

April 11, 2022

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

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

To Whom it May Concern:

The undersigned financial services trade associations (the Associations) welcome the opportunity to submit this comment in response to the Consumer Financial Protection Bureau’s (CFPB)’s Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services (RFI).¹

We support the CFPB’s mission “of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”² The market for consumer financial products and services is highly competitive.³ Strong consumer understanding of the cost of credit and other terms of financial products and services—including fees charged with consumers’ consent pursuant to contract and other governing law—is the best means to ensure consumer financial services markets remain “fair, transparent, and competitive.” Clear and conspicuous disclosure of the relevant terms helps foster robust competition in the marketplace, while allowing consumers to shop for and select the product or service that best suits their needs and avoid unnecessary fees.

The Associations have worked constructively with the CFPB (and with the agencies that previously had authority over the statutes transferred to the CFPB after its creation) on numerous rulemakings designed to advance transparency of fees and consumers’ understanding of such fees with respect to nearly every consumer credit product in the marketplace, including those specifically mentioned in the RFI. However, the RFI does not discuss, or even acknowledge, the significant work that both the CFPB and financial institutions have undertaken to advance consumer understanding of the cost of consumer financial products and services, which is an essential back drop to any initiative designed to enhance consumer choice and competition in the marketplace. The Associations stand ready to support evidence-based efforts of the CFPB to increase consumer understanding, consistent with the CFPB’s authority, and urge the CFPB to consider and weigh the views of all stakeholders in the consumer financial services marketplace.

¹ 97 Fed. Reg. 5801 (Feb. 2, 2022).

² 12 U.S.C. § 5511(a).

³ See, e.g., <https://www.housingwire.com/articles/mbas-mike-fratantoni-on-measuring-mortgage-competition/> (observing that the mortgage market has become even more competitive in the past decade); <https://www.cbcinstitute.org/21stcenturycouncil-at-72-73> (discussing “intense competition in the auto finance industry”).

I. The CFPB Must Consider the Existing Regulatory Regime and Significant Body of Existing Data Concerning Consumer Understanding of Consumer Financial Products and Services

In its most recent Strategic Plan, the CFPB pledges to be a “data-driven” agency, which seeks to “[e]nsure that CFPB policy development and other functions are informed by the latest market developments and trends.”⁴ The Associations appreciate that commitment and urge the CFPB to approach any policy interventions related to fees only after careful consideration of the existing regulatory framework and available relevant data, consistent with its obligations under the Administrative Procedure Act.

A. Fees in Consumer Financial Services Market Are Subject to Significant Disclosure Requirements, Intended to Promote Consumer Choice and Competition

The RFI provides an inaccurate picture of the consumer financial services market and consumer understanding of the cost of credit and other consumer financial services. It begins by discussing so-called “junk fees,” which the 2016 Obama administration report cited by the RFI describes as “mandatory or quasi-mandatory” fees that are not included in the advertised price.⁵ As the report suggests, such fees can “make prices unclear, hinder effective consumer decision making, and dull the competitive process.”⁶

However, the report makes scant reference to the consumer financial services market, likely because similar “junk fees” do not exist in the consumer financial services market. In 1968, Congress enacted the Truth in Lending Act (TILA), initiating the modern era of federal regulation of consumer financial products and services. TILA is premised on a finding that the “informed use of credit” is the best means for the federal government to ensure “competition among the various financial institutions and other firms engaged in the extension of credit.”⁷ Accordingly, TILA was enacted to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.”⁸ Consistent with this purpose, TILA required disclosure of finance charges and other fees charged by creditors “incident to the extension of credit,” and authorized the Federal Reserve Board and now the CFPB to promulgate further regulations to carry out TILA’s purpose of promoting the “informed use of credit.”⁹

Subsequent enactments extended the premise of TILA—that disclosure of costs and fees strengthens competition—to other financial products and services. For example, in 1974 Congress enacted the Real Estate Settlement Procedures Act (RESPA), which was intended “to insure that consumers throughout the nation are provided with greater and more timely

⁴ [CFPB Strategic Plan FY 2022 to FY 2026 \(consumerfinance.gov\)](https://www.consumerfinance.gov), at 8.

⁵ See *The Competition Initiative and Hidden Fees*, at 7 (Dec. 2016), available at https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf.

⁶ *Id.*

⁷ Pub. L. No. 90-321, § 102 (1968) (codified at 15 U.S.C. § 1601).

⁸ *Id.*

⁹ 15 U.S.C. §§ 1604, 1605.

information on the nature and costs of the [real estate] settlement process.”¹⁰ In 1991, Congress enacted the Truth in Savings Act (TISA) based on a finding that “competition between depository institutions would be improved” through the “clear and uniform” disclosure of interest rates and “fees that are accessible against deposit accounts,” so that consumers can shop effectively.¹¹ Finally, when Congress enacted the Consumer Financial Protection Act of 2010 (CFPA), one of its express purposes was to ensure that “consumers are provided with timely and understandable information to make responsible decisions about financial transactions.”¹² To advance that purpose, it created the CFPB, consolidated most of the authority to implement these and similar disclosure statutes in the CFPB, and granted the CFPB additional authority to require disclosures.¹³ As detailed below, the CFPB has exercised that authority, extensively.

The consumer financial services marketplace is, and historically has been, one of the most intensely regulated markets in the economy, including with respect to the disclosure of fees. That regulation reflects Congress’s determination that robust disclosures of the terms and conditions of consumer financial products, including fees, are the best means to protect consumers and encourage competition among financial institutions. To suggest that the consumer financial services market is rife with “mandatory or quasi-mandatory” fees that are not adequately disclosed to consumers is inaccurate.

B. The CFPB Itself Has Engaged in Extensive Research and Rulemaking to Assess and Advance Consumer Understanding of Fees, Which the RFI Fails to Consider

The RFI does not discuss the many regulations *promulgated by the CFPB* to advance consumer understanding of the costs, including fees, charged in connection with the provision of consumer financial products and services that are discussed by the RFI. To take just a few examples, the CFPB has engaged in extensive rulemaking to ensure consumer understanding of the fees and other costs associated with:

- mortgage origination;¹⁴
- mortgage servicing;¹⁵

¹⁰ Pub. L. No. 93-533, § 2 (1974) (codified at 12 U.S.C. § 2601(a)).

¹¹ Pub. L. No. 102-242, § 262 (1991) (codified at 12 U.S.C. § 4301).

¹² Pub. L. No. 111-203, § 1021 (2010) (codified at 12 U.S.C. § 5511(b)(1)).

¹³ *See generally*, 12 U.S.C. §§ 5491, 5532, 5581.

¹⁴ *See, e.g.*, Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79730 (Dec. 31, 2013), *as amended* by 80 Fed. Reg. 8767 (Feb. 19, 2015), 80 Fed. Reg. 43911 (July 24, 2015), 82 Fed. Reg. 37656 (Aug. 11, 2017), 83 Fed. Reg. 19159 (May 2, 2018).

¹⁵ *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696 (Feb. 14, 2013), *as amended* by 78 Fed. Reg. 44686 (July 24, 2013), 78 Fed. Reg. 60382 (Oct. 1, 2013), 78 Fed. Reg. 62993 (Oct. 23, 2013), 81 Fed. Reg. 72160 (Oct. 19, 2016), 82 Fed. Reg. 30947 (July 5, 2017), 82 Fed. Reg. 47953 (Oct. 16, 2017), 85 Fed. Reg. 39055 (June 30, 2020), 86 Fed. Reg. 34848 (June 30, 2021); Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902 (Feb. 14, 2013), *as amended* by 81 Fed. Reg. 72160 (Oct. 19, 2016), 82 Fed. Reg. 30947 (July 5, 2017), 83 Fed. Reg. 10553 (March 12, 2018).

- international remittances;¹⁶
- prepaid cards;¹⁷ and
- debt collection.¹⁸

The CFPB also repromulgated regulations developed by the Federal Reserve Board to ensure adequate disclosures of fees charged in both the credit card¹⁹ and deposit markets.²⁰ These regulations were developed via Administrative Procedure Act rulemaking procedures that took years, were often based on extensive consumer testing of the proposed disclosures, and were finalized only after the collection and consideration of feedback and information from all relevant stakeholders.²¹

Similarly, the RFI does not discuss the CFPB’s own assessments of many of these disclosure rules pursuant to Section 1022(d) of the CFPA.²² Congress directed the CFPB to conduct these assessments to determine, among other things, whether the rules advance the goal of a “fair, transparent, and competitive” consumer financial marketplace.²³ Notably, the Bureau’s Section 1022(d) assessments, which are required to “reflect available evidence and data that the Bureau reasonably may collect,”²⁴ do not identify a concern with consumers’ understanding of the fees associated with their use of the relevant financial products or services like those asserted by the RFI. In addition, the CFPB’s recently published biannual report on the credit card market, which is required to consider “the effectiveness of disclosure of terms, fees, and other expenses of credit card plans,”²⁵ fails to identify a concern with CFPB regulations that require disclosure of information concerning fees charged in connection with credit cards, including late fees.²⁶

¹⁶ See Remittance Transfers Under the Electronic Fund Transfer Act (Regulation E), 77 Fed. Reg. 6194 (Feb. 7, 2012), *as amended by* 77 Fed. Reg. 40459 (July 10, 2012), 77 Fed. Reg. 50244 (Aug. 20, 2012), 78 Fed. Reg. 6025 (Jan. 29, 2013), 78 Fed. Reg. 30662 (May 22, 2013), 78 Fed. Reg. 49365 (Aug. 14, 2013), 79 Fed. Reg. 55970 (Sept. 18, 2014), 85 Fed. Reg. 34870 (June 5, 2020).

¹⁷ See Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 83934 (Nov. 22, 2016), *as amended by* 82 Fed. Reg. 18975 (April 25, 2017), 83 Fed. Reg. 6364 (Feb. 13, 2018).

¹⁸ See Debt Collection Practices (Regulation F), 85 Fed. Reg. 76734 (Nov. 30, 2020), *as amended by* 86 Fed. Reg. 5766 (Jan. 19, 2021).

¹⁹ See 12 CFR §§ 1026.60(b); 1026.6(b); 1026.7(b).

²⁰ See 12 CFR §§ 1030.4(b)(4); 1030.6(a)(3); 1030.11.

²¹ See generally 78 Fed. Reg. at 79741-79750 (describing the “multifaceted information gathering campaign,” including prototype testing, that preceded finalization of the TILA-RESPA Integrated Disclosure Rule); 78 Fed. Reg. at 10909-10910 (discussing outreach and consumer testing that preceded the Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z)); 77 Fed. Reg. at 6200-6201 (describing the outreach and consumer testing that preceded the Remittances Rule).

²² See, e.g., [Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act \(Regulation X\) and the Truth in Lending Act \(Regulation Z\) Rule Assessment](#) (Oct. 2020); [Remittance Rule Assessment Report](#) (Oct. 2018, revised April 2019); [2013 RESPA Servicing Rule Assessment Report](#) (Jan. 2019).

²³ 12 U.S.C. §§ 5511(a), 5512(d)(1).

²⁴ 12 U.S.C. § 5512(d)(1).

²⁵ 15 U.S.C. § 1616.

²⁶ See [2021 Consumer Credit Card Market Report \(consumerfinance.gov\)](#), at 52-60 (discussing fees associated with credit card accounts); see also 12 C.F.R. §§ 1026.6(b)(2)(viii) (requiring disclosure of “[a]ny fee imposed for late payment in account-opening disclosures); 1026.7(b)(11) (requiring disclosure of “any late payment fee” in periodic statement); 1026.60(b)(9) (requiring disclosure of “[a]ny fee imposed for a late payment” in credit card solicitations); App. G-10(a) (model form for credit card applications and solicitations); App. G-17(A) (account-opening model form); App. G-18(D) (model form for credit card periodic statements).

In short, the RFI fails to consider the CFPB’s own extensive work to ensure adequate disclosure of fees and other costs of consumer financial services and products, the data and evidence in its possession regarding consumer understanding of the fees associated with consumer financial products and services, and its own assessments of the strength or adequacy of those disclosures. Any feedback received in response to the RFI must be considered within the context of the entire body of existing data and knowledge. The Bureau must acknowledge its previous assessments and reach a different conclusion only if it can demonstrate that the evidence supports a change of position.

II. Any Policy Interventions Must Be Grounded in the CFPB’s Authority

As the CFPB digests responses to the RFI and weighs any potential policy interventions, it must consider its role in the broader regulatory regime for consumer financial services. While Congress has delegated to the CFPB broad authority to require appropriate disclosure of fees charged in connection with consumer financial products and services, it has enacted or authorized the CFPB to promulgate relatively few substantive limitations on such fees and only in specific, well-defined circumstances. As a result, the substantive regulation of fees charged in connection with consumer financial products and services has generally been left to state or local governments or to other Federal agencies.²⁷ Today, states set a number of the fees referenced in the RFI, including late fees, convenience (surcharge) fees, NSF fees, and ancillary fees for mortgage closings. For example, in the case of late fees, states often set the fee amount,²⁸ in addition to how many days late the account must be to trigger a fee.²⁹ The minimum and maximum charges for late fees are also often set by state law. States consistently update their laws. Elected state legislatures across the country debate, vote, and set fees that they deem fair and appropriate. The existing regime reflects Congress’s judgment regarding the appropriate distribution of regulatory authority over the market, including its judgment as to whether to preempt these state laws. Any CFPB policy intervention must be consistent with that judgment.

Congress has delegated to the Bureau extensive authority to advance consumers’ understanding of the cost associated with consumer financial products and services, including fees charged in connection with their use of such products and services. For example, the CFPB provides the CFPB with broad authority to “prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the 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, in light of the

²⁷ See, e.g., [50-State Survey of Consumer Finance Laws | CSBS](#) (providing an interactive “50-state survey of consumer finance licensing laws for reference use by regulators, industry, consumer groups and other stakeholders”); 12 CFR § 7.4002 (authorizing national banks to charge non-interest fees in “accordance with safe and sound banking principles” and listing factors to consider when determining appropriate fees); 12 CFR § 701.35(c) (providing that Federal credit unions may, consistent with governing law and their contractual obligations, “determine the types of fees or charges and other matters affecting the opening, maintaining and closing of a share, share draft or share certificate account.”).

²⁸ For example: 5% of a delinquent installment under Ariz. Stat. Ann § 6-635(A0(1) versus 2% of a delinquent installment under KY. Rev. Stat. Ann. §§ 286.4-530(4), 286.4-533(5).

²⁹ For example: 10 days under Neb. Rev. State. Ann. § 45-1024(20(d) versus 7 days under KY. Rev. Stat. Ann. §§ 286.4-530(4), 286.4-533(5).

facts and circumstances.”³⁰ This general authority supplements more specific grants of authority transferred to the CFPB after its creation.³¹

In contrast, Congress has delegated to the CFPB limited authority to substantively regulate fees. For example, Congress expressly stated that no provision of the CFPA “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.”³² In this respect, Congress has not granted the CFPB authority, explicit or otherwise, to establish usury limits. Further, when Congress has determined that it is necessary to establish limits or standards for specific fees, it has done so expressly.³³ Congress’s express limitation on the Bureau’s authority to establish a usury limit, its decision to subject only certain fees to specific limitations, and its delegation to the CFPB of broad authority to require disclosure of fees is consistent with its longstanding policy of promoting competition in the consumer financial services marketplace through robust disclosure and consumer choice.³⁴

Nevertheless, the RFI states that certain fees may be “exploitative” or “not meaningfully avoidable,” suggesting that, despite the lack of express authorization to regulate fees except in very specific circumstances, the CFPB might seek to impose substantive limits on fees using its general authority to address unfair, deceptive, or abusive acts or practices (UDAAP). The CFPB should not attempt to exercise its UDAAP authority in this manner. Fees charged in connection with consumer financial services pursuant to valid contractual arrangements and in accordance with state or federal laws that specifically govern such fees, are not deceptive, unfair, or abusive. As a general matter, such fees are clearly and conspicuously disclosed pursuant to the CFPB’s own regulations, which are designed to ensure that consumers understand when and why they will be charged fees and thereby help them “avoid unnecessary or unwarranted fees.”³⁵ Indeed, the CFPB’s own consumer testing, its assessments, and reports show that consumers generally understand the fees associated with a product or service and the circumstances under which they might incur the fee. These disclosures therefore should ensure that consumers are not misled or “surprised” about the existence or nature of fees or unable to take steps to avoid such fees.³⁶ Any remaining concerns with “unexpected” or “surprise” fees, to the extent such concern can be substantiated, should be addressed through the adoption of appropriate disclosures pursuant to notice and comment rulemaking. Restricting financial institutions’ ability to charge reasonable fees may adversely impact consumers’ access to credit and related services, to the detriment of both consumers and competition. Where Congress has determined that a specific fee or type of

³⁰ 12 U.S.C. § 5532(a). Before exercising this authority, the CFPB must first “consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.” *Id.* at § 5532(c).

³¹ *See, e.g.*, 15 U.S.C. §§ 1604(a), 1632, 1693c(a); 12 U.S.C. §§ 2617(a), 4308.

³² 12 U.S.C. § 5517(o).

³³ *See, e.g.*, 12 U.S.C. §§ 2605(k)(1)(B) (restricting fees for qualified written requests to certain mortgage servicers), 2605(m) (requiring charges related to forced place insurance to be “bona fide and reasonable”); 15 U.S.C. §§ 1637(l) (limiting certain fees related to the method of payment with respect to certain credit card accounts); 1665d (directing the Bureau to establish standards for certain credit card penalty fees); 1693l-1(b) (establishing specific limitations on certain fees charged with respect to a gift certificate, store gift card, or general use prepaid card).

³⁴ *See* 15 U.S.C. § 1601(a).

³⁵ *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10709.

³⁶ *Cf.* 12 U.S.C. § 5531.

fee should be limited, it has expressly established such limitations and done so with particularity.³⁷ Accordingly, the CFPB should not attempt to rely on its general UDAAP authority to impose substantive limitations on fees, but should defer to Congress's judgment regarding when, if at all, particular fees should be subject to substantive regulation under the Federal consumer financial laws.

In summary, the CFPB is charged with ensuring that “consumers are provided with timely and understandable information to make responsible decisions about financial transactions.”³⁸ If the CFPB now asserts that its past rulemaking efforts have failed to achieve that objective, it must square that assertion with the actual evidence, much of which is already available to the CFPB. If, based on such evidence, the CFPB determines that policy intervention may be warranted, it should proceed in a fair and impartial manner, grounded in its authority, and in coordination with other relevant agencies.

Sincerely,

American Bankers Association
American Financial Services Association
Bank Policy Institute
Community Development Bankers Association
Consumer Bankers Association
Credit Union National Association
Housing Policy Council
Independent Community Bankers of America
Mortgage Bankers Association
National Association of Federally-Insured Credit Unions
U.S. Chamber of Commerce

³⁷ See *supra* note 33.

³⁸ 12 U.S.C. § 5511(b)(1).