U.S. Chamber of Commerce

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Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: **Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services; Docket No. CFPB-2022-0003, 87 FR 5801**

To Whom It May Concern:

The Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau ("CFPB") in response to its Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services (the "RFI").[1]

The United States has the most innovative, competitive, and consumer-focused financial services market in the world. Financial services companies offer an exceptionally broad array of products across and within numerous product categories as they compete for consumers' business. These products have long supported the American dream—whether helping finance a child's college education, paying for the family's first home, or overcoming unexpected financial hardships. Continued access to this wide variety of affordable financial products and services will be essential for American consumers as they pursue their goals in the years ahead.

Financial services companies use fees to ensure that the products they offer are competitive while remaining commercially viable. Fees allow financial services companies to employ tailored pricing that reflects the services used and financial needs of individual consumers. Along with other pricing components, product features, rewards and other product elements, fees play a role in each consumer's often complex and distinctive decision of what product is best for them. Indeed, a consumer is better empowered to choose the most suitable financial products and services when financial services companies can offer products and services with choices for various benefits

[1] *See* CPFB, Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services, 87 Fed. Reg. 5,801 (Feb. 2, 2022).

and features, at corresponding price points and with varying pricing structures. This consumer choice powers the robust competition and innovation seen in the consumer financial services market.

Congress has not imposed significant limitations or prohibitions upon fees charged for consumer financial products and services. For example, Congress clearly stated that no provision of the Consumer Financial Protection Act "shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law."[2] Rather, to facilitate competition and consumer choice, Congress has focused on fee disclosures across the broad range of consumer finance products. As a result, fees charged by consumer financial services companies are subject to strict disclosure requirements,[3] including requirements related to when a financial institution must disclose the fees. These disclosure requirements, which are implemented through numerous regulatory frameworks, empower consumers to make decisions in their best interest based on the material financial elements of a consumer finance product or service and the consumer's financial goals and needs. Maintaining this approach will allow competition to continue to drive the creation of innovative and varied financial products that benefit consumers. Taking an alternative path, in contrast, likely would reduce the ability of financial services companies to offer innovative, competitive products to consumers, including those who are underbanked or have a limited credit history.

We accordingly write to make four points:

- Fees can be an appropriate element of responsible consumer financial products and services.
- Consumer financial services companies offer transparent fee structures so that products are tailored to consumers' needs, competitive and commercially viable.
- Fees charged by financial services companies are subject to extensive disclosure requirements that facilitate consumer choice and competition.
- Any new regulation of fees should be pursued through notice-and-comment rulemaking and closely coordinated with the prudential regulators.

[2] *See* 12 U.S.C. § 5517(o).

[3] *See, e.g.*, 12 CFR §§ 1005.7, 1005.16, 1005.17, 1026.6, 1030.4., 1030.5, 1030.11.

Analysis

1. Fees can be an appropriate element of responsible consumer financial products and services.

The CFPB has encouraged financial services companies to responsibly develop innovative products and services that benefit consumers, including by helping increase access to financial services among underserved consumers.[4] Indeed, one of the statutory objectives of the CFPB is to ensure "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[5] Fees, along with other pricing and product features, are one component of the wide array of innovative, competitive products that financial services companies offer to consumers. For example, fees help financial services companies offset risks when loan terms are not met. The ability to offset risk gives financial services companies greater flexibility to develop innovative products and offer a greater variety of products to consumers of all economic backgrounds. This flexibility promotes consumer choice and competition among financial services companies.

Fees serve numerous purposes. For example, fees allow companies to offset costs associated with certain customer actions and to mitigate the risk associated with certain product features—and thus continue to offer the products that customers want. To that end, fees can help offset increased costs associated with late-paying accounts. Conversely, fees also often discourage violating the terms of a service agreement or using a product in an unintended way, both actions that can create significant default risk. For example, late fees encourage consumers to pay on time. Timely payment lowers costs to financial services companies, but more importantly, helps consumers establish good repayment history. Paying on time can help consumers avoid, if applicable to the product, additional interest accruing on unpaid funds, future default on debt, and negative credit reporting. In this way, fees can encourage sound financial behavior and benefit consumers—all while remaining subject to the intense competition of the financial services marketplace and the extensive disclosure requirements discussed below.

Financial services companies consider a variety of factors when deciding whether to offer and how to price products and services. These factors include benefits to consumers, competitiveness with other financial services companies, profitability, sustainability, risk management, and safety and soundness principles. Eliminating or setting fees could distort the marketplace and discourage the risk-based pricing that

[4] *See, e.g.*, CFPB, Request for Input on Alternative Data and Modeling Techniques in the Credit Process, 82 Fed. Reg. 11,183, 11,183 (Feb. 21, 2017).

[5] *See* 12 U.S.C. § 5511(b)(5).

greatly benefits consumers.[6] If the financial services industry is unable to price in the cost of services and risk of customer behavior, it will likely result in higher interest rates and decreased access, particularly for consumers lacking robust credit history.

Financial products must be priced to be viable. A financial services company will only be able to provide a product to meet consumer needs if that product is sustainable. If a product becomes unprofitable and unsustainable, consumers will not be able to rely on the product's presence in the market. Accordingly, regulatory approaches that prohibit or limit fees from playing an appropriate role in responsible consumer products will reduce consumer choice in the long run. The CFPB should avoid any such distortion of the marketplace and should treat fees as an appropriate element of responsible financial products.

2. Consumer financial services companies offer transparent fee structures so that products are tailored to consumers' needs, competitive and commercially viable.

Financial services companies offer American consumers an exceptionally broad and varied range of products. Often a company offers numerous products within a single category, each designed to serve various segments of consumers. The fee structure of these products is a key element in their design. A credit card, for example, may have an annual fee as part of a rewards program; may have fewer fees, but a higher APR; may waive foreign transaction fees as part of a "travel" card offering; or offer any number of other permutations designed to benefit particular consumers. Likewise, a bank may offer a consumer the opportunity to avoid maintenance fees if the account maintains a certain balance at the institution or the account holder uses direct deposit. If a consumer does not choose any of the product offerings of a particular company, the consumer can select among the varied offerings of numerous competitors.

Consumers thus can readily choose among different product options that offer varied approaches to fees and other key product elements. The broad range of pricing structures for consumer financial products and services allows consumers to find the right products for their particular circumstances. Such decisions are often highly specific to the individual consumer. While consumers with seemingly similar financial profiles thus may choose different products with different fee structures, one key factor is consistent: the ability of consumers to evaluate products and choose what is right for them. In many cases, this may mean choosing the product with lower fees, but that will not always be the case.

[6] *See* U.S. Chamber of Commerce, The Economic Benefits of Risk-Based Pricing for Historically Underserved Consumers in the United States (Spring 2021), https://www.centerforcapitalmarkets.com/resource/rbp/.

Consumer financial services companies design fee structures—along with other product features—so that the products are both competitive in the marketplace and commercially viable. Competition often focuses both on the fees (or lack thereof) charged for a product, as well as other significant product features and costs. Such competition is intense. According to the CFPB's September 2021 Consumer Credit Card Market Report, for example: "In 2019 and 2020, innovation continued to reshape the credit card market for both users and providers. New providers, including large and small financial institutions as well as startup and mainstream technology companies have entered—or are in the process of entering—the market with competing products, features, and methods for issuing credit cards."[7] In its study on Industrial Concentration in the United States sponsored by the U.S. Chamber of Commerce, NERA Economic Consulting similarly found that the consumer banking and credit industry has seen a decline in concentration since reaching a peak in 2007.[8]

Low fees or free benefits frequently feature in marketing materials for a variety of consumer financial products and services. In fact, over the last two years, numerous financial institutions have responded to competitive pressures by lowering or eliminating fees in many core products and services such as checking accounts, savings accounts, and credit cards. Moreover, reduced or no-fee services are often offered by non-banks and financial tech companies entering the market. The broad range of pricing structures for consumer financial products and services, combined with this intense competition in the marketplace, benefits underserved consumers by increasing the number of low or no-cost products or benefits available to consumers.

Consumer financial services companies also offer numerous features designed to help consumers avoid certain fees. For example, many consumer financial services companies send payment reminders to help consumers remember to pay on time and avoid late fees. Some consumer financial services companies also waive a late fee the first time a consumer pays late. In addition, some financial services companies enable consumers to set up accounts not to exceed a set limit or to provide alerts when their accounts exceed a certain limit.

3. Fees charged by financial services companies are subject to extensive disclosure requirements that facilitate consumer choice and competition.

Congress has repeatedly chosen to use disclosure requirements—and the informed consumer choice they enable—to regulate and protect the consumer financial services market. Under this approach, financial services companies are required to

[7] *See* CFPB, Consumer Credit Card Market Report, page 7 (Sept. 2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

[8] *See* Robert Kulick and Andrew Card, Industrial Concentration in the United States: 2002-2017, page 16 (March 2022), https://www.uschamber.com/assets/documents/Final-Industrial-Concentration-Paper.pdf.

comply with a plethora of statutes and regulations that impose rigorous disclosure requirements. This approach—repeated numerous times by Congress across different product categories—allows consumers to make informed decisions about the best products for their own needs and goals. In this way, financial disclosures enable consumers to avoid surprises as they use their products and facilitate robust competition in the marketplace by enabling informed decisions between products.

Financial services companies offering credit cards, mortgages, and countless other consumer financial services are well versed with the clear and prominent disclosure of fees required under relevant regulatory frameworks. These fee disclosure requirements include the timing, form, and content of the disclosure. Fee disclosures generally must be in writing and frequently must meet certain formatting requirements. Further, fees charged by financial services companies must be disclosed to the consumer before the consumer incurs the fee, typically at account opening, in periodic statements, and depending on the fee, immediately before the consumer incurs it. Because fees are disclosed either before or at account opening, a consumer can determine whether the product or service and its associated fees are right for the consumer before actually purchasing the product or service. Accordingly, any comparison of highly regulated and extensively disclosed fees charged by financial services companies to hidden costs that may be charged by largely unregulated entities in other industries is misplaced.

The central role of disclosure requirements to the effective—and longstanding—regulation of the consumer financial services market merits particular emphasis, given the key role it plays in facilitating competition and innovation that benefits consumers of all economic profiles. To that end, we highlight below a few key examples, namely disclosure requirements under the Truth in Lending Act ("TILA"), the Truth in Savings Act ("TISA"), and the Electronic Funds Transfer Act ("EFTA").

a. TILA

As the CFPB is aware as the governing agency, TILA, as amended by the Credit Card Accountability Responsibility and Disclosure ("CARD") Act, and its implementing regulation, Regulation Z, requires creditors to extensively disclose fees charged in connection with the extension of consumer credit. For open end credit plans, for example, a creditor must disclose applicable fees at the time of account opening in the format required by the CFPB.[9] Moreover, certain disclosures must be in a format

[9] Specifically, a creditor must disclose any periodic fee for the issuance or availability of the plan, including any fee based on account activity or inactivity, as well as how frequently the fee will be imposed and the annualized amount; any non-periodic account-opening fees; cash advance fees; late payment fees; over-the-limit fees; balance transfer fees; returned-payment fees; insurance fees; debt cancellation or suspension fees; penalty fees; taxes imposed on the transaction; and termination fees. *See* 12 CFR § 1026.6.

substantially similar to model forms created by the CFPB, which demonstrate how a creditor must disclose fees (e.g., Model Form G-10 and Model Form H-24).[10] Through these and other disclosure requirements, Regulation Z accomplished Congress's goal in passing the CARD Act of making credit transactions fairer and more transparent. As stated by former CFPB Director Richard Cordray, following implementation of the CARD Act "[p]ricing became more transparent upfront . . . . [t]he view expressed by Congress in 2009—that smart and thoughtful guardrails could bring positive change to this market that would benefit all participants—has been thoroughly ratified."[11] Likewise, the CFPB's first CARD Act Report found that the end result of the CARD Act was a market "in which shopping for a credit card and comparing costs is far more straightforward than it was prior to enactment of the Act."[12]

b. TISA

As implemented through Regulation DD, TISA requires depository institutions to comply with numerous fee disclosure requirements. As with the TILA requirements, the TISA requirements pertain to the content, timing, and format of disclosures. Depository institutions are required to clearly disclose applicable fees before or at account opening, allowing consumers the opportunity to evaluate the full cost of opening an account before proceeding. At (or before) account opening, the depository institution must disclose the amount of any fee that may be imposed in connection with the account and the conditions under which the fee may be imposed.[13] At that time, a depository institution must provide a disclosure stating any minimum balance required to avoid the imposition of a fee.[14] If any of the account opening fees will change in a way that may adversely affect the consumer, the depository institution must provide advance notice.[15] Depository institutions must also disclose any early withdrawal penalties and the conditions for their assessment. These disclosures must be clear,

[10] For example, the variations of Model Form G-10 for open end credit disclosures require creditors to disclose each fee within a box, separated from all other required disclosures and contract terms. Similarly, the variations of Model Form H-24 set out the format requirements for mortgage loan transactions, which include itemized lists of origination charges and other loan costs as well as a description of any late payment penalties.

[11] CFPB, Consumer Credit Market Report, Message from Richard Cordary, pages 2-3 (Dec. 2015), https://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

[12] *See* CFPB, Card Act Report, page 5 (Oct. 1, 2013), https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

[13] *See* 12 CFR §§ 1030.3, 1030.4. The CFPB's interpretation of this regulation states that such fees include maintenance fees, fees to open or close an account, fees related to withdrawals and deposits (including fees for use of the institution's ATMs), and fees for special services, such as stop-payment fees, fees for balance inquiries or verification of deposits, fees associated with checks returned unpaid, and fees for regularly sending to consumers checks that otherwise would be held by the depository institution.

[14] *See* 12 CFR § 1030.4.

[15] *See* 12 CFR § 1030.5.

conspicuous, written, and in a form the consumer may keep.[16] Likewise, requirements for the disclosure of fees relating to overdrafts in marketing materials allow consumers the opportunity to evaluate the full cost of agreeing to an overdraft service when shopping for deposit accounts.[17]

c. EFTA

In a final example, relevant financial services companies must also comply with disclosure requirements under EFTA and its implementing regulation, Regulation E. These disclosures allow consumers the opportunity to assess the full cost of using ATMs and purchasing overdraft services prior to proceeding with account opening.[18] For example, an ATM operator that imposes a fee on a consumer for initiating an electronic fund transfer or balance inquiry must provide a notice disclosing the amount of the fee and require the consumer to consent to the fee before proceeding with the transaction or inquiry.[19] As with other disclosure regimes, such notices must be substantially similar to the model form published by the CFPB.[20]

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To be clear, Congress and applicable regulators also have chosen to regulate fees directly in certain cases. In doing so, Congress and applicable regulators have given careful consideration to the purpose of fees, the need to preserve the safety and soundness of financial institutions, and how consumers use applicable financial products.

For example, Congress directed the CFPB to issue rules on penalty fees for open-end credit plans considering, among other factors, the cost incurred by the creditor for a violation of the cardholder agreement and deterrence of violating the agreement. Congress permitted the Federal Reserve Board (the "Board") (and now, the CFPB) to implement a safe harbor for these penalty fees, under which a fee is presumed to be reasonable and proportional to the violation.[21] In doing so, Congress expressly instructed the Federal Reserve Board to consider the cost incurred by a creditor from a

[16] *See* 12 CFR § 1030.11.

[17] *See* 12 CFR § 1030.11.

[18] At account opening, a financial institution must disclose any fees for electronic fund transfers or the right to make transfers and provide a notice that a fee may be imposed by an ATM operator and any network used to complete an electronic fund transfer or make a balance inquiry. *See* 12 CFR § 1005.7.

[19] *See* 12 CFR § 1005.16.

[20] The model notice includes a description of the overdraft service, the types of transactions for which an overdraft fee may be charged, the dollar amount of any overdraft fees, any factors used to determine the amount of the fees, the maximum number of overdraft fees that may be assessed per day, disclosure of the right to opt-in, and alternative plans for covering overdrafts. *See* 12 CFR § 1005.17.

[21] *See* 15 U.S.C. § 1665d.

violation of product terms, the deterrence of a violation, and the conduct of the cardholder when drafting a rule on the reasonable amount of penalty fees, signaling that these are all valuable and legitimate considerations in assessing penalty fees.[22] The CFPB's commentary on Regulation Z states that several considerations are relevant to a card issuer's determination of the cost of penalty fees, including: the number of violations experienced by the card issuer; the costs incurred by the card issuer as a result of those violations; once a violation has occurred, the costs associated with preventing additional violations; and, the number of penalty fees the card issuer reasonably estimates it will be unable to collect.[23]

In setting the safe harbor penalty fees for open-end credit products, the Board engaged in a well-reasoned rulemaking that considered comments from the public and evaluated the deterrent effects of penalty fees, penalty fees for other types of accounts, state and local limits on penalty fees, the safe harbor for default charges established in the United Kingdom, the stated purposes of the CARD Act, and costs to card issuers.[24] The Board specifically decided not to codify a proposed requirement for card issuers to develop and use a model to set penalty fees based on their estimated deterrent effect, replacing it with the set price safe harbors that exist today. The Board made this decision after consumer groups and industry both commented that this modeling requirement was inconsistent with the purposes of the CARD Act.[25] Based on the above-mentioned considerations, the Board instead decided that the safe-harbor penalty fees, to be adjusted periodically for inflation, were reasonable, proportional to the violation, and sufficient to cover most issuers' costs and deter violations.[26]

[22] *See* 15 U.S.C. § 1665d.

[23] *See* 12 CFR § 1026.52(b)(1)(i), cmt. 1. In addition, for late payment fees, card issuers may consider costs associated with the collection of late payments, such as the costs associated with notifying consumers of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements). For returned payment fees, card issuers may also consider: costs associated with processing returned payments and reconciling the card issuer's systems and accounts to reflect returned payments; costs associated with investigating potential fraud with respect to returned payments; and costs associated with notifying the consumer of the returned payment and arranging for a new payment. For over-the-limit fees, card issuers are permitted to include costs associated with determining whether to authorize over-the-limit transactions and costs associated with notifying the consumer that the limit was exceeded and arranging for payments to reduce the balance below the limit.

[24] *See* Federal Reserve System, Truth in Lending; Final Rule, 75 Fed. Reg. 37,526, 37,527, 37,533, 37,542 (June 29, 2010).

[25] Consumer groups were concerned specifically that this standard would allow card issuers to use marginal changes in the frequency of violations to justify unreasonably high fee amounts. Some industry participants were concerned that this standard would require testing various fee amounts on consumers, and would also be impossible for smaller institutions to implement. *See* Federal Reserve System, Truth in Lending; Final Rule, 75 Fed. Reg. 37,526, 37,533 (June 29, 2010).

[26] *See* Federal Reserve System, Truth in Lending; Final Rule, 75 Fed. Reg. 37,526, 37,526-27, 37,533 (June 29, 2010).

These examples of direct regulation of fees confirm the general rule that Congress has chosen to use fee disclosure as the primary tool for empowering consumer choice and facilitating competition. This thereby supports the continued creation of innovative consumer financial products and services that benefit countless Americans. Indeed, if Congress wanted to eliminate or further restrict fees, it could have done so. Instead, Congress has repeatedly decided to regulate fees largely through disclosure requirements. With carefully crafted exceptions, as discussed above, Congress has focused on empowering—not limiting—consumer choice. This key policy judgment should be reflected in any actions taken by the CFPB.

4. Any new regulation of fees should be pursued through notice-and-comment rulemaking and closely coordinated with the prudential regulators.

We request that if the CFPB seeks to further regulate fees, that it work in coordination with the prudential regulators as required under the Consumer Financial Protection Act to ensure consistency with the prudential, market, and systemic objectives pursued by these agencies.[27] It should also coordinate closely with state regulatory counterparts. Regulations imposed by the various prudential regulators should be consistent so that financial services companies are not subject to conflicting obligations. Any regulations imposed by the CFPB should not operate in tension with regulations imposed by the prudential regulators. For example, the Office of the Comptroller of the Currency's regulations expressly permit banks to decide whether to set non-interest charges and fees, and their amounts, based on the bank's business judgment.[28] Banks are deemed to make these decisions in accordance with safe and sound banking principles when they consider the cost incurred in providing a service, the deterrence of misuse by consumers, the enhancement of the competitive position of the bank, and the maintenance of safety and soundness of the bank.

We also request that, in any instance in which the CFPB seeks to regulate fees, it do so carefully and consistently with clear authority, after an opportunity for stakeholders to weigh in on the details, in accordance with the Administrative Procedure Act. As we have explained in the past, the CFPB should avoid regulation by enforcement. Such an approach to regulation blurs the rules of the road by generating significant uncertainty about regulatory requirements and creates an uneven playing field as different companies take different views of how the CFPB understands governing legal requirements. It would be unhelpful, if not inappropriate, for the CFPB to attempt to use its authority regarding unfair, deceptive, or abusive acts or practices to attempt to regulate fees or otherwise set pricing. It is neither unfair, deceptive, nor abusive to charge consumers for legally disclosed fees. As discussed above, we think

[27] *See* 12 U.S.C. § 5495.

[28] *See* 12 CFR § 7.4002.

that prohibitions or limitations on permissible fees would be a mistake. Attempting to impose such a prohibition or limitation by enforcement would only compound that error.

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Thank you for considering these comments. We are happy to discuss these issues further.

Sincerely,

William R Hulse

Bill Hulse
Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce