Testimony of Lindsey Johnson

President and CEO

Consumer Bankers Association

U.S. House Financial Services Committee

Subcommittee on Financial Institutions and Monetary Policy

Hearing Entitled "Politicized Financial Regulation and its Impact on Consumer Credit and Community Development"

March 7, 2024

Chairman Barr, Ranking Member Foster, and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss concerns about "Politicized Financial Regulation and its Impact on Consumer Credit and Community Development."

I am the President and Chief Executive Officer of the Consumer Bankers Association ("CBA"). CBA is America's only member-driven trade association focused exclusively on retail banking. Since 1919, CBA has partnered with member banks to promote sound policy, prepare the next generation of diverse bankers to lead the industry, and enable consumers' individualized approaches to the American dream. Our corporate members include the nation's largest retail banks, with the vast majority holding more than $10 billion in assets – meaning that they are subject to CFPB supervision and enforcement jurisdiction.

The Paperwork Reduction Act identifies 19 enumerated "independent regulatory agencies."[1] These independent agencies hold immense influence over Americans' day-to-day lives. Eighty percent of the provisions assigned rulemaking responsibilities or authorities under the Dodd-Frank Wall Street Reform and Consumer Protection Act to one of five "independent" regulatory agencies.[2]

My testimony today focuses primarily on concerns about regulations that will have specific impacts on retail banks and consumers – many of which are being promulgated by the Consumer Financial Protection Bureau (the "CFPB" or "Bureau"). But as many agencies appear to be racing to finalize regulations before the November elections, there are troubling indications of increased political influence by "independent" agencies across government.[3]

CFPB policy is increasingly a direct reflection of the political party that holds the White House, and not an impartial regulator that listens to the viewpoints of all stakeholders to ensure the best regulatory solutions for consumers are considered. The Supreme Court ruled in 2020, notwithstanding its status as an independent agency, that the CFPB's Director serves at the discretion of the President, increasing the politicalization of the Bureau by allowing its activities to become more aligned with the administration's agenda.[4]

As Federal Reserve Governor Michelle Bowman recently made clear, "We live in a time when confidence in public institutions is waning. As such, the banking agencies should strive to demonstrate beyond doubt that they execute their duties in an independent manner, focusing on statutory obligations."[5] At the very least, regulators must follow the law. And while policymakers are entitled to their own opinions, they aren't entitled to their own facts. The politicization of the CFPB's policymaking apparatus erodes public confidence in government as a whole, damages

---

[1] 44 U.S.C. § 3502(5).

[2] Curtis W. Copeland, Economic Analysis and Independent Regulatory Agencies (April 30, 2013), https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf.

[3] The Federal Trade Commission (the "FTC"), for instance, is literally attempting to redefine longstanding principles of antitrust law in order to achieve its policy goals. Separately, political grandstanding has created dangerous impediments to banks' ability to consummate strategic mergers and acquisitions.

[4] Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

[5] https://www.federalreserve.gov/bowman-starling-insights-20240213.pdf.

the CFPB's long-term durability, and may lead to policy outcomes that are optimized for short-term political wins, at the cost of consumers' long-term financial health.

CBA and our members **support consumer protection regulation**. We believe, however, that for the market to operate effectively, **the American public requires regulators that heed the law**. We believe that facts matter – and that **regulators must represent facts accurately**. And, most importantly, we believe that **American consumers deserve regulators that show consideration for the impact of regulation** on financial inclusion and consumers' broader access to well-regulated financial services.

With that in mind, as discussed in further detail below, CBA recommends:

1. After a decade of highly politicized experimentation, the CFPB's abusiveness authority remains unclear and needs to be reconsidered. Accordingly, Congress should pass H.R. 6789, the Rectifying UDAAP Act.

2. The CFPB must stop penalizing businesses in the press without offering basic due process to rebut the CFPB's allegations.

3. The CFPB's Dodd-Frank Act Section 1034(c) Advisory Opinion establishes substantive new requirements and should be withdrawn and proposed as a formal rulemaking.

4. The CFPB's credit card late fees rulemaking represents the CFPB attempting to deliver a short-term bump in the polls for an administration desperate for a political win. The rulemaking is procedurally deficient and is based on a false portrayal of the CFPB's own data. Most importantly, it would ultimately harm far more consumers than it purports to help. The CFPB's rule must be withdrawn.

5. The CFPB's Dodd-Frank Act Section 1033 consumer data rights proposal requires a number of changes before finalization to ensure that the CFPB and other parties take appropriate responsibility and meaningfully protect consumers.

6. The CFPB's overdraft rulemaking is an illegal attempt at government price setting, meant to buttress the administration's political narrative on "junk fees." The rulemaking violates the Truth in Lending Act. It misrepresents consumers' options regarding overdraft services, as well as the alternatives available to them if the rulemaking were to be finalized. The CFPB's proposed rule must be withdrawn so overdraft services can remain a viable option for consumers.

7. We recommend that Congress provide long-term certainty for banks to make highly regulated small dollar loans.

8. The cumulative impact of the Bureau's proposals must be considered in conjunction with proposals from other agencies, including the Federal Reserve Board's changes to Regulation II and the Community Reinvestment Act.

1. **<u>The CFPB's Unfair Deceptive and Abusive Acts and Practices authority is undefined and in need of reform.</u>**

At their very core, banks can only succeed if they treat customers fairly. Accordingly, banks must absolutely prioritize and significantly invest in compliance with consumer protection regulations on a day-to-day, customer-by-customer basis. CBA and its members wholeheartedly support and adhere to rigorous anti-discrimination and fair lending laws. Since its creation, however, the CFPB's unfair, deceptive, and abusive acts or practices ("UDAAP") authority has been largely undefined and closed to input from stakeholders.

By granting new and undefined UDAAP authority to the Bureau, the Dodd-Frank Act created an anomaly within a pre-existing and well-documented regulatory regime. Federal authority for unfair deceptive acts and practices dates back to 1938, when Congress amended the Federal Trade Commission Act to prohibit "unfair or deceptive acts or practices," in addition to "unfair methods of competition." In the ensuing decades, the expectations for "unfair" and "deceptive" conduct have been developed and refined over many decades by regulation and case law at both the Federal and state level, where each of the 50 states have their own version of a statutory prohibition on unfair, deceptive acts and practices.[6]

When the CFPB was created, the Dodd-Frank Act pushed forward a new theory of liability in abusiveness. And even now, more than a decade after the passage of the Dodd-Frank Act and after multiple efforts by various different leadership of the CFPB to make sense of the authority, it's not clear that a "plain language" explanation of the "abusiveness" standard exists – particularly when trying to differentiate it from the CFPB's separate "unfair" and "deceptiveness" authorities. After all of this experimentation, it may be time to ask if "abusiveness" is a solution in search of a problem.

The CFPB continues to overextend its statutory UDAAP authority.

Notwithstanding the well-developed contours of the Federal Trade Commission's UDAP authority, creative regulators often push the boundaries of their authorities beyond statutory limits. In 2021, a unanimous Supreme Court ruled that the Federal Trade Commission had exceeded its authority by illegally obtaining *billions* of dollars of monetary relief under its Section 13(b) authority. No one disagrees with the importance of protecting consumers from unfair and deceptive acts and practices. But even Justice Breyer, who authored the decision, recognized that regulators must follow the law as well.[7]

The CFPB similarly overextended its authority by relying on a 2022 update to an examination manual to advance a novel and broadly impactful extension of its UDAAP authority: arguing that "unfairness" can be applied to alleged discriminatory practices by using disparate impact analysis. Congress passed the Equal Credit Opportunity Act in 1974. In the 49 years since, Congress has never used the separately defined statutory concepts of "unfairness" and "discrimination" interchangeably. Further, industry and regulators iterated through various forms of additional laws, new regulations, guidance, examination procedures, rules arrived

[6] https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection

[7] https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf

through legal jurisprudence, and compliance best practices on myriad issues, large and small, to support the statute's goal of eliminating discrimination in financial services.

We believe the CFPB was wrong to unilaterally overlay, displace, or disrupt this prior precedent, which would have significant implications for lenders and borrowers, with a simple examination manual update instead of a rulemaking. These actions ultimately created significant uncertainty across the financial marketplace and impacted banks' ability to serve consumers. We feel the CFPB was required to seek input from the public before engaging in a policy change of that magnitude. It surely must be required to conduct impact assessments, both for consumers and the industry, while also disclosing other options it considered. Accordingly, in September 2022, CBA and other trade associations filed a lawsuit challenging the exam manual update on several grounds, but ultimately arguing that regulators must also follow the law.[8] The court agreed.[9] In September 2023, the United States District Court for the Eastern District of Texas granted CBA and other plaintiffs' motion for summary judgment and ultimately vacated the CFPB's examination manual update.

Congress has a vehicle for correcting these issues in the Rectifying UDAAP Act.

Given the misuse of the CFPB's UDAAP authority, basic reforms are needed. CBA urges Congress to pass H.R. 6789, the Rectifying UDAAP Act, sponsored by Rep. Andy Barr. This legislation would provide much needed clarity and certainty by establishing due process protections under UDAAP consistent with previously adopted CFPB principles, which were subsequently reversed by the current CFPB Director.

Among other reforms, this includes:[10]

- Ensuring the CFPB cannot retroactively seek a civil money penalty for a practice that was not previously identified as being prohibited under UDAAP;
- Requiring the Bureau to conduct a rulemaking to clearly define "abusive act or practice";
- Adequately distinguishing the concepts of "abusive," "unfair," and "deceptive";
- Providing institutions that self-report UDAAP issues with an opportunity to cure violations;
- Reiterating that discrimination is not part of UDAAP;
- Enabling monetary penalties only when there has been a lack of good faith effort to comply with the law, while maintaining the Bureau's ability to seek restitution for consumer harm; and
- Not challenging conduct as abusive when the benefits to consumers outweigh the alleged harms.

---

[8] https://www.consumerbankers.com/cba-media-center/media-releases/cba-leading-financial-groups-pursue-legal-action-against-cfpb

[9] https://www.consumerbankers.com/sites/default/files/CBA-Chamber-of-Commerce-CFPB_Final-Judgment.pdf

[10] https://consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-regarding-prohibition-abusive-acts-practices/

This legislation will clearly define the parameters of the CFPB's UDAAP authority, providing necessary guardrails to ensure that regulated entities know the rules of the road. ***CBA encourages Congress to pass the Rectifying UDAAP Act.***

2. **<u>The CFPB must stop penalizing businesses in the press without offering basic due process to rebut the CFPB's allegations.</u>**

Over the years, the CFPB has developed a reputation for issuing hyperbolic press releases that often differ from the substance of the underlying enforcement action, supervisory finding, or data report.[11] In some cases, this is puffery. But in other cases, the CFPB has gone so far as to name specific companies in its *headlines* that it does not actually name in the underlying litigation.

In the CFPB's press release regarding its settlement with LendUp Loans, the CFPB included a headline that identified Google Ventures, Andreessen Horowitz, Kleiner Perkins, and other prominent venture capital firms.[12] None of these firms are CBA members. Yet CBA must point out that none of these firms were actually defendants in the underlying enforcement action with the CFPB. Accordingly, the CFPB not only failed to allege any substantive violations of law before calling out these entities – the firms presumably did not have any due process before the CFPB essentially publicly shamed them, overtly attempting to cause reputational damage.

Similarly, in a recent discussion of the use of artificial intelligence by financial institutions, Director Chopra referenced the whistleblower program, asserting that: "[t]hey're going to be a huge source of really good, high-quality investigative information about lackadaisical use of modeling [and] things that they have said were discriminatory but an institution has turned a blind eye or gone ahead with it."[13] Director Chopra cited no data or even anecdotes for his claims of industry abuse. The CFPB did not highlight examination findings or announce an enforcement action. More than two years ago, the CFPB created a "whistleblower" program, in which it specifically called on technology workers to raise concerns about the use of algorithmic discrimination and other theories about the use of artificial intelligence tools. The CFPB has repeatedly emphasized this whistleblower effort. But still, the CFPB had nothing to reference when Director Chopra made his sweeping condemnations of the industry from the bully pulpit. This unchecked behavior is simply beneath any government agency, much less an independent regulator as important as the CFPB.

---

[11] See, e.g., https://www.consumerbankers.com/cba-media-center/media-releases/facts-matter-cba-uses-cfpb-data-set-record-straight-card-act-report.

[12] https://www.consumerfinance.gov/about-us/newsroom/cfpb-shutters-lending-by-vc-backed-fintech-for-violating-agency-order/.

[13] https://bankingjournal.aba.com/2024/01/regulators-say-banks-responsible-for-ensuring-ai-complies-with-law/.

3. The Bureau's Dodd-Frank Act Section 1034(c) Advisory Opinion establishes substantive new requirements and should be withdrawn and proposed as a formal rulemaking.

On October 11, 2023, the Bureau issued an Advisory Opinion on Section 1034(c) of the Dodd-Frank Act that creates new regulatory requirements and entirely new categories of enforcement liability.[14]

To the extent that the CFPB has authority to introduce any such new regulatory expectations, the Bureau should have done so via a formal rulemaking under Administrative Procedures Act ("APA") processes. The Advisory Opinion contains specific new obligations and establishes new legal penalties, thereby introducing new regulatory expectations more than a decade after the statute was enacted. In contrast, an Advisory Opinion would only have been appropriate if the CFPB was simply articulating its interpretation of already-existing statutory or regulatory requirements.

By outlining these requirements through an Advisory Opinion rather than a rulemaking, the CFPB has failed to consider input from impacted parties as to the possible effects of the substantive new requirements presented by the Advisory Opinion. This means that the Bureau has bypassed its obligations to perform a meaningful cost-benefit analysis of the impact these new requirements would have on industry and consumers.

To be clear, the Advisory Opinion creates large, amorphous costs for financial institutions. In the Advisory Opinion, the Bureau grants itself authority to regulate and restrict fees that simply does not exist in the statute:

> First, the Bureau creates a new requirement and regulatory obligation that does not exist in the statutory text: that a financial institution may not impose conditions for consumers' information requests that may "unreasonably impede" the customer's ability to request and obtain account information.
>
> Second, the Bureau further scaffolds on this framework by reasoning that fees or other charges to request information would "unreasonably impede consumers' information requests." This would presumably even prohibit the recovery of reasonable and proportionate costs. The Bureau's reasoning on "unreasonable impediments" similarly has no natural limit. Nothing prevents the Bureau from applying this reasoning in every other context under its presumptive authority. Cost recovery may be particularly important because the Advisory Opinion provides remarkably little specification about its scope or broader compliance expectations. The CFPB sets no upper bound, tiering, or qualitative constraints on the types of information requests that covered persons must presumably fulfill at no cost.[15]

[14] https://files.consumerfinance.gov/f/documents/cfpb-1034c-advisory-opinion-2023_10.pdf

[15] The Advisory Opinion has generated significant uncertainty for industry in evaluating compliance. For instance, the CFPB creates a "timely manner" requirement – but it's not clear whether and how that requirement contradicts "timely manner" requirements that financial institutions must comply with currently under state law. The Advisory Opinion creates "completeness" requirements that

Lastly, the Bureau provided less than four months for banks to comply with these significant new requirements and resisted industry requests to meet to discuss them. The Bureau was even asked a set of technical questions about the Advisory Opinion by stakeholders and would not respond to them. The CFPB must withdraw its Advisory Opinion and instead promulgate these requirements through a formal rulemaking process.

4. **The CFPB's credit card late fees final rule is procedurally deficient and is being justified by a portrayal of the market that its own data shows to be false.**

On March 5, 2024, the CFPB finalized its proposed rule that would cut the Federal Reserve Board's safe harbor for credit card late fees from $30 ($40 for subsequent late payments) to $8, without an inflation adjustment.[16]

The CFPB's rule is part of the Biden Administration's overarching campaign regarding "junk fees," which purports to reduce fees charged to consumers by several industries, including but not limited to hotel and lodging, transportation, groceries, and entertainment.[17]

Credit card late fees are not "junk fees." Credit card late fees are authorized under Regulation Z, which implements the Truth in Lending Act ("TILA"). By law, these fees are clearly disclosed to the consumer up front. In addition to clear and required disclosures, credit card penalty late fees serve an important purpose recognized by TILA: for issuers to charge fees that are reasonable and proportional to the "violation" of the card agreement.

Nevertheless, President Biden highlighted the proposed rule in last year's State of the Union Address and is expected to highlight the final rule in this year's address. Remarkably, notwithstanding that the proposed rule would not even be published in the Federal Register for another *eight weeks*, the President announced where the CFPB's rule would land, presumably after considering all of the comments that had not yet been filed: "We're cutting credit card late fees by 75 percent, from $30 to $8."[18]

The degree of political coordination between the CFPB and the White House suggests the CFPB prejudged this rulemaking and calls the rulemaking's integrity into question. Further, the CFPB appears to have rushed to judgment throughout various important steps in the rulemaking process, raising additional concerns about improper prejudgment.[19] Even the Small

---

may or may not contradict other regulatory record retention requirements, for example under Regulations E and Z. Particularly given rampant levels of digital identity theft and fraud, it's not clear the extent to which financial institutions may require identity verification and other information for security protections, in light of the Advisory Opinion's broad expectations.

16 https://www.consumerfinance.gov/rules-policy/final-rules/credit-card-penalty-fees-final-rule/

17 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

18 https://www.whitehouse.gov/state-of-the-union-2023/.

19 Among other concerns: (1) The CFPB refused to provide sufficient time for industry to provide data on credit card late fees and late payments; (2) The CFPB failed to utilize its market monitoring authority to engage in requests for information on this topic; and (3) the CFPB did not conduct a thorough analysis of the available economic research on the effects of late fees, and the little analysis that the CFPB did perform was not done in a transparent and consistent manner.

Business Administration Office of Advocacy has raised concerns about the CFPB's rush to judgment.[20] [21] Based on public statements by the administration and the CFPB, it appears that the CFPB was unwilling to alter course based on industry feedback to help protect consumers.

In addition to the CFPB's procedural shortcuts, the CFPB has justified this rulemaking by portraying market conditions to the American public that simply are not true.

To justify the CFPB's late fee rulemaking, CFPB Director Chopra argued that late fees and, by extension credit cards, "aren't subject to the normal forces of competition."[22] According to the Director, competition had been "undermined," so the CFPB needed to intervene to ensure the credit card market is fair and competitive."[23] The CFPB has made its claims about a lack of competition in the credit card market a recurring theme in the months leading to the finalization of its late fee rulemaking. For instance, in the CFPB's press release for its 2023 overview of the credit card market (the "CARD Act Report"), the CFPB asserts, "[m]ajor credit card companies' profits are now higher than pre-pandemic levels, potentially signaling a lack of competition in a market consistently dominated by the top 10 credit card companies."[24]

Under any commonly accepted legal measure of market concentration, like the Herfindahl–Hirschman Index, the credit card market is a highly competitive market. But also, the CFPB's own CARD Act Report clearly shows a highly competitive market for credit cards. CBA detailed these findings in greater detail in a four-part series.[25] But as an example, the CFPB's CARD Act Report shows that there were $53 billion of balance transfers in 2022.[26] To put that number in context, the amount of balance transfers that moved from one issuer to another is greater than the *total* holdings of each but the top seven credit card issuers.

---

[20] Under the Small Business Regulatory Enforcement Fairness Act (SBREFA), the CFPB is required to convene a panel of small entity representatives when a proposed rule will have a significant economic impact on a substantial number of small entities. CBA and other banking trade associations have informed the CFPB that more than half the banks impacted by the rule – and nearly 85 percent of the impacted credit unions – have less than $750 million in assets. https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-docket-no-cfpb-2023-0010-rin-3170-ab15. Yet, the Bureau failed to hold a SBREFA panel.

[21] https://www.consumerbankers.com/cba-issues/comment-letters/joint-trades-comment-letter-late-fees-anpr

[22] https://www.consumerfinance.gov/about-us/newsroom/director-chopras-remarks-on-press-call-for-credit-card-late-fees-nprm/.

[23] Id. and https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/.

[24] https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-credit-card-companies-charged-consumers-record-high-130-billion-in-interest-and-fees-in-2022/

[25] CBA detailed these contradictions in greater detail in a four-part series. https://www.consumerbankers.com/cba-media-center/media-releases/facts-matter-cba-uses-cfpb-data-set-record-straight-card-act-report.

[26] As the CFPB explains, "[b]alance transfer offers enable consumers to potentially reduce the cost of credit card debt." That's because "consumers are typically offered a lower interest rate on the transferred balance (often zero percent) but are also typically required to pay an upfront fee assessed as a share of the transferred balance." "Depending on the duration of the promotion and the interest rate differential, as well as the consumer's repayment behavior, savings from balance transfers can be significantly higher than the upfront cost of the initial balance transfer fee." https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf

The CFPB has gone on to paint a picture of a credit card industry that unconscionably piles late fee upon late fee to unsuspecting consumers – whereas the Bureau's own data shows the opposite. As CBA has demonstrated using data from the CFPB's 2023 CARD Act Report, late fees appear to have grown only in proportion to the increase in credit card balances, especially as issuers provide greater access to credit cards for consumers with lower credit scores or little to no credit history. [27] Similarly, in order to portray itself as a white knight fighting for distressed consumers, the CFPB has increasingly painted a dire picture of market conditions with "more consumers carrying balances month-to-month, with many falling deeper into debt over time."[28] But again, as CBA has shown with the CFPB's own 2023 CARD Act Report, the reality is literally the *opposite* case.[29] The CARD Act Report shows a notable shift in consumer behavior, in which:

> (1) more consumers are paying their credit card balances off each month than in prior years, and
>
> (2) consumers who do revolve debts are paying down higher shares of their balances each month (39.1 percent) than ever before.[30]

CBA has shown that these improvements in consumer financial resilience are partially due to actions banks have taken – such as reminders of payment due dates and automatic payment options – to ensure consumers make more progress paying down their balances.[31]

These facts matter. Sadly, it appears the CFPB feels that it needs to portray a poorly functioning market in order to justify the White House's commitment to a late fee rulemaking. But its own data shows that the credit card market is currently working very well for consumers, despite the CFPB's and White House's protestations to the contrary.

The CFPB's credit card late fees rule is deeply flawed and will harm far more consumers than it purports to help – and may even create long-term harm to the consumers it purports to help, as well.

The CFPB's misrepresentations are particularly concerning because its rule poses long-term impacts to consumers – even those that it purports to help. The CFPB's rule is explicit that its primary beneficiaries would be consumers who frequently pay late on their credit card bills. The CFPB did not provide estimates of the size of that population in its proposed rule. However, using the CFPB's data underlying its March 2022 research report on credit card late fees, it is

---

[27] https://www.consumerbankers.com/cba-media-center/media-releases/facts-matter-card-act-report-reveals-credit-card-fee-landscape-stark. Issuers have reduced annual fees charged to these consumers and instead charged higher annual fees to the highest-scored consumers.

[28] https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-credit-card-companies-charged-consumers-record-high-130-billion-in-interest-and-fees-in-2022

[29] https://www.consumerbankers.com/cba-media-center/media-releases/facts-matter-card-act-report-highlights-banks-positive-impact.

[30] Consumer improvements in paying down debt have been so significant the CARD Act Report specifically states: "Consumers tend to display consistent transacting and revolving activity over time, which makes the shifts in repayment behavior observed in recent years particularly notable." https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf#page=38

[31] https://www.consumerbankers.com/cba-media-center/media-releases/facts-matter-card-act-report-highlights-banks-positive-impact.

apparent that only 26 percent of consumers are late payers – and hence, would be the intended beneficiaries of the rulemaking.[32]

The proposed rule conceded that the rule would result in credit cards becoming more expensive and less available for the vast majority of consumers who pay their bills on time. By the Bureau's own admission, "[c]ardholders who never pay late will not benefit from the reduction in late fees and could pay more for their account if maintenance fees in their market segment rise in response."[33] Again, the CFPB does not provide estimates of the size of this population in the proposed rule. But this means that the proposed rule essentially redistributes benefits from the 74 percent of consumers who pay their bills on time to the 26 percent of consumers who, in the CFPB's words, are "consumers most likely to violate [the] terms of their card agreement."

Commentators may attempt to frame this transfer as a redistribution from "wealthy" to "lower-income consumers." Or they may try to describe the redistribution as transferring funds from prime consumers to subprime consumers. But the transfer is specifically from consumers who pay their bills on time to consumers who frequently do not. Indeed, **CBA – using the CFPB's late fee data – showed that nearly 50 percent of subprime cardholders pay their bills on time, yet could face higher APRs** and hence, more difficulty paying on time, now that CFPB has finalized this rulemaking.[34] [35]

While it may seem that late-paying customers could experience some short-term relief from this proposal, it may result in far more long-term financial harm. The CFPB's final rule would, by definition, make it easier for consumers to miss their credit card payments.[36] As more consumers pay late, there is a higher chance they will become delinquent. Ultimately, consumers experiencing delinquency will have this information reported to credit bureaus, leading to higher credit card balances carried month-to-month and lower credit scores, which can lead to far worse outcomes for consumers such as difficulty obtaining credit, or higher financing costs for housing, cars, and other necessary purchases.

In light of these concerns, the CFPB should withdraw its rulemaking and should re-propose it, complying with the Administrative Procedures Act without prejudging the results of its rulemaking. Further, before finalizing the rule, the CFPB should be required to conduct a rigorous cost-benefit analysis of this rule and how it would affect (1) the cost and availability of credit, particularly with

---

[32] https://www.consumerfinance.gov/data-research/research-reports/credit-card-late-fees/

[33] Credit Card Penalty Fees Final Rule, at 227, https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees_final-rule_2024-01.pdf

[34] The CFPB's Proposed Late Fee Rulemaking estimates that its finalization could cause credit card interest rates to raise as much as 2 percent. https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf#page=8

[35] https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees-nprm_2023-02.pdf#page=113

[36] The Bureau expressly acknowledged "the possibility that consumers who were more likely to pay attention to late fees than to other consequences of paying late, like interest charges, penalty rates, credit reporting, and the loss of a grace period, might be harmed in the short run if a reduction in late fees makes it more likely that they mistakenly miss payments." Credit Card Penalty Fees Final Rule, at 248, https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees_final-rule_2024-01.pdf .

respect to non-prime borrowers, (2) the safety and soundness of credit card issuers, and (3) the use of risk-based pricing.

5. **Congress should ensure that the CFPB treads carefully and incrementally if it advances its Dodd Frank Act Section 1033 rulemaking.**

The CFPB's attempt to reshape the structure of the financial market far extends its authority and Congressional mandate under Section 1033.

This fall, we expect the CFPB to finalize its notice of proposed rulemaking ("NPRM") to implement Section 1033 of the Dodd-Frank Act, which addresses consumers' personal financial data rights. CBA and our members support consumer access to their financial data. Many of our members have invested heavily in developing open application programming interfaces ("APIs") for their systems, enabling outside parties to build consumer products that draw from their consumers' financial data. But these shifts are complex. The technology investments and compliance costs are expensive and often are underestimated. For example, the CFPB's proposed rule estimated that bank industry APIs receive as many as 2 billion requests per year – but the comment process has shown that just one large bank estimates that its APIs will need to be able to handle billions of requests per *month*.[37] The risks to bank safety and soundness are serious. And most importantly, the focus should be solely on the consumer's access to their data, as outlined in statute, as opposed the creation and support of a broad "developer" economy.

Notwithstanding our members' broader support of a market-driven approach to more open banking, the Bureau's approach to the rulemaking raises serious questions about whether the Bureau has exceeded its authority. The plain statutory language is fundamentally centered on a consumer's right to access and use their own information; in fact, the title of Section 1033 is "[c]onsumer rights to access information."[38] Under Section 1033, covered persons are required to "make [data] available *to a consumer*" . . . "in an electronic form usable *by consumers*."[39] Yet, the CFPB has written a rulemaking focused solely around "developer interfaces" that are fully distinct from separately defined "consumer interfaces."

At best, Section 1033 envisions a technological predecessor to the shift to open APIs we see today: allowing consumers to download digital copies of their financial records. Yet, the CFPB has read that slim statutory language as authority to overhaul and change the very structure of the consumer financial marketplace,[40] by modeling many of these changes on jurisdictions with a far less competitive financial services market than exists in the United States. The statute also makes no reference to a prohibition on recovering costs for building out

---

[37] *See* JPMorgan Chase & Co., *Comment in Response to Personal Financial Data Rights Rulemaking, Docket No. CFPB-2023---52; RIN 3170-AA78* (Dec. 28, 2023), https://www.regulations.gov/comment/CFPB-2023-0052-0884 ("We support over one billion third party API calls each month.")

[38] 12 U.S.C. § 5533

[39] 12 U.S.C. § 5533(a)

[40] https://www.consumerfinance.gov/about-us/newsroom/director-chopra-prepared-remarks-at-money-20-20/. The Bureau asserts the statute grants it the authority "to establish a framework that readily makes available covered data in an electronic form usable by consumers and third parties acting on behalf of consumers," as well as "authority to specify procedures to ensure third parties are truly acting on behalf of consumers when accessing covered data." Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. at 74802.

and maintaining these vast technological changes, standard setting organizations, application programming interfaces, or other dramatic market changes introduced by the NPRM. Notwithstanding its willingness to overreach in breadth and specificity in these areas, the CFPB has simultaneously left enormous open questions about how this new world would operate – particularly what the CFPB's own responsibilities would be. This is notable given these open questions, such as the allocation of liability among all data access ecosystem participants, are actually addressed in the other jurisdictions, such as the European Union, that the CFPB has modeled some aspects of the NPRM on. Other jurisdictions that have tried to usher in such changes were granted explicit authority and incorporated regulatory expertise from their prudential and competition authorities.[41] If Congress wanted to enable changes of such vast economic and political significance, it surely would have stated that expressly.[42]

The CFPB misrepresents or misunderstands the state of competition in financial services more broadly.

As with the CFPB's misrepresentations justifying its credit card late fee rulemaking, the CFPB justifies its Dodd Frank Act Section 1033 by misrepresenting the state of competition – but this time for the broader marketplace of financial products and services. In the Section 1033 rulemaking context, the proposed rule itself asserts that "commercial actors are able to use their market power and incumbency to privilege their concerns and interests above fair competition that could benefit consumers."[43]

---

[41] For example, the European Union introduced the Revised Payment Services Directive (PSD2) in 2015. https://eurlex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L2366. PSD2 was transposed into United Kingdom legislation by the Treasury in the Payment Services Regulations 2017. https://www.legislation.gov.uk/uksi/2017/752/pdfs/uksi_20170752_en.pdf. Payment Services Regulations 2017 designated the Financial Conduct Authority as the competent authority for PSD2. The Financial Conduct Authority subsequently published a PSD2 policy statement and approach document relating to implementation of PSD2. https://www.fca.org.uk/publication/policy/ps17-19.pdf. https://www.fca.org.uk/publication/finalised-guidance/fca-approach-payment-services-electronic-money-2017.pdf. https://www.fca.org.uk/publication/policy/ps17-19.pdf.

[42] Cf. West Virginia v. Environmental Protection Agency, 597 U.S. ___ (2022).

The CFPB's currently stated plans to broaden the coverage of FCRA to data brokers and companies strains the statutory text of the FCRA. https://www.consumerfinance.gov/rules-policy/small-business-review-panels/small-business-review-panel-for-consumer-reporting-rulemaking/ By equating "credit report" with "data that could be included in a credit report," the CFPB broadly expands its regulatory, supervisory, and enforcement authorities, arguably entering into entirely new areas of policy-setting. We expect that other industries will raise questions about whether Congress has sufficiently expressed its intent for the CFPB to create policy around areas of such vast economic and political significance. But that debate will generally impact industries and consumers outside of the retail banking sector.

CBA's primary concern with the CFPB's plans for the FCRA is that such dramatic changes to the statute will complicate the use of credit header data. Limiting the use of credit header data will significantly derail critically important and consumer-protective bank activities, such as identity verification and fraud prevention services, which require banks to use credit header data. Subjecting these routine – and statutorily required - consumer identity verification practices to the FCRA would increase a bank's compliance obligations, introduce consumer confusion, and add additional friction to the account opening process. https://www.consumerbankers.com/cba-issues/comment-letters/joint-trades-comment-cfpb-fcra-sbrefa-outline.

[43] Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796, 74798 (Oct. 31, 2023).

Over objections from market participants like CBA,[44] the only creditors that would be subject to the proposed rule's data sharing and competitor subsidization framework would be depository institutions and credit card issuers. As discussed above, the CFPB's own CARD Act Report shows that the credit card marketplace is highly competitive.

The Section 1033 rulemaking would extend to checking accounts and other transaction accounts covered by Regulation E. The CFPB's perceived lack of competition in the checking account marketplace is just as misplaced as it is for credit cards. The number of new checking accounts opened by Americans has grown from 10 percent in 2020, to 12 percent in 2021, to 15 percent in 2022.[45] From 2020 to 2023, the share of checking accounts opened at the nation's largest banks dropped from 24 percent to 17 percent. Similarly, the share for regional lenders declined from 27 percent to 21 percent. Instead, digital banks and fintechs make up nearly half of all new checking accounts.

Even the data aggregators that would benefit from the CFPB's proposed open banking rule celebrate the extent of the market's adoption of non-bank financial services. In its 2021 report on the "fintech effect," one leading data aggregator takes a victory lap:

> Fintech has reached mass adoption. Between 2020 and 2021, the proportion of U.S. consumers using fintech grew from 58 percent to 88 percent – a 52 percent year-over-year increase. Similar adoption leaps took the refrigerator twenty years, the computer ten and the smartphone five. In terms of consumer technology penetration, fintech has entered the stratosphere of video streaming subscriptions (78%), and social media (72%) and is nearing par with the internet (93%). We've reached an era in which financial technology is no longer a corner of the financial system, but approaching its center.[46]

The CFPB's Section 1033 proposal requires a number of changes before finalization to ensure that the CFPB and other parties take appropriate responsibility and meaningfully protect consumers.

Beyond concerns regarding the CFPB's statutory authority, a number of specific provisions in the NPRM need to be revised to ensure a durable, efficient, and practicable final rule. Specific revisions include:

(1) providing liability protections for financial institutions,

(2) permitting the recoupment of costs for development and maintenance of developer interfaces,

---

[44] https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-cfpb-notice-proposed-rulemaking-personal-financial

[45] https://www.bankingdive.com/news/fintechs-digital-banks-checking-accounts-chime-robinhood/686710

[46] Plaid, 2021 Fintech Effect Report (2021) (internal citations omitted).

(3) broadening the coverage of data providers, and

(4) meaningfully sunsetting the practice of screen scraping.[47]

Accordingly, the CFPB's Dodd-Frank Act Section 1033 Consumer Data Rights proposal requires a number of changes before finalization to ensure that the CFPB and other parties takes appropriate responsibility and meaningfully protect consumers.

6. **<u>The CFPB's overdraft rulemaking is an unlawful attempt at government price setting.</u>**

In January 2024, the CFPB proposed an overdraft rule that would fundamentally restructure and restrict consumer overdraft services offered by banks that exceed $10 billion in assets.

The proposal purports to provide three options for large banks that wish to offer overdraft services to consumers:

(1) Banks would be able to deem overdrafts to be extensions of credit subject to Regulation Z's disclosure and underwriting requirements;

(2) Banks would be able to set pricing at or below their specific "breakeven" costs and losses; or

(3) Banks would use a single price, determined by the CFPB.[48]

The CFPB's proposed rule violates a plain reading of the Truth in Lending Act.

When the Federal Reserve Board constructed Regulation Z more than 50 years ago, it intentionally excluded overdraft as it was clear that overdraft services did not fit the definition of credit under TILA. The CFPB claims the Federal Reserve Board's decision not to cover overdraft fees in Regulation Z was an exemption grounded in overdrafts being a "courtesy," not an interpretation of the statute. However, there is no basis for this rationale in the initial promulgation of Regulation Z in 1969. The CFPB's cited interpretive documents do not support the CFPB's rationale that overdraft was a "courtesy" previously exempted from Reg Z. As initially promulgated, Reg Z provided that overdraft fees "are not finance charges" "unless the payment of such items and the imposition of the charge were previously agreed upon in writing," which does not indicate an exemption for a courtesy.

TILA's statutory definition of credit is "the *right* granted by a creditor to a debtor to defer payment of a debt or to incur a debt and defer its payment."[49] Overdraft services are offered as a

---

[47]These, and a more fulsome list of concerns, are outlined in detail in CBA's 1033 comment letter relating to the NPRM. https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-cfpb-notice-proposed-rulemaking-personal-financial

[48] The CFPB's proposed rule explains that the CFPB is considering setting prices at $3, $6, $7, or $14.

[49] 15 U.S.C. § 1602(f); see also 12 CFR 1026.2(a)(10) (similarly defining "credit" as "the right to defer payment of a debt or to incur a debt and defer its payment").

courtesy: financial institutions retain the *discretion* to pay or decline to pay items that would overdraw a consumer's account and payment is due immediately. Consumers do not have a right to overdraw their accounts or to "incur a debt and defer its payment." Accordingly, the exemption of overdraft services from the definition of credit under TILA is not because it is a "credit" product that was intentionally excluded for specific reasons – it's because it does not meet the statutory definition of "credit" as promulgated by Congress in TILA. It is not within the authority of the Bureau to rewrite the clear and specific terms of statutory text. If the definition of credit is to be changed, it would be wholly incumbent upon Congress to do so.

Despite its purported options, the CFPB's proposed overdraft rule will inevitably prove to be a thinly veiled attempt at top-down price setting.

Although the CFPB purports to offer banks three different pricing mechanisms, it isn't clear that issuers will have any actual choice other than to use the price set by the CFPB.

Treating overdraft fees as finance charges would make it extremely difficult, if not impossible, for depository institutions to offer overdraft services to their customers. Financial institutions would be expected to underwrite consumers who may, in large part, lack significant credit histories. Lenders would be subject to pricing restrictions that were initially created for much longer-term products, like the CARD Act's limitations on first-year fees[50] as well as annualized interest rate limitations under the Servicemembers Civil Relief Act and the Military Lending Act.[51] Further, the operational compliance frameworks under TILA would not facilitate the types of consumer experiences typically expected for overdraft services. In the proposed rule, the CFPB makes clear that account opening disclosures would have to be provided to consumers on the day a consumer has a transaction that is covered by overdraft credit. And lenders would be required to conduct fair lending analyses under the Equal Credit Opportunity Act and provide adverse action notices for declined consumers.[52]

Likewise, the CFPB's "breakeven" option similarly leaves open enormous questions about operational implementation. The CFPB only allows for recovery of "direct" costs, though it's not clear what methodology banks should use when identifying such direct costs. The CFPB fails to provide clarity regarding the frequency or process by which issuers could change their pricing when their costs change. Banks would be relegated to having case-by-case discussions with examiners for each product or product change, with the understanding that any change in supervisory staffing may require discussions to begin entirely anew. It isn't clear that any rational actor would seek to undergo the downside risks and compliance investment of such an ambiguous, risk-fraught process solely to "break even" on their products.[53]

---

[50] Under the CARD Act, first year fees required to open a credit card account cannot total more than 25 percent of the initial credit limit. https://www.consumerfinance.gov/rules-policy/regulations/1026/52/

[51] https://www.consumerfinance.gov/ask-cfpb/im-in-the-military-are-there-limits-on-how-much-i-can-be-charged-for-a-loan-en-893/

[52] https://www.consumerfinance.gov/rules-policy/regulations/1002/9/ https://www.ftc.gov/business-guidance/resources/using-consumer-reports-credit-decisions-what-know-about-adverse-action-risk-based-pricing-notices

[53] The CFPB similarly set a "price recovery" alternative option in its proposed regulation that would effectively set prices for credit card late fees across the industry. Despite representations to

The CFPB misrepresents consumers' options regarding overdraft services.

As with the credit card and checking account markets, the CFPB has pointed to a lack of competition in the market to justify its rulemaking that would effectively set a single price for overdraft services offered by large financial institutions. Since its promulgation, the CFPB has portrayed its market intervention in overdraft services as "part of a continued effort by the CFPB to rein in junk fees and spur competition in the consumer financial product marketplace."[54] According to the CFPB, the fact that overdraft revenue exists is evidence that "has required regulators to invest substantial resources to prevent illegal activity that inhibited fair competition."[55]

For more than a decade, and particularly over the last several years, banks have innovated and competed to create a range of highly tailored, consumer-friendly products that aim to support each bank's consumers best. The CFPB's market analysis produces tables comparing overdraft services offered by the top 20 banks, with nine different dimensions of product options for consumers ranging from "No overdraft fees for any transactions," to daily limits on the number of overdraft transactions, to cushions before overdraft fees are charged (ranging from $1 to $50), to extended grace periods.[56] Further, banks have innovated and may compete by offering additional features not captured by the CFPB's reports, such as: real-time payment updates; payment control, so that consumers can choose to pay or return certain individual checks and payments when their balances are negative; and low balance alerts.[57]

While these innovations have been taking place for more than a decade, the CFPB's own data shows that there has been a $5 billion reduction of overdraft fees from 2019 to 2022 because of these bank-led innovations– a nearly 50 percent drop since before the pandemic. More recently announced changes to overdraft programs are projected to save consumers $18.3 billion from 2021 to 2025, more than $3.5 billion per year. Overdraft fees are projected to have declined by 82 percent since 2008, or $167 of annual savings per U.S. adult.[58]

Congress last summer that it would provide clarity, the CFPB has yet to provide clarity to industry regarding how the "price recovery" option would actually be effectuated. https://www.banking.senate.gov/hearings/06/06/2023/the-consumer-financial-protection-bureaus-semi-annual-report-to-congress
https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=408856

[54] https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-close-bank-overdraft-loophole-that-costs-americans-billions-each-year-in-junk-fees

[55] https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-overdraft-lending-press-call

[56] https://files.consumerfinance.gov/f/documents/cfpb_overdraft-table_2023-05.pdf

[57] The CFPB's own data shows that there has been a $5 billion reduction of overdraft fees from 2019 to 2022 because of these bank-led innovations– a nearly 50 percent drop since before the pandemic. More recently announced changes to overdraft programs are projected to save consumers $18.3 billion from 2021 to 2025, more than $3.5 billion per year. Overdraft fees are projected to have declined by 82 percent since 2008, or $167 of annual savings per U.S. adult. The CFPB has previously conceded that "changes in overdraft program settings and in other checking account policies are making meaningful difference in the amount consumers incur in various fees while using their checking accounts at their banks." https://www.consumerfinance.gov/about-us/blog/banks-overdraft-nsf-fee-revenues-evolve-along-with-their-policies

[58] https://curinos.com/our-insights/update-competition-drives-overdraft-disruption

Yet, as part of the administration's push for policy messaging regarding so-called "junk fees," the CFPB now proposes a rule to fundamentally restructure and restrict consumer overdraft services offered by banks with more than $10 billion of assets.[59] Unfortunately, the CFPB's proposed rule has not taken any of these changes into account. This has the potential to undo the years of progress banks have made by instead forcing all banks to offer their overdraft products at certain government-imposed prices. As a result, this proposal's one-size-fits-all approach would hinder innovation, limit competition, and hamper banks' ability to provide this essential product to the millions of consumers who rely on it.[60]

CFPB misrepresents the alternatives available to consumers that rely on overdraft services.

In its push for headlines that support the administration's intervention in the market for overdraft services, the CFPB again misrepresents the options available to consumers who rely on these products for financial resilience in times of need.

Last December, the CFPB issued a press release that ostensibly provides an overview of consumers that use overdraft services. The CFPB's bold headline read: "New report finds that many of these customers have cheaper credit options available."[61] CFPB Director Chopra doubled down on this argument, asserting "[o]ur research finds that American families are paying fees they do not expect, even when they have access to cheaper forms of credit." According to the CFPB, "[m]ost households incurring overdraft fees had available credit on a credit card: Among households charged 1-3 overdraft fees in the past year, 68 percent had credit

---

[59] https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-close-bank-overdraft-loophole-that-costs-americans-billions-each-year-in-junk-fees

[60] The Bureau's narrative on its nonsufficient funds rulemaking similarly ignores actions banks have taken to eliminate NSF fees. The CFPB presents its NSF rule as an elimination of specific fees charged to consumers, but the fees subject to the proposal's provisions *no longer exist*. Rather it appears the bigger picture goal with this rule is to bolster the CFPB's UDAAP authority– primarily abusive standards.

The CFPB's press release on the proposal would make the reader believe that NSF fees are rapidly evolving and growing. The CFPB says that "[o]ver the years, large banks and their consultants have concocted new junk fees for fake services that cost almost nothing to deliver." The Bureau proclaims that "banks should be competing to provide better products at lower costs, not innovating to impose extra fees for no value." https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-stop-new-junk-fees-on-bank-accounts

However, the CFPB's own data shows that banks almost never charge fees for transactions that are declined in real time. Further, in October 2023, the CFPB itself released a data spotlight on NSF fees overall. The CFPB highlighted that banks have eliminated the vast majority of NSF fees and estimated that consumers save almost $2 billion annually. https://www.consumerfinance.gov/data-research/research-reports/vast-majority-of-nsf-fees-have-been-eliminated-saving-consumers-nearly-2-billion-annually In its report, the CFPB highlights nearly two-thirds of banks with more than $10 billion of assets have eliminated NSF fees– "representing an estimated 97 percent of annual NSF fee revenue earned by those institutions"– while a majority of banks that earned the most from NSF fee revenue have eliminated these fees entirely. Additionally, none of the largest banks (those with more than $75 billion of assets) charge these fees. The CFPB even notes that this is due to "changes in bank policies," as opposed to the result of regulation.

Despite this recent data, the CFPB instead points to ten-year-old data to justify this "preemptive" rulemaking, a solution in search of a problem. These regulatory efforts create costs– opportunity costs for both regulators and industry– and important compliance and operational risk-related costs. It isn't clear what, if any, consumer benefit would offset these costs.

[61] https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-report-showing-many-americans-are-surprised-by-overdraft-fees

available on a credit card, while 62 percent of households charged 3-10 overdraft fees had credit available on a credit card. In households charged more than 10 fees in the past year, 51 percent still had credit available on a credit card."

The CFPB limited its research to a narrow set of data and did not take other industry surveys and reports into consideration to obtain a deeper understanding of the overdraft market.[62] In its attempt to describe the consumers that rely on overdraft services, the CFPB solely drew from its "Making Ends Meet" survey. The survey is an important and valuable source of information – but it is not a complete picture of America. The survey is limited to consumers that have credit histories. That means that as many as 10 percent – or 26 million – of Americans who are "credit invisible" are excluded from the CFPB's analysis. These consumers, due to their lack of credit scores, generally have limited access to credit products in the well-regulated bank sector, like credit cards.[63]

Accordingly, the CFPB was able to make headlines about consumers having credit alternatives only because the CFPB specifically excluded consumers that lack credit reports from its analysis.

For these reasons, the CFPB must withdraw its proposed overdraft rulemaking. Should the CFPB re-propose the rule, the CFPB should be required to conduct a cost-benefit analysis that evaluates harm to consumers when they must use non-bank services (or cannot access credit at all) when they are unable to access bank-offered overdraft services. These may include the cost of not making rent, missing a utility payment, or missing other important obligations.

7. **We recommend that Congress provide long-term certainty for banks to make highly regulated small dollar loans.**

Millions of Americans live paycheck to paycheck, leaving many consumers with little cushion for emergency expenses, strained credit scores, and fewer credit options. The need for access to reasonably priced small dollar liquidity products has become more important than ever.

Historically, federal banking regulators and Congress have encouraged banks to help finance these needs because they can do so at lower costs and higher regulatory standards than other products. And while bank-issued small dollar loans are carefully designed with strong safeguards to protect customers, wide swings in small dollar lending policy – based largely on

[62] https://www.consumerbankers.com/cba-media-center/media-releases/cba-statement-cfpb%E2%80%99s-misleading-overdraft-press-release

[63] Indeed, according to the Federal Reserve Board's Survey of Household Economics and Decision Making, thirty-seven percent of consumers that used overdraft services at least once in 2022 indicated that they were "not confident" they would be approved if they applied for credit. Further, fifty-four percent of consumers who used overdraft services at least once in the last year indicated they could not obtain credit when they applied. Additionally, The Pew Charitable Trusts found more than half (54 percent) of consumers who used overdraft in 2017 could not use a credit card to cover a $400 expense. CBA conducted a metastudy of these sources, available at https://www.consumerbankers.com/cba-media-center/media-releases/numbers-how-consumers-may-be-harmed-cfpb-regulatory-action-limiting

political ideology and coupled with overly restrictive regulations – have precluded market stability and limited banks' ability to innovate small dollar products.

A 2022 bipartisan report from the Government Accountability Office reaffirmed CBA's longstanding position that excessive and ever-changing policies are stifling innovation and product development and hampering the most vulnerable consumers' access to credit.[64] For these reasons, long-term certainty on small dollar policy is needed to facilitate more banks being able to make these consumer-friendly loans.

Lending safeguards should be put in place to protect consumers and hold bad actors accountable. The answer, however, is not overly prescriptive rules that force consumers to borrow more money than necessary or place arbitrary caps on consumers who use these products responsibly and repay them on time. Small dollar loans offered by depository institutions have built-in controls intended to protect consumers– all designed to prevent reliance on such loans and support the ability to repay the loan. Most importantly, all of this is done within the well-regulated and well-supervised depository marketplace. Empowering banks to offer viable short-term lending products will provide consumers with a valued emergency safety net and far greater protections than they might receive at a payday lender or other less-regulated entity.

CBA supports Rep. Young Kim's draft legislation to codify the prudential banking regulators' 2020 small dollar lending guidance which remains in place today.[65] This legislation should (1) be limited to federally insured depository institutions, (2) permit both installment loans and lines of credit with reasonable repayment terms, (3) prohibit balloon payments, and (4) prohibit prepayment penalties, overdraft fees, and nonsufficient funds fees. This will provide long-term stability and certainty for banks to reenter the small dollar lending marketplace by preventing wild swings of the regulatory pendulum between administrations.

8. **The cumulative impact of the Bureau's proposals must be considered in conjunction with proposals from other agencies, including the Federal Reserve Board's changes to Regulation II and the Community Reinvestment Act.**

The problems with the Bureau's rulemaking agenda are compounded by additional rules being proposed by the prudential banking regulators, which will pose a potentially harmful cumulative impact to banks' ability to serve their customers.[66]

For example, the Federal Reserve surprised everyone by proposing to revise Regulation II, the implementing regulation for the Durbin Amendment to the Dodd-Frank Act. Without disclosing the proposed rulemaking in its regulatory agenda at the Office of Management and Budget, the Federal Reserve proposed that it further reduce the maximum interchange revenue that a debit card issuer may receive for a debit card transaction.[67] The existing interchange cap

[64] https://www.gao.gov/assets/gao-22-104468.pdf

[65] https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-65a.pdf

[66] Representatives Bill Huizenga, Dan Meuser, and Alex Mooney wrote the Federal Reserve Board, CFPB, FDIC, and OCC addressing these issues on November 14, 2023.

[67] https://www.federalregister.gov/documents/2023/11/14/2023-24034/debit-card-interchange-fees-and-routing

already severely restricts debit interchange, and the new rule would further restrict it by one third. Furthermore, the proposed rule would have the debit interchange cap adjust "automatically" every two years moving forward, without the benefit of public comment.

The Federal Reserve's proposal is as concerning as it was surprising and unnecessary. The results of the Federal Reserve's original debit interchange cap have been both predictable and detrimental for consumers. Federal Reserve Board research has clearly shown that its regulation raised the cost of checking accounts, minimum balance requirements, and direct deposit requirements. At the same time, free checking, debit rewards programs, and interest-bearing checking accounts have declined significantly.[68] Consumers also experienced little to no demonstrable savings on retail prices.[69]

In a recent meta study commissioned by CBA, Nick Bourke, the former Director of Consumer Finance at the Pew Charitable Trusts, estimates that the Federal Reserve Board's current proposal could increase consumer costs by up to $2 billion if finalized.[70] Further, Bourke estimates that the brunt would primarily be borne by lower- and middle-income consumers.[71] Notwithstanding these demonstrable costs to consumers, Bourke was also clear that "[a]ny corresponding merchant and consumer savings under the 2010 Durbin Amendment are contested or not measurable." "If merchants passed savings through to consumers, as theory and some lawmakers suggest, economists concluded it is "virtually impossible" to prove or measure."

Ultimately, Bourke concludes that if the Federal Reserve Board's current proposal to further reduce debit interchange revenue is finalized, experience from the 2010 Durbin Amendment suggests that consumers will pay an extra $1.3 billion to $2 billion annually in higher bank account fees. Once again, consumers will find it harder to avoid fees, as "free" bank accounts with no maintenance fees become less common and the average minimum deposit required to qualify for fee waivers increases. It is no wonder, then, that Federal Reserve Governor Michelle Bowman raised concerns that:

> It is difficult to predict the impact of this rule on bank product offerings, but one consequence may be that banks discontinue their

---

[68] See, e.g., Manuszak, Mark D. and Krzysztof Wozniak (2017). "The Impact of Price Controls in Two-sided Markets: Evidence from US Debit Card Interchange Fee Regulation," Finance and Economics Discussion Series 2017-074. Washington: Board of Governors of the Federal Reserve System, https://doi.org/10.17016/FEDS.2017.074; Government Accountability Office, Regulators Have Taken Actions to Increase Access, but Measurement of Actions' Effectiveness Could Be Improved, (Feb. 2022) https://www.gao.gov/assets/gao-22-104468.pdf

[69] Renee Haltom and Zhu Wang, Federal Reserve Bank of Richmond, Did the Durbin Amendment Reduce Merchant Costs? Evidence from Survey Results (Dec. 2015), https://www.richmondfed.org/-/media/richmondfedorg/publications/research/economic_brief/2015/pdf/eb_15-12.pdf. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3328579

[70] https://www.consumerbankers.com/cba-media-center/media-releases/icymi-new-research-shows-consumers-could-pay-2-billion-more-under

[71] In that regard, prior research on the 2010 Durbin amendment noted that "over 70% of consumers in the lowest income quintile (annual household income of $22,500 or less) bear higher account fees, since they fall below the average post-Durbin account minimum required to avoid a monthly maintenance fee ($1,400). In contrast, only 5% of consumers in the highest income quintile (household income of $157,000 or more) fall below this threshold." https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3328579

> lowest-margin products, including options designed to increase financial inclusion and access for low- and moderate-income individuals and families. I sincerely hope that this is not the case, but this is a real and important risk. . . .Before finalizing any rule, it is incumbent upon policymakers to understand the intended and unintended consequences of our revisions.[72]

Similarly, CBA has long supported the goals of the Community Reinvestment Act (the "CRA") and efforts to modernize this important law to ensure the policy better reflects today's banking landscape. We appreciate the attempts by the agencies to bring clarity and transparency to how banks are evaluated under CRA requirements. We also support the formalization of some metrics, clearer Community Development Definitions, excluding consumer credit cards from the rule, and a longer implementation timeline. Still, some of the updates to the CRA could unintentionally impact the consumers we are all trying to help.

When taken together with the CFPB's proposed rule to restrict the overdraft fees that banks may charge, these proposals will continue to chip away at banks' already limited revenue sources available for checking accounts. Beyond that, by treating overdraft as credit, the overdraft rule will force banks to hold capital against overdraft under the Basel III Endgame rule. This will apply even more pressure on banks' ability to offer cost-effective checking accounts. The inevitable result will be that the cost of checking will continue to go up and access will go further down, particularly for consumers on the margins with low or moderate income. Unfortunately, neither the CFPB nor the prudential banking regulators appear to have attempted to analyze the cumulative impacts of these rules.

Accordingly, the Federal Reserve Board should withdraw its proposed Regulation II rulemaking. If it opts to propose a further modification of the debit interchange rates, the Federal Reserve Board should be required to evaluate and justify the impact of any such proposed change will have on consumers — particularly the availability of low-cost checking account products. CBA supports the Secure Payments Act, sponsored by Rep. Blaine Luetkemeyer, that would require the Federal Reserve Board to stop the Regulation II rulemaking and study its impacts.

Similarly, we urge the Federal Reserve Board, FDIC, and OCC to take a hard look at compliance burdens of the Community Reinvestment Act final rule given its complexity. America's leading banks remain committed to investing in the communities that need it most and will work to comply with the final rule.

Finally, the CFPB and other banking regulators should immediately pause all rulemakings until the collective impact of these policy shifts can be assessed. Before progressing any rulemaking activity, banking regulators should collaborate on producing an interagency, comprehensive cost-benefit analysis to better understand the interaction of all these proposals and their potential aggregate impact on consumers.

[72] https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20231025.htm

Conclusion

Under the current administration, the CFPB and other financial regulatory agencies have made policy decisions that prioritize political headlines over stable, fair, and impartial regulatory actions. A deeper regulatory analysis is needed that focuses on the impact these regulatory proposals will have on financial institutions and access to banking products for all consumers. We call on Congress to consider the legislative changes recommended in this testimony that will provide continued access to safe, transparent, and affordable financial services.