

June 8, 2023

The Honorable Sherrod Brown
Chairman
Senate Committee on Banking, Housing, and
Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Tim Scott
Ranking Member
Senate Committee on Banking, Housing,
and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Brown and Ranking Member Scott:

The Consumer Bankers Association (CBA) submits the following comments for the hearing entitled “The Consumer Financial Protection Bureau’s Semi-Annual Report to Congress.” We appreciate the committee’s continued oversight of the Consumer Financial Protection Bureau (CFPB or Bureau) and its activities. CBA is the voice of the retail banking industry whose products and services provide access to credit to millions of consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans, and collectively hold two-thirds of the country’s total depository assets.

The CFPB was created in 2011 by the Dodd-Frank Act and has seen no significant changes to its structure since it became operational. Since its inception, the Bureau has been a political lightning rod, instead of a steady and consistent voice for consumer protection regulation expected from a world class regulator. Recent actions taken by the Bureau have established new regulatory requirements for banks outside of the rulemaking process required by the Administrative Procedure Act, and, under the current leadership, the Bureau seeks minimal input from the industry it is responsible for overseeing. This is in stark contrast to the open dialogue that the banking industry experienced with multiple previous CFPB Directors, regardless of party affiliation. Furthermore, the current Director’s nearly constant and public attacks on banks erode consumer confidence in the banking system and undermine efforts to bring more consumers into highly regulated and time-tested depository intuitions.

In this letter, we offer legislative and regulatory suggestions to lawmakers and the Bureau for the purpose of ensuring consumers continue to have access to highly regulated financial products that enable them to achieve their financial goals. Topics discussed include: (1) credit card late fees, (2) Dodd-Frank Section 1071 implementation, (3) needed changes to the Bureau’s UDAAP authority, and (4) structural reforms to the Bureau.

Credit Card Late Fees

On February 1, 2023, the CFPB announced a Notice of Proposed Rulemaking (NPRM) on credit card late fees that would drastically alter the credit card late fees landscape. Comments were due on May 3, 2023. This NPRM is part of the Biden Administration’s overarching campaign against “junk fees,” which seeks to reduce fees in several industries, including but not limited to hotel and lodging, transportation, and entertainment, and received national recognition in the President’s State of the Union Address.

Under current Federal Reserve regulations, (1) the credit card late fee safe harbor is \$30 for the first

late payment and \$41 for a subsequent late payment, (2) these safe harbor amounts are adjusted annually for inflation, and (3) late fees cannot be more than 100% of the required minimum payment. The NPRM proposes to (1) reduce the safe harbor amount to \$8, (2) eliminate the annual inflation adjustment, and (3) cap late fees at 25% of the required minimum payment.

As proposed, this rule would have significant negative impacts on both credit card customers and issuers. The Bureau claims that this rule could help some credit card customers, but the proposal directly points to the Bureau’s lack of data analysis needed to truly understand its consumer impact. **The Bureau acknowledged that cardholders who never pay late– which the CFPB’s own data indicates is 74 percent of all Americans with credit cards¹ will not benefit from the reduced fees and could experience “...higher maintenance fees, lower rewards, or higher interest on interest-paying accounts,” and increased costs could completely negate any benefits.² Banks are required by their prudential regulators to manage and offset credit risk, and a reduction of the ability for financial institutions to recoup costs would result in a tightening of credit availability for some consumers.**

Additionally, **the proposal would reduce competition in the credit card marketplace by forcing some card issuers to exit the market entirely because they will be unable to cover the costs associated with funding card operations. Lowering the safe harbor would also provide a weaker or nonexistent deterrent effect**, likely resulting in a greater share of late-paying and delinquent accounts, which may ultimately cause more consumers who have delinquent accounts to be reported to credit bureaus, leading to lower credit scores.

Aside from the deeply flawed policies in the proposed rule, it is also procedurally deficient. The CFPB did not conduct a thorough analysis of the available economic literature on the effects or late fees, and the analysis that the CFPB did perform was not done in a transparent and consistent manner. The Bureau’s flawed assumptions and deficient analysis have resulted in incorrect conclusions about the benefits and harms to consumers, as well as the costs issuers face in the marketplace. Finally, a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel is required when a rulemaking will have a significant economic impact on a substantial number of small entities. CBA and other trades stated in their joint trades response to the ANPR on credit card late fees that a SBREFA panel should be required because “[o]f the approximately 824 credit card-issuing banks, more than half (452) have assets less than \$750 million, and of the 3,172 credit card-issuing credit unions, nearly 85 percent (2,682) have assets less than \$750 million.”³ Despite this, the Bureau has failed to hold a SBREFA panel.

Dodd-Frank Section 1071 Implementation

On March 30, 2023, the CFPB released its long-awaited final rule implementing Section 1071 of the Dodd-Frank Act.⁴ Section 1071 requires small business lenders to compile, maintain, and report information regarding loan applications made by woman- and minority-owned small businesses, with the goal of expanding access to credit in underserved communities. Implementation of these

¹ https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf

² <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/>

³ <https://www.consumerbankers.com/cba-issues/comment-letters/joint-trades-comment-letter-late-fees-anpr>

⁴ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-to-create-a-new-data-set-on-small-business-lending-in-america/>

requirements is an enormous undertaking, so much so that some lenders may choose to terminate their small business lending programs altogether because of the compliance costs.

The most fundamental change that needs to be made to the final rule is an extension of the implementation deadline. The final rule requires larger lenders, defined as originating at least 2,500 small business loans a year, to collect 1071 data starting October 1, 2024. **This short, 18 month implementation period is not sufficient and should be extended to 36 months.**

The rule defines a small business as one with annual revenue of less than \$5 million. While a standard definition is positive, this threshold is too high and requires data collection and reporting on businesses that often have an existing relationship with a financial institution and typically do not experience difficulty accessing credit.

CBA appreciates that the final rule provides that this data reporting is optional for small business loan borrowers, and that lenders can rely on the information provided by borrowers (i.e. race and gender) without the need to independently verify it. However, the CFPB has stated that if a lender has a low response rate from its borrowers, that will be considered a sign that the lender could be discouraging borrowers from responding, and could become a supervisory problem. This is a troublesome contradiction and could lead to unnecessary scrutiny of lenders that are complying in good faith.

Needed Changes to the Bureau's UDAAP Authority

For decades, Congress has never used the statutory concepts of “unfairness” and “discrimination” interchangeably. Rather, they are distinct, and each has a well-established meaning and scope of application. Congress did not authorize or intend for the CFPB to fill gaps between the clearly articulated boundaries of antidiscrimination statutes with its unfair, deceptive, and abusive acts or practices (UDAAP) authority.

In March 2022, the CFPB ignored required rulemaking procedures and sought to conflate the concepts of unfairness and discrimination by announcing that it will begin examining financial institutions for alleged discriminatory conduct that it deems “unfair” under its UDAAP authority. The CFPB also revised its exam manual to reflect its new view that “unfairness” can be applied to allegedly discriminatory practices. The CFPB’s action has created significant uncertainty in the financial services marketplace to the detriment of consumers and banks alike, and it raises profound substantive and procedural legal concerns. The CFPB’s actions have left industry with little choice but to pursue legal correction of the issue. In September 2022, CBA and other trades filed a lawsuit challenging the CFPB’s position on several grounds, including the agency’s lack of statutory authority and failure to follow appropriate rulemaking procedures.⁵ This case is on hold pending the Supreme Court’s decision in the CFPB funding mechanism case, *Selia Law v. CFPB*.

Given the Bureau’s misuse of its UDAAP authority, reforms are needed. CBA calls on Congress to enact due process protections under UDAAP consistent with those adopted by the CFPB in 2020, which were subsequently reversed by the current CFPB Director.⁶ These include: (1) not

⁵ <https://www.consumerbankers.com/cba-media-center/media-releases/cba-leading-financial-groups-pursue-legal-action-against-cfpb>

⁶ <https://consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-regarding-prohibition-abusive-acts-practices/>

challenging conduct as abusive when the benefits to consumers outweigh the alleged harms, (2) not conflating the concept of abusive with unfair or deceptive, (3) providing regulated entities with an opportunity to cure violations, (4) reiterating that discrimination is not part of UDAAP, and (5) seeking monetary relief only when there has been a lack of good faith effort to comply with the law (not to impede the Bureau's ability to seek restitution for consumers who have experienced actual harm).

Structural CFPB Reforms

CBA appreciates the House Financial Services Committee's actions on meaningful reforms to the CFPB. In April, the committee passed H.R. 2798, the *CFPB Transparency and Accountability Reform Act*, which includes four bills that CBA supports: (1) changing the Bureau's leadership structure from a single Director to a bipartisan commission, (2) placing the Bureau under the annual Congressional appropriations process, (3) requiring robust cost-benefit analysis with rulemakings, and (4) establishing an independent CFPB Inspector General. These reforms will bring greater accountability and transparency to the Bureau and will ensure proper checks and balances are applied to a regulator with such a broad scope and influence over the financial services marketplace.

Conclusion

The consumer financial services marketplace thrives when the regulatory agencies overseeing the institutions that provide products and services to consumers and small businesses issue rules and guidance that are developed through a transparent and consistent regulatory process. Further, consumers are only protected when financial products and services are subject to consistent consumer protections, not changes to regulation due to one particular ideological view. CBA stands ready to work with Congress and the CFPB to implement legislative and regulatory improvements to the Bureau to achieve these goals, and we appreciate the opportunity to submit this statement for the record.

Sincerely,



Lindsey D. Johnson
President and CEO
Consumer Bankers Association