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Submitted via *regulations.gov*

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 Director Chopra,

The Independent Community Bankers of America (ICBA)¹ appreciates this opportunity to respond to the Consumer Financial Protection Bureau’s (CFPB) Request for Information (RFI) Regarding Fees Imposed by Providers of Consumer Financial Products or Services.² The RFI begins by observing an increasing trend of businesses charging “junk fees” – defined as “mandatory or quasi-mandatory fees added at some point in the transaction after a consumer has chosen the product or service based on a front-end price.”³ The Bureau then expresses its concern that “[e]xploitative junk fees charged by banks and non-bank financial institutions have become widespread” and seeks information from stakeholders regarding steps the Bureau should take to curb fees that “take advantage of a captive relationship with the consumer to drive excess profits.”⁴ The RFI provides a list of fees that it considers to be ‘junk fees’ including “penalty fees such as late fees, overdraft fees, non-sufficient funds (NSF) fees, convenience fees for processing payments, minimum balance fees ... and more.”⁵

ICBA respectfully rejects the Bureau’s characterization of the fees listed as “junk fees” of the same type as “resort fees added to hotel bills and service fees added to concert ticket prices.”⁶ **Community banks are committed to providing affordable access to financial services to their customers. Relationship**

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5.8 trillion in assets, over \$4.8 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org

² 87 Fed. Reg. 5801.

³ *Id.*

⁴ 87 Fed. Reg. 5802.

⁵ *Id.*

⁶ 87 Fed. Reg. 5801.

banking, the cornerstone of the community banking business model, is built on trust. That trust would be severely damaged if community banks were to charge their customers opaque, or excessive fees.

Banks, like any business, must charge for the services they provide in order to cover their expenses and earn a profit. Limiting their ability to do so by regulation will inevitably lead to reduced competition and, ultimately, a reduction in the availability of banking services. The Bureau's RFI states that bank fees "are not subject to competitive processes that ensure fair pricing."⁷ The reality, however, is that the fees charged by banks are already subject to comprehensive disclosure, rigorous market competition on price, and cover the cost of services that are highly demanded by consumers. The community banking business model is built on relationship banking and consumer trust, and the fee policies of community banks are, on average, fairer than at large financial institutions.

Definition of a "Junk Fee"

Before addressing the specific bank fees outlined by the Bureau, it is important to define what a "junk fee" is – and what it isn't. According to the Bureau's RFI, junk fees are "hidden back-end fees— which are mandatory or quasi-mandatory fees added at some point in the transaction after a consumer has chosen the product or service based on a front-end price."⁸ "Junk fees" can also arise, "when a company charges for individual activities that are typical attributes of a product or service."⁹ In an op-ed in "The Hill," praising the Bureau's RFI, Stanford Economist Neale Mahoney writes, "Markets work when consumers observe the full price (and quality) of a good or service when they are making their purchase decision. If consumers observe only an upfront price – and are unaware of add-on charges – when making a purchase, they won't choose the product with the best value, gumming up the market."¹⁰

Based on these descriptions, we note several key criteria of a junk fee, and why bank fees do not meet this definition:

1. **Hidden or Back-End** – A key aspect of the Bureau's objection to "junk fees" appears to be that these fees are hidden from consumers. This is a problem because, according to the Bureau, customers may be lured in by a low up-front price, only to be surprised with additional mandatory charges later. Bank fees do not meet this criterion because there is already a robust disclosure regime to ensure that fees associated with credit cards, mortgage lending, deposit accounts, and more are prominently disclosed at the time of account opening. Ample disclosure of fees allows customers to distinguish between products with low up-front costs but differing fee structures on the back-end.
2. **Not Subject to Competition** – Another trait of junk fees stated by the Bureau is that they are not subject to price competition which reduces market efficiency. This criterion is not satisfied for fees where either (1) robust price competition already exists for a product or service or (2) competition on price does not exist due to government price controls.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Neale Mahoney, "Regulating 'Junk Fees' Will Save Consumers Money," *The Hill: Opinion* (Jan 4, 2022), available at: <https://thehill.com/opinion/finance/592742-regulating-junk-fees-will-save-consumers-money?rl=1>.

- 3. Additional Fee for Something That Is Typical of a Product or Service** – This criterion is the most descriptive of fees such as “hotel convenience fees” or “service fees” added to concert tickets. Neither overdraft fees, insufficient fund (NSF) fees, nor late payment fees fit this criterion because they are not typical features of a deposit account or a loan – they are only assessed when there is a specific customer action (writing a bad check, overdrawing an account, or failing to pay as agreed, respectively).

Based on the Bureau’s definition of “junk fees,” fees charged by banks are not “junk fees.” As the Bureau is aware, bank fees are subject to rigorous disclosure, often using model language provided by the Bureau itself. They cannot fairly be described as hidden fees.

Furthermore, a customer can avoid these fees by altering their conduct. In cases of financial need, community banks often work with customers to create payment plans, waive overdraft fees, provide service alerts or communications to inform of account status, or conduct account transfers from designated accounts. A community bank’s goal is not to be punitive, but rather to ensure that their customers are financially healthy.

Overdraft and NSF Fees

ICBA disagrees with the Bureau’s characterization of overdraft and NSF fees as “junk fees” that are harmful to consumers. Regulation E requires banks to provide notice in writing describing the institution’s overdraft service, provide a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the institution’s payment of ATM or one-time debit card transactions, and provide the consumer with confirmation of the consumer’s consent in writing including a statement informing the consumer of the right to revoke such consent.¹¹ **In other words, customers must voluntarily opt-in to benefit from overdraft services for ATM or one-time debit card transactions and they are free to opt-out at any time.**

The reason that many customers choose to partake in overdraft services is that, **despite negative media portrayals, a customer overdrawing their checking account and paying the associated fee is often the least financially harmful choice available.** Consider the customer who does not have access to credit or is living paycheck to paycheck and needs to overdraw their account to make a timely rent or credit card payment. For this consumer, a transaction that overdraws their account and results in a fee, would be less harmful than late payment fees levied by the payee, plus a negative credit report entry for missing a payment. Likewise, overdraft services can enable low-income customers who need to make emergency repairs to their car or home. If overdraft services were not available, these customers could be forced towards the title pawn industry, where they would be required to pay high rates of interest – far exceeding the cost of the overdraft fee – in order to cover the cost of repairs.

The ability to overdraw an account can be a lifeline, with consumers looking to avoid fallout from missed or late payments for their mortgage, rent, car insurance, medicines, and other critical needs. Fallout from missed or late payments can include collections, damage to credit score, or repossession. The ability to overdraw an account can also allow customers to purchase necessary goods and services and avoid the embarrassment and harm to reputation of having their transaction declined.

¹¹ 12 CFR 1005.17(b).

Customers should be allowed to decide whether tapping into a lifeline or avoiding embarrassment at the point of sale is worth the average cost of a \$34 overdraft fee. Regulation E states that a financial institution “shall not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, unless the institution: (i) Provides the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information, describing the institution's overdraft service; (ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions; (iii) **Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions;** and (iv) Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically, which includes a statement informing the consumer of the right to revoke such consent.”¹² If the customer decides the cost of overdraft is not worthwhile, they already have the option to opt-out of an account with overdraft services. The CFPB has publicized this option, as well as providing a list of other steps customers can take to avoid overdraft, on its own website.¹³

Overdraft and NSF fees do not meet the Bureau’s own definition of “junk fees” because, unlike resort fees or fees for food delivery, these fees are disclosed, up-front, in writing, opted-in to by the customer, and cover the cost of a service that allows many customers to avoid more serious financial harms. If the Bureau prohibits or imposes price controls on overdraft services, many banks may stop offering these services. This is likely to push consumers into higher cost products like title loans, excess credit card debt, or outside of regulated finance entirely.

Community banks are committed to offering their customers financial products and services on fair and transparent terms. Many community banks are willing to waive overdraft fees in cases where new funds can be deposited in a timely manner. Others use overdraft as an opportunity to begin a dialogue with customers about their financial health. Community bankers have a genuine desire to understand why a customer is overdrawing their account, and want to work with customers to find ways to make unexpected overdrafts less likely in the future.

Finally, while some large banks have recently scrambled to obtain favorable publicity by eliminating or reducing overdraft fees, it is important to remember that community banks still offer more favorable overdraft policies than their larger brethren. According to the CFPB’s own data, banks below \$100 million in assets charge an average overdraft fee of \$27.80 and banks between \$100 million and \$550 million in assets charge an average of \$29.52 while large banks (in excess of \$10 billion in assets) charge an average of \$34.05.¹⁴ **This 20.21% price difference for overdraft services between the smallest and largest banks illustrates that, contrary to the Bureau’s position, there is robust competition in the market for overdraft services.**

¹² 12 CFR 1005.17(b)(1).

¹³ Gary Stein, *Consumer Financial Protection Bureau*, “Understanding the Overdraft ‘Opt-In’ Choice,” (Jan. 19, 2017), available at: <https://www.consumerfinance.gov/about-us/blog/understanding-overdraft-opt-choice/>.

¹⁴ Consumer Financial Protection Bureau, Data Point No. 2021-11, “Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors” (Dec. 2021) at p. 36, available at https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf.

Credit Card and Payment Fees

The Bureau further objects to fees associated with the issuance of credit cards, noting that “[c]ard issuers charged \$23.6 billion in fees in 2019 alone and nearly \$14 billion of those fees were late fees not subject to competitive pricing pressure.”¹⁵ How the Bureau concludes that there is no price competition in this market is unclear, but presumably it is related to the observation that “[n]early every bank charges the same for late fees – the maximum allowed by law of \$30 for the first late payment and \$41 for subsequent late payments.”¹⁶

We disagree that the late payments should be considered “junk fees.” If lenders could not rely on timely payments, it would impair the proper functioning of credit markets. If banks are required to reduce or eliminate late fees to comply with a cap imposed by statute or regulation it is likely that interest rates would increase because lenders would be forced to build a greater margin of safety into their underwriting. This would have a punitive effect on customers who make timely payments.

Finally, credit card fees are disclosed in a transparent way that is easily understood, not in “fine-print or boilerplate contracts” that are not well understood by consumers. Regulation Z, the implementing regulation of the Truth in Lending Act (TILA) requires clear disclosure of credit card terms – including the penalty fees for late payments – in a clear and concise manner.¹⁷ A model disclosure, provided by the Bureau on its website is provided as Appendix A to this letter for reference.¹⁸ This required disclosure is neither complicated nor confusing. It discloses APR and all applicable fees in clear terms. The existing model disclosures provide clear and concise information to cardholders.

Mortgage Fees

Community banks strive to meet the needs of their customers by providing affordable mortgage credit with transparent and fair pricing that meets or exceeds the requirements dictated by the numerous laws and regulations in the housing finance space. The very nature of a community bank’s high touch business model requires that they leverage their vast knowledge of their communities to help enable the dream of homeownership. Moreover, community banks typically minimize the fees they do charge on loans – especially for mortgage loans they retain in portfolio. Mortgage loans that are sold into the secondary market will usually have higher fees due to individual investor requirements.

In the discussion of “junk fees” and mortgage lending, it is critical to distinguish between the types of fees a bank can and cannot control, as well as the fees banks are already required by law or regulation to disclose to a consumer. Mortgage lending is a highly regulated space, with specific requirements that determine and limit the fees that can accrue throughout the mortgage origination and closing process. This includes disclosure timing and tolerances as well the types of fees for which a consumer is allowed to shop.

¹⁵ 87 Fed. Reg. 5801

¹⁶ *Id.*

¹⁷ See 12 CFR 226.5.

¹⁸ 12 CFR Appx. G to Part 1026 G-17(C).

Additionally, many of the fees are pass-through and required by the secondary market investor, meaning the lending institution has no control over the costs and merely acts as the intermediary for fees such as property appraisals and title insurance. Other mortgage-related fees are clearly and fully disclosed to the consumer, including those related to late or missing payments resulting in delinquency.

1. **Mortgage lending is already a highly regulated space.** This is especially true regarding disclosures and transparency. All mortgage lenders, including community banks, are subject to the TILA-RESPA Integrated Disclosure (TRID) rules that require specific and prescriptive disclosure requirements. This includes disclosure and redisclosure timing requirements for loan estimates and closing disclosures. There are also hard limits – or tolerances – on discrepancies between estimated closing costs and final costs. Some of these limits require the lender to absorb any changes to these fees once they have been disclosed to the borrower. Many of the supposed “junk fees” listed in the Bureau’s RFI are therefore already considered and remedied by the Bureau’s longstanding regulations, requiring creditors to be upfront and transparent. It is important that any further regulation not be duplicative or contradictory to existing regulation. Additionally, the TRID mortgage disclosure regime is designed to encourage consumers to shop and compare rates, terms and fees, again making sure they fully understand the cost of their mortgage loan.
2. **Many of the listed fees exist outside of the lender’s control.** Costs like appraisal fees, title insurance, tax service, flood insurance, and credit report fees are fees to third party providers and are required by secondary market investors or by government agencies.¹⁹ They are also fully disclosed to the consumer. Some of these fees are dependent on market forces, especially in the case of appraisals, and are on the rise due to scarcity in the rural markets where community banks often operate. We encourage the Bureau to not simply identify them as “junk fees” that are unnecessarily imposed on consumers by their bank – this is simply untrue and distorts the complex reality of the mortgage lending process.
3. **Late fees, foreclosure fees, and other fees related to mortgage delinquency are clearly disclosed and represent a real, tangible cost to community banks.** While unfortunate, some loans do go delinquent. Community banks go out of their way to work with customers who may be struggling financially. However, any fees related to a mortgage delinquency are disclosed upfront to the customer and are shown clearly in mortgage documents. They do not represent a barrier to homeownership. As was shown during the COVID-19 pandemic, community banks went above and beyond to help their customers continue to make payments on time or provided forbearance to customers who needed it, and saw relatively small numbers of mortgage foreclosures. Further, community bank mortgage servicers, like other mortgage servicers, are required to pay property taxes and maintain hazard insurance on the collateral property even if the borrower cannot pay for it. The Bureau’s mortgage servicing rules are very explicit regarding what can be charged to the borrower who has defaulted and when it can be charged, and in some cases when the servicer must refund money back to the borrower when the loan or insurance coverage has been reinstated. These are hardly junk fees.

¹⁹ For example, the Department of Housing and Urban Development, Fair Housing Administration, Veterans Administration, or the U.S. Department of Agriculture.

Conclusion

In conclusion, as the Bureau analyzes the feedback received in response to its RFI and considers future actions, we urge it to do so in a deliberate and nuanced way. There is a spectrum of financial institutions with different charter types, differing regulatory regimes, and that charge different fees. Community bankers do not support “junk fees,” but we believe it is important to differentiate between amply disclosed and reasonable fees that are necessary to maintain healthy financial institutions that provide valuable services to their customers and fees that are “junk.”

The community banking business model is built on relationship banking and consumer trust – charging “junk fees” that are abusive to the consumer would irreparably damage that trust. The financial health of community banks is intertwined with the financial health of the communities they serve, and it is in their economic best interest to serve as partners and advisors to their retail and small business customers.

Fees charged by community banks are neither hidden nor excessive, they are calibrated to ensure a reasonable profit and the continued stability and existence of the community banking industry. **If the ability of community banks to charge reasonable fees for the services they provide is limited, community banks may be required to limit their services. Inevitably, this will push consumers towards less scrupulous institutions and more predatory lending products.**

Thank you again for the opportunity to provide feedback in response to the Bureau’s RFI Regarding Fees Imposed by Providers of Consumer Financial Products or Services. Please feel free to contact me at (202) 821-4411 or Michael.Marshall@icba.org if you have any questions about the positions stated in this letter.

Sincerely,



Mickey Marshall
Director, Regulatory Legal Affairs

APPENDIX A: SAMPLE CARD DISCLOSURE

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	8.99% introductory APR for one year. After that, your APR will be 14.99% . This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	15.99% This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	21.99% This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	28.99% This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. How Long Will the Penalty APR Apply?: If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
Paying Interest	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date.
Minimum Interest Charge	If you are charged interest, the charge will be no less than \$1.50.
For Credit Card Tips from the Consumer Financial Protection Bureau	To learn more about factors to consider when applying for or using a credit card, visit the website of the Consumer Financial Protection Bureau at http://www.consumerfinance.gov/learnmore

Fees	
Set-up and Maintenance Fees	NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. Based on your initial credit limit of \$250, your initial available credit will be only about \$209 (or about \$204 if you choose to have an additional card). You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges.
<ul style="list-style-type: none"> • Annual Fee • Account Set-up Fee • Participation Fee • Additional Card Fee 	<p>\$20</p> <p>\$20 (one-time fee)</p> <p>\$12 annually (\$1 per month)</p> <p>\$5 annually (if applicable)</p>
Transaction Fees	
<ul style="list-style-type: none"> • Balance Transfer • Cash Advance • Foreign Transaction 	<p>Either \$5 or 3% of the amount of each transfer, whichever is greater (maximum fee: \$100).</p> <p>Either \$5 or 3% of the amount of each cash advance, whichever is greater.</p> <p>2% of each transaction in U.S. dollars.</p>
Penalty Fees	
<ul style="list-style-type: none"> • Late Payment • Over-the-Credit Limit • Returned Payment 	<p>Up to \$35.</p> <p>Up to \$35.</p> <p>Up to \$35.</p>

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Loss of Introductory APR: We may end your introductory APR and apply the Penalty APR if you make a late payment.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

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