April 11, 2022

Comment Intake – Fee Assessment
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

Dear Consumer Financial Protection Bureau:

Better Markets Inc.[1] appreciates the opportunity to comment[2] on the above-captioned request for information ("Request"), issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau").[3] The Request seeks stories, data, and information from the public on the impacts junk fees have had and continue to have on peoples' lives. We applaud the Bureau for undertaking a close examination of junk fees and gathering information from all stakeholders, with an eye toward possible reforms that may be necessary to further protect consumers from predatory financial products and services.

While fees can serve an important function by enabling bank and non-bank financial institutions to offer an array of financial products and services to their customers, these fees should not be excessive or exploitative. Unfortunately, as discussed below, many fees, especially those associated with overdraft and credit card products, are excessive compared to the actual costs to the financial institution of providing the product or service. In addition, those fees are often exploitative due to the captive nature of the banking relationship. The Bureau has the legal authority to regulate these excessive and exploitative fees and it should take action where necessary to protect consumers. As detailed below, we recommend that the Bureau address abusive fees by prescribing strong disclosure requirements; regulating hidden fees (including discriminatory fees)

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 This comment letter was prepared with the assistance of JoAnn Kintz, Democracy Forward Foundation.

3 Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services, 87 Fed. Reg. 5,801 (Feb. 2, 2022).

as unfair, deceptive, and abusive acts or practices; and banning or limiting acts or practices that *result* in excessive and exploitive fees.

I. THE FINANCIAL SERVICES INDUSTRY RELIES HEAVILY ON FEES, MANY OF WHICH ARE EXCESSIVE AND EXPLOITATIVE.

As interest rates fell from their highs in the early 1980s, banks began supplementing their lost revenue from interest by increasing revenue through other means, namely fees and services.[4] The list of these charges has grown long and now includes fees related to overdraft and non-sufficient funds; remittances; account maintenance; minimum balance; ATM withdrawal; online bill pay; mobile deposit; external bank transfer; savings withdrawal; card replacement; inactivity; paper statements; early closure; and overdraft protection to name only a few. While the Credit Card Accountability Responsibility and Disclosure (Credit CARD) Act of 2009 made strides in enhancing disclosures to consumers for open-end credit lending, the trend in the banking industry of relying upon fees and services for a greater share of revenue has continued to grow unimpeded by the Credit CARD Act or any other statutes or regulations. According to Federal Deposit Insurance Corporation (FDIC) bank revenue data analyzed by the Pew Charitable Trusts, bank revenue from fees and services, including overdraft and non-sufficient funds, has more than doubled from 1984 to 2015, while revenue from interest has declined over that same period.[5]

These fees may appear individually modest and perhaps even appropriate, ranging from a $3 ATM withdrawal charge to a $15 monthly checking account maintenance fee, but collectively they are exacting a huge price from consumers, especially those consumers with low incomes.[6] Moreover, these fees are often hidden or effectively hidden in plain sight from customers through inadequate disclosure. For example, the disclosure of many fees are buried in hundreds or thousands of lines of account agreement legalese that most consumers do not read through. The disclosure of all fees would benefit from the type of requirements outlined by the CFPB for credit cards.[7] However, as history has proved, disclosure itself is not always enough to adequately protect American financial consumers.

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4 The Pew Charitable Trusts, *Consumers Need Protection From Excessive Overdraft Costs* 3 (2016), https://www.pewtrusts.org/-/media/assets/2016/12/consumers_need_protection_from_excessive_overdraft_costs.pdf.

5 *Id.*; *See also* The Office of Sen. Cory Booker, *An Analysis of Bank Overdraft Fees Final* (Aug. 2018), https://www.scribd.com/document/385303657/An-Analysis-of-Bank-Overdraft-Fees-Final ("A number of concerning practices persist, including a disproportionately high fee per overdraft; multiple fees per day; financial rewards for employees based on overdraft revenue and/or overdraft opt-in rates; and non-sequential ordering of transactions").

6 *See* Éva Nagypál, CFPB, Data Point: Overdraft/NSF Fee Reliance Since 2015 – Evidence from Bank Call Reports, 3 (2021) (The CFPB estimates overall market revenue from overdraft and non-sufficient funds fees was $15.47 billion in 2019); *see* CFPB, The Consumer Credit Card Market 52–54 (2021) (In 2020, consumers were assessed $20.8 billion in credit card fees, including $12 billion in late fees); *see* David Low et al., CFPB, Data Point: Frequent Overdrafters,5 (2017) (The CFPB found that nine percent of all accounts accounted for 79 percent of all overdraft and non-sufficient funds fees).

7 *See* Truth in Lending (regulation Z),12 C.F.R. §1026 (2022).

As shown below, many bank and non-bank financial institutions have been using these hidden or hidden in plain sight fees in a manner that is both excessive and exploitative in an effort to boost their bottom line at the expense of consumers.

A. Many hidden fees are excessive compared to costs of the underlying financial product.

Many fees charged by bank and non-bank financial institutions originated as a means of recovering the costs of providing varying products and services. Those costs to the institution included such items as human capital required to implement and service products, technology that automates products and services, the losses associated with closing an account with negative balances, fraudulent charges, and others. Due to technology lowering transaction costs and the U.S. moving to faster payment systems, in addition to increasing automation, the costs to bank and non-bank financial institutions offering these products and services continues to decline. While technology is lowering costs to bank and non-bank financial institutions, these lower costs are not always being passed on to consumers. Increasingly, these hidden fees have evolved into dedicated revenue streams that boost profitability without regard to the underlying costs incurred by the institution. According to the CFPB's own research, bank assessed fees on overdraft and non-sufficient funds were an estimated $15.47 billion in 2019, a number which does not include fees from non-bank financial institutions.[8] Compared to the actual costs of providing overdraft services, namely charging off principal balances which represents roughly 14.4% of net overdraft fees, bank and non-bank financial institutions are reaping a windfall in excessive fees on their overdraft programs.[9]

Revenue derived from fees and services has proven to be so lucrative that some banks have perfected the art to the extent they now generate a majority of their revenue from the practice. For example, recent research found that six banks, five of which have $1 billion in assets or more, generated more than fifty percent of their revenues from overdraft fees alone, including three banks that "had overdraft revenues greater than total net income (meaning they lost money on every other aspect of their business)."[10] It is difficult to imagine how a bank that relies so heavily on a single revenue stream, especially one that is dependent on squeezing excessive fees from their own customers' accounts, could possibly have a safe and sound banking model. In fact, such practices are more akin to the practices of the payday loan industry, where fee generation is the business model in and of itself. For example:

> "Overdraft is essentially a very high-interest loan: If paid within two weeks, a $27 overdraft fee for a $20 overdraft incident is equivalent to a bank loan with an APR of 3,520%. Banks offer cheaper ways to complete these transactions, for example, by opening an overdraft line of credit (usually an APR of around 18%) or linking a checking account to a savings or credit card account (costing a $5 flat fee). Given the availability of cheaper alternatives, banks' ability to generate overdraft revenue,

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8 Nagypál, *supra* note 6.

9 CFPB, CFPB Study of Overdraft Programs 17 (2013).

10 Aaron Klein, *A few small banks have become overdraft giants*, Brookings Inst. (Mar. 1, 2021), https://www.brookings.edu/opinions/a-few-small-banks-have-become-overdraft-giants/.

especially from repeat overdrafters, is puzzling. One possible explanation for overdraft incidence is consumer inattention--nearly all consumers who overdraft are unaware that they are about to overdraw their accounts and unfamiliar with the magnitude of overdraft penalties. The lack of salience of these fees to the consumers who bear them enables banks to generate large overdraft profits."[11]

This reliance on overdraft fees as a primary driver of revenue motivates banks to adopt policies and practices that incentivize their customers to habitually overdraft. Fewer than 10 percent of all checking account customers accrue 84% of the checking account fees due to habitual overdrafting.[12] This has a much more pronounced effect on low-income individuals who are more likely to have less in their accounts and twice as likely to frequently overdraft their bank accounts.[13] Meanwhile, in some cases, banks are using the increased fees on their low-income customers to offer lower-cost products to their more wealthy clients.[14] The bank and non-bank financial institutions that rely heavily on fees as a primary source of revenue are further and further removed from assessing reasonable fees on products they offer, as they prey on their own customers' financial instability through excessive fees.

Increasing public awareness and pressure from lawmakers surrounding these fee-gouging practices have prompted some banks to lower or eliminate certain fees, especially overdraft and non-sufficient funds fees, or offer alternative accounts with no overdraft charges and limited fees.[15] In fact, the industry's own trade association recently encouraged every bank across the country to offer checking accounts that meet the Cities for Financial Empowerment Fund's Bank On National Account Standards.[16] These Bank On accounts are low cost checking accounts, with no overdraft fees. They offer Community Reinvestment Act credit to banks that offer them, and they "perform in a manner consistent with that of a bank's existing customer base and at similar costs."[17]

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[11] Natasha Sarin, *Making Consumer Finance Work*, 119 COLUM. L. REV. 1519, 1553–54 (2019).

[12] *Id.* at 1553.

[13] *Id*. at 1559.

[14] *See also id*. at 1559-60 ("The existence of inequitable cross-subsidization calls for regulatory intervention. These cross-subsidies arise for two distinct reasons: (1) High-income consumers are less likely to bear hidden penalty fees--because they tend to be more attentive and because they are wealthier, so they are less likely to overdraw their accounts or be delinquent on a credit card payment; and (2) high-income consumers have access to the most attractive financial products. For example, they transact with payment instruments that provide rewards for retail purchases. Cash users receive no similar benefits, and the result is a regressive transfer from low-income, creditless consumers to their wealthier counterparts").

[15] *See* Press Release, Bank of Am., *Bank of America Announces Sweeping Changes to Overdraft Services in 2022, Including Eliminating Non-Sufficient Funds Fees and Reducing Overdraft Fees* (Jan. 11, 2022), https://newsroom.bankofamerica.com/content/newsroom/press-releases/2022/01/bank-of-america-announces-sweeping-changes-to-overdraft-services.html; *see* Press Release; Capital One Bank, *Capital One Eliminated Overdraft Fees for Customers* (Dec. 1, 2021), https://www.capitalone.com/about/newsroom/eliminating-overdraft-fees/.

[16] Press Release, Am. Bankers Ass'n, ABA Urges America's Banks to Offer Bank On-Certified Accounts (Oct. 19, 2020), https://www.aba.com/about-us/press-room/press-releases/aba-urges-americas-banks-to-offer-bank-on-certified-accounts.

[17] *Id.* (citing Fed. Rsrv. Bank of St. Louis, *The Bank On National Data Hub: Findings from the First Year* (2019), https://www.stlouisfed.org/-/media/project/frbstl/stlouisfed/files/pdfs/community-development/bank-on/2019_bankon_report_final.pdf?la=en&hash=DC19FC5164ADCE880258E20B824A1488).

However, while the number of banks offering these Bank On accounts increased in 2021, including eight of the ten largest banks, it remains a very small percentage of all financial institutions: Of the thousands of banks and credit unions throughout the country, only 174 offer Bank On certified accounts.[18] And this does not account for the many other types of fees, apart from checking account fees, that show no signs of abating. As the industry's own trade association has acknowledged above, these low-cost, no overdraft fee accounts operate at cost levels similar to those associated with traditional checking accounts.

Of course, many customers want the option to have overdraft privileges on their accounts, or essentially short-term lines of credit, but questions remain about whether the charges associated with overdrafts are commensurate with the costs to the bank and non-bank financial institutions of providing the short-term credit. In some instances, large banks are eliminating or limiting overdraft and non-sufficient funds fees while maintaining their overdraft protection program at no or low cost.[19] Guided by previous research and reports issued on this topic by the CFPB, the Acting Comptroller of the Office of the Comptroller of the Currency (OCC) has laid out several best practices for bank overdraft programs identified by OCC staff, including grace periods before an overdraft charge is imposed, overdraft alerts, and limits on multiple charges in a single day.[20] These efforts by some but not all financial institutions and regulators highlight that effective overdraft programs can be implemented in a manner that does not result in excessive and exploitative fees. This is further evidence that many hidden fees imposed on consumers by bank and non-bank financial institutions, at least as they relate to fees associated with operating checking accounts, are unnecessary and excessive when compared to the costs to the financial institution of offering these accounts.

B. Many fees are exploitative due to the captive nature of banking relationships.

Excessive fees charged by bank and non-bank financial institutions become exploitative when customers have little or no recourse based on the captive nature of their relationship with the bank, especially when mandatory arbitration clauses are tucked into these customer agreements. According to a survey of more than 2,600 adults, the average American consumer will maintain a primary checking account with the same bank or credit union for more than 14 years.[21] While it may be true that many consumers are satisfied with their bank or non-bank financial institution, it is also true that it is exceedingly time consuming and notoriously difficult to close a checking

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[18] FDIC, 2021 Annual Report 68–69 (2021).

[19] *See* Press Release, Ally Bank, Ally Bank Eliminates all overdraft fees, ending centuries-old industry practice and lifting consumer burden (June 2, 2021), https://media.ally.com/2021-06-02-Ally-Bank-eliminates-all-overdraft-fees,-ending-centuries-old-industry-practice-and-lifting-consumer-burden; *see* Press Release, PNC Bank, PNC Launches Low Cash Mode (SM) To Address $17 Billion In Industry Overdraft Fees (Apr. 13, 2021), https://pnc.mediaroom.com/2021-04-13-PNC-Launches-Low-Cash-Mode-SM-To-Address-17-Billion-In-Industry-Overdraft-Fees.

[20] Michael Hsu, Acting Comptroller, Off. of the Comptroller of the Currency, Remarks before the Consumer Fed'n of America's 34th Ann. Fin. Servs. Conf.: Reforming Overdraft Programs to Empower and Promote Financial Health (Dec. 8, 2021).

[21] Mary Wisniewski, *Survey: While checking fees vary wildly by race and age, Americans stay loyal to their banks*, Bankrate (Jan. 15, 2020), https://www.bankrate.com/banking/best-banks-consumer-survey-2020/#:~:text=Yet%2C%20most%20Americans%20stay%20committed,current%20bank%20or%20credit%20union.

account and transfer it to another bank or credit union. From the beginning of the relationship, a consumer begins to integrate their primary checking account into nearly every aspect of their life – direct deposit for earned wages, debit cards, checks, automatic payment for bills, safe deposit boxes, convenient ATM access, and much more. In addition, bank and non-bank financial institutions institute fees and rely on other hurdles to discourage a consumer from closing an account, including wait times for processing checks, fees for transferring funds to an external account, fees for closing accounts, and the negative implications of a closed account on a credit report. These are just some of the hurdles that further entrench captive relationships between customers and their bank and non-bank financial institutions, enabling these institutions to exploit their customers through excessive fees without fear of losing their business.

The ability of banks and nonbanks to exploit their customers without fear of accountability is facilitated through the inclusion of mandatory arbitration clauses in customer agreements. As the CFPB well knows, tens of millions of consumers are obligated to pursue arbitration to resolve complaints or claims against their bank or non-bank financial institution, thanks to mandatory pre-dispute arbitration clauses found in consumer financial products or services contracts.[22] Mandatory arbitration clauses are common in credit card, checking account, payday lending, prepaid card, and private student loan agreements. Many not only mandate arbitration but also preclude class arbitration. As is the case with many hidden fees, when a dispute between a consumer and financial institution arises, the cost and hassle of bringing an individual case to arbitration is often outweighed by the fee or fees at issue. Where the average individual claim is relatively modest in amount, the inclusion of mandatory arbitration clauses in consumer financial services agreements does not effectively deter excessive and exploitative fees and leaves consumers with little means of effective recovery.

Pre-dispute arbitration agreements in consumer finance agreements are particularly harmful to consumers seeking redress over hidden fees. Hidden fees are by their nature meant to be small enough to go unnoticed by consumers – to be hidden. However, bank and non-bank financial institutions reap huge windfalls from these hidden fees when they are assessed across thousands and millions of consumer accounts. The inclusion of pre-dispute arbitration agreements in consumer finance contracts and the costs and hurdles associated with bringing such claims make it highly unlikely that consumers would seek to bring their bank or non-bank financial institution to arbitration over any hidden fee or fees. Without the class-action remedy available to consumers, there are few deterrents for bank and non-bank financial institutions from imposing excessive and exploitative fees on their customers. Indeed, as the CFPB's own study shows, the ability of a large number of claimants to form a class is the most effective means of facilitating recovery and deterring misconduct through private actions.[23]

Fees charged by bank and non-bank financial institutions can also become exploitative when they have a disparate impact on a particular class, typically minority groups who can least

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[22] CFPB, *Arbitration Study* 9 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[23] Press Release, CFPB, CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers (Mar. 10, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/.

afford the costs. It is well established that Black and Hispanic households have far different experiences than White households when accessing financial services and banking. The same can be said when it comes to hidden fees:

- On average per month, Black and Hispanic checking account holders reported paying $12.30 and $15.85 in fees, respectively, while White checking account holders paid only $5.29.[24]
- In a press release for a large bank announcing the elimination of all overdraft fees, the CEO cited a report that found consumers paid $12.4 billion in overdraft fees in 2020, disproportionately affecting Blacks and Hispanics.[25]
- The percentage of Black and Hispanic households that reported paying account maintenance fees on checking accounts were 28% and 22%, respectively, while the percentage of White households that reported paying these fees was 13%.[26]
- Hispanic households represent nearly half of all remittance fee spending in the U.S.[27]

There can be little doubt that some of these fees are being paid by a disproportionate percentage of Black and Hispanic households.

II. WELL-DESIGNED DISCLOSURES OFFER IMPORTANT BUT INSUFFICIENT PROTECTIONS AGAINST HIDDEN FEES.

Requiring financial institutions to disclose information serves as an important "policy tool designed to increase transparency and provide consumers with valuable information to make informed decisions."[28] However, establishing requirements to disclose hidden fees to consumers is effective only if the disclosures are properly designed, worded, formatted, and located within client documents; delivered in timely fashion; and not disparaged or discounted by agents' remarks to their clients. In an era when "[c]onsumer financial contracts have become increasingly complicated over time—the average credit card contract used to be one page long but now averages

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24 Wisniewski, *supra* note 21.

25 Press Release, Ally Bank, *supra* n. 19 (citing Meghan Greene et al, Fin. Health Network, *The FinHealth Spend Report* 21-22 (2021), https://cfsi-innovation-files-2018.s3.amazonaws.com/wp-content/uploads/2021/04/19180204/FinHealth_Spend_Report_2021.pdf).

26 Meghan Greene et al., Fin. Health Network, The FinHealth Spend Report 24 (2021), https://cfsi-innovation-files-2018.s3.amazonaws.com/wp-content/uploads/2021/04/19180204/FinHealth_Spend_Report_2021.pdf.

27 *Id.*

28 Angela Hung et al., *Effective Disclosures in Financial Decisionmaking* (2015), https://www.rand.org/pubs/research_reports/RR1270.html.

more than thirty pages"[29] and depository account disclosures can be even longer,[30] the form of disclosure becomes even more important.[31]

Moreover, disclosure cannot substitute for establishing standards of conduct limiting or banning altogether unfair, deceptive, and abusive acts or practices. Even the best designed disclosure regime addressing hidden or back-end fees may not effectively accomplish its goal of providing consumers a sufficient understanding of fee structures to make informed financial decisions.[32] There is a growing body of scholarship recognizing that disclosure alone is not an effective tool to address the exploitative and excessive nature of hidden fees.[33] This is because, "in practice, consumers may have limited attention or limited understanding of the disclosure," and furthermore, "they may not have the ability to appropriately take the disclosed information into account as they make financial decisions."[34] Thus, the problem is not one of "insufficient information per se," but "of insufficient ability to process accurately the information one possesses insofar as that information bears on one's own risks."[35] And, in relation to overdraft fees, "[d]isclosures—even very clear ones—may prime consumers to the costs of overdrafting, but it is unrealistic to expect most people to retain this information or accurately estimate their likelihood of ever bearing these fees."[36]

For example, the Federal Reserve amended Regulation DD (implementing the TISA) in 2005 "to require additional disclosures about overdraft services and rein in misleading

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29 Sarin, *supra* n. 11 at 1527.

30 The Pew Health Grp., *Hidden Risks: The Case for Safe and Transparent Checking Accounts* 1 (2011), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2011/safecheckingpewreporthiddenriskspdf.pdf.

31 George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 Am. Econ. Rev. 423, 427 (2011) ("[W[hether (and to what extent) information actually improves economic outcomes depends critically on what information is delivered, how it is delivered, and how it is utilized by receivers.").

32 Hung, *supra* n. 28, at 24 ("[R]esearch indicates that disclosure alone, even simplified disclosure, may not be effective at improving financial decisionmaking. Given that many consumers have low levels of financial capability, disclosure is likely to be most effective when used in conjunction with other policy tools.").

33 Robert Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059 (2011) (concluding that disclosures do not give sufficient information to investors and may even cause brokers to give more biased advice); Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011) (finding that disclosure as a regulatory tool has a history of being ineffective); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1638 (2014) ("Mandating new forms of disclosure is unlikely to significantly improve outcomes when (1) the underlying contractual complexity would remain and (2) firms have strong incentives to undermine choice in response to the required disclosures."); Sarin, *supra* n. 11, at 1564-65 ("[M]any are skeptical of the usefulness of disclosures, noting that financial institutions generate rents by exploiting consumers' tendency to underestimate the likelihood they will make a late payment or overdraft. . . . This is why recent changes to overdraft disclosure forms proposed by the CFPB are unlikely to be effective.").

34 Hung, *supra* n. 28, at 1.

35 Christine Jolls et. al., A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471, 1541–42 (1998) ("[O]veroptimism leads most people to believe that their own risk of a negative outcome is far lower than the average person's. Similarly, the effect of salience may lead to substantial underestimation of certain risks encountered in everyday life (for example, the risks from poor diet), since these harms may not be very salient. When overoptimism is combined with salience, people may underestimate risks substantially.").

36 Sarin, *supra* n. 11, at 1565.

advertisements."[37] While regulators "hoped disclosures would nudge customers away from overdraft[s] and push them toward cheaper alternatives," instead overdraft fee income for banks and credit unions rose 35% in the two years following promulgation of the regulations.[38]

This is just one example of how increased disclosure requirements did not ultimately net the result of curtailing hidden fee practices. The same problems and logic that apply to overdraft fees, which has been one of the more prominently studied hidden fees, can be applied to the myriad other back-end fees that financial institutions may charge, including those listed in the CFPB's request for information: late fees, non-sufficient funds (NSF) fees, convenience fees for processing payments, minimum balance fees, return item fees, stop payment fees, check image fees, fees for paper statements, fees to replace a card, fees for out-of-network ATMs, foreign transaction fees, ACH transfer fees, wire transfer fees, account closure fees, inactivity fees, fees to investigate fraudulent activity, and ancillary fees in the mortgage closing process.

Further, requiring disclosure of back-end fees does not address the fact that institutions have incentives to offer lower up-front fees to remain competitive, such as annual percentage rates, while shrouding the back-end fees that may result in consumers ultimately paying more for a product.[39] In an analogous context, a market study was conducted on vendors that employ "drip-pricing strategies," where a lower base price is initially listed for a product and additional mandatory fees associated with a purchase are not displayed until a later stage in the purchasing process.[40] In the study, StubHub participated in a large scale pricing experiment, where it provided 50% of its customer base full up-front pricing and provided the other 50% of customers with tacked on mandatory fees later on in the purchasing process.[41] The results showed that disclosing fees upfront "reduces both the quantity and quality of purchases."[42] The study of StubHub resulted in the group where fees are obfuscated spending "almost 21% more than those assigned to the Upfront Fee group."[43] Ultimately, Stubhub reverted back to its back-end fee pricing scheme in order to remain competitive in the market.[44] At a minimum, this study shows the complexities involved in consumers' understanding of fees; it also demonstrates that leaving when and how fees are assessed to the discretion of individual firms is unlikely to benefit consumers.

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[37] *Id*. at 1554.

[38] *Id*. (citing Truth in Savings, 70 Fed. Reg. 29,582, 29,583 (May 24, 2005) (codified at 12 C.F.R. § 230.11)).

[39] Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 506 (2006). ("banks prominently advertise the virtues of their accounts, but the marketing materials do not highlight the costs of an account which include ATM usage fees, bounced check fees, minimum balance fees, etc. Banks could compete on these costs, but they instead choose to shroud them."); Sarin, *supra* n. 11, at 1527 ("Firms have no incentive to compete to offer low nonsalient prices because most consumers ignore them. In fact, firms purposely charge *high* nonsalient prices, so they can offer *low* salient prices and attract the most customers.").

[40] Steve Tadelis et al., Price Salience and Product Choice, at 1 (2020), https://bit.ly/37YFAEl (listing studies of drip-pricing demonstrating "that consumers are more likely to purchase goods when fees are obfuscated.").

[41] *Id*. at 2.

[42] *Id*.

[43] *Id*. at 10.

[44] Rafi Mohammed, *It's Time to Ban Hidden Fees,* Harv. Bus. Rev. (Feb. 26, 2019), https://hbr.org/2019/02/its-time-to-ban-hidden-fees.

In addition, precedent exists for curtailing abusive hidden fee practices by banking and nonbanking financial institutions, not merely requiring disclosure regarding such fees and practices. Prior to establishment of the CFPB, acting under its authority under the Electronic Fund Transfer Act,[45] the Board of Governors of the Federal Reserve issued a regulation in 2009 updating Regulation E to address some aspects of one particularly problematic hidden fee – fees imposed by banks when consumers overdraft their bank account. At the time the rule was promulgated, many institutions had a practice of "automatically enroll[ing]" consumers that met certain criteria in overdraft services and imposing a flat fee when the institution paid a transaction that resulted in an overdraft.[46] After recognizing that consumer testing indicated that "many participants would prefer to have ATM withdrawals and debit card transactions declined if they had insufficient funds, rather than incur an overdraft fee," and that many consumers "are unaware that they can incur overdrafts at the ATM or at POS [point of sale for debit card transactions],"[47] the Federal Reserve issued regulations in an effort to curtail institutions' automatic overdraft protection enrollment practices. The 2009 Rule requires institutions to provide consumers with the right to "opt in, or affirmatively consent, to the institution's overdraft service for ATM and one-time debit card transactions," and it also prohibits banks from conditioning payment of overdrafts on other types of transactions (such as checks) on consumers opting into overdraft protection for ATM and one-time debit transactions.[48] Notably, the opt-in requirement does not apply to overdraft fees assessed for other types of transactions, including check transactions and recurring debits.[49] The regulations also impose disclosure requirements, requiring institutions to describe the service offered and the consumer's opt-in rights.[50]

In sum, while disclosure requirements are important to provide transparency to consumers, disclosures alone are insufficient to protect consumers from hidden fees. Instead, the CFPB should also take steps to directly regulate hidden fees to prevent financial institutions from distorting the cost of the financial products and services they offer and from engaging in unfair and abusive practices.[51]

III. <u>THE CFPB HAS BROAD LEGAL AUTHORITY TO REGULATE HIDDEN FEES.</u>

The CFPB possesses broad regulatory authority covering a wide range of consumer financial products and services provided by bank and non-bank financial institutions. The agency can require disclosure of, and in appropriate instances ban, hidden fees imposed by consumer financial institutions, particularly fees that it identifies as unfair, deceptive, abusive, or

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[45] Regulatory authority that the CFPB now possesses. *See* 12 U.S.C. § 5481 (12)(C).
[46] Electronic Fund Transfers, 74 Fed. Reg. 59033, 59033 (Nov. 17, 2009).
[47] *Id.* at 59,034-35.
[48] *Id.* at 59,036.
[49] *Id*. at 59,040; *see also* 12 C.F.R. § 1005.17(b).
[50] 12 C.F.R. § 1005.17(d).
[51] Sarin, *supra* n. 11, at 1524–25 (making the case for why regulators should target hidden fees and recognizing that this "is a market failure that well-designed regulation can solve," and should also address the regressive nature of financial produces where "low-income consumers tend to pay higher prices than their higher-income counterparts"); Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 Notre Dame L. Rev. 211, 217 (2019) ("Consumer laws that address overcharge can make markets more competitive, and thus remove or prevent distortions.").

discriminatory. Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, establishing the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[52] The Act defines "financial products and services" to include deposit-taking activities, mortgages, credit cards, and other types of credit extensions, loan servicing, "check cashing, check collection, or check guaranty services," collection of consumer reporting data, and consumer debt services.[53]

In granting the CFPB regulatory authority over institutions engaging in these services, Congress enumerated certain objectives, including exercising authority under nineteen federal consumer financial laws to ensure that "consumers are provided with timely and understandable information to make responsible decisions about financial transactions;" that "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;" and that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[54] These federal financial consumer laws through which the CFPB regulates include the Electronic Fund Transfer Act ("EFTA"),[55] the Truth in Lending Act ("TILA"),[56] and the Truth in Savings Act ("TISA"),[57] among others.

The CFPB has broad regulatory authority to issue regulations and release guidance aimed at accomplishing these objectives.[58] Additionally, the Dodd-Frank Act provides the CFPB with the authority to issue regulations that ensure that the features of a financial product or service "are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service."[59]

In addition to authorizing the CFPB to address transparency and disclosure of information to consumers in connection with the financial products and services they utilize, the Dodd-Frank Act also vests the CFPB with authority to address unfair, deceptive, and abusive acts or practices (known as UDAAP). The CFPB is authorized to "prescribe rules applicable to a covered person or service provider identifying as unlawful, unfair, deceptive, or abusive acts or practices in

52 12 U.S.C. § 5491 (a).
53 *Id.* § 5481(15)(A)(vi).
54 *Id.* § 5511 (b)(1), (2), (5).
55 15 U.S.C. § 1693 et seq.
56 15 U.S.C. § 1601 et seq.
57 12 U.S.C. § 4301 et seq.
58 12 U.S.C. § 5512. While certain aspects of the CFPB's regulatory authority, in particular its ability to exercise supervisory and examination authority over an institution, may vary depending on an institution's size and bank charter status, *see* 12 U.S.C. §§ 5514-16, the agency's authority to issue regulations with the force and effect of law apply broadly to those offering consumer financial products and services, notwithstanding the limitations the Dodd-Frank Act may impose on other aspects of the CFPB's regulatory authority. The CFPB implements the following regulations: Regulation E, 12 C.F.R. Part 1005, pursuant to the EFTA, which applies to financial institutions, including banks, savings associations, credit unions holding consumer accounts, and addressing such issues as disclosures of fees and limits relating to electronic fund transfers; Regulation Z, 12 C.F.R. § 1026, pursuant to the TILA, governing open-ended credit and certain loans including mortgages-related loans and addressing statements, disclosures, and annual percentage rates; and Regulation DD, 12 C.F.R. § 1030, pursuant to the TISA, governing depository accounts, including savings, checking, and money market accounts, and addressing such matters as disclosures, misleading advertising, annual percentage yield, and fees.
59 12 U.S.C. §5532.

connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."[60] The Dodd-Frank Act defines a covered person as "any person that engages in offering or providing a consumer financial product or service" and affiliates thereof.[61]

The Act also defines the circumstances in which the CFPB may find practices unfair or abusive and therefore declare them unlawful. It may deem a practice unfair if the agency reasonably believes the practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers" and that injury is "not outweighed by countervailing benefits to consumers or to competition."[62] Pursuant to the Act, the CFPB may also declare a practice abusive if it "materially interferes" with a consumer's ability to understand a term or condition of a consumer financial product or service.[63] It may also deem the practice abusive if it "takes unreasonable advantage" of (1) a consumer's lack of understanding of the risks or costs associated with a product or service, (2) a consumers' inability to protect their interests when selecting or using a product or service, or (3) a consumer's reasonable reliance on an institution to act in the consumer's interest.[64] The CFPB further defines a deceptive practice as one that "misleads or is likely to mislead the consumer," the consumer's interpretation of the practice is reasonable, and the practice is material.[65]

IV. RECOMMENDATIONS.

A. Disclosure requirements should be carefully crafted and prescriptive in nature.

The CPFB should take steps to ensure that bank and non-bank financial institutions are providing consumers clear and concise disclosures of fees associated with products and services provided. While the current regulations governing disclosure require regulated institutions to disclose fees associated with many products and services, the form the disclosure may take is largely left to the choice of the institution. In a 2011 study of more than 250 types of checking accounts provided by the 10 largest banks in the United States, the Pew Charitable Trusts found that the "median length of bank disclosures for key checking account policies and fee information was 111 pages."[66] Those same researchers also found that different institutions used different nomenclature for the same fee or service, disclosed information in different locations in documents or different documents altogether, and did not "summarize or collect key information anywhere."[67]

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60 *See also* 12 U.S.C. § 5531.

61 12 U.S.C. § 5481(6); *see also id.* § 5517 (generally excluding "merchant, retailer, or seller of any nonfinancial good or service" from the CFPB's regulatory authority, subject to exceptions); § 5519 (excluding auto dealers).

62 12 U.S.C. § 5531(c).

63 *Id*. § 5531(d)(1).

64 *Id*. § 5531 (d)(2).

65 CFPB Supervision and Examination Manual, https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf; *see also CFPB v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016).

66 *See* Pew Health Grp., *supra* n. 30, at 1.

67 *Id*.

These types of inconsistencies between institutions and piece-meal disclosures prevent consumers from fully understanding back-end fees associated with depository accounts and also prevent consumers from being able to price-compare between institutions.

By contrast, for credit card accounts, governed by Regulation Z, the CFPB sets forth requirements governing format that institutions must adopt for the disclosures of fees, interest rates, and transaction charges associated with credit cards. Credit card providers must at the time of application or solicitation include a tabular disclosure, known as the "Schumer box," that describes the fees and charges associated with the credit card in a format that must be similar to the model forms provided by the CFPB.[68]

We therefore make the following recommendations on how to improve disclosure of some of the hidden fees that are prevalent in the consumer finance market:

- Regulations implementing the TISA require that disclosures are "clearly and conspicuously, in writing, and in a form the consumer may keep,"[69] but do not otherwise elaborate on what form the disclosure must take. For checking and savings accounts and other depository accounts, the CFPB should require institutions to provide all fees associated with an account in a consolidated, easy-to-read format, and clearly explain when and under what circumstances fees may be assessed. This could take a form similar to the Schumer Box required for credit cards.

- For overdraft fees, the CFPB should require institutions to provide a comprehensive disclosure of overdraft penalties and fees (including how NFS fees and overdraft protection fees relate) as well as lower-cost alternatives to overdraft fees, such as opening an overdraft line of credit (with an established APR) or linking another savings/checking account. The current A-9 Model Consent Form for Overdraft Services briefly mentions alternatives but does not explain those options.

- Finally, the CFPB should require banks to notify consumers in real time when their depository account balances are low, including disclosure of all pending credits and debits; provide a breakdown of potential fees associated with low account balances (such as overdraft, draw-down, and low account balance fees); and provide alternative options and fees associated with such options available to consumers.

The approach reflected in these recommendations can and should be applied more broadly to the disclosure of other types of fees as well. Requiring institutions to take these steps will provide consumers a greater opportunity to understand the fees associated with financial products and services and the options available to them.

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68 12 C.F.R. § 1026.60.
69 *Id*. § 1030.3(a).

B. The CFPB should continue to utilize its UDAAP authority to regulate hidden fees, including its authority to address discriminatory acts or practices.

One of the core mandates of the CFPB is to enforce consumer financial protection laws and to ensure "consumer financial products and services are fair, transparent, and competitive."[70] As explained above, the principal tool the CFPB has in its arsenal to ensure fair, transparent, and competitive markets is its UDAAP authority. This UDAAP authority has enabled the CFPB to protect consumers through supervisory and enforcement actions as well as through rulemaking.

In 2020, the CFPB exercised its UDAAP authority to secure a consent order from TD Bank, N.A. (TD Bank) regarding the marketing and sale of one of its overdraft products.[71] In the consent order, the Bureau identified several unfair, deceptive, and abusive acts or practices in TD Bank's enrollment practices for its overdraft products and services, including:

- deceptively claiming its Debit Card Advance (DCA) product was a "free" product;
- deceptively explaining services to consumers during enrollment that were not covered by the DCA product; and
- interfering with the consumer's ability to understand the product's overdraft terms and conditions by pre-checking the "enroll" box and obscuring or attempting to obscure the pre-checked "enroll" status.[72]

The CFPB's consent order with TD Bank identified numerous additional violations of law; included TD Bank's undertaking to correct these violations; and required TD Bank to pay an estimated $97 million in restitution to about 1.42 million consumers, in addition to a civil monetary penalty of $25 million.[73]

The TD Bank consent order provides a useful framework for the CFPB to continue utilizing its UDAAP authority in the case of hidden fees, the imposition of which will in many cases constitute an unfair, deceptive, and abusive act or practice.[74] It is critically important for the CFPB to utilize all of its tools, including its UDAAP authority, to protect consumers from excessive and exploitative hidden fees and ensure fair, transparent, and competitive markets.

In addition to utilizing its UDAAP authority as it did in the TD Bank case mentioned above, the CFPB should examine the use of hidden fees by bank and non-bank financial institutions that are discriminatory, intentionally or unintentionally, through their recently expanded definition of what constitutes "unfair" acts or practices. Historically, the CFPB would bring cases of

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70 12 U.S.C. § 5511(a).
71 TD Bank, N.A., CFPB No. 2020-BCFP-0007 (Aug. 20, 2020).
72 *Id*. at 19.
73 *Id.* a 12, 36 40 (Unfortunately, the consent order did not require TD Bank to admit to any wrongdoing or violations of law – a provision that the CFPB, and all regulators with enforcement authority, should insist upon in their settlements).
74 This approach is *especially important u*ntil such time when consumer financial services agreements no longer mandate arbitration.

discrimination under a number of enumerated fair lending laws, including the Equal Credit Opportunity Act. While enumerated fair lending laws have enabled government regulators to hold consumer finance companies accountable for discriminatory lending acts and practices in some instances, statutory limitations have constrained regulators' ability to look more broadly at cases of discrimination in consumer finance.[75] This, and the CFPB's reluctance to bring any enforcement actions for violations of fair lending laws in recent years, has left a hole in enforcement against discriminatory acts and practices in consumer finance.[76] However, the CFPB's recently announced changes to its supervisory operations and exam manual for evaluating unfair acts or practices, which now includes intentional and unintentional discrimination, gives the CFPB additional opportunities to regulate discriminatory consumer financial products and services.

The CFPB should utilize its expanded interpretation of "unfair" acts or practices to examine intentional and unintentional discriminatory acts or practices in bank and non-bank financial institutions imposition of hidden fees. Specifically, hidden fees associated with remittance transfers are ripe for further examination due to their impact on Hispanic and Asian consumers. Nearly $600 billion flowed to low- and middle-income countries via remittances in 2021.[77] Research has suggested that U.S. households paid $16.3 billion in fees for remittance services in 2019, more than half of which were hidden fees paid on inflated exchange rates.[78] This is, in part, why the CFPB issued its remittances transfer rule in 2020,[79] which brings more transparency to this often-opaque market. The rule requires remittance transfer providers to disclose the exchange rate, fees, and amount to be received by the recipient. While this rule enhances transparency in the remittance transfer market, it missed the opportunity to regulate excessive and exploitative fees imposed on customers that rely on these services, which has a more profound adverse impact on Hispanic and Asian households.

According to the FDIC, roughly 5.5% of U.S. households used international remittances in 2019, while 20.2% and 13.3% of Hispanic and Asian households in the U.S. utilized international remittances.[80] Further, research has found that Hispanic households comprise 46% of all remittance fee spending in the U.S..[81] Due to the concentrated usage of remittance transfer services

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[75] *See e.g.* Akyar v. TD Bank US Holding Co*.,* 2018 WL 4356734 at *5 (S.D.N.Y. Sept. 12, 2018) ("the text of the [Title II of the Civil Rights Act of 1964] does not explicitly include banks…and courts have expressly concluded that banks are not places of public accommodation"); Hatcher v. Servs. First Bank, 2016 WL 7336403 (N.D. Ala. Dec. 19, 2016); Lowe v. ViewPoint Bank, 972 F. Supp. 2d 947 (N.D. Tex. Sept. 18, 2013); Ajuluchuku v. Wachovia Corp., 2006 WL 406602 (W.D.N.C. Feb. 17, 2006).

[76] *See also* CFPB, *Fair Lending Report of the CFPB* (2018); *see also* CFPB, Fair Lending Report of the CFPB (2019); *see also* CFPB, Fair Lending Report of the CFPB (2020); *See also* CFPB, Fair Lending Report of the CFPB (2021) (The CFPB brought three fair enforcing cases between fiscal years 2017 to 2020).

[77] KNOMAD, *Recovery: COVID-19 Crisis Through a Migration Lens 34*, 2 (Nov. 2021), https://www.knomad.org/sites/default/files/2021-05/Migration%20and%20Development%20Brief%2034_1.pdf.

[78] Nicholas Lembo, *Stop The Exchange Rate Ripoff Report*, Wise (Sept. 23, 2020), https://wise.com/us/blog/stop-the-exchange-rate-ripoff-report.

[79] Remittance Transfers Under the Electronic Fund Transfer Act (Regulation E) 85 Fed. Reg. 34,870 (June 5, 2020) (codified at 12 C.F.R. pr. 1005).

[80] FDIC, *How America Banks: Household Use of Banking and Financial Services*, *2019 FDIC Survey 37*, tbl. 6.1 (2020).

[81] Fin. Health Network, *supra* n. 26.

among Hispanic and Asian households, any excessive or exploitative fees in this area of the market has an especially harmful effect on these populations. The CFPB's expanded interpretation of "unfair" acts or practices will be particularly helpful in areas of consumer finance such as remittance transfers, where excessive and exploitative fees have disparate impacts on particular classes of consumers. More broadly, the CFPB's expanded interpretation of "unfair" acts or practices, which now encompasses intentional and unintentional discriminatory acts and practices by bank and non-bank financial institutions, will ensure a more equal and equitable financial services industry that serves all consumers fairly.

C. The CFPB should ban or limit unfair, deceptive, and abusive acts or practices that result in excessive and exploitative fees.

a. Overdraft Fees

The CFPB should use its UDAAP authority to ensure bank and non-bank financial institutions are not reordering the processing of checks, debit card transactions, bill payments, and ATM withdrawals to maximize overdraft, overdraft protection, and non-sufficient funds fees on their customers' accounts. As mentioned above, the CFPB has the responsibility to prohibit unfair, deceptive, or abusive acts or practices in connection with any consumer financial product or service. According to the CFPB's own study, bank and non-bank financial institutions implement their own "processing policies, overdraft program features and pricing, and other practices that may affect the outcomes that consumers experience and that vary across banks."[82] These complex processing policies that vary among bank and non-bank financial institutions can trigger the overdraft or non-sufficient funds fees paid by consumers, which are often not disclosed or are disclosed in a way that is not meaningful to the consumer.[83] In the case of overdraft processing orders and policies within individual bank and non-bank financial institutions, disclosure alone will not be enough to protect consumers from unfair, deceptive, or abusive acts or practices that result in excessive and exploitative fees.

The CFPB should also consider using its UDAAP authority to impose limits and restrictions on various fees imposed by bank and non-bank financial institutions on consumers, including but not limited to, overdraft and non-sufficient funds fees. According to the CFPB's own study, only a small fraction of consumer accounts are responsible for an overwhelming majority of the overdraft fees charged by banks and non-bank financial institutions. In a 2017 Data Point published by the CFPB, which analyzes practices at large banks, the Office of Research found that 9% of consumer accounts paid 79% of all overdraft fees.[84] Much as the CFPB did in its 2017 payday lending rule,[85] the CFPB should consider implementing a cooling-off period and a limit on overdraft fees within a specified time-period to ensure bank and non-bank financial institutions are not profiting unfairly off of habitual overdrafters, many of whom are so financially stressed that they cannot avoid recurrent overdrafts.

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[82] *CFPB Study of Overdraft Programs*, *supra* n. 9, at 41.
[83] *Id.* at 63.
[84] *Data Point: Frequent Overdrafters*, *supra* n. 6, at 5.
[85] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017).

b. Credit Card Penalty Fees

The CFPB should consider using its authority under Regulation Z to ensure open-end credit card issuers are adjusting their penalty fees annually, if greater than the fees allowed by the safe harbor provision, to ensure they are reasonable and proportional. The Credit CARD Act of 2009 amended the Truth-in-Lending Act to require any penalty fee or charge on open-end consumer credit plans to be reasonable and proportional to the violation.[86] The Credit CARD Act includes a list of factors regulators must account for when determining reasonable and proportional penalty fees, including the cost incurred by the creditor, the deterrent effect on the cardholder, the conduct of the cardholder, and any other factor regulators should take into account.[87] Regulations issued by the CFPB implementing the Credit CARD Act require card issuers to reevaluate every twelve months the dollar amount of the fee compared to the costs incurred by the issuer for that type of violation, if it exceeds the penalty fees listed in the safe harbor provision.[88] To the extent credit card issuers are charging penalty fees in excess of the safe harbor, the CFPB should examine these issuers to ensure annual evaluations of penalty fees are being completed and that they are reasonable and proportional.

The CFPB should also consider lowering the penalty fees listed in the safe harbor provision of Regulation Z. The Credit CARD Act included a safe harbor provision which allowed, but did not require, regulators to implement a specified amount for penalty fees that would not have to comply with card issuers duty to conduct an annual reevaluation and would be presumed to be reasonable and proportional.[89] The CFPB included a safe harbor provision in the subsequent rulemaking for Regulation Z, which allowed for a $25 fee to be assessed for the first violation and $35 fee to be assessed on any subsequent violation, adjusted for inflation.[90] This safe harbor has failed to meaningfully lower penalty fees for consumers. While late fees are below their pre-CARD Act level of $33, they are only marginally lower than their average in 2020 of $31.[91] In fact, late fees have continued their growth trajectory upwards with credit card issuers assessing nearly $14 billion in late fees in 2019.[92] In order to lower credit card penalty fees paid by consumers, the CFPB should consider lowering the penalty fees listed in the safe harbor in Regulation Z.

CONCLUSION

We hope the Bureau finds these comments helpful.

Sincerely,

[86] Credit Card Accountability Responsibility and Disclosure Act (Credit CARD Act), Pub. L. No. 111-24, § 102, 123 Stat. 1734, 1740 (2009).
[87] *Id*.
[88] 12 C.F.R. § 1026.52(b)(1)(i).
[89] Credit CARD Act, § 102, 123 Stat. at 1740 (2009).
[90] Truth in Lending (Regulation Z), 76 Fed. Reg. 79,767, 79,821 (Dec. 22, 2011) (codified at 12 C.F.R. pt. 1026).
[91] *The Consumer Credit Card Market*, *supra* n. 6, at 55 (Pre-Credit CARD Act threshold would be $40 adjusted for inflation).
[92] *Id.* at 54.

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