,[34] origination fees,[35] detailed closing costs (broken out based on whether the consumer can or cannot shop for each service),[36] taxes and government fees,[37] and information regarding

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Card Fee Disclosures (Nov. 2014), *available at* https://files.consumerfinance.gov/f/201411_cfpb_summary-findings-design-testing-prepaid-carddisclosure.pdf; ICF Int'l, Final Report of Findings: Post-Proposal Testing of Prepaid Card Disclosures (Oct. 2015), *available at* http://files.consumerfinance.gov/f/201510_cfpb_reportfindings-testing-prepaid-card-disclosures.pdf.

[25] 124 Stat. at 2104, 2108 (codified in 12 U.S.C. § 2603 and 15 U.S.C. § 1604).

[26] 12 U.S.C. § 2603(a).

[27] 78 Fed. Reg. 79,730, 79,730 (Dec. 31, 2013).

[28] 12 C.F.R. § 1026.37(b)(2).

[29] Id. § 1026.37(*l*)(2).

[30] Id. § 1026.37(*l*)(1).

[31] *Id.* § 1026.37(b)(4), (7).

[32] *Id.* § 1026.37(c)(2).

[33] *Id.* § 1026.37(c)(2), (4).

[34] *Id.* § 1026.37(d)(1), (f)(4), (g)(6).

[35] *Id.* § 1026.37(f)(1).

[36] *Id.* § 1026.37(f)(2), (3).

[37] *Id.* § 1026.37(g)(1).

potential post-closing changes (such as variable rates).[38] At closing, the lender must make a second disclosure showing the same price elements as well as substantial additional details concerning the mortgage—in addition to expressly disclosing changes from the loan estimate.[39] Determining how these terms of a mortgage—all of which are important—would translate into a "Total Price" as defined in the Proposed Rule is, in the first instance, impossible. Were such a single, bottom-line disclosure possible and more useful to consumers than the final rule's approach, the CFPB would have identified and mandated it. Even if a lender were to draw inferences about "maximum" fees and charges and attempt to calculate a "Total Price" under the Proposed Rule, presenting that information, more prominently than every other element of pricing information—as § 464.2(b) of the Proposed Rule would require—in the TRID disclosures would be both fundamentally misleading to consumers and in violation of the TRID rules. The CFPB's regulations *prohibit* lenders from deviating from the form disclosures prescribed by the agency—which do not include the FTC's novel "Total Price."[40]

While particularly egregious for mortgages, the same concern holds true for all financial products subject to an existing price disclosure regime: Even if banks could discern how to comply with the FTC's Proposed Rule and the existing disclosure regime, doing so would only confuse consumers. Would a bank have to disclose two APRs, one with the fees required by Regulation Z and one incorporating all fees? Or would a bank have to provide a second finance charge adjacent to the APR? Would prepaid card disclosures require two different short-form disclosures? The purpose behind these financial disclosure regulations, in addition to ensuring consumers are informed about the cost of credit and other financial products, is to facilitate shopping by creating a consistent pricing disclosure that permits easy comparison between product offers. Creating a new, more prominent *additional* price disclosure would undermine that objective.

The Proposed Rule notes many (but not all) of the statutes above but observes that the FTC "has not identified any conflict arising from complying with these sector or transaction-specific rules and statutes and the proposed rule's prohibition against misrepresenting the nature and purpose of any amount a consumer may pay" and "invites comment and information regarding any potentially duplicative, overlapping, or conflicting Federal statutes, rules, or policies."[41] The examples above—which describe only a few—demonstrate the extent of the conflicts between the Proposed Rule and federal consumer financial disclosure laws and regulations. The Proposed Rule neither acknowledges nor assesses the full, nuanced impact of superimposing its requirements on the intricate regime of financial product-specific statutes and regulations that Congress and the financial regulatory agencies have crafted over several decades. To the extent that the FTC believes that its proposed framework could yield improvements to the existing financial regulatory regime, it is the financial regulators who must call upon their financial market monitoring experience to collect data, run studies and analyses, and conduct full rulemaking proceedings to determine whether changes to the regulations that have been tailored to the financial products under their jurisdiction are justified.

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[38] *Id.* § 1026.37(b)(6), (i), (j).
[39] *See generally* 12 C.F.R. § 1026.38.
[40] *See* 12 C.F.R. §§ 1026.37(o)(ii), 1026.38(t)(1)(ii).
[41] 88 Fed. Reg. at 77,480.

The FTC should take comfort that deference to existing federal price disclosure regulations applicable to consumer financial products and services will equally serve the consumer protection purposes that motivate the Proposed Rule. The CFPB has invested substantial resources in the development of these disclosures and carefully monitors the markets to assess when that framework needs revision. The overlay of the Proposed Rule does not meaningfully advance the agency's interest in protecting consumers from unfair or deceptive acts and practices—a command that the FTC shares with the CFPB—and, in fact, for the reasons described above is more likely to result in consumers being confused about the pricing of financial products, not better informed.

The FTC should therefore exclude from the Proposed Rule's scope consumer financial products and services within the jurisdiction of the CFPB, including the many that that are already the subject of a price disclosure regime under TILA, RESPA, EFTA, TISA, and/or the CLA, or that may be the subject of CFPB regulation in the future.

III. The FTC Must Follow Magnusson-Moss Hearing Procedures

The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act requires the FTC to conduct a hearing before finalizing the rule, which the agency has not yet done. Section 18 of the FTC Act requires the agency to "provide an opportunity for an informal hearing" before finalizing a rule,[42] and directs that "an interested person is entitled . . . to present his position orally or by documentary submission (or both).[43]

Under 16 C.F.R. §§ 1.11(e) and 1.12, the Associations hereby request that the FTC conduct a hearing regarding (1) the scope of the FTC's jurisdiction to issue this Proposed Rule and (2) the inadvisability and substantial risk of conflict in applying the Proposed Rule to consumer financial products and services, including those subject to TILA, RESPA, EFTA, TISA, or the CLA. The Associations, whose interests in the proceeding are described throughout this comment, intend to present an oral submission. The Associations therefore satisfy each of the requirements of § 1.11(e) for participation in such a hearing.

Further, the Proposed Rule reflects that there appears to be a "disputed issue of material fact," within the meaning of the FTC's Rules of Practice, concerning the relationship between the disclosures required by the Proposed Rule and the disclosures required under other federal consumer financial laws.

Section 18 of the FTC Act makes such hearing mandatory, both because the Associations, as interested persons, intend to present their position orally and because there is a disputed issue of material fact.[44] The FTC may not issue a final rule without complying with the procedural requirements of Section 18(c) and 16 C.F.R. §§ 1.12 and 1.13.

[42] 15 U.S.C. § 57a(b)(1)(C).
[43] *Id.* § 57a(c)(2)(A).
[44] *See id.* § 57a(c)(2)(A), (B).

IV. Conclusion

For the reasons outlined above, the FTC should amend the Proposed Rule as follows:

Proposed Section 464.1(b) should be amended to read:

> *Business* means an individual, corporation, partnership, association, or any other entity **within the jurisdiction of the Federal Trade Commission** that offers goods or services, including, but not limited to, online, in mobile applications, and in physical locations. Motor vehicle dealers that must comply with 16 CFR part 463, requiring motor vehicle dealers to disclose the full cash price for which a dealer will sell or finance the motor vehicle to any consumer, and prohibiting motor vehicle dealers from making misrepresentations, are exempted from the definition of "Business" for all purposes under this part.

New Section 464.5 should be added to the Proposed Rule, to read as follows:

> (a) This Part shall not apply to any "consumer financial product or service," as that term is defined in 12 U.S.C. § 5481(5).
>
> (b) This Part shall not apply to any transaction that is subject to the Truth in Lending Act, the Truth in Savings Act, the Electronic Fund Transfer Act, the Real Estate Settlement Procedures Act, or the Consumer Leasing Act, or any regulations promulgated by the Bureau of Consumer Financial Protection under any of the foregoing.

These changes to the Proposed Rule will bring the regulation in line with the FTC's jurisdiction and better serve the consumer protection purposes of the Proposed Rule.

For the reasons described above, the Associations also requests that the FTC conduct the hearing required under the procedures described in Section 18(c) and afford the Associations an opportunity to present their positions orally at that hearing.

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The Associations appreciate the FTC's consideration of our comment.

American Bankers Association

Consumer Bankers Association