November 27, 2023

The Honorable Patrick McHenry
Chairman
House Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Maxine Waters
Ranking Member
House Committee on Financial Services
4340 O'Neill House Office Building
Washington, D.C. 20515

Dear Chairman McHenry and Ranking Member Waters:

The Consumer Bankers Association (CBA) submits the following comments for the hearing entitled "The Semi-Annual Report of the Bureau of Consumer Financial Protection." 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.

Under the current leadership, the Bureau seeks minimal input from the industry it is responsible for overseeing. This is in 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. The Bureau frequently establishes new requirements for regulated depository institutions outside of the rulemaking process required by the Administrative Procedure Act (APA) though advisory opinions and press statements that do not have the same weight or clarity as a rule and leave banks seeking clarity to ensure they remain compliant to avoid negative repercussions, such as costly enforcement actions.

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:

- ***Credit Card Late Fees Rule:*** The CFPB should be required to conduct a rigorous cost-benefit analysis of this proposed rule and how it would affect (1) the cost and availability of credit, particularly with respect to non-prime borrowers, (2) the safety and soundness of credit card issuers, and (3) the use of risk-based pricing.
- ***Section 1033 Rulemaking:*** The Bureau's final Section 1033 rule should broaden the coverage of data providers, address liability more robustly, and meaningfully sunset the practice of screen scraping.
- ***Overdraft:*** The CFPB should hold off on an overdraft rule that would substantively change how banks offer overdraft services to their customers until other rules have been finalized and banks can assess the effects those changes will have on their ability to provide free checking.
- ***Section 1034(c) Advisory Opinion:*** The Bureau should withdraw its advisory opinion and propose it as a formal rulemaking pursuant to the APA.
- ***Section 1071 Implementation:*** The CFPB should provide at least 36 months for small business

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lenders to comply with the final rule.

Credit Card Late Fees

On February 1, 2023, the CFPB issued a notice of proposed rulemaking (NPRM) on credit card late fees that would drastically alter the rules on late fees charged by credit card issuers. Comments were due on May 3, 2023, and a final rule is expected to be issued in the coming months. This NPRM is part of the Biden Administration's overarching campaign regarding "junk fees," which seeks to reduce fees charged to consumers by several industries, including but not limited to hotel and lodging, transportation, and entertainment. Of note, the "war on fees" campaign received national recognition in the President's 2023 State of the Union Address– signaling unprecedented coordination between the CFPB and the White House. This degree of coordination between the CFPB and the White House– when viewed in light of the fact that the CFPB has refused to give industry sufficient time to provide data on credit card late fees and late payments in its responses to the proposed rulemaking, as well as the CFPB's decision not to utilize its market monitoring authority to engage in requests for information on this topic– suggest that the CFPB is not truly seeking meaningful responses or data, and instead has prejudged the outcome of the rulemaking and the amount of "consumer savings." This is further evidenced by the White House incorporating a presumed $9 billion of consumer savings into its communications strategy.

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.

The long-term costs and impacts of this rulemaking on consumers are unclear. However, initial analysis from industry and even the CFPB suggests a majority of consumers could see their costs increase because of this proposal. As discussed below, the rule departs from traditional risk-based pricing practices required by prudential regulators, resulting in high cost of credit and reduced credit access for consumers who pay their bills on time. Banks are required by their prudential regulators to manage and offset credit risk, and severely limiting the ability for credit card issuers to discourage late payments and limit losses would reduce access to credit for consumers with subprime credit profiles.

While the CFPB and Biden Administration may frame this as "the rich subsidizing lower-income consumers" or "prime credit consumers subsidizing subprime consumers," the CFPB's own research shows that nearly 50% of subprime issuers pay their bills on time. The Bureau claims that this rule could help some credit card customers, but the proposal itself confirms that the Bureau lacks data analysis that is 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 cards–[1] 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.**

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

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Additionally, **the proposed rule 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. Dramatically reducing the safe harbor would also provide a weak 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 have negative information reported to credit bureaus, leading to lower credit scores.

Furthermore, 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. Finally, a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel is required when a proposed rule will have a significant economic impact on a substantial number of small entities. CBA and other associations 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."[2] Even the Small Business Administration's Office of Advocacy has raised concerns about the CFPB's disregard for statutorily required economic impact analyses.[3] Despite this, the Bureau has failed to hold a SBREFA panel.

In light of all of these concerns, the CFPB should be required to conduct a rigorous cost-benefit analysis of this proposed rule and how it would affect (1) the cost and availability of credit, particularly with respect to non-prime borrowers, (2) the safety and soundness of credit card issuers, and (3) the use of risk-based pricing.

Dodd-Frank Section 1033 Implementation

On October 19, 2023, the CFPB released its notice of proposed rulemaking (NPRM) to implement Section 1033 of the Dodd-Frank Act, which addresses consumers' personal financial data rights.[4] Comments are due on December 29, 2023, and the CFPB expects to finalize the rule in fall 2024. CBA has several fundamental concerns with the rule as proposed, and, accordingly, CBA urges the Bureau in the final rule to: (1) broaden the coverage of data providers, (2) address liability more robustly, and (3) meaningfully sunset the practice of screen scraping.

First, the scope of data providers covered by the rule remains too narrow. The proposed rule only covers insured depository institutions and credit card issuers, as well as "other payment facilitation providers." CBA has urged the CFPB to adopt a broad scope of coverage not only for asset accounts, but also for credit products beyond credit cards, like captive auto loan accounts and non-bank credit alternatives, such as buy now pay later products. The CFPB has stated it will cover other consumer financial products and services through a supplemental rulemaking, though no time frame has been provided for such supplemental rulemaking and there will be little time after the finalization of the current rule for this CFPB to initiate a follow-on rulemaking.

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

[3] U.S. Small Business Administration Office of Advocacy, Letter to Rohit Chopra (May 3, 2023), https://advocacy.sba.gov/wp-content/uploads/2023/05/Comment-Letter-CFPB-Credit-Card-Penalty-Fees-508c.pdf.

[4] https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/open-notices/required-rulemaking-on-personal-financial-data-rights/

The rule as proposed would massively increase the flow of consumer data without any real attempt to address liability for breaches. Under the Electronic Fund Transfer Act and Regulation E, banks would generally be held liable in most cases even if a third party accessing the consumer's data or third-party data aggregator suffered the breach, but consumers could also be liable for fraudulent or erroneous transactions in some instances. The CFPB's failure to engage in a more fulsome discussion of liability is surprising because the proposal already requires third parties to make certifications relating to a wide range of issues, so the CFPB could have required third parties accessing consumer data to certify that they will be liable for fraudulent and erroneous transactions resulting from a data breach of their systems or their vendors' and clients' systems.

The NPRM does not expressly prohibit screen scraping, and as drafted, it appears to permit third parties to bypass their obligations under the NPRM if they engage in screen scraping rather than accessing covered data through a developer interface. The CFPB has left it to data providers to detect and block screen scraping by third parties. The CFPB could have declared that it would be a violation of the rule if a third party screen scrapes information that could instead be accessed via a developer interface, yet the CFPB placed the onus on data providers to police third parties.

Moreover, industry has expressed significant concerns about the length of the comment period for the NPRM. The Bureau has provided only 70 days for industry to comment, yet offered at least 90 days for notice and comment at previous points in the Section 1033 rulemaking process. To ensure that a final Section 1033 rule is properly crafted and durable, the Bureau must provide a reasonable period of time for stakeholders to submit comments.

Beyond these concerns, there are serious questions about whether the Bureau has exceeded its authority under the Dodd-Frank Act. Section 1033 is half of a page of statute that discusses making data available to consumers in a usable electronic format, yet the CFPB has used this language to propose a rule requiring the banking industry to subsidize an open banking marketplace.

Potential Damaging Changes to Overdraft Policies

In its most recent rulemaking agenda,[5] the Bureau listed a pre-rule item pertaining to overdraft services provided by financial institutions. Currently, little is known about the specifics of what such a proposal would entail, but the Bureau indicated it is considering treating overdraft fees as finance charges under the Truth in Lending Act (TILA) and Regulation Z.

Treating overdraft fees as finance charges would make it impractical, if not impossible, for depository institutions to offer overdraft services to their customers. Each overdraft would be considered an extension of credit, forcing financial institutions to provide consumers with a TILA disclosure regarding the specific transaction. The consumer would have to agree to the terms and the financial institution would have to approve the overdraft, all before a consumer could make an everyday purchase. When the Federal Reserve constructed Regulation Z almost 50 years ago, it intentionally excluded overdraft because it was clear that applying TILA and Regulation Z to overdraft would be impractical. At the time, overdraft was used mainly in the context of paper checks, as debit cards were not yet prevalent. Now, consumers use overdraft with debit purchases every day, making these near-constant disclosures wholly unworkable.

[5] https://www.consumerfinance.gov/rules-policy/regulatory-agenda/

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Making matters worse with this proposal is the fact that millions of consumers have significant short term financing needs, and eliminating overdraft as an option would direct them to sources of credit which are far more costly and less regulated than the banking industry. Research by Curinos[6] has found consumers make highly informed choices about when to use overdraft services. Consumers, especially overdraft users, continue to demonstrate a deep understanding of overdraft and available alternatives. More than 60% of overdrafts come from consumers who intend to use the service, and more than 80% of overdraft transactions come from consumers who opted into debit card overdraft programs with the clear intention of using it to cover their payments.

Beyond that, according to the CFPB's own data, banks have made significant progress reducing overdraft fees by 48% since the beginning of the pandemic.[7] Banks have proactively implemented new overdraft polices such as elimination of overdraft fees, elimination of account transfer fees to cover overages, de minimis exceptions to cover small overages, grace periods for customers to make accounts whole before overdraft fees are assessed, access to small dollar loans, elimination of extended overdraft fees, elimination of returned items fees, and more.
Banks have accomplished this progress by competing with one another and innovating, resulting in highly tailored programs that are specific to the needs of their customers. A CFPB rule that would apply Regulation Z to overdraft services would likely undo all of the progress made by banks by forcing the banking industry into a one size fits all commodity product that will likely fall short of meeting consumers' liquidity needs. It would require significant retooling of the bank programs already in place, reduce competition and innovation, and ultimately harm consumers.

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% since 2008, or $167 of annual savings per U.S. adult.[8] These developments demonstrate that additional heavy-handed overdraft restrictions are not necessary.

CBA also believes the CFPB should hold off on a rule for overdraft services until other issues such as changes to Regulation II's allowable debit interchange amounts have been finalized and banks can properly assess the effect such changes will have on their ability to provide free checking. Similarly, under the Basel III Endgame proposal, banks may have to hold capital against credit created under Regulation Z for overdraft services, applying even more pressure on their ability to offer cost-effective checking accounts. It would be helpful to give banks the ability to understand what those costs may be, which at this time is unknown, before undertaking what will certainly reduce banks' ability to provide quality checking products to their customers.

We also urge the CFPB to conduct a cost-benefit analysis that evaluates harm to consumers when they have to 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.

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6 https://curinos.com/our-insights/competition-drives-overdraft-disruption/
7 https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-q4-2022-down-nearly-50-versus-pre-pandemic-levels/full-report/
8 https://curinos.com/our-insights/update-competition-drives-overdraft-disruption/

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The Bureau's Advisory Opinion on Dodd-Frank Section 1034(c)

The Bureau has recently adopted the practice of issuing advisory opinions that, in some instances, effectively change bank practices and procedures without engaging in an APA rulemaking process. On October 11, 2023, the Bureau issued an advisory opinion on Section 1034(c) of the Dodd-Frank Act.[9] The CFPB Director has confirmed on many occasions that guidance does not establish new regulatory requirements and does not have the force of law, but this advisory opinion establishes new obligations on covered entities and offers inadequate guidance for how to comply with those requirements. As such, this guidance should have been promulgated as a formal rulemaking pursuant to the APA. By outlining these requirements through an advisory opinion rather than a rulemaking, the CFPB has also bypassed performing a meaningful cost-benefit analysis of the impact these new requirements would have on industry and consumers. The murky, insufficiently detailed scope of what is covered by these requirements has generated significant uncertainty for industry in evaluating their compliance costs. To address both these deficiencies, it is necessary for the CFPB to withdraw its advisory opinion and instead promulgate these requirements through a formal rulemaking.

In the advisory opinion, the Bureau asserts authority to regulate and restrict fees, which the Bureau believes are "excessive," that financial institutions may charge for the provision of certain customer information. However, the statute does not require regulated entities to provide this information to customers for free, or state anything about fees– just that customers must be provided with the information upon request. Additionally, the guidance provides that a financial institution may not impose conditions for consumers' information requests that "unreasonably impede" the customer's ability to request and obtain account information– but this term does not appear anywhere in the statute. The Bureau instead reasons that imposing conditions that "unreasonably impede consumers' information requests" would be a violation of the obligation to "comply" with the consumer's request, and that requiring a consumer to pay a fee or charge to request this information is one type of action that would "unreasonably impede consumers' information requests." Beyond that, this troublesome advisory opinion addresses many other issues aside from fees, and the Bureau could attempt to apply it in a variety of other contexts. This is yet another example of the Bureau attempting to assert broad authority that Congress has not provided to it, and it warrants Congressional scrutiny.

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.[10] 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 requirements is an enormous undertaking, so much so that some institutions 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

[9] https://files.consumerfinance.gov/f/documents/cfpb-1034c-advisory-opinion-2023_10.pdf
[10] https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-to-create-a-new-data-set-on-small-business-lending-in-america/

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, just 18 months after the final rule was issued. Two federal district courts have issued injunctions blocking implementation of the rule until the Supreme Court issues a ruling on whether the Bureau's funding mechanism is constitutional. These injunctions are expected to provide several months of additional time for lenders to comply with the rule, but **the current implementation period is not sufficient and the CFPB should extend the deadline to 36 months to ensure that small business lenders are not forced to pause their small business lending programs to come into compliance with the rule.**

Conclusion

The CFPB was established in 2011 by the Dodd-Frank Act, and there have been no significant changes to its structure or its rulemaking procedures since its inception. The Bureau has been a politically charged agency from the beginning, instead of a steady and consistent voice for consumer protection expected from a world class regulator. The consumer financial services marketplace thrives when the regulators overseeing the institutions that provide products and services to consumers and small businesses issue policies that are developed through a transparent and consistent regulatory process. Further, consumers are best protected when financial products and services are subject to consistent consumer protections, not frequent 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

1225 New York Avenue, NW, Suite 1100, Washington, DC 20005
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