

December 9, 2024

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 “Consumer Protection: Protecting Workers’ Money and Fighting for the Dignity of Work.” 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.

CBA hopes Members of Congress will address several areas of concern with the CFPB Director regarding the Bureau’s current regulatory posture and the changes that the new administration should make.

- **The CFPB must follow the law.** As discussed throughout this letter, the Bureau frequently flouts required rulemaking procedures and other statutory obligations when issuing its interpretations of law.
- **The CFPB should put consumers first by conducting robust cost-benefit analysis before issuing new policies and avoiding policies that result in consumers being de-banked.** Unfortunately, a number of the Bureau’s recent rules and guidance fail this basic test and warrant deeper analysis.
- **Facts matter.** The CFPB frequently misrepresents its own data about the state of the consumer financial services marketplace to justify its policies pertaining to overdraft, data access, credit cards, and others.
- **The Bureau should consider input from all stakeholders so its policies are based on a thorough understanding of how consumers will be impacted by its 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:

- ***Overdraft Proposed Rule:*** The CFPB’s overdraft proposed rule exceeds the Bureau’s statutory authority, fails to appropriately consider how it could harm consumers, and relies on incomplete data. The CFPB should withdraw the overdraft proposed rule.
- ***Dodd-Frank Act Section 1033 Final Rule:*** The Bureau’s Dodd Frank-Act Section 1033 final rule is highly flawed and jeopardizes consumers’ control and security of their data. The new administration should reconsider the rule.

- ***Credit Card Late Fees Final Rule:*** The CFPB’s credit card late fees final rule will increase the cost of credit, reduce credit availability, and increase the negative outcomes for consumers when paying late. Additionally, the rule will likely cause more Americans to fall into persistent debt. The new administration should rescind the rule.
- ***Fraud and Scams:*** The CFPB should conduct a consumer education campaign to make consumers aware of the growing problem of fraud and scams and how to avoid them.
- ***Process Issues:*** The CFPB frequently disregards required rulemaking procedures for the sake of expediency, resulting in policies that are highly flawed and not durable. The CFPB must follow the law.
- ***Structural CFPB Reforms:*** Congress should enact structural reforms to the CFPB to create more transparency and establish proper checks and balances for an agency with such broad scope and influence over the financial services marketplace.

## Overdraft

On January 17, 2024, the CFPB proposed an overdraft rule that would fundamentally restructure and restrict consumer overdraft services offered by banks that exceed \$10 billion of assets. Stated more directly, the proposed rule will create a one-size-fits-all government-mandated banking service that operates under a separate and more restrictive regulatory framework for institutions above \$10 billion of assets, reducing access to checking services for customers at these banks. The proposal would deem overdrafts to be extensions of credit subject to Regulation Z, including the rules applicable to credit cards, unless the bank restricts its overdraft fees to proposed benchmark thresholds (\$3, \$6, \$7, \$14) or calculates its “breakeven” costs.<sup>1</sup>

The CFPB’s overdraft rulemaking is an unlawful attempt at government price setting and will cause consumers to lose the freedom to choose a popular and helpful form of emergency liquidity.<sup>2</sup> The Bureau is attempting to cap overdraft fees under the Truth in Lending Act (TILA). However, TILA is not a tool for regulating overdrafts, much less the pricing of financial products and services. Nothing in TILA suggests that overdraft products are credit. The CFPB should put consumers first and avoid making policies that result in consumers being de-banked. It should also provide real consumer impact data when access to overdraft and checking accounts declines because of the rule.

Besides lacking statutory authority to regulate overdraft in such a way, the CFPB continues to fundamentally misrepresent the current overdraft market.<sup>3</sup> For more than a decade, and particularly over the last several years, banks— particularly the largest banks— have innovated and competed to create a range of highly tailored, consumer-friendly products that aim to support each bank’s customers. 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

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<sup>1</sup> <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-close-bank-overdraft-loophole-that-costs-americans-billions-each-year-in-junk-fees/>

<sup>2</sup> <https://consumerbankers.com/press-release/cba-releases-national-empirical-survey-results-showing-consumer-value-and-need-for-bank-overdraft-products/>

<sup>3</sup> <https://consumerbankers.com/blog/facts-matter-cfpb-misrepresents-data-showing-dramatic-shift-in-the-overdraft-market/>

extended grace periods, to cushions before overdraft fees are charged— up to \$50.<sup>4</sup> 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.<sup>5</sup> Alarming, the CFPB’s proposed rule ignores these trends and cites data that is more than a decade old in its evaluation of the overdraft market.<sup>6</sup> The CFPB’s reliance on this decade-old data means that its proposed rule fails to account for major shifts in market practices and innovations and relies on inaccurate data to justify its rulemaking.<sup>7</sup>

Overdraft fees are projected to have declined by 82 percent since 2008, or \$167 of annual savings per U.S. adult.<sup>8</sup> 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— not government-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.

Yet, as part of the administration’s messaging push regarding so-called “junk fees,” the CFPB has proposed a rule to fundamentally change overdraft. Unfortunately, the CFPB’s proposed rule has not taken any of these changes into account and instead relies on outdated and incomplete data regarding the overdraft marketplace.<sup>9</sup> The CFPB also has not considered the rule’s true impact on consumers, many of whom would lose access to these important products should the rule be finalized as is. This is not conjecture. CBA recently surveyed our member banks to assess the impact of this rule on overdraft services, and 92 percent of banks that responded to the survey indicated that any of the CFPB’s proposed overdraft fee caps would materially reduce the amount of overdraft-related liquidity they are able to offer to consumers.<sup>10</sup> The Bureau’s overdraft proposal 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-

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<sup>4</sup> [https://files.consumerfinance.gov/f/documents/cfpb\\_overdraft-table\\_2023-05.pdf](https://files.consumerfinance.gov/f/documents/cfpb_overdraft-table_2023-05.pdf)

<sup>5</sup> <https://www.consumerfinance.gov/about-us/blog/banks-overdraft-nsf-fee-revenues-evolve-along-with-their-policies>

<sup>6</sup> [https://files.consumerfinance.gov/f/documents/201708\\_cfpb\\_data-point\\_frequent-overdrafters.pdf](https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf)

<sup>7</sup> For example, when the proposed rule states that a majority of overdraft fees are paid by frequent overdraft users (ten or more overdrafts a year), who constitute approximately nine percent of all checking accounts, it importantly does not reflect the current state of the market. It fails to account for the significant consumer-friendly innovations introduced into the market by the largest institutions or how those changes have improved consumers’ financial health. More recent surveys of consumers from the Financial Health Network estimate that frequent overdrafters comprise nine percent of all overdrafters (as opposed to overall checking accounts, per the Proposal). CBA’s survey found that only three percent of respondents who reported overdrafting in the last 12 months did so ten or more times (or less than two percent of all consumers in the study). <https://finhealthnetwork.org/research/overdraft-trends-amid-historic-policy-shifts/>

<sup>8</sup> <https://curinos.com/our-insights/update-competition-drives-overdraft-disruption>

<sup>9</sup> The proposed rule cites a 2017 CFPB report which analyzes data that is more than a decade old and importantly does not reflect the current state of the market, including the *significant* consumer-friendly innovations introduced into the market by the largest institutions, or consumer financial health. For instance, more recent analyses from third parties, including CBA and the Financial Health Network, have both found varying levels of overdraft use since the CFPB’s analysis in 2017. Additionally, the CFPB’s more recent data on overdraft use from its Making Ends Meet survey does not reflect the use of overdraft by consumers without credit as it pulls from a sample of the CFPB’s Credit Card Panel which only includes consumers with a credit record. [https://files.consumerfinance.gov/f/documents/201708\\_cfpb\\_data-point\\_frequent-overdrafters.pdf](https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf) <https://www.consumerfinance.gov/data-research/research-reports/overdraft-and-nonsufficient-fund-fees-insights-from-the-making-ends-meet-survey-and-consumer-credit-panel/>

<sup>10</sup> <https://consumerbankers.com/press-release/new-cba-survey-illustrates-consumer-harm-of-cfpb-overdraft-proposal/>

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. Also, the CFPB has failed to meet its statutory cost-benefit analysis requirements, as it relied on data that did not include overlooked credit invisible consumers, who lack traditional access to bank-offered credit products.

Accordingly, the CFPB literally failed to include the most critical one-fifth of Americans in its impact analysis, who will be irreparably de-banked by their rulemaking.<sup>11</sup>

The CFPB should not proceed with a final rule on overdraft. Instead, it should collect, analyze, and update data on consumers' use of overdraft services, with particular attention paid to frequent overdrafters and those who struggle to access other alternative forms of credit such as credit cards.

Should the current Director and CFPB finalize the rule, the next Director should do the appropriate analysis to understand the harm to consumers of this rulemaking, and the overreach of its own authority, and should rescind this rule.

### Dodd-Frank Section 1033 Implementation

On October 22, 2024, the CFPB issued a final rule implementing Section 1033 of the Dodd-Frank Act, which addresses consumers' personal financial data rights.<sup>12</sup> CBA and our member banks support consumer access to their financial data and a move to a more open banking system. Many banks have already invested heavily in developing open application programming interfaces (APIs), enabling outside parties to build consumer products that draw from their consumers' financial data. With that said, we have significant concerns about a number of aspects of the CFPB's final rule.

First, CBA continues to strongly object to the CFPB's inaccurate assertions that this rulemaking is needed to increase competition in the marketplace. The consumer credit card and deposit account markets are highly competitive and the CFPB should not rely on mischaracterizations of the marketplace to justify the necessity of this rulemaking.

Next, the CFPB must adhere to its statutory authority. The final rule goes far beyond a short section of statute by requiring banks to subsidize a vast open banking marketplace. The rule is also half-baked and does not even specify a standard setter, so banks do not know what they are building toward.

Provisions in the final rule jeopardize consumers' control and security of their data. The final rule will increase fraud in a number of ways— (1) it requires “information to initiate payment to or from a Regulation E account” (account and routing numbers) to be shared with third parties; (2) data recipients will only have to certify compliance but will not be examined; (3) the final rule fails to prohibit screen scraping; and (4) it lacks a liability framework and relies on the existing structure in the Electronic Fund Transfer Act (EFTA) and its implementing regulation, Regulation E, bilateral contracts, and private network rules which would leave banks and even consumers on the hook. Third parties' use and protection of sensitive consumer data is outside of banks' control, which

leaves banks unable to protect their customers from data breaches at third-party companies and from fraud that may result from these breaches. Third parties should be required to address

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<sup>11</sup> <https://consumerbankers.com/press-release/cba-statement-on-cfpbs-misleading-overdraft-press-release/>

<sup>12</sup> <https://www.consumerfinance.gov/rules-policy/final-rules/required-rulemaking-on-personal-financial-data-rights/>

consumer harm that results from their inadequate controls, and limits on third party access to consumer data should be considered.

The scope of covered accounts should be more than just asset accounts and credit cards— it should include auto loans and non-bank credit alternatives like Buy Now Pay Later (BNPL) and Electronic Benefit Transfer (EBT) cards. If the CFPB wants to create an open banking ecosystem that fosters competition and benefits consumers, all participants in the market should be covered.

The final rule prohibits banks and other data providers from imposing any fees on third parties for accessing consumer data. Such fees, which are now being contemplated in the European Union,<sup>13</sup> could be imposed by data providers on third parties in order to recover the costs of developing and maintaining new interfaces for third parties. Banks will shoulder the burden of setting up data sharing systems; non-banks should share in the development and operational cost of setting up these systems.

The new administration should reconsider the rule in light of these significant shortcomings.

### Credit Card Late Fees

On March 5, 2024, the CFPB finalized its proposed rule that would cut the Federal Reserve Board’s longstanding safe harbor for credit card late fees from \$30 (\$41 for subsequent late payments) to \$8, without an inflation adjustment.<sup>14</sup> The CFPB’s rule is part of the Biden Administration’s 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.<sup>15</sup>

Credit card late fees are not “junk fees.” Credit card late fees are authorized under Regulation Z, which implements TILA. By law, these fees are clearly disclosed to the consumer up front, and are entirely avoidable. 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.

The Bureau attempts to justify the late fees rule by portraying the credit card market in ways that its own data shows are false. The CFPB Director argued that late fees and, by extension credit cards, “aren’t subject to the normal forces of competition.”<sup>16</sup> According to the Director, competition had been “undermined,” so the CFPB needed to intervene to ensure the credit card market is fair and competitive.<sup>17</sup> But 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.<sup>18</sup> For example,

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<sup>13</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0360>

<sup>14</sup> <https://www.consumerfinance.gov/rules-policy/final-rules/credit-card-penalty-fees-final-rule/>

<sup>15</sup> <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>

<sup>16</sup> <https://www.consumerfinance.gov/about-us/newsroom/director-chopras-remarks-on-press-call-for-credit-card-late-fees-nprm/>.

<sup>17</sup> Id. and <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/>.

<sup>18</sup> 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>.



the CFPB’s CARD Act Report shows that there were \$53 billion of balance transfers in 2022.<sup>19</sup> 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 of the top seven credit card issuers.

The Bureau also claims that this rule could help some credit card customers, in particular those who frequently pay late. However, 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 and 47 percent of subprime cardholders<sup>20</sup>—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.<sup>21</sup> As discussed further below, this rule may harm the very consumers it purports to protect. However, in addition to these specific harms, this unnecessary market intervention may limit overall access to credit. As card issuers adjust to manage the risk of more late payers, there is risk that the supply of credit will constrict. This restriction of credit could potentially “debank” existing consumer cardholders, while also making it more difficult for consumers to get access to new credit.

Despite the CFPB’s avowed concerns about rising rates of consumers in “persistent debt”<sup>22</sup>— when a consumer pays more in interest and fees over an 18-month period than their balances<sup>23</sup>— the CFPB either fails to recognize or acknowledge that its late fees rulemaking will almost certainly push additional consumers into “persistent debt.” The CFPB’s late fees rulemaking is specifically designed to reduce the short-term financial consequences of missing credit card payments (i.e., reducing the late fee from \$30 to \$8). Indeed, the CFPB may be saving a consumer \$22 in the short term. But by reducing the effectiveness of late fees, the CFPB also exposes consumers to increased risks that they will incur costs that may be less salient, because they occur over time, but are ultimately significantly more damaging than a \$30 late fee. The consumer will likely carry a higher balance, resulting in higher interest charges and smaller principal payments. This may lead to a lower credit score, making it more difficult and expensive for the consumer to obtain other types of credit, such as a mortgage or auto loan. While the consumer may save a little money in the short term, these long-term costs will be so much greater. The CFPB did not even attempt to consider these long-term consumer harms in its proposed or final rule, despite them being raised directly by industry during the notice and comment process.<sup>24</sup>

CBA is a co-plaintiff on a lawsuit led by the U.S. Chamber of Commerce challenging this rulemaking. The U.S. District Court for the Northern District of Texas granted a preliminary injunction on May 10, preventing the rule from going into effect while the merits of the challenge are litigated in court.<sup>25</sup>

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<sup>19</sup> [https://files.consumerfinance.gov/f/documents/cfpb\\_consumer-credit-card-market-report\\_2023.pdf#page=116](https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf#page=116)

<sup>20</sup> [https://files.consumerfinance.gov/f/documents/cfpb\\_credit-card-late-fees\\_report\\_2022-03.pdf](https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf)

<sup>21</sup> [https://files.consumerfinance.gov/f/documents/cfpb\\_credit-card-penalty-fees\\_final-rule\\_2024-01.pdf#page=227](https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees_final-rule_2024-01.pdf#page=227)

<sup>22</sup> <https://consumerbankers.com/press-release/facts-matter-card-act-report-highlights-banks-positive-impact-on-consumers-financial-resilience/> Overall rates of “persistent debt” remain lower than every pre-pandemic year.

<sup>23</sup> <https://www.fca.org.uk/publications/policy-statements/ps18-04-credit-card-market-study>; see, e.g.,

<https://www.ukfinance.org.uk/our-expertise/cards/financial-conduct-authority-fca-rules-persistent-credit-card-debt-36-months-actions-frequently>

<sup>24</sup> [https://consumerbankers.com/wp-content/uploads/2024/03/CBA20Comment20on20Docket20No20CFPB-2023-001020RIN203170-AB15\\_0.pdf#page=4](https://consumerbankers.com/wp-content/uploads/2024/03/CBA20Comment20on20Docket20No20CFPB-2023-001020RIN203170-AB15_0.pdf#page=4)

<sup>25</sup> <https://www.uschamber.com/cases/consumer-protection/cfpb-late-fees-rule>

The new administration should rescind the rule and focus on increasing consumer access to affordable credit card products.

### Fraud and Scams

While fraud and scams continue to dominate headlines, the types of fraud and scams occurring and the complications facing consumers and banks have evolved over the last year. In light of continued innovation by banks to counter fraud related to instant peer-to-peer (P2P) payment platforms, P2P fraud has begun to slow down while check fraud and synthetic identity fraud have resurged.

CBA commissioned a white paper with Nick Bourke, former Director of Consumer Finance at The Pew Charitable Trusts, to develop a national strategy for preventing fraud and scams against consumers and businesses.<sup>26</sup> The white paper was accompanied by a roundtable of relevant stakeholders to discuss the issues raised, which culminated in a policy document highlighting actions that are needed from an inter-governmental and inter-industry perspective for addressing fraud, scams, and cybersecurity.<sup>27</sup>

The white paper also discusses the importance of consumer education to help inform consumers of how to avoid being defrauded and scammed. Equally as important, education must destigmatize falling victim to fraud and scams and teach consumers what to do if they do unfortunately fall victim. It is critically important that the CFPB use its Civil Penalty Fund to conduct a consumer education campaign to make consumers aware of the growing problem of fraud and scams and how to avoid them. Additionally, the CFPB should work with other federal agencies, such as the FTC and FCC, to crack down on various types of consumer scams. Additionally, law enforcement officials need to be adequately resourced in order to support the prosecution of fraudsters and scammers. One of the likely reasons that fraud and scams have exploded in recent years is because of insufficient prosecutions of these fraudsters and scammers.

### Process Issues

The CFPB frequently disregards required rulemaking procedures for the sake of expediency, resulting in policies that are highly flawed and not durable. For example, 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.<sup>28</sup> It contains specific new obligations and establishes new legal penalties, thereby introducing new regulatory expectations more than a decade after the statute was enacted. To the extent that the CFPB has authority to introduce any such new regulatory expectations, it should have done so via a rulemaking under the Administrative Procedure Act (APA). The new administration should withdraw the advisory opinion.

On September 17, 2024, the CFPB issued a consumer circular regarding overdraft opt-in practices.<sup>29</sup> This circular attempts to impose new regulatory obligations by increasing record

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<sup>26</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4897644](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4897644)

<sup>27</sup> <https://consumerbankers.com/wp-content/uploads/2024/07/2024-07-21-Fraud-and-Scams-Writeup.pdf>

<sup>28</sup> [https://files.consumerfinance.gov/f/documents/cfpb-1034c-advisory-opinion-2023\\_10.pdf](https://files.consumerfinance.gov/f/documents/cfpb-1034c-advisory-opinion-2023_10.pdf)

<sup>29</sup> <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-05/>

retention requirements for overdraft services. This is yet another example of the CFPB issuing what should be a rule without going through the required APA rulemaking process. Financial institutions that offer overdraft services are required to have consumers affirmatively opt-in for overdraft services and are required to keep a record of that opt-in for two years. The CFPB is trying to change this requirement via a footnote of the circular suggesting that absence of a record suggests that the bank never obtained consent. This wholly ignores the regulation's clear record retention requirements by effectively requiring financial institutions to keep records of overdraft opt-in forever. The new administration should withdraw this circular in light of its legal deficiencies.

The CFPB has also frequently misused its unfair, deceptive, and abusive acts or practices (UDAAP) authority. A prime example of why the CFPB's UDAAP authority is in need of reform is the Bureau's March 2022 update to its UDAAP exam manual, in which it added provisions to reflect its new view that "unfairness" can be applied to alleged discriminatory practices by using disparate impact analysis. However, Congress has historically been very restrictive on granting agencies the ability to apply disparate impact theory due to its inherent inaccuracy of predicting discriminatory outcomes. The CFPB's action created significant uncertainty in the financial services marketplace to the detriment of consumers and banks alike, and it raised profound substantive and procedural legal concerns. In essence, the CFPB went beyond its authority by extending fair lending laws to non-lending products and services, meaning that discriminatory conduct could violate UDAAP even in instances where fair lending laws do not apply. The CFPB's actions left industry with little choice but to pursue legal correction of this overreach. In September 2022, CBA and other trades filed a lawsuit challenging the exam manual update on several grounds, including the agency's lack of statutory authority and failure to follow appropriate rulemaking procedures.<sup>30</sup> In September 2023, a U.S. district court granted CBA and other plaintiffs' motion for summary judgment, and denied the CFPB's counter motions. In granting CBA and the other plaintiffs' motion, the court deemed the CFPB's March 2022 update to the UDAAP exam manual beyond the agency's constitutional and statutory authority, and vacated the update in its final judgment.<sup>31</sup> The CFPB is appealing the decision to the Fifth Circuit Court of Appeals.

The Bureau has also issued interpretive rules on BNPL and earned wage access (EWA) products which should be withdrawn.<sup>32 33</sup>

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<sup>30</sup> <https://www.consumerbankers.com/cba-media-center/media-releases/cba-leading-financial-groups-pursue-legal-action-against-cfpb>

<sup>31</sup> [https://www.consumerbankers.com/sites/default/files/CBA-Chamber-of-Commerce-CFPB\\_Final-Judgment.pdf](https://www.consumerbankers.com/sites/default/files/CBA-Chamber-of-Commerce-CFPB_Final-Judgment.pdf)

<sup>32</sup> On May 22, 2024, the CFPB issued an interpretive rule that treats BNPL providers as credit card issuers under TILA and Regulation Z. While CBA supports much of the substance of the interpretation, it creates substantive new obligations on regulated entities and is not a mere interpretation of existing rules. Therefore, it must be submitted as a formal rule through the rulemaking process required by the APA. <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-ensure-consumers-can-dispute-charges-and-obtain-refunds-on-buy-now-pay-later-loans/> <https://consumerbankers.com/wp-content/uploads/2024/08/BNPL-Interpretive-Rule-Comment-Letter-8-1-24.pdf>

<sup>33</sup> On July 18, 2024, the CFPB proposed an interpretive rule that treats earned wage access (EWA) products as consumer loans subject to TILA and Regulation Z. The interpretive rule creates substantive new obligations on regulated entities and must be promulgated through an APA rulemaking process. Additionally, a cost-benefit analysis must be conducted pursuant to Section 1022 of the Dodd-Frank Act, along with an interagency consultation and an initial regulatory flexibility analysis. CBA urges the CFPB to rescind the interpretation and reevaluate the merits of the proposed policy conclusions. <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-interpretive-rule-to-ensure-workers-know-the-costs-and-fees-of-paycheck-advance-products> <https://consumerbankers.com/wp-content/uploads/2024/08/CBA-comment-on-CFPB-EWA-interpretive-rule-CFPB-2024-0032.pdf>



### Structural CFPB Reforms

When the new Congress begins, CBA hopes legislators will strongly consider structural changes to the Bureau to bring stability and certainty to the regulatory process.

CBA appreciates the House Financial Services Committee taking action on meaningful reforms to the CFPB. In April 2023, the Committee passed H.R. 2798, the *CFPB Transparency and Accountability Reform Act*, which includes four CFPB reform 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. In May 2024, the Committee passed H.R. 8338, the *Clarity in Lending Act*, which includes two CFPB reform bills that CBA supports: (1) reforming the Bureau's UDAAP authority and (2) obtaining stakeholder input on the Section 1071 balancing test.

These reforms will bring greater accountability and transparency to the Bureau and will apply proper checks and balances to a regulator with broad scope and influence over the consumer financial services marketplace.

### Conclusion

The new Congress and the new administration present valuable opportunities for major legislative and regulatory changes to the CFPB. Over the last four years, the Bureau's leadership has prioritized short-term political wins over what is best for consumers. Enacting the legislative changes recommended in this letter would help protect against the radical pendulum shift that has taken place in the last three administrations and result in policies that are more measured and durable. Additionally, the next CFPB Director should rescind the Bureau's most harmful rules that are undoubtedly making it more difficult and expensive for consumers to access financial services. CBA stands ready to work with Congress and the CFPB to implement legislative and regulatory improvements to the Bureau for the benefit of consumers, and we appreciate the opportunity to submit this statement for the record. CBA also looks forward to sharing additional policy recommendations with the new administration and Congress in the coming weeks.

Sincerely,



Lindsey D. Johnson  
President and CEO  
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