S. HRG. 118–461

# TAKING ACCOUNT OF FEES AND TACTICS IMPACTING AMERICANS' WALLETS

## HEARING

BEFORE THE

SUBCOMMITTEE ON
FINANCIAL INSTITUTIONS AND CONSUMER PROTECTION

OF THE

## COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

ON

EXAMINING WAYS TO LOWER THE EVERYDAY COSTS FOR AMERICANS AND TO ENSURE STABILITY IN THE FINANCIAL INSTITUTIONS THAT SERVE THEM

JULY 26, 2023

Printed for the use of the Committee on Banking, Housing, and Urban Affairs

Available at: https://www.govinfo.gov/

U.S. GOVERNMENT PUBLISHING OFFICE
57–229 PDF WASHINGTON : 2025

## COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

SHERROD BROWN, Ohio, *Chairman*

JACK REED, Rhode Island
ROBERT MENENDEZ, New Jersey
JON TESTER, Montana
MARK R. WARNER, Virginia
ELIZABETH WARREN, Massachusetts
CHRIS VAN HOLLEN, Maryland
CATHERINE CORTEZ MASTO, Nevada
TINA SMITH, Minnesota
KYRSTEN SINEMA, Arizona
RAPHAEL G. WARNOCK, Georgia
JOHN FETTERMAN, Pennsylvania

TIM SCOTT, South Carolina
MIKE CRAPO, Idaho
MIKE ROUNDS, South Dakota
THOM TILLIS, North Carolina
JOHN KENNEDY, Louisiana
BILL HAGERTY, Tennessee
CYNTHIA M. LUMMIS, Wyoming
J.D. VANCE, Ohio
KATIE BOYD BRITT, Alabama
KEVIN CRAMER, North Dakota
STEVE DAINES, Montana

LAURA SWANSON, *Staff Director*
LILA NIEVES-LEE, *Republican Staff Director*

CAMERON RICKER, *Chief Clerk*
SHELVIN SIMMONS, *IT Director*
PAT LALLY, *Assistant Clerk*

---

## SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER PROTECTION

RAPHAEL G. WARNOCK, Georgia, *Chair*
THOM TILLIS, North Carolina, *Ranking Republican Member*

MARK R. WARNER, Virginia
ELIZABETH WARREN, Massachusetts
CHRIS VAN HOLLEN, Maryland
CATHERINE CORTEZ MASTO, Nevada
TINA SMITH, Minnesota
JOHN FETTERMAN, Pennsylvania

MIKE CRAPO, Idaho
CYNTHIA M. LUMMIS, Wyoming
J.D. VANCE, Ohio
KATIE BOYD BRITT, Alabama
KEVIN CRAMER, North Dakota

MAX VIRKUS, *Subcommittee Staff Director*
RYAN ADAMS, *Republican Subcommittee Staff Director*

# C O N T E N T S

**WEDNESDAY, JULY 26, 2023**



**WITNESSES**



ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

# TAKING ACCOUNT OF FEES AND TACTICS IMPACTING AMERICANS' WALLETS

**WEDNESDAY, JULY 26, 2023**

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER PROTECTION,
*Washington, DC.*

The Subcommittee met at 9:30 a.m., in room SD–538, Dirksen Senate Office Building, Hon. Raphael G. Warnock, Chair of the Subcommittee, presiding.

## OPENING STATEMENT OF CHAIR RAPHAEL G. WARNOCK

Chair WARNOCK. Good morning. This Subcommittee will come to order. Welcome to the first hearing of the Subcommittee on Financial Institutions and Consumer Protection this Congress.

This hearing is in a hybrid format, but our Members and our witnesses will be here in person today. We are grateful for their presence and their willingness to participate.

And I am honored, deeply, to the Subcommittee again this session and to continue to work with Ranking Member Tillis to make life more affordable by lowering costs for consumers all across our country, and to ensure stability in our financial institutions that serve families, that serve our small businesses, and communities in Georgia and around the country.

I am proud of our efforts to ensure that communities have equal access to financial resources so we can build an economy that works for all Americans. I think that is in our collective, enlightened self-interest.

Today's hearing is about protecting Americans from junk fees in financial services, and it will examine the exploitive fee practices that fall under the jurisdiction of this Committee. This includes unnecessary and onerous fees on bank deposit accounts, a topic I have examined before, as well as student loans, and also in the rental housing market, and also small-dollar lending.

We understand that many fees do indeed fund critical services and products, and so I want to say that at the outset. Not all fees are the same. Some fees are excessively high, some fees are unclear, and some fees exist solely so that large corporations can pad their bottom lines on the backs of hardworking families. These fees provide no economic value. They are a drag on the American economy, and business school economists call this, quote, "rent seeking."

But today I will say that what we all know they actually are—they are junk fees. And these junk fees are keeping hardworking Americans out of our financial system, particularly those who are already living on the edge of the economy. For example, one-third of unbanked households cite high fees as the reason that they remain without a bank account. And we know these types of fees affect poor people and people of color at a disproportionate rate.

Since this Subcommittee began our examination on fees, the good news is that some banks have now voluntarily made these changes permanent, and I applaud Zillow, apartments.com, and affordablehousing.com for committing to transparency in their rental listings, and more of their peers should follow suit and do the same.

Let me say that this is not theoretical stuff for me. I have heard from Georgians about the harms of these fees. I have talked to the owners of small businesses, parents who have seen their children targeted while on a college campus. And in the Consumer Financial Protection Bureau's request for feedback on fees, one Georgian serving in the military wrote about how technical glitches and shady business practices by their large bank cost them money and stress while they were preparing to deploy to a war zone.

Protecting our servicemembers is something that both the Ranking Member and I are serious about, and I am glad that today, on the Senate floor, we will be voting on my amendment to the NDAA to help prevent the harassment of members of the military by shady debt collectors. And I am grateful for the Ranking Member's cosponsorship of this bipartisan amendment and support bringing that into law. Our men and women in uniform should be focusing on their missions and caring for their families. They should not be nickeled and dimed by unscrupulous corporations, and debt collectors certainly should not be able to weaponize their services in pursuit of this practice.

This is also personal for me. In addition to serving as the Senator for Georgia I still serve as senior pastor of the historic Ebenezer Baptist Church in Atlanta. And my church counts among its members Georgians from every walk of life, and we look out for each other. As a pastor and as a Senator, I seem work as grounded in serving others and my community, and I want to extend this call to all of our Nation's financial institutions to do the same. Love your neighbors, yourself.

These fees do not just directly hurt families. Small businesses, which form the backbone of our economy also face the brunt of predatory fees. The burden of excessive fees eats into their profit margins, reducing their ability to invest in expansion, to hire more workers, and to compete. By hampering small businesses' growth, these fees impede job creation and limit economic opportunity. As I often say, I think this is one more example where the right thing to do is also the smart thing to do. It is good not only for these individual consumers, it is the right thing to do for our economy. It in our enlightened, collective self-interest.

I believe Congress, and this Subcommittee in particular, have an important role to play in ensuring that the financial institutions that support our communities, our small businesses, and working families have the resources, the tools, and the support to continue

their important work. At the same time, this is about our values. We must hold these businesses accountable when they juice their profits off the backs of hardworking Americans and ensure that they are not looking at these customers as easy targets to be taken advantage of with onerous and opaque fees.

As a long-time student of Dr. King, this makes me think of words he wrote in his very last book, 1967, *Where Do We Go from Here: Chaos or Community?* Dr. King said that the profit motive, when it is the sole basis of an economic system, encourages a cutthroat competition and selfish ambition that inspire men to be more I-centered than thou-centered.

And so I am focused on growing the middle class by lowering costs for Georgians and saving them money, and like all of my hearings, this hearing is about helping people, helping ordinary people, helping communities, helping small businesses to thrive by making life more affordable and creating jobs in the process. As American families, small businesses, and communities recover, we must ensure that they have the resources they need, not only to survive but to thrive.

Thank you, and with that I will now turn to Ranking Member Tillis for his opening statement.

**OPENING STATEMENT OF SENATOR THOM TILLIS**

Senator TILLIS. Thank you, Chairman Warnock, for holding this hearing, and thanks to the witnesses for being here to testify.

Any careful study of Federal statute or regulations will be hard-pressed to find a formal definition for the term "junk fees." It is quite simply because it does not exist. Though policymakers and regulators should certainly act against dishonest and abusive charges and practices, it is undeniable that the term "junk fees" is political in origin. So too, unfortunately, are the many regulatory actions that are underway on the issue.

President Biden first announced his Administration's initiative to combat so-called junk fees last October. This announcement, which broadly coincided with the looming election and levels of inflation not seen in 40 years was widely branded as the Administration's primary solution to the economic pain being felt by Americans. It is interesting that these fees, most of which had long been present in the economy, were suddenly identified as the drivers of surging inflation, though the nearly $2 trillion President Biden opted to pump in the U.S. economy was somehow not.

In announcing his initiative, President Biden directed Federal agencies to "reduce or eliminate hidden fees, charges, and add-ons for everything from banking services to cable and internet bills to airline and concert tickets," end quote. As the President's own words suggest, the scope of this initiative is exceedingly wide and vaguely defined, thus giving individual Federal regulators tremendous latitude to act under the banner of junk fees.

Chief among these regulators is the CFPB, an agency with a well-established reputation for pushing against its regulatory and jurisdictional boundaries. Similar to much of the CFPB's work over the years, several concerning themes have emerged in their efforts on so-called junk fees. First, the CFPB, at times, has offered various definitions as to what constitutes a junk fee in their eyes,

muddying the waters for honest, good-faith actors who are simply trying to comply with the CFPB's public stances.

Second, the CFPB has resorted to one of its favorite tricks—engaging in naming and shaming campaigns. In actions taken on overdraft and insufficient funds policy, the CFPB publicized a list of institutions that were all, by any reasonable measure, clearly abiding by the law but not the policy preferences of the CFPB. Unfortunately, these coercion-style tactics were only encouraged by the Biden administration.

Third, the CFPB continues to maneuver its policy actions to skirt around the Administrative Procedures Act, which is clearly designed by Congress to bring accountability and oversight to the rulemaking process. Through its reliance on blog posts, press releases, guidance, and statements of policy, the CFPB often mislabels its actions to avoid the rigors of the APA and minimize the likelihood of judicial review.

Finally, as with much of their work there is little to no evidence of the CFPB collaborating with other regulators or consulting them on implications of their policy changes. The wholesale changes of overdraft and NSF pushed by the CFPB certainly have significant implications for prudential regulation. Yet it is unclear if the CFPB sought feedback from the Federal Reserve or others. If not, this represents a serious instance of irresponsible regulation for political outcomes, not actions that promote safety and soundness in the U.S. banking system.

For these reasons and others, many have concerns with the efforts led by the CFPB, and the Biden administration as a whole, on so-called junk fees. Reasonable people can disagree on policy. In Congress, we frequently do. But no one should find practices common at the CFPB acceptable.

I look forward to the questions and I look forward to your testimony. Thank you, Mr. Chair.

Chair WARNOCK. Thank you so very much, Ranking Member Tillis, for your opening statement, and we turn now to our witnesses testifying today, will the Honorable Michelle Henry, Attorney General for the great State of Pennsylvania. Also testifying is Ms. Lindsey Siegel, who is the Director of Housing Advocacy for the Atlanta Legal Aid Society. And finally, our third witness is Mr. Brian Johnson, who is the Managing Director at Patomak Global Partners.

We appreciate your testimony, and I look forward to this discussion about this important issue.

Attorney General Henry, I will now turn things over to you.

## STATEMENT OF MICHELLE A. HENRY, ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA

Ms. HENRY. Well, thank you. Good morning, Chairman Warnock, Ranking Member Tillis, and Members of the Committee. Thank you for inviting me to testify today. My name is Michelle Henry, and I am the Attorney General of Pennsylvania. I first joined the office in January of 2017, as a First Deputy Attorney General.

I will begin by saying this Committee is right to focus its attention on junk fees because they harm both businesses and consumers. Honest businesses lose out to competitors who charge junk

fees because the competitors' prices appear at first to be a better deal. Junk fees also prevent consumers from effectively shopping for the best overall price.

In Pennsylvania, we have been working to protect consumers against junk fees. In the consumer finance space we recently filed a multistate lawsuit against Mariner Finance, a Wall Street private equity-owned installment lender. Our lawsuit alleges that Mariner charged consumers junk fees for hidden, add-on products that consumers either did not know about or did not agree to buy. These hidden, add-on product, such as credit insurance and auto clubs, are typically low- or no-value products.

Consumers left Mariner believing that they had entered into an agreement to borrow and repay, over time, a certain amount of money. In reality, because of these hidden junk fees, Mariner added hundreds to thousands of dollars to the total amount a consumer owed.

The cost of the junk fees is staggering. For a random sample of loans originated in Pennsylvania in December of 2020, Mariner charged each consumer an average of $1,085 in junk fees, for an average of $3,394 in cash borrowed.

We also had a significant junk fee settlement in 2018 with Wells Fargo. This settlement stemmed from Wells charging its auto finance customers millions in junk fees. Despite evidence that many customers already had the required car insurance, Wells improperly charged more than 2 million accounts for force-placed insurance. To resolve the multistate action, Wells agreed to pay States $575 million.

And although Mariner and other predatory lenders often argue that their overpriced loans are necessary to help consumers make ends meet in a moment of dire need, such as an unexpected car repair, we have found, from empirical research that far more predatory loans are taken out to meet reoccurring expenses than for emergencies.

Consumers in Pennsylvania often tell our office that they regret taking out their loans from a high-cost lender. Many times they tell us that the lender pushed them to borrow more than they wanted or needed, and often they were led to the lender by online lead generators that purport to be helping the consumer find the best deal available. In reality, most consumers would have been better off getting an auto refinance loan or an installment loan at their local credit union or community bank rather than going to an expensive installment lender that charges junk fees.

We have also worked hard to stop hotel companies and concert promoters from charging junk fees. In 2020, we announced a settlement with a ticket seller that had been charging fees the consumer never agreed to, and it also refused to honor a refund policy. As part of that settlement, the company agreed to provide full refunds for all Pennsylvania consumers for events that were canceled.

In 2021, we announced the landmark junk fee settlement with Marriott International. For many years, travelers had been misled by the published rates offered by hotels for a night's stay, only later to be hit with the mandatory resort fees when they were checking in.

Thanks to our settlement, Marriott now has a policy in place to be upfront and transparent in the disclosure of mandatory fees, including resort fees, as part of the total price of a hotel stay, allowing consumers to compare total costs for hotels and find the one that is the best fit for them. Marriott was the first hotel chain to formally commit to the upfront disclosure of resort fees as part of the initial advertised price. We hope others will follow.

Of course, our fight against junk fees is one we cannot do on our own. We are working closely with our fellow States as well as our Federal law enforcement partners, like the CFPB, and I look forward to continuing to work with our partners.

In the end, what we are fighting here for is basic fairness and transparency. When consumers are shopping online or in person, they deserve to understand what a loan, a house, or a vacation will cost, and exactly what key terms they are agreeing to. At the same time, all businesses deserve to compete on an even playing field, where the price is the price with no hidden surprise fees.

Thank you for inviting me to testify today, and I look forward to your questions.

Chair WARNOCK. Thank you very much, Attorney General Henry, for your testimony and for your work on this issue.

Next we will hear from Ms. Siegel.

**STATEMENT OF LINDSEY SIEGEL, DIRECTOR OF HOUSING ADVOCACY, ATLANTA LEGAL AID SOCIETY**

Ms. SIEGEL. Good morning, Chairman Warnock, Ranking Member Tillis, and Members of the Committee. Thank you for the opportunity to testify on behalf of the low-income clients of the Atlanta Legal Aid Society, and thank you to Senator Warnock for your leadership and long history of fighting for low-income families not just in Georgia but throughout the country.

My name is Lindsey Siegel, and I am the Director of Housing Advocacy at Atlanta Legal Aid, which provides free civil legal services to families with low incomes in the metro Atlanta area. Today I will focus on the rental housing market and how predatory and hidden rental fees gouge families living in poverty and make their rent even more unaffordable than it already is.

Ms. Dixon is a single mother who found an online listing for an apartment in the fall of 2020. The advertisement said it rented for $1,400 per month. It did not list any other monthly fees she would be required to pay. She applied and paid $525 through the landlord's online portal which covered her $50 application fees, a $175 move-in fee, and a $300 screening fee, all of which were nonrefundable. She was not able to see the lease or the apartment she would be renting, but she knew if she did not pay sight unseen she would lose the apartment.

And when her application was approved a few weeks later, the landlord charged her another $200 approval fee.

She finally received and signed a copy of her lease just 2 days before she was slated to move in. It was 50 pages long and contained eight different addenda. She had expected to pay her rent and for water. She did not expect to be responsible for a package locker fee, a trash removal fee, a separate valet trash fee, a pest control fee, a technology package fee, an insurance fee, and a credit

reporting fee. When the fees added up, $83 had been tacked onto her monthly rent. And to make matters worse, Ms. Dixon's landlord did not accept the rent by cash, check, or money order. When she paid through the landlord's online portal she was charged another $72 per-payment convenience fee.

The low-income renters Atlanta Legal Aid represents have an extreme power imbalance with their landlords. The high demand for rental housing, especially at the more affordable end of the market, makes some landlords believe they can easily get away with unfair and deceptive lease terms and rental practices. The bait-and-switch Ms. Dixon experienced, where the landlord advertised the rent as one price only to raise it much higher with junk fees after she had spent hundreds of dollars up front, is a far-too-common practice of many investor landlords in the Atlanta area.

Low-income renters like Ms. Dixon become trapped. She could not afford to walk away from a predatory lease 2 days before she was supposed to move in, even if she realized it would be unaffordable.

Of particular concern is the use of high application fees. They often far exceed the cost of running a report, and most renters have to pay them several times before finding a home to rent. We have heard reports that some institutional landlords even collect application fees after they have found a renter for an available home.

The renters of color Atlanta Legal Aid serves are particularly harmed. Researchers believe the high application fees likely steer renters of color toward lower-quality housing in lower-opportunity areas, driving residential segregation. In Atlanta, renters who used to live in in-town neighborhoods have been pushed further outside the city, to areas where schools are lower performing, transportation is more challenging, housing is lower quality, and jobs are harder to find.

Although junk rental fees affect all aspects of the rental market, they place a disproportionate burden on the livelihoods of low-income families. Atlanta Legal Aid's low-income clients understand the risk of not paying rent, and the vast majority will avoid it at all costs. They will forego food, medicine, clothing, and doctor visits. They will get a second job. They will apply for public benefits like food stamps. They will do whatever they can to avoid becoming homeless.

The proliferation of these abusive fees and how common they are, particularly with investor landlords, demonstrates the need for specific protection for tenants. Stronger Federal regulation could help define what is excessive and give States, advocates, and renters new tools to combat these fees.

We are pleased the White House and this Subcommittee are concerned about fairness and transparency in the rental market, and I appreciate the opportunity to share our clients' experiences with you today. I look forward to answering any questions you have.

Chair WARNOCK. Thank you very much, Ms. Siegel.

Next, Mr. Johnson.

**STATEMENT OF BRIAN JOHNSON, MANAGING DIRECTOR, PATOMAK GLOBAL PARTNERS**

Mr. JOHNSON. Chairman Warnock, Ranking Member Tillis, and Members of the Subcommittee, thank you for inviting me to testify about financial institutions' fees and the appropriate Federal regulatory response. My name is Brian Johnson. I am Managing Director of Patomak Global Partners, where I advise on financial regulatory compliance matters. I previously served as the Deputy Director of the CFPB, and prior to that I served on the staff of the House Committee on Financial Services.

Today's hearing is timely. The American people have suffered from abnormally high inflation for 2 years, which has decimated the value of their savings. Because of this inflation, a dollar today buys only about 86 percent of what it did in just 2021, which represents an erosion of over $9,900 in median household purchasing power. Indeed, without the burden that inflation has inflicted on the American family, it is unlikely we would be here today talking about the fees.

The Administration's decision to launch an initiative to combat so-called junk fees is an unfortunate missed opportunity to address the root causes of inflation. To date, the focus on the President's initiative has been on applying political pressure to companies to induce them to change their fee disclosure practices. In the process, the White House and supporting agencies have dismissed broad categories of fees as junk without ever providing any consistent definition of the term, which has created uncertainty as to which fees can be assessed by institutions without undue reputational or regulatory risk.

The CFPB has been the most enthusiastic among regulators in heeding the President's call, indiscriminately attacking a growing list of common financial services fees, no matter that they are lawful and fully disclosed. While the President's agenda is more far-reaching than the CFPB, my testimony focuses on the bureau's activity, based on my experience there.

The primary metric by which to judge the CFPB's actions should be whether the agency has adhered to the rule of law. By this objective measure, the CFPB's actions are deeply concerning. While my written testimony goes into greater detail regarding the CFPB's transgressions, let me summarize them here.

The agency has publicly hectored companies about deposit account fees and used the implied threat of investigation to induce such companies to abandon these legal fees. Further, in addressing other fees, the CFPB appears to have violated its own regulations and laws governing how agencies proffer rules by disguising interpretative rules as policy statements in bulletins and issuing circulars that function as legislative rules.

In another instance, under the guise of interpretation, the CFPB read a word into a statute to achieve its desired policy outcome. In still another, the agency treats the rulemaking process as a foregone conclusion, acting as though a still-proposed rule has already taken effect, signaling that the agency has no interest in considering public comments, establishing an adequate evidentiary basis to supports its conclusions, or considering potential changes to improve the rule.

These examples demonstrate an abuse of power and the agency's disregard for process and the limits placed on it. Moreover, the CFPB's behavior subverts the authority of Congress to oversee the agency and legislate the legality of fees in our financial marketplace. Simply put, it is not playing by the rules.

Some may defend the agency by saying the ends justify the means, but the CFPB itself acknowledges that these efforts harm more people than they help. For example, the CFPB claims, in its proposed credit card late fees rule, that it will reduce late fees by $9 billion per year. But the harsh reality is there is no free lunch, and this reduction will not achieve a net savings for consumers but rather a cost transfer from the relatively few late payers to the great majority of consumers who always pay their credit card bills on time.

I applaud the Subcommittee for exercising its authority to explore the Administration's efforts to reduce or eliminate what some label as "junk fees." I urge Congress to look more closely at the expected costs and benefits of these efforts, both for the intended beneficiaries and for all the other affected consumers who are too often dismissed as an afterthought. Congress should pay special attention when the means used to achieve an agency's ends run afoul of the rules and laws that make the system fair for everyone. Most of all, I applaud the Subcommittee's effort to shine a light on the burden shouldered by consumers under the weight of extraordinary inflation.

Thank you again for the chance to discuss this important issue, and I welcome the opportunity to answer your questions.

Chair WARNOCK. I thank all of you for your testimony, and we will begin with questions now. I am going to defer to my colleague, Senator Cortez Masto, who is double-booked, to offer her questions.

Senator CORTEZ MASTO. Thank you, Mr. Chairman, and to the Ranking Member. Thank you so much for having this Subcommittee hearing. Thank you to the panelists.

This is such an important issue I hear all the time from Nevadans, and let me just start this because I do think there is a problem with surprise fees and junk fees. It is not inflation related. It is not because of what the CFPB is doing out there. There is an issue, and I hear it from my constituents in Nevada all the time.

Let me give you an example. Since May of 2020, there are 123,000 eviction filings in southern Nevada. Nearly 60,000 evictions were filed this past year. That is a 160 percent increase since before the pandemic. Just last month, southern Nevada had nearly 5,000 eviction filings.

Now I know that it is not just the high rental costs and housing costs, but there were extra surprise fees that I heard from these families that were having an impact on them as well. Let me just give you an example. I had heard from families that some of these companies were charging multiple family application fees for one apartment, even when landlords knew that the apartment had already been rented. They were charging applicants for credit reports that the property manager did not even end up purchasing or had no intention of purchasing. They were charging an application fee for minors living with a prospective tenant.

Ms. Siegel, we heard from you. On and on and on, this is an issue that is happening. These are junk fees. These are junk fees. And let me just say, over the course of my experience in housing, when I purchased apartments, I did not deal with these fees, and I would question these fees. And who should not question these fees? And I am so appreciative that General Henry, you are here, and the AGs are looking at this as well.

I guess my question to maybe General Henry and Ms. Siegel is what can be done. Whose action is it to really address this? Is it at a Federal level, or do we leave it to the States to look at addressing this as well?

And maybe, General Henry, I will start with you.

Ms. HENRY. Thank you and thank you for your concern. I concur with that, and I would see this. I think it is both. In terms of what Pennsylvania has seen and working with other States, we join with our Federal partners in really holding these individuals accountable, that take advantage of consumers, that lack transparency. And we have seen it in all different areas. You mention the landlord tenant. We also have looked into that matter, and it is often first-time renters.

At Penn State University, we had a case where similar conduct was happening, where landlords were charging tenants, on top of their regular rent, administrative fees and other fees that were illegal in Pennsylvania.

So I think it is important that the States remain vigilant as well as looking at the regulations that we can apply with our Federal partners. Thank you.

Senator CORTEZ MASTO. Thank you.

Ms. SIEGAL. Thank you, Senator. I think the White House press release from last week is a good first step, and the commitment that the Administration got from Zillow and others to be more transparent I think will help tenants understand what the fees are going to be and what they can afford. And it will likely lead to lower eviction rates because people will not get trapped in leases that are unaffordable for them, like Ms. Dixon did.

But I think disclosure alone is not enough to protect people. Even if fees are disclosed, what we are seeing in Atlanta is they are often buried in the lease or they contradict what tenants are hearing verbally from the property manager.

So I think the Federal Government does have a role to play. The CFPB could create best practices, investigate junk fees further, especially those being charged for tenant screening reports, could bring enforcement actions against debt collectors that engage in collection practices that violate the Fair Debt Collection Practices Act in their collection of rental debt, especially includes collection of junk fees. And certainly, you know, HUD could further study and address the disproportionate impact of these practices on renters and rental applicants of color.

Senator CORTEZ MASTO. Thank you. And Ms. Siegel, I think you mentioned this in your testimony. You assert that very large institutional property management companies are the main culprits of using junk and hidden fees to help drive profits. Can you talk a little bit more about that and that assessment, because I see, in southern Nevada, listen, we have large institutional properties

coming in, equity companies coming in and purchasing up all these rental properties.

So what data do you have that supports that statement?

Ms. SIEGAL. You know, I represent individual tenants so I cannot speak as much to the data as I can to my clients' experiences. But I can tell you that tenants living in Atlanta have a very hard time finding a rental, finding a home that is not owned by a corporate landlord at this point. They have bought up many properties in the Atlanta area, and they always seem to be working in lockstep so that one institutional landlord is charging a certain kind of fee, then another one tends to charge it as well.

Just one example of this is the proliferation of landlords charging for insurance fees, and often tenants will think that these are renter's insurance because they are often called renter's insurance. But it is not like traditional renter's insurance that protects the renter and their property if it is destroyed. What it does is protect the landlord and does not really provide a benefit to tenants at all. And we have seen that proliferate with investor landlords, in particular.

Senator CORTEZ MASTO. Thank you. Thank you, Mr. Chairman.

Chair WARNOCK. Thank you very much, Senator Cortez Masto. Ranking Member Tillis.

Senator TILLIS. Thank you, Mr. Chairman.

General Henry, I think you made a great point on transparency. Part of what we have to do is, we can have a different discussion about fees and whatever you want to call them, but I think it is fair to say, I cannot imagine any reasonable Member of Congress not saying, "I want the person to know what their financial obligation is when they sign an instrument, not after they read page 10 and the fine print." So I stipulate that. I want to work on that, and we have similar issues in health care and a number of other areas where we need transparency.

And Ms. Siegel, your point on the rent, I am less caught up in whether or not a trash collection fee is appropriate or not. I am more caught up in does that renter know at the point in time they are signing a lease what they are expected to pay every month. It is another example of transparency. We can discuss the fees. I mean, if one fee goes away the rent could go up. We know that at the end of the day they are going to try and collect enough to manage their risk and pay their own bills, the landlords. So I agree with that. I think that practice is wrong.

But I am still concerned, and we have had several references in the opening statements, about the CFPB could do this or could do that. But I personally think they have a scattershot, an ill-defined regulatory approach right now.

Mr. Johnson, can you talk about the effect of the method that the CFPB is using to go after this and the negative implications it has?

Mr. JOHNSON. Well, thank you, Senator. I mean, the use of the phrase "scattershot" I think is apt with respect to the approach that the CFPB us using. To have any chance of success in a regulation, from my experience at the agency, you have to carefully identify a market failure, you have to come up with a proposal that is narrowly tailored to address the root causes of that market failure, and you have to undergo careful cost-benefit analysis to determine whether or not your solution is going to be worse than the problem

to begin with. So there are many unintended consequences that come when agencies cut corners, and a scattershot approach will have those unintended consequences.

Senator TILLIS. One unintended consequence could be reducing underbanking or unbanking certain people because you have reached a point to where it is no longer fiscally viable for a product or service to be offered to a certain segment of the population. Is that one?

Mr. JOHNSON. Absolutely. There is a longstanding tradeoff between price and access.

Senator TILLIS. Is the CFPB a prudential regulator?

Mr. JOHNSON. It has no safety and soundness mission. It is market conduct regulator like the SEC or FTC, who are appropriated by Congress.

Senator TILLIS. If you take a look at the CFPB's efforts on overdraft fees as an example, after the 2008 financial crisis some regulators under the Obama administration emphasized reliability and countercyclical nature of overdraft revenue as an appropriate tool for ensuring the stability of the bank's balance sheets.

Some of the Federal Reserve went so far as to express a desire to see overdraft revenue when grading banks on well-known CAMELS rating system. And now the CFPB has undertaken a name-and-shame campaign to coerce banks who were following the established prudential standards for the crime of listening to their previous Federal regulators.

So does the CFPB have the proper jurisdiction, resources, or staff to make prudential regulatory decisions?

Mr. JOHNSON. No.

Senator TILLIS. Is the CFPB's tendency to name-and-shame business institutions to avoid certain practices or adopt new ones effective regulation?

Mr. JOHNSON. It is not, and I would add that this tactic of using the implied threat of investigation to coerce lawful businesses to change their practices for political purposes should be condemned.

Senator TILLIS. Do you believe the bureau thinks these implications or conducts sufficient analysis on the follow-on effects of their junk fee regulations? You more or less answered that in a prior question. They are not really thinking through the full impact and all the potential unintended consequences. Can you think of any example under this current leadership of the CFPB where they have taken that into consideration?

Mr. JOHNSON. Well, I mean, they are moving forward, at least, with a rulemaking on credit card late fees, but the problem with that rulemaking is the bureau admits that it lacks the evidence to understand the effect that the regulation will have on small card issuers, and rather than going to get that evidence, through, for instance, the SBREFA panel, it simply declined to do so.

Senator TILLIS. I thank you all for your testimony. Mr. Chair, I would like to submit for the record a letter from the Consumer Bankers Association on the subject.

Chair WARNOCK. Without objection.

Senator TILLIS. Thank you.

Chair WARNOCK. So I would like to go back to something that Attorney General Henry was talking about earlier. You talked about

the case in Pennsylvania where a finance company allegedly engaged in egregious tactics to impose hundreds of dollars in hidden financial products for consumers. You talked about how that company would mail checks to folks who were struggling, and then when consumers cashed them they automatically opened a loan and discovered that they were playing these add-on insurance products over and over again.

You have been vigilant going after these bad actors in that space, and in this case against Mariner, Pennsylvania partnered with several other States, and you have said in your testimony and in your answer that you think there is a role for States to play as well as the Federal Government.

Let me ask you directly. How often do these kinds of cases cross State lines, and would having Federal standards against these types of hidden fees make these cases easier to bring?

Ms. HENRY. Almost always, and I think that is critical. I mean, where we have been most successful is joining with our fellow States, other attorneys general, and partnering with them, and including the CFPB. In December of 2020, the CFPB, with all 50 States and the District of Columbia, filed an enforcement action, for instance, against Nationstar Mortgage, again for deceptive practices, for not being transparent when they were servicing borrowers' mortgages. And as a result of that joint effort we were able to obtain a settlement of $73 million and brought aid to 40,000 borrowers.

So typically, in the practice of what we do at the Attorney General's Office, is we often see things bleed over State lines and boundaries, as you are well aware. So it is important that we work together to enforce these matters.

Chair WARNOCK. Do you think consumers know what junk fees are?

Ms. HENRY. I think consumers are hit with them, and they often do not understand or see. And as you raised, the reality is a lot of times consumers get misled. So they are looking on the internet. They are trying to do due diligence and look for the best price, whether it is for a hotel, a vacation. And they are examining it and they get led to a certain area or a certain website thinking that is the best price, and they go down this rabbit hole where they have no idea, at the end of it, that the price they thought they were going to pay for a hotel stay with their family is actually far larger because of fees that they were not prepared or were not properly advised of. And at that point they are so far in, or they never discover it.

So no, I do not think they understand exactly what to be aware of. We are trying to do our best to educate, but far more work needs to be done, and I applaud this Committee for working on it.

Chair WARNOCK. If more Federal agencies have the authority to address these hidden fees, how would that affect your office's capacity?

Ms. HENRY. It would help tremendously.

Chair WARNOCK. Thank you so very much.

Yes, Senator Smith.

Senator SMITH. Great. Thank you so much, Chair Warnock and Ranking Member. I really appreciate you holding this hearing, and

I am glad to have a chance to be here to see all of you and ask some questions.

So I want to focus on the issue of some of the exploitive practices we are seeing around land contracts. Just earlier this month I chaired a hearing in my Housing Subcommittee on land contracts. These are arrangements such as lease-to-purchase or rent-to-own agreements that can be highly exploitive, and they often target home buyers in underserved communities, particularly those of color. In my home State of Minnesota, these products have been targeted at many people in the Somali community.

The terms of these arrangements are often misrepresented or not fully disclosed, which means that buyers are facing unexpected fees and penalties, which only compound their challenges. And this can be a big deal.

So what this is, is essentially somebody enters into a contract, as you know, where they are leasing or renting to own, but they do not end up owning the property until the very last payment is made. And if one thing goes wrong then they lose all of the equity that they have put into that home. They lose all of the rent. They are basically left high and dry, and this can be really significant.

One of the witnesses at our hearing testified that his organization, which works to help folks that have been abused by this process, have helped to forgive $130,000 in penalties and fees and charges for 40 families, so really significant.

My question is to the attorney general and also to Ms. Siegel. I understand that both of you have some experience with this kind of home financing, and I am wondering what you have observed in your work and what advice you have for us as we think about how to protect people from these exploitive kinds of contracts?

Ms. HENRY. If I may.

Senator SMITH. Yes, please, Ms. Henry.

Ms. HENRY. Yes. We have seen this. We have had two recent rather large cases against Harbor Portfolio and Vision Properties where it was exactly as you described, where individuals, consumers were attempting to be able to get properties and rent to own. And in the end, again, what we saw was it lacked transparency.

Senator SMITH. Right.

Ms. HENRY. So the details are buried deep, or they are never fully explained, and the fine print allows them to take away the equity that these individuals have built up, with some minor transgression, and they are completely unaware. And again, I think the critical piece to this is to require that all of these companies are up front with the individuals, so they understand exactly what they are signing up for, exactly what they are getting into, and can make a decision based on that, as opposed to being so far in and then to lose and owe so much more money. It is a vicious cycle that they are unable to get out of, as a result of not being up front and transparent.

Senator SMITH. Right, and I know attorneys general around the country are working on this, and this idea of increased transparency has been brought up as a solution. Another solution has been to—the way that this occurs for people is that they are faced with complete forfeiture rather than any kind of a foreclosure proc-

ess. So I wonder, maybe Ms. Siegel, if you would like to comment on that, or if anybody would like to comment on that.

Ms. SIEGAL. Thank you, Senator. We do see those types of cases at Atlanta Legal Aid, often called contract for deed or rent to own. What we see is that potential homeowners do often forfeit any potential equity that they may have had after paying over months or years on a contract. They also pay very high downpayment type fees and monthly option fees. And even though some of these rent-to-own companies say that those fees are refundable, when you look at the fine print you find that they actually forfeit all those fees if the tenant is not ultimately able to purchase the home.

We also find that there are very high failure rates. Not many people that come to us are actually able to become successful and become homeowners at the end of the day, and we think that is problematic.

Senator SMITH. The testimony before our Subcommittee really talked about how, in many ways, these contracts are designed to fail. It is not just like, oh, it is just not working out most of the time. When it is 80-plus percent of the time they are failing and people are losing all of their equity then it is designed to fail, and that is, I think, something that there is an opportunity for us to work on.

And I want to just also point, before I yield back, Mr. Chair, that in some parts of our economy, and in Minnesota, for example, contracts for deed are used by folks in agriculture, young folks that are getting into buying land, and they can be used in a non-exploitive way. But the ways in which these contracts are being used to really take advantage of people, I think we need to focus on, and there is a lot that we can do.

Thank you, Mr. Chair.

Chair WARNOCK. Thank you very much, Senator Smith.

Senator Warren.

Senator WARREN. Thank you very much, Mr. Chairman, and thank you for holding this hearing today.

Earlier this month, the Consumer Financial Protection Bureau ordered Bank of America to pay $100 million to its customers for illegally charging fees, withholding credit card rewards, and opening fake bank accounts. Now I know what you are thinking—fake accounts, illegal fees, fraudulent credit card practices, I have seen this movie before. Is this deja vu all over again?

Name your favorite big bank—Bank of America, Wells Fargo, JPMorgan Chase—and chances are that the CFPB has caught them red-handed engaging in any one of these tricks, at least one and sometimes all at the same time.

Consider overdraft. Overdraft fees, the charge you get if you spend more money than you have in your bank account, squeezed as much as tens of billions of dollars out of consumers' pockets every year. The banks claim that these fees help consumers by allowing banks to offer overdraft protection to those who want it.

So Attorney General Henry, you have spent years prosecuting consumer protection violations. You are someone who has seen up close the junk fee tricks that financial institutions use to nickel and dime consumers for their last buck. So let me ask you, are these fees good for consumers, like the banks claim?

Ms. HENRY. Thank you for the question. No, they are definitely not good for the consumers. In fact, in April of 2022, we urged the biggest banks to follow Citi and Capital One to eliminate harmful junk fees, overdraft fees, nonsufficient fund fees. And the truth is they hit families of color harder and often result in account closures, leaving them unbanked. Ninety percent of these fees are paid by a small subset, and they generally pay three or more a year while earning less than $50,000. And the truth is, typically the costs of the bank to cover unfunded transactions is far lower than the fee.

Senator WARREN. So as I understand it, the fee to the consumer can be as high as $37, and you are saying the actual cost to the bank——

Ms. HENRY. Much less.

Senator WARREN. ——much less than that.

You know, for Bank of America, hitting consumers with a single $35 overdraft fee was not enough. They were caught double-dipping, charging multiple fees for the same transaction, earning them hundreds of millions of dollars over a 3 ½-year period.

Now banks know that these fees are junk, and that is why many of these banks recently announced changes to their overdraft policies. At the same time that Bank of America was breaking the law, it made a splashy announcement early last year that it would lower its overdraft fees and reduce its overdraft-related revenue by 90 percent. But the fact of the matter is that Bank of America still took in nearly $400 million in overdraft fees from families last year, and altogether big banks raked in more than $7.7 billion in these fees.

Attorney General Henry, now that we know that $7.7 billion is not a ton of money to a big bank like Bank of America, it is just icing on the cake for them, but it is a lot of money to low-income families that are forced to fork it over. Do you believe that the big banks, like Bank of America, should eliminate overdraft fees?

Ms. HENRY. Yes.

Senator WARREN. That was very direct. Good. I will take that.

You know, despite continuing to rake in billions in revenue from predatory overdraft fees, and continuing to get caught charging these fees illegally, the bank lobby holds up the changes they have made to their overdraft policies as evidence that these giant banks can be trusted to do the right thing on their own and that they do not need stronger rules that would protect consumers from predatory overdraft fees. And let's not forget, these are the same banks that are bankrolling the attacks on the CFPB.

So Attorney General Henry, given their propensity for repeated lawbreaking, do you think the giant banks can be trusted to act in the best interest of consumers without stronger rules and vigorous enforcement?

Ms. HENRY. Well, if history is any lesson we know that they cannot be trusted to act in the best interest of consumers on their own. Look, they are in the business of making money for their shareholders, and we need robust consumer protection rules enforcement to ensure that.

Senator WARREN. Yeah. I have no problem with the banks making a profit, but not like this. You know, the big banks have prov-

en, over and over, that they will abuse their power to no end in their endless pursuit of profits. The CFPB has shown that it will stop them in their tracks, and we need to keep it that way.

Over the past 12 years, the CFPB has returned $17 billion to American families cheated by financial institutions, money that otherwise would have stayed in the pockets of Wall Street executives. I am proud of the work that the CFPB has achieved, and I look forward to working with my colleagues to support their work in the future.

Thank you, Mr. Chairman.

Chair WARNOCK. Thank you very much, Senator Warren.

Ranking Member Tillis.

Senator TILLIS. Thank you. Just a brief question, and a statement again to General Henry and Ms. Siegel. What you are witnessing here, I think, is not Members saying that we should not have transparency, that a consumer should know what it costs at the time that they make a financial commitment. What we are really having a discussion here is, I think Chair Warnock or one of the Members, suggested we just need to give the regulators more authority.

So what we are talking about here is not the "what." It is the "how." And I, for one, do not think that the regulators who have demonstrated pushing the boundaries of their authority, giving them more authority, is a good idea if we are coming up with a real bipartisan, sustainable solution. I think that comes by saying the practices that you demonstrated are wrong. How do we deal with that? And as a matter of Congress, how do we agree that that should look?

The problem we have here, too, when we transfer power out of Congress to another branch is that it changes every 4 years or so. So you may be thrilled with a regulatory regimen that comes out from the CFPB today, but because of the way they have behaved it would be one of the first things I would work to repeal if the Administration changed and withdraw it.

So I think we have an opportunity here, if we realize that there are probably extremes at either end who are not going to be satisfied, but the problem that you all identified has been addressed. I think it should be the purview of Congress.

So Mr. Johnson, could you speak a little bit about the efforts and the lengths the CFPB goes in an effort to avoid judicial review and skirt the APA process, because that provides a little bit more context for behaviors that concern me about empowering regulators to do more. But if you could just give a few examples, then I am done, Mr. Chair.

Mr. JOHNSON. Thank you, Senator. So as you know, the APA requires agencies to go through a full public notice and comment process to solicit the views of the public regarding a rule proposal, and that process takes time, although it is incredibly important to do so. So for some agencies there is an incentive to skirt that process because it takes that time to go through that careful deliberation.

We have seen trends of agencies like the CFPB issuing guidance, for instance, the CFPB's new form of guidance called circulars, which are meant to advise other enforcement agencies——

Senator TILLIS. Does the industry do that as guidance, or do they do it as a de facto rule that they better adhere to?

Mr. JOHNSON. It is viewed as a de facto rule, and that is the game that is played, which is labeling it as a statement of policy as opposed to going through the full rulemaking process, but banking on the idea that industry will treat it as a mandatory obligation.

Senator TILLIS. By not going through the full process of notice and public comment, are we not missing the opportunity to identify some of the very unintended outcomes that consumers may ultimately bear the burden of?

Mr. JOHNSON. Absolutely, and Congress has specified that the CFPB has to go through a fulsome cost-benefit analysis under its Section 1022 of the Dodd-Frank Act.

Senator TILLIS. Thank you.

Senator WARREN. Mr. Chairman, might I ask a question?

Chair WARNOCK. Yes, by all means.

Senator WARREN. I would like to follow up with the same witness. Is the CFPB the only agency that issues guidance?

Mr. JOHNSON. It is not. In my written testimony I point out the trend that the agency——

Senator WARREN. And you have data on the trend.

Mr. JOHNSON. Well, I pointed out several instances of guidance——

Senator WARREN. The plural of anecdote is not data. You have data on the trend?

Mr. JOHNSON. I have pointed out the instances of the CFPB's efforts with respect to the President's junk fee initiative what I think are skirting APA requirements.

Senator WARREN. So the question I was asking you, is the CFPB the only agency that does guidance?

Senator TILLIS. No, and to be honest——

Mr. JOHNSON. No, Senator, it is not.

Senator TILLIS. ——if I may answer that question, no. Several of them do, and Senator Warren, it is one of the reasons why when we see guidance, speeches, memos, letters, suggestions, that we think ultimately rise to a rule, we get an accounting of that, and we try to have that particular policy position withdrawn or just subjected to the Administrative Procedures Act.

Senator WARREN. Well——

Senator TILLIS. And it is rampant in the financial regulators. So no, it is not just about the CFPB.

Senator WARREN. And that is my only point. Is the CFPB, the OCC, the Fed, the IRS, guidance is a part of how they explain to the industry the agency's view of emerging practices, for example. If there is a problem I would really like to see the data on it. Thank you.

Chair WARNOCK. With that, all questioning has concluded. And look, I would invite our colleagues on the other side of the aisle, if they feel that something is amiss here and they are interested, if they think Congress needs to get involved, I look forward to their suggestions about how we strengthen regulations to protect consumers. I do think they can wait another day as we deal with,

whether we are talking about housing in Atlanta or the bank fees that others face all across our country.

Thanks to our witnesses for being with us today. Thank you again to Ranking Member Tillis for your partnership with holding this hearing.

And this is the Senate Banking Committee's first hearing on junk fees as Congress. I look forward to more to come. This hearing highlights how Congress and this Administration are focusing on lowering costs for the American people. There is a difference between offering a service that will lend a hand and offering a service that will kick someone while they are down.

I am grateful to the work that the CFPB and the FTC are doing to tackle predatory junk fees. Clearly there is a lot more work to be done in this space. Lowering or eliminating onerous fees is something I will keep pushing for through legislation, by working with the business community, when necessary, and by working with regulators to stop bad actors from taking advantage of working Americans through rulemaking as well as by providing guidance.

This topic is about saving people money, creating an economy that works for all Americans, and ensuring that hardworking families are not swindled out of a shot at financial stability.

For Senators who wish to submit questions for the record, those questions are due 1 week from today. For our witnesses, you will have 45 days to respond to any questions.

Thank you all again, and with that this hearing is adjourned.

[Whereupon, at 10:33 a.m., the hearing was adjourned.]

[Prepared statements, responses to written questions, and additional material supplied for the record follow:]

## PREPARED STATEMENT OF MICHELLE A. HENRY

ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA

JULY 26, 2023

Good Morning Chairman Warnock, Ranking Member Tillis, Members of the Committee. Thank you for inviting me to testify today. My name is Michelle Henry, and I am the Attorney General of Pennsylvania. I joined the office in January 2017 as First Deputy Attorney General, and I became Attorney General in January 2023.

This Subcommittee is right to focus its attention on junk fees because they harm both businesses and consumers. Honest businesses lose out to competitors who charge junk fees because the competitors' prices appear (at first) to be a better deal. This problem is often compounded by Internet lead generators that steer consumers to the companies charging the junk fees. Consumers end up paying more than they expected for a product or service. Junk fees prevent consumers from effectively shopping for the best overall price. This hinders the functioning of a competitive marketplace.

While the phrase "junk fees" is a relatively new way of describing surprise charges, our work in combatting these practices goes back many decades. Today, I want to tell you about the work we have done in recent years, in three markets where junk fees have become more and more pervasive: consumer finance, landlord tenant, and hotels.

**Consumer Finance**

In the consumer finance space, our landmark junk fees case is a multistate lawsuit against Mariner Finance, a Wall Street private equity-owned installment lender. Our lawsuit alleges that Mariner charged consumers junk fees for hidden add-on products that consumers either did not know about or did not agree to buy. Consumers left Mariner believing they had entered into an agreement to borrow and repay, over time, a certain amount of money. In reality, because of these hidden junk fees, Mariner added hundreds to thousands of dollars to the total amount a consumer owed. Mariner compounds the problem by pushing many consumers to put down their car title as collateral, trapping them in loans that are inflated by junk fees.

The cost of the Mariner's junk fees is staggering: for a random sample of loans originated in Pennsylvania in December 2020, Mariner charged each consumer an average of $1,085 in junk fees for an average of $3,394 in cash borrowed. In the aggregate, Mariner charged Pennsylvanians more than $27 million in junk fees and interest for add-ons from 2015 to 2018.[1] Nationwide, Mariner charged consumers over $120 million in junk fees for add-on products in 2019.

We filed the Mariner lawsuit in Federal court in Philadelphia together with four other attorneys general: New Jersey, Washington, Oregon, and the District of Columbia. We are using the authority that Congress granted us to enforce the Dodd-Frank Act. We are asking the Court to order that Mariner: (1) refund of all junk fees and associated interest, (2) pay penalties, and (3) stop charging junk fees, among other relief.

We announced a significant junk fee settlement in 2018 with Wells Fargo.[2] The media widely covered the first Wells Fargo scandal—where the bank opened millions of bank accounts without the customers' knowledge. But the much more harmful conduct was uncovered later: the $385 million in junk fees Wells charged its auto finance customers for so-called force-placed car insurance.

Despite evidence that many customers already had the required car insurance, Wells Fargo improperly charged premiums, interest, and fees for force-placed insurance to more than two million accounts. In addition, Wells Fargo refunded more than $100 million in mortgage junk fees because it improperly charged mortgage consumers for rate lock extension fees even when the delay was caused by Wells Fargo. To resolve the multistate action, Wells Fargo agreed to pay the States $575 million. This was in addition to the consumer refunds I mentioned, and on top of another $2.3 billion the bank paid to resolve other regulatory and class actions.

I want to address an argument that companies such as Mariner sometimes make. Predatory lenders often argue that their overpriced loans are necessary to help consumers make ends meet in a moment of dire need, such as unexpected car repairs.

---

[1] *https://www.attorneygeneral.gov/wp-content/uploads/2022/09/2022-09-07-Mariner-Multistate.pdf; https://www.attorneygeneral.gov/taking-action/ag-shapiro-takes-action-to-defend-pennsylvanians-from-predatorypersonal-lending-company/*

[2] *https://www.attorneygeneral.gov/taking-action/attorney-general-shapiro-announces-575-million-50-statesettlement-with-wells-fargo-bank-for-opening-unauthorized-accounts-and-charging-consumers-for-unnecessaryauto-insurance-mortgage-fees/*

But we know from empirical research that far more predatory loans are taken out to meet recurring expenses than for emergencies.[3] Consumers in Pennsylvania often tell our office that they regret taking out their loan from a high-cost lender. Many times they tell us the lender pushed them to borrow more than they wanted or needed. And often they were led to the lender by an online lead generator that purports to be helping the consumer find the best deal available.

In reality, most consumers would be better off getting an auto refinance loan or an installment loan at their local credit union or community bank rather than going to an expensive installment lender that charges junk fees.

Finally, I want to note that in April 2022 we joined other attorneys general in urging the[4] CEOs of the biggest banks—JPMorgan Chase, Bank of America, U.S. Bank, and Wells Fargo—to follow the lead of Citi and Capital One and eliminate harmful junk fees such as overdraft fees and nonsufficient fund fees. Overdraft fees hit families and communities of color harder than others. They start a vicious cycle that drives them deeper and deeper into debt. Eliminating these fees helps create a system that works for everyone.

**Landlord Tenant**

We have brought several landlord tenant cases against landlords charging junk fees, particularly in areas where many tenants are first-time renters, such as in State College, where Penn State University is located. For example, last year we settled with a landlord that illegally charged a 15 percent Administrative Charge on top of damage charges assessed against tenants' security deposits. In addition, the company's leases gave landlords the right to apply $100 of each tenant's share of the security deposit towards repairing damage to shared common areas. The collection of these charges without proof that actual damage was caused by a specific tenant is illegal under the Pennsylvania Landlord and Tenant Act.

Another landlord against whom we are currently litigating has allegedly unlawfully charged his tenants hundreds and sometimes thousands of dollars for normal wear and tear and maintenance.[5] This allows him to unlawfully retain all or significant portions of tenants' security deposits, padding his profits at the expense of his tenants and his competition.

**Hotels and Ticket Platforms**

We have also worked hard to stop hotel companies and concert promoters from charging junk fees. In 2020, we announced a settlement with Event Ticket Sales LLC and its owner because they had been charging fees that consumers never agreed to pay. They also refused to honor their refund policy. As part of our settlement, the company agreed to provide full refunds for all Pennsylvania consumers who purchased tickets for events that were canceled.

In 2021, we announced a landmark junk fees settlement with Marriott International. For many years, travelers have been misled by the published rates offered by hotels for a night's stay only later to be hit with mandatory "resort fees" when they are checking in. Thanks to our settlement,[6] Marriott now has a policy in place to be upfront and transparent in the disclosure of mandatory fees, including resort fees, as part of the total price of a hotel stay—allowing consumers to compare total costs for hotels and find the one that is the best fit for them. Marriott was the first hotel chain to formally commit to the upfront disclosure of resort fees as part of the initial advertised price.

Of course, our fight against junk fees is one we cannot win on our own. We are working closely with our fellow States, as well as our Federal law enforcement partners. We have a particularly close relationship with the CFPB because we have partnered with them on major cases, including most recently the Trident Mortgage redlining settlement in the Philadelphia region. That case, which also involved the Department of Justice and the attorneys general of New Jersey and Delaware, will

---

[3] For example, The Pew Charitable Trusts found that 69 percent of payday loans are taken out for recurring expenses, with only 16 percent for unexpected emergencies, 8 percent for "something special," and 2 percent for "other." The Pew Charitable Trusts, "Safe Small-Dollar Loans Research Project, Payday Lending in America: Who Borrows, Where They Borrow, and Why", at 8, 13 (2012), available at *https://www.pewtrusts.org/en/research-and-analysis/reports/2012/07/19/whoborrows-where-they-borrow-and-why.*

[4] *https://www.attorneygeneral.gov/taking-action/ag-shapiro-calls-for-consumer-banks-to-eliminate-overdraft-fees/; https://ag.ny.gov/sites/default/files/2022.04.04-overdraft-letters-combined.pdf*

[5] *https://www.statecollege.com/articles/local-news/pennsylvania-attorney-general-files-lawsuit-against-statecollege-landlord/*

[6] *https://www.attorneygeneral.gov/taking-action/ag-shapiros-action-requires-marriott-to-disclose-resort-fees/*

provide $18.4 million in loan subsidies that will spur hundreds of millions of dollars in new mortgages to majority-minority neighborhoods.

We have also sent comment letters to the CFPB in support of several of its initiatives, including the junk fees request for information. In our April 2022 letter,[7] we said that we share the Bureau's broad concern about the proliferation of junk fees, and we wrote about convenience fees imposed by mortgage servicers. Fees charged to make a mortgage payment (such as by phone or through a third party) are particularly insidious because, unlike in other marketplaces, consumers have no choice of who will be their mortgage servicer, and they cannot switch servicers.

We commend the CFPB for taking supervisory action against mortgage servicers that have charged junk fees,[8] and we encourage it to consider banning or significantly restricting convenience fees in markets where consumers do not have the ability to take their business elsewhere to avoid the fees. And I look forward to continuing to work closely with the CFPB and Director Rohit Chopra on cases and policy initiatives.

Ultimately, our work battling junk fees protects not only consumers, but also honest businesses. For example, not only does Mariner Finance harm a consumer when it charges her thousands of dollars in hidden junk fees, but it also harms the local community bank or credit union that might have otherwise earned the consumer's business. By ensuring that prices are truly transparent, we protect businesses from being undercut by "cheaper" or "faster" competitors that rip off consumers with hidden fees. This is especially true in an era where more and more consumers are shopping online, and many websites sort their products or services by the upfront price or APR.

Thank you for inviting me to testify today, and I am happy to answer any questions.

---

## PREPARED STATEMENT OF LINDSEY SIEGEL

DIRECTOR OF HOUSING ADVOCACY, ATLANTA LEGAL AID SOCIETY

JULY 26, 2023

Good morning Chairman Warnock, Ranking Member Tillis, and Members of the Subcommittee. Thank you for the opportunity to testify on behalf of the low-income clients of the Atlanta Legal Aid Society about predatory rental fees and the burdens these fees place on the families we serve. My name is Lindsey Siegel, and I'm the Director of Housing Advocacy at Atlanta Legal Aid.[1] Atlanta Legal Aid provides free legal services to families living in poverty in the five-county metro Atlanta area. We assist individuals who have a range of civil legal issues, but today I will focus on the rental housing market and the business model where institutional landlords gouge families living in poverty by charging junk fees that make rental housing unaffordable for many low-income families.

### Atlanta Legal Aid's Representation of Low-Income Renters

Since 1924, Atlanta Legal Aid Society has offered free civil legal aid for low-income people across metro Atlanta. With five neighborhood offices, three offices in Children's Healthcare of Atlanta hospitals, three county courthouse projects, a variety of self-help clinics, and countless community education programs, Legal Aid lawyers and volunteers represent low-income individuals in 20,000 cases every year.

Atlanta Legal Aid is all too familiar with the burdens facing low-income renters. Since the pandemic began, roughly half of the individuals we serve each year contact us about a landlord-tenant legal problem.[2] We represent tenants in a range of rental housing issues, including eviction defense, challenging illegal practices, connecting tenants with rental assistance, filing lawsuits to address discrimination and systemic inequities, and more.

---

[7] *https://ag.state.il.us/pressroom/2022-04/State-Attorneys-General-Multistate-Comment-Letter-to-CFPB-conveniencefees-41122.pdf*

[8] *https://www.consumerfinance.gov/about-us/newsroom/cfpb-supervisory-examinations-find-credit-reportingfailures-surprise-junk-fees/*

[1] In my 10 years at Atlanta Legal Aid, I have represented hundreds of low-income tenants in Federal and State court to challenge discrimination, address unfair practices, and enforce their civil and legal rights. As Director of Housing Advocacy, I lead the organization's housing litigation and advocacy strategy, represent clients directly, maintain expertise on local and national housing protections, and serve as a resource to other lawyers and housing advocates.

[2] Before the pandemic, about one third of Atlanta Legal Aid cases involved a landlord-tenant issue.

Ms. Dixon[3] is a single mother who found an apartment in the fall of 2020. At the height of the pandemic, she searched online for a place she could afford. She found a two-bedroom apartment that advertised a rent of just under $1,400 per month. This rate was at the top end of what she could afford, but she looked at her budget and determined it would be possible. The apartment listing did not list any other fees she would be required to pay. She applied for the apartment and paid $525 through the landlord's online portal which was supposed to cover her $50 application fee, a $175 move-in fee, and a $300 screening fee. All these fees were nonrefundable. She was not able to see the lease or the apartment she'd be renting, but she knew if she did not pay sight unseen, she would lose the apartment to someone else.

A few weeks later, Ms. Dixon's landlord approved her application. She finally received and reviewed a copy of her lease 2 days before she was slated to move in. It was 50 pages long and contained 8 different addenda. She expected to pay her rent and pay for water. She didn't expect to be responsible for a package locker fee, a trash removal fee, a separate valet trash fee, a pest control fee, a technology package fee, an insurance fee, and a credit reporting fee, all of which were buried in the lease agreement. She also didn't know she would be charged a one-time $200 approval fee. To make matters worse, Ms. Dixon's landlord did not accept the rent by cash, check, or money order. She either had to pay through Money Gram, which itself charges a fee, or pay through the landlord's online portal, which charged her an astonishing $72 per month "convenience fee." When Ms. Dixon contacted our office a year later, she was paying $230 more per month than her expected rent.

**Junk Fees Disproportionately Harm Low-Income Families**

When landlords surprise low-income tenants with hidden fees or charge them more than the cost of actually providing a service, they make rental housing even more unaffordable and exacerbate the challenges that low-income renters are already facing to maintain housing and financial security for their families.[4] Many of the renters Atlanta Legal Aid serves have already seen skyrocketing rents and monthly rent increases of $300 or more each time they've renewed a lease in the past three years.

Because three out of every four families who qualify for federally subsidized housing don't have it,[5] most low-income families already struggle to find the most affordable private housing they can. In Georgia, 46 percent of all renters are cost-burdened, meaning they pay more than 30 percent of their income on housing costs.[6] The unaffordability is most pronounced for Black renters, 54 percent of whom are cost burdened, and over half of those severely so, meaning they pay more than 50 percent of their income on housing.[7]

Although junk rental fees affect all aspects of the rental market, they place a disproportionate burden on the livelihoods of low-income families. Atlanta Legal Aid's low-income clients understand the risk of not paying rent, and the vast majority will avoid it at all cost. As Matthew Desmond put it, the rent eats first.[8] Families who can't afford junk fees will cut from other areas in their lives: food, medicine, clothing, transportation to work, doctor's visits, or internet that their children need to complete school assignments. They will forgo other basic needs to avoid becoming homeless.

**Investor Landlords Drive Fees**

In the communities Atlanta Legal Aid serves, institutional and investor landlords are the main culprits of using junk and hidden fees to help drive profits. And these companies have invested heavily in the Atlanta area since the 2008 recession. The *Atlanta Journal Constitution* recently reported that across metro Atlanta, 65,000 single family homes have been converted to an investment product by Wall Street companies in the last decade.[9] Just two companies—Invitation Homes and Progress Residential, own 10,000 properties each in Atlanta. Many of the low-income families we serve who rent single family homes have an institution as their landlord. In

---

[3] I am using a pseudonym to protect our client's identity; the facts have not been changed.

[4] See Ariel Nelson, April Kuehnhoff, Chi Chi Wu, and Steve Sharpe, "Too Damn High: How Junk Fees Add to Skyrocketing Rents" (Mar. 13, 2023).

[5] Peggy Bailey, "Addressing the Affordable Housing Crisis Requires Expanding Rental Assistance and Adding Housing Units", Center on Budget and Policy Priorities (Oct. 27, 2022).

[6] Federal Reserve Bank of Atlanta, Southeastern Rental Affordability Tracker (2023).

[7] Id.

[8] Matthew Desmond, "Evicted: Poverty and Profit in the American City", p. 302 (Penguin Books, 2017).

[9] Brian Eason and John Perry, "American Dream for Rent: Investors Elbow Out Individual Home Buyers", *Atlanta Journal Constitution* (Feb. 9, 2023).

2022 research conducted through UC Berkeley, the authors reported that Invitation Homes, one of the largest institutional landlords of single-family homes in the country, was on track to earn more than $30 million in what they deem "ancillary fees" that year alone. [10]

Investor owners of multifamily properties, like the owner of Ms. Dixon's apartment, are just as fond of using junk fees to drive up the cost of housing. And like investors of single-family homes, they unfairly compete against local landlords by masking their actual prices. So far, this trend has not infected so called mom-and-pop landlords or smaller landlords with strong ties to the communities Atlanta serves. One landlord recently summed it up best—many local landlords are community landlords: they live, work in, and have ties to their communities. These investment companies are commodity landlords.

The low-income renters coming to Atlanta Legal Aid have an extreme power imbalance with their landlords—the high demand for rental housing, especially at the more affordable end of the market, makes some landlords believe they can easily get away with unfair and deceptive lease terms and rental practices. The bait and switch Ms. Dixon experienced, where the landlord advertised the rent as one price only to raise it much higher with junk fees, is a far too common practice of many investor landlords in the Atlanta area. When a low-income renter pays hundreds of dollars in application and upfront fees before even seeing a lease, they feel stuck. These renters often can't afford to walk away from a lease with hidden fees and pay that same amount to apply somewhere else, even once they realize the rent will be unaffordable.

**Application and Tenant Screening Fees Are an Unregulated Source of Profit**

Of particular concern are how many institutional landlords charge high application fees, ostensibly to conduct a tenant background check. These fees often far exceed the cost of running a report, and most renters have to pay them several times before finding a home to rent.

Many of our low-income clients spend hundreds of dollars on application fees before being accepted. A renter applying often has no way of knowing whether the landlord actually checked their credit, or even if the home is still available. When their application is denied, they hardly ever find out the exact reason for their denial. Then, when a rejected tenant applies for the next home, she is forced to pay the fee again, for the same background check. And though products exist to enable an applicant to pay one time for a report that can be used repeatedly within 30 days, very few landlords accept those reports.

One property manager reported to Atlanta Legal Aid that she was aware of some unscrupulous companies using these fees to unfairly profit by collecting applications from more renters than they have homes available. She described how one company in particular kept rental homes listed on its website for weeks after it had already found a renter, because by charging $75 per adult in the household, the company could continue to collect without actually considering each tenant's application.

Renters of color are particularly harmed by unregulated application fees. They are far more likely to be turned down after paying an application fee and often pay more in application fees before being accepted. A recent *Georgetown Law Review* article surmised that high application fees likely steer renters of color toward lower quality housing in lower opportunity areas where they perceive their chances of being approved are higher. [11] In other words, the ubiquity of application fees is likely driving residential segregation. Atlanta Legal Aid has seen the effects play out with the renters of color we serve—those who used to live in intown neighborhoods have been pushed further outside the city, to areas where schools are lower performing, transportation is more challenging, housing is lower quality, and jobs are harder to find.

**Fees Should Be Both Transparent and Fair**

As the White House recently announced, a lack of transparency is just one of the problems of junk fees. [12] Even when fees are disclosed to tenants, many cover services that used to be included in the rent, that tenants don't want or can get cheaper

---

[10] Desiree Fields and Manon Vergerio, "Corporate Landlords and Market Power: What Does the Single-Family Rental Boom Mean for Our Housing Future?" U.C. Berkeley (Apr. 13, 2022).

[11] Eric Dunn, "The Case Against Rental Application Fees", 30 *Geo. J. on Poverty L. & Pol'y* 21 (2022).

[12] The White House, "FACT SHEET: Biden-Harris Administration Takes on Junk Fees in Rental Housing To Lower Costs for Renters" (July 19, 2023); see also Domestic Policy Council and National Economic Council, "The White House Blueprint for a Renters Bill of Rights" (Jan. 2023).

on their own, or that cost far less than the landlord is charging. Many institutional landlords are charging fees that in no way mirror the cost of providing that service—for instance, by charging two trash fees to each renter per month, by charging a $10 mandatory HVAC filter fee each month, or by imposing a $40 fee each month to send a late rent letter (in addition to a hefty late fee). Or they charge fees for services tenants would expect to be included in the rent, like a $10 common area electric fee or a $25 property management fee. Many investor landlords also profit by prohibiting tenants from paying rent by cash or money order. Instead, like Ms. Dixon, many of Atlanta Legal Aid's clients have to pay extra just to pay their rent through an online portal.

**The Federal Government Can Step in To Help Low-Income Tenants**

The proliferation of these abusive fees demonstrates the need for specific protection for tenants. Even in States with good legal protections, tenants usually need legal representation to have any hope of effectively challenging junk fees. In States with poor or nonexistent legal protections or where legal representation is not available, such challenges may not be possible.

Atlanta Legal Aid participated in the response to the request for public comment that the Consumer Financial Protection Bureau and Federal Trade Commission used to learn more about unfair and deceptive tenant screening practices. CFPB in particular has an opportunity to investigate and initiate enforcement actions against companies whose tenant screening practices are unfair and deceptive, and harm consumers. Atlanta Legal Aid also attended listening sessions with the U.S. Department of Housing and Urban Development to share our clients' stories about the burden junk fees have on their financial security. Stronger Federal regulation could help define what is excessive and give States, advocates, and renters new tools to combat these fees. We are glad that this Subcommittee, the White House, HUD, FTC, and CFPB are all concerned about fairness and transparency in the rental market.

Thank you for the opportunity to share our clients' experiences with you today. I look forward to answering any questions you have.

Georgetown Journal on Poverty Law and Policy
Volume XXX, Number 1, Fall 2022

# The Case Against Rental Application Fees

Eric Dunn*

ABSTRACT

*Rental application fees have become exceedingly common throughout the United States rental market, with housing seekers routinely paying anywhere from $30 to over $50 per adult just to apply for admission. These fees are typically justified as compensation for a landlord's costs in conducting background screening on applicants—though certain consumer rights abuses are common, such as imposing fees above the landlord's actual costs or extracting fees from applicants who are never actually considered for the housing.*

*While a single application fee may be slight in the context of rental housing that will cost hundreds or thousands of dollars per month, application fees can raise enormous barriers for renters with criminal history, past evictions, landlord-tenant debts, or other significant admission barriers. Not only may such households face the prospect of paying application fees repeatedly before being accepted as tenants, but they are also incentivized to steer themselves toward lower quality housing they perceive as less selective and hence less likely to deny admission. With extensive research showing the most significant barriers to obtaining rental housing are disproportionately common among certain protected classes, especially Black female-headed households, the practice of charging rental application fees appears likely to drive residential segregation.*

*This article highlights and explains the most significant problems that arise from rental application fees and suggests three key responses for fair housing and consumer advocates. First, the article describes various legislative approaches that states have taken to limit or prohibit rental application fees. This includes a discussion of so-called "portable tenant screening reports," which a housing seeker can purchase one time and then theoretically use repeatedly until housing is secured. Second, the article identifies plausible legal theories advocates may pursue under existing laws to curb abuses around rental application fees and mitigate the effects on communities. Finally, the article identifies needed*

* Eric Dunn joined the National Housing Law Project in 2018 after serving as a legal aid attorney for the Legal Aid & Defender Association of Detroit (2001—2005) and the Northwest Justice Project (2005—2016), and as a lobbyist and statewide housing advocate for the Virginia Poverty Law Center (2016—2018). A long-time housing advocate, Eric has experience in broad range of issues affecting low-income tenants and homeowners, but is probably best known for his advocacy on rental housing admissions and his national leadership around anti-eviction protections during the COVID-19 pandemic. Eric is a graduate of the University of Michigan (1997) and University of Louisville, Brandeis School of Law (2000). 

*research, particularly around the collective impacts rental application fees appear to cause in steering nonwhite renters to lower-quality housing in areas of diminished opportunity, which could greatly strengthen the case for legislative action and support more far-reaching litigation remedies.*



In September 2021, journalist Brian Goldstone posted a Twitter thread[1] about his recent experience assisting an Atlanta woman search for rental housing. "Each landlord charged a fee to apply," Goldstone reported, with one requiring both a $60 application fee as well as a "$150 admin fee," both collected in advance and both nonrefundable. Later in the thread, Goldstone described having met other Atlanta area "low-income families who spent over $1200 on application fees and still weren't approved for a single apartment."[2]

1. Brian Goldstone (@brian_goldstone), TWITTER (Sept. 10, 2021, 10:42 AM), https://twitter.com/brian_goldstone/status/1436339218930937858?s=20.

2. Brian Goldstone (@brian_goldstone), TWITTER (Sept. 10, 2021, 2:42 PM), https://twitter.com/brian_goldstone/status/1436399792041701376?s=20.

Renters from all over the United States responded to Goldstone's thread with their own anecdotes of expensive rental application fees. "We paid the $150 admin fee and $75 app fee," tweeted a renter from Charlotte, "twice after getting rejected at the first place."[3] A woman from Dallas and her partner "paid $300 to apply to [their] apartment, $50 per person and then [a] $200 admin fee."[4] Another user described paying $2,600 to apply to five different apartments in Louisville.[5] Still, another explained how he had "spent well over $500 in non-refundable application fees while looking for an apartment" for himself and his wife.[6]

Many of the hundreds of commenters questioned why rental application fees should cost so much when a landlord's actual cost for obtaining background information on rental applicants is much lower, typically between about $15 and $40.[7] Yet the better question is why housing seekers should have to pay rental application fees at all—especially those who are ultimately not offered the housing.

Nonrefundable rental application fees, which roughly two-thirds of renter households pay when searching for new housing[8] and are nearly ubiquitous in markets where rental vacancies are scarce,[9] have been around long enough that few renters question them nowadays. Application fees have largely evaded scrutiny because the amount associated with a single application—about $30-$75 per applicant—tends to appear insignificant in the context of leasing a home for hundreds or thousands of dollars in rent per month.[10] But those who are denied admission forfeit the application fees and must pay again to apply elsewhere. For some renters, this results in a dynamic of risk and uncertainty that transforms the search for rental housing into a high-stakes wager. The transformation of rental applications into such a gamble undermines important public policies around economic resilience, efforts to combat housing insecurity and homelessness, expansion of equality and opportunity, and eradication of residential segregation.

---

3. @equusjf, TWITTER (Sept. 11, 2021, 3:35 PM), https://twitter.com/equusjf/status/1436775438102183941?s=20.

4. @joyfulwretch, TWITTER (Sept. 11, 2021, 1:40 PM), https://twitter.com/joyfulwretch/status/1436746543256776704?s=20.

5. @hurlman81, TWITTER (Sept. 11, 2021, 1:02 PM), https://twitter.com/hurlman81/status/1436736894788947969?s=20.

6. @SidFinch, TWITTER (Sept. 12, 2021, 9:45 AM), https://twitter.com/SidFinch/status/1437049697915518977?s=20.

7. *See* Stephen Michael White, *How Much Does Tenant Screening Cost? Average Pricing Guide*, RENTPREP (June 15, 2021), https://rentprep.com/landlord-tips/how-much-does-tenant-screening-cost/.

8. Manny Garcia & Edward Berchick, *Renters: Results from the Zillow Consumer Housing Trends Report 2021*, ZILLOW (Aug. 10, 2021), https://www.zillow.com/research/renters-consumer-housing-trends-report-2021-29863/ (finding that nationally 64% of renters pay application fees and the typical fee is $50).

9. *See, e.g.*, Candyd Mendoza, *Zillow lists renters most likely to pay application fees*, MORTG. PRO. AM. (Feb. 5, 2020), https://www.mpamag.com/us/news/general/zillow-lists-renters-most-likely-to-pay-application-fees/212670 ("Tenants are more likely to pay application fees at higher rates in the competitive rental markets in urban and suburban areas.").

10. *See* Taylor Marley, *Rental Application Fees: A Landlord and Renters Guide*, TURBOTENANT (Aug. 12, 2019), https://www.turbotenant.com/blog/rental-application-fees/.

Policymakers should heed these adverse social consequences and take prompt action to restrict rental application fees—whether by limiting the amount and narrowing the circumstances in which rental application fees may be charged, or—better yet—by prohibiting them altogether as the states of Vermont and Massachusetts have already done.[11] In the meantime, advocates should seek opportunities for challenging rental application fees through litigation under existing consumer protection and fair housing laws.

Part I of this article discusses the methods by which residential landlords commonly determine which applicants to accept as tenants in the contemporary rental housing market, including the types of information accessed and the kinds of procedures and technology used in screening and reaching admission decisions. Part II explains the role of rental application fees in the admissions process, describing the typical amounts charged and the justifications given for the fees. Part III details a host of adverse public policy dynamics that flow from the widespread practice of charging rental application fees, including impacts both on individual households as well as the broader, collective implications of the practice. Finally, parts IV and V explore responses, both actual and theoretical, to the various policy difficulties that rental application fees pose. Specifically, part IV examines legislative measures that some jurisdictions have already taken to mitigate the problems associated with rental application fees, as well as considers other ideas that have not yet been enacted. Part V examines legal theories by which individuals, groups, or communities adversely impacted by rental application fees might seek redress under existing law.

## I. Rental Admissions Screening in the Internet Age

Most residential landlords utilize some form of credit or background report in deciding whether to accept particular rental applicants as tenants.[12] Many tenant-screening companies offer background reports, specifically designed for rental housing admissions, that contain the categories of information residential landlords usually consider most relevant in evaluating prospective tenants.[13] This typically includes credit information (especially related to housing, such as rental debts or utility accounts), records of involvement in landlord-tenant litigation

11. Vt. Stat. Ann. tit. 9, § 4456a (West 2022); Mass. Gen. Laws Ann. ch. 186, § 15B(1)(b) (West 2022).

12. *See* TransUnion SmartMove, *Low Turnover and Higher Rental Prices in 2017 Driving Profitable and Attractive Market for Landlords,* GlobeNewswire (Apr. 19, 2017), https://www.globenewswire.com/news-release/2017/04/19/963170/0/en/Low-Turnover-and-Higher-Rental-Prices-in-2017-Driving-Profitable-and-Attractive-Market-for-Landlords.html ("the majority of landlords (90%) conduct credit checks and criminal background checks on all of their potential renters. Approximately 85% of landlords review eviction reports for all applicants.").

13. *See* Brian Carmody, *Best Tenant Screening Services,* Investopedia, https://www.investopedia.com/best-tenant-screening-services-5070361 (last updated Oct. 21, 2022).

(most often eviction cases), and criminal history materials.[14] In addition to—or often in lieu of—this background information, many tenant-screening companies offer analytical reports on applicants, usually in the form of computer-generated scores or recommendations of whether to accept or deny the applicant.[15]

To receive tenant-screening reports, a landlord must contract with a consumer reporting agency.[16] This process can be as simple as establishing an on-line account, or—particularly with larger, multifamily landlords—may entail the creation of an electronic portal specific to that landlord and integrated into the company's property management software.[17] But once the necessary infrastructure is in place, the tenant-screening reports are ordered and generated electronically at the time of a rental application—generally either from an electronic webform the applicant completes and submits,[18] or from a landlord agent who enters information taken from a handwritten application form the prospective tenant fills out.[19]

---

14. *See* CONSUMER FIN. PROT. BUREAU, MARKET SNAPSHOT: BACKGROUND SCREENING REPORTS, CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT 5–6 (Oct. 2019), https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf ("The analysis estimates that for 2019 there are 1,954 background screening companies"); *TransUnion Independent Landlord Survey Insights*, TRANSUNION (Aug. 7, 2017), https://www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page.

15. *See* Colin Lecher, *Automated Background Checks Are Deciding Who's Fit for a Home*, THE VERGE (Feb. 1, 2019), https://www.theverge.com/2019/2/1/18205174/automation-background-check-criminal-records-corelogic; Cyrus Farivar, *Tenant screening software faces national reckoning*, NBC NEWS (Mar. 14, 2021), https://www.nbcnews.com/tech/tech-news/tenant-screening-software-faces-national-reckoning-n1260975; Lauren Kirchner & Matthew Goldstein, *How Automated Background Checks Freeze Out Renters*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/05/28/business/renters-background-checks.html.

16. *See* 15 U.S.C. § 1681a(f) ("The term 'consumer reporting agency' means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.").

17. Compare, for example, companies like TurboTenant and RentRedi that enable landlords to simply create an account and on-line dashboard and from there order screening reports at $55 per applicant (TurboTenant) or $35 per applicant (RentRedi), *see Tenant Screening Services*, TURBOTENANT, https://www.turbotenant.com/tenant-screening/ (last visited Oct. 27, 2022); *Tenant-Screening*, RENTREDI, https://rentredi.com/tenant-screening/ (last visited Oct. 27, 2022), with screening products directed at large multifamily landlords. RealPage, for example, offers "Artificial Intelligence (AI) Screening" that is integrated with the landlord's property management software, *see Resident Screening*, REALPAGE, https://www.realpage.com/apartment-marketing/resident-screening/ (last visited Oct. 27, 2022). Some other companies that deliver screening reports through similar high-volume portals directed at multifamily landlords include First Advantage, Saferent Solutions, and RentGrow. *See Tenant Background Check Services*, FIRST ADVANTAGE, https://fadv.com/solutions/residential-tenant-background-checks/ (last visited Oct. 27, 2022); *Learn: Frequently Asked Questions*, RENTGROW, https://www.rentgrow.com/learn-now/ (last visited Oct. 27, 2022); *Resident Screening*, SAFERENT SOLUTIONS, https://saferentsolutions.com/resident-screening/ (last visited Oct. 27, 2022).

18. *See, e.g.*, *How it Works*, TURBOTENANT, https://www.turbotenant.com/how-it-works/ (last visited Oct. 27, 2022).

19. *See, e.g.*, Kristi Mergenhagen, *Free Tenant Background Check Form*, RENTPREP (Dec. 2, 2016), https://rentprep.com/screening-services/tenant-background-check-form/ (noting "[a] signed rental application (with consent) is even better than a tenant background check form because you get additional information from the tenant.").

Upon receiving the rental application, the tenant-screening company will retrieve background information about the applicant—usually by searching any number of linked databases using personal identifiers from the application form (such as the prospective tenant's name, date of birth, social security number, and current and former addresses).[20] Background information corresponding to the applicant's identifiers will then be filtered using a "matching logic" to determine which pieces of information appear sufficiently likely to belong to the applicant that they should appear on the screening report.[21] The surviving items of information should then usually be filtered additional times to remove items that may be unlawful to report in the jurisdiction where from where the housing is located.[22]

Once these filtering processes are completed, the remaining information constitutes the applicant's tenant-screening background file. For ease of reading and interpretation, the screening company will typically configure a report form with blank fields that the background information populates (e.g., so that eviction records appear in an "eviction records" field, criminal records in a "criminal history" grid, etc.).[23] Most often these reports are generated through fully automated processes, instantly compiled and transmitted back to the requesting landlord within seconds of the application.[24]

In recent years, many tenant-screening companies have added a third phase to the end of the report-generation process.[25] After compiling the background report, the screening company will apply additional algorithms that use the contents of the report either to calculate a numerical score or simply determine whether or not the applicant qualifies under the relevant landlord's rental

---

20. *See What is a tenant screening report?*, CONSUMER FIN. PROTEC. BUREAU (July 1, 2021), https://www.consumerfinance.gov/ask-cfpb/what-is-a-tenant-screening-report-en-2102/; *see also* Brian Carmody, *Best Tenant Screening Services*, INVESTOPEDIA (July 4, 2022), https://www.investopedia.com/best-tenant-screening-services-5070361 (describing business models for seven major tenant-screening companies); Nat'l Consumer L. Ctr., Comment Letter on the Financial Institutions' Use of Artificial Intelligence, Including Machine Learning (July 1, 2021), https://www.fdic.gov/resources/regulations/federal-register-publications/2021/2021-rfi-financial-institutions-ai-3064-za24-c-041.pdf; *Tech, Bias, and Housing Initiative: Tenant Screening*, TECH EQUITY COLLABORATIVE (Feb. 23, 2022), https://techequitycollaborative.org/2022/02/23/tech-bias-and-housing-initiative-tenant-screening/.

21. *See* CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2021-03, CONSUMER REPORTING OF RENTAL INFORMATION 10–13 (2021) (discussing matching procedures in the preparation of tenant screening reports).

22. A number of states have their own laws which may restrict consumer reporting agencies, such as tenant-screening companies, from reporting information that would not be unlawful to include under the federal Fair Credit Reporting Act. *See* CONSUMER FIN. PROT. BUREAU, THE FAIR CREDIT REPORTING ACT'S LIMITED PREEMPTION OF STATE LAWS 2–3 (2022).

23. For examples of what tenant-screening report displays look like, *see* TEX PASLEY, HENRY OOSTROM-SHAH, & ERIC SIROTA, SCREENED OUT: HOW TENANT SCREENING REPORTS UNDERMINE FAIR HOUSING LAWS AND DEPRIVE TENANTS OF EQUAL ACCESS TO HOUSING IN ILLINOIS 5 (2021), https://www.povertylaw.org/wp-content/uploads/2021/01/tenant-screening-final-report.pdf, and TECH EQUITY COLLABORATIVE, *supra* note 20.

24. *See* Lauren Kirchner, *What Can You Do if Your Tenant Background Report Is Wrong?*, THE MARKUP (May 28, 2020), https://themarkup.org/the-breakdown/2020/05/28/what-can-you-do-if-your-tenant-background-report-is-wrong; *see also* TECH EQUITY COLLABORATIVE, *supra* note 20.

25. *See* PASLEY ET AL., *supra* note 23, at 4.

admission policy.[26] The screening company will then transmit the resulting score or determination to the housing provider.[27] A report containing the applicant's underlying background information may or may not accompany the score or recommendation.[28]

Landlords who purchase these kinds of decision-only or score-based analytical reports typically follow the rental decisions calculated by the screening algorithms.[29] After all, the promised advantages of such automated decisions include making admission practices more consistent and freeing landlords from the burden of reviewing and deciding upon applicants themselves;[30] deviating from the screening company's recommendations may vitiate these benefits and indeed defeat the purpose of obtaining such reports altogether.[31] And since landlords do not review, and may not even have access to, the underlying information upon which a denial of admission is based, they may hardly be in a position to reconsider or reverse an adverse recommendation anyway.[32] In this manner, rental

---

26. *See* PASLEY ET AL., *supra* note 23, at 10–11; *see also* Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, 369 F. Supp. 3d 362, 367 (D.Conn. 2019) ("Defendant marketed CrimSAFE as an 'automated tool [that] processes and interprets criminal records and notifies leasing staff when criminal records are found that do not meet the criteria you establish for your community.'"); Brittany Benz, *Using Technology to Simplify the Tenant Screening Process,* APPFOLIO BLOG (Dec. 20, 2021), https://www.appfolio.com/blog/tenant-screening/ ("With AppFolio's built-in Tenant Screening all you have to do is press the 'screen now' button after an application is submitted and you'll receive a comprehensive report shortly after. This includes summarized and detailed views of an applicant's credit score, criminal history, eviction history, and income verification. AppFolio then calculates a result based on criteria and parameters that the client themselves set up[.]").

27. *See, e.g.*, *Conn. Fair Hous. Ctr.*, 369 F. Supp. 3d at 367 ("CrimSAFE uses an algorithm to interpret an applicant's criminal record and provide housing providers with a decision on whether the applicant qualifies for housing.").

28. *See, e.g.*, *id.* ("The report provides no additional information such as the underlying records, the nature of the alleged crime, the date of the offense or the outcome of the case, if any."); *see also* Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back From Tough Times,* CONSUMER REPS. (Mar. 11, 2021), https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/ ("RealPage allows large landlords to choose not to show detailed underlying records in the reports that leasing agents see."); PASLEY ET AL., *supra* note 23, at 11.

29. *See* HOUS. JUST. CTR., OPENING THE DOOR: TENANT SCREENING AND SELECTION 19–20 (2021), https://www.hjcmn.org/wp-content/uploads/2021/04/Tenant-Screening-Report.pdf; *see also* Erin Smith and Heather Vogell, *How Your Shadow Credit Score Could Decide Whether You Get an Apartment,* PROPUBLICA (Mar. 29, 2022), https://www.propublica.org/article/how-your-shadow-credit-score-could-decide-whether-you-get-an-apartment.

30. *See* TONY KARELS, AUTOMATED LEASE DECISIONS IMPROVE BACKGROUND SCREENING RESULTS & INSULATE STAFF FROM FAIR HOUSING ISSUES 3–4 (2012), https://www.rentalhistoryreports.com/wp-content/uploads/sites/3/2016/04/Rental-History-Reports-White-Paper-Automated-Lease-Decisions-Improve-Screening-Results.pdf (Listing the benefits of automated rental admission screening models "[m]aintain a consistent adherence and application of the company's leasing guidelines" and "the initial training of new site and leasing staff can be reduced, as they are not required to be experts on the company criteria and comparing the raw data from a background check result against the denial factors.").

31. *Cf., e.g.*, *SmartMove,* TRANSUNION, https://www.transunion.com/product/smartmove (last visited Oct. 27, 2022) (touting how landlords purchasing SmartMove reports "receive custom leasing recommendations in order to make quicker and better-informed decisions.").

32. *Cf.* PASLEY ET AL., *supra* note 23, at 11 (observing that screening companies typically charge more for reports containing the recommendations, scores, or other analytical information).

admission decisions are often effectively "outsourced" to the third-party screening companies—a practice of "treating every applicant the same" that many landlords erroneously believe shields them from possible fair housing liability.[33]

## II. Role of Rental Application Fees in the Housing Admission Process

Landlords that contract with tenant-screening companies to receive background reports and admission recommendations typically pay for the screening on either a per-report basis or a subscription basis (e.g., to subscribe to the screening agency's data for a month, year, or other period of time). Rental application fees traditionally arose as a means of offsetting a landlord's out-of-pocket costs for obtaining these reports, and in most markets, the prevalent scheme underlying rental application fees has been for landlords to pass only their actual fees on to housing applicants.[34]

Beyond recovering expenses, however, rental application fees also serve other purposes. Probably the most significant is to deter certain kinds of unwanted applicants from applying.[35] One category of rental applicants landlords often seek to avoid consists of those persons who are not sufficiently interested in the housing such that time spent showing them a unit or processing an application is viewed as a waste.[36] Colloquially known as "tire-kickers," these might include people considering the property in question among other possible options, or maybe even tenants satisfied with their current housing with no firm or immediate plans to move. Along with other impediments, such as burdensome documentation requirements or explicit signals or tacit indications of disinterest, a rental

---

33. *See* Hous. Just. Ctr., *supra* note 29 ("While some landlords believe exceptions to their screening standards are warranted in some circumstances, others fear exercising discretion exposes them to claims that they are treating tenants differently. Until the recent introduction of disparate impact analysis into the tenant screening and selection conversation, 'treating everyone the same' was a longstanding approach to fair housing compliance within the industry."); *see also* Karels, *supra* note 30, at 2 (suggesting that the use of automated decision tools reduces a landlord's exposure to fair housing liability because "placing the responsibility of assessing candidate worthiness on the site level staff often times leads to subjective interpretation of the information and poor or inconsistent application of the criteria[.]").

34. *See* Stephen Michael White, *A Landlord's Guide to Rental Application Fees (50 States)*, RentPrep (Aug. 13, 2020), https://rentprep.com/tenant-screening-news/the-landlord-guide-to-charging-rental-application-fees/ ("Rental application fees are intended to cover the cost of processing the rental application. Specifically, the fees are most often used to cover the cost of screening tenants through background checks and credit reports.").

35. *See* Andrea Collatz, *The Do's and Don'ts of Rental Application Fees*, TransUnion SmartMove (June 5, 2018), https://www.mysmartmove.com/SmartMove/blog/dos-donts-collecting-rental-application-fees.page ("keep in mind if you don't accept an application fee, you run the risk of spending time (and money) on an applicant that isn't truly interested or who doesn't meet your screening criteria").

36. *See* White, *supra* note 34, at 11 (rental application fees have become the standard in the industry because they keep potential tenants from applying to properties they do not have any real interest in. Not only is the fee used to pay for the screening, but it also helps to ensure that those applying to rent the property are serious about their interest.).

application fee could decrease the likelihood that semi-serious applicants would choose to go through the full screening process.[37]

Landlords also commonly seek to deter applications from persons the landlord is unlikely to want as tenants. Typically, the most significant barriers to rental housing admission are unpaid debts to past landlords, involvement in prior eviction cases, and criminal history.[38] Significant rental application fees deter people with such impediments from applying to properties they perceive as unlikely to accept them because of such reasons. "In most cases," one industry-side blogger wrote, "the tenants that know they have evictions or criminal records that will appear on their background checks will not pay to have [a housing provider] find this information and disqualify them."[39]

Another ulterior purpose of rental application fees is as a means of financial gain. Particularly in markets where demand and competition for rental units are high and multiple prospective tenants may apply for the same vacancy, a landlord can profit by collecting fees from all the interested applicants but only purchasing screening reports for some (often just one)—a practice frowned upon—if begrudgingly acknowledged by some in the residential leasing industry.[40] In recent years, residential landlords in some markets have begun regularly collecting additional amounts, such as "administrative fees" (supposedly, compensation "for the landlord or agent taking the time to do your application all while holding the apartment off the market") or "move-in fees" (supposedly a charge for the landlord "to make slight changes and touch-ups to the apartment before you move in [such as] repainting, touching up the carpet, changing the locks or power washing the patio") on top of the background check reimbursement.[41]

## III. Adverse Public Policy Impacts of Rental Application Fees

No matter one's views as to the legitimacy of the various reasons for which a landlord might impose a rental application fee, there is no question that such fees

---

37. *See, e.g.,* Kasia Manolas, *Pre-Screen Tenants to Save Time*, Avail (Jul. 2, 2021), https://www.avail.co/education/guides/complete-guide-to-tenant-screening/pre-screen-tenants-to-save-time (recommending landlords use a screening fee to deter unwanted applicants: "If the screening fee is too expensive for a tenant, or they don't want to authorize a credit or background check, then they likely won't reach out.").

38. *See* TransUnion, *supra* note 14.

39. *See* White, *supra* note 34.

40. *See* Tony Drost, *Are Landlords Profiting from Application Fees?*, First Rate Prop. Mgmt. Blog (Nov. 21, 2018), https://www.boiseproperty.management/blog/are-landlords-profiting-from-application-fees; *see also* Robert McCain, *How and Why to Collect Application Fees*, Am. Apartment Owners Ass'n Blog (Dec. 12, 2008), https://www.american-apartment-owners-association.org/property-management/latest-news/how-and-why-to-collect-application-fees/ ("Application fees are not meant to be a profit center. The fact that some landlords used application fees as profit centers resulted in the legislature adding [limitations] to the Landlord/Tenant Laws of many states.").

41. *See* Ashley Singleton, *What Does an Admin Fee Cover in Your Apartment Application?* Apartment Guide (Mar. 2, 2021), https://www.apartmentguide.com/blog/admin-fee-apartment-application/; *see also* Martin Scott, *How to Avoid Hidden Rental and Application Fees as a Renter*, Avail (Aug. 23, 2022), https://www.avail.co/education/articles/how-to-avoid-hidden-rental-fees-and-application-fees-as-a-renter.

present a host of public policy challenges. Beginning with perhaps the simplest and most straightforward of these problems, rental application fees increase the cost and difficulty of obtaining housing. This increased cost and complexity inhibits efforts to promote housing stability and combat homelessness.

While the same might be said of rent or any other housing-related charge, a person who pays rent receives a certain benefit in return—specifically, the use and occupancy of premises for a period of time. A person who pays a rental application fee receives only a *chance* to lease a home. If that chance does not materialize, the applicant comes away with nothing of value.

A rejected applicant must typically then pay a subsequent fee to apply for housing elsewhere. Where the subsequent application is close in time after the first, this fee will usually pay for the creation of a new tenant-screening report with contents largely duplicative of the previous report. Hence, even if one views a failed chance at housing as being fair consideration for a rental application fee, the cost of those successive chances is inflated by the serial creation of duplicative screening reports.

Landlords who need not cover the costs of screening tenants have diminished incentives to minimize those costs—such as by making admission decisions based on portable screening reports[42] or reports recently prepared in connection with applications to other properties, alternatives that provide landlords the information they seek at reduced or even zero cost. Shifting screening costs to applicants through application fees prevents this customary market dynamic from helping control screening costs. Instead of favoring the low-cost producer, the market rewards screening companies for collecting repeated fees for duplicative single-use reports.

Prospective tenants who pay rental application fees to landlords seldom have any way of verifying that the amount of the fee matched the cost of the report to the landlord, as a number of states require.[43] A few tenant-screening products, such as RentRedi and TurboTenant, allow for rental applicants to pay the screening company directly (to have a report sent to the landlord)—which at least enables tenants to know that a report was run and how much the report cost.[44] But only a handful of tenant-screening companies offer this option, and do not even necessarily require it—TurboTenant, for example, tells landlords "[t]he majority

42. Portable tenant-screening reports, discussed below, is a concept in which a screening report containing an applicant's basic background information is created and kept current for a limited time (often 30 days), during which the report may be accessed repeatedly by successive potential landlords without payment of a separate fee.

43. *See, e.g.*, WASH. REV. CODE ANN. § 59.18.257(1)(b) (West 2022) (authorizing landlord to "charge a prospective tenant for costs incurred in obtaining a tenant screening report"); MINN. STAT. ANN. § 504B.173, subd. 2(b) (West 2022) ("landlord must return any amount of the applicant screening fee that is not used for" obtaining background reports); CAL. CIV. CODE § 1950.6(b) (West 2022) ("The amount of the application screening fee shall not be greater than the actual out-of-pocket costs of gathering information concerning the applicant[.]").

44. *See, e.g.*, *How it Works for Tenants*, RENTREDI, https://rentredi.com/tenant-screening/ (last visited Oct. 27, 2022); *see also* TURBOTENANT, *supra* note 17.

of landlords have the tenant pay the $55 fee to cover the screening report. But if you've already collected a fee or just want to pay it yourself, you have that option too."[45]

Even verifying that a screening report was run can be difficult for an applicant who pays the fee to the landlord; the Fair Credit Reporting Act requires an "adverse action notice" be given to a rejected applicant whenever a consumer report (such as a tenant-screening report) is used in connection with a denial of housing.[46] In theory, the adverse action notice contains information the tenant can use to obtain a copy of the tenant-screening report from the company that provided it to the landlord—which should list each person (including prospective landlords) who procured a report about that person within the previous year.[47] But if a landlord rejects an application without providing an adverse action notice,[48] a tenant cannot verify whether a report was run unless the tenant happens to know which of the roughly 2,000 tenant-screening companies the landlord uses.[49] While rental applicants commonly lack insight into the landlords' actual screening costs and sometimes into whether a report was even run,[50] only when a landlord provides the actual reason(s) for denial can a tenant be reasonably assured the application was actually considered. But the federal adverse action notice provision does not require disclosure of the reasons for denial,[51] and only a handful of state and local laws impose such obligations.[52]

In markets where landlords are able to impose "administrative fees" or other additional application charges on top of reimbursement for out-of-pocket screening costs, the potential profits from screening new tenants may even incentivize lease termination and eviction. For example, in September 2021, an advocate from Montana reported that a property management firm in her state had received

---

45. *See* TURBOTENANT, *supra* note 17.

46. *See* 15 U.S.C. § 1681m(a).

47. *See* 15 U.S.C. § 1681g(a)(3) (requiring certain disclosures to consumers); 15 U.S.C. § 1681m (h)(5) (outlining required contents of adverse action notices).

48. Note the Fair Credit Reporting Act (FCRA) may not allow private suits to enforce the adverse action notice requirement. *See* 15 U.S.C. § 1681m(h)(8)(A). *But cf.* Barnette v. Brook Rd., Inc., 429 F. Supp. 2d 741, 749 (E.D.Va. 2006) (finding because of scrivener's error in FCRA "that the limitation in § 1681m(h)(8) should read 'subsection' rather than 'section,' thereby applying solely to subsection (h) and not eliminating the private right of action for violations of the remainder of § 1681m.").

49. CONSUMER FIN. PROT. BUREAU, MARKET SNAPSHOT: BACKGROUND SCREENING REPORTS, CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT 4 (2019), https://files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf ("The analysis estimates that for 2019 there are 1,954 background screening companies.").

50. *See, e.g.*, Marin Scott, *How to Avoid Hidden Rental and Application Fees as a Renter*, AVAIL (Aug 23, 2022), https://www.avail.co/education/articles/how-to-avoid-hidden-rental-fees-and-application-fees-as-a-renter.

51. *See* 15 U.S.C. § 1681m(a).

52. *See, e.g.*, WASH. REV. CODE ANN. § 59.18.257(1)(c) (West 2022) ("If a prospective landlord takes an adverse action, the prospective landlord shall provide a written notice of the adverse action to the prospective tenant that states the reasons for the adverse action."); *see also* PHILA., PA., CODE § 9-1108(4) (2022) (stating that it is unlawful housing practice "to reject an application for rental housing without providing the applicant a written or electronic document setting forth a plain statement of all reasons for the denial of the application.").

over 100 applications, for which it collected $50 each, for a single vacancy—or over $5,000 in application fees to re-let a single unit.[53] The potential to collect two or three times the monthly rent for an apartment through the application and admission process may create an incentive to repeat the screening and leasing process as often as possible, so as to maximize such profits.[54] This could induce landlords to decline renewal of expiring leases, shorten lease terms, or more quickly pursue eviction over minor lease violations or delinquencies that have been resolved.

Probably the most significant policy impact, however, is that charging rental application fees has discriminatory effects by race and color and possibly along other protected class lines. Renters who are Black, Indigenous, and people of color (BIPOC) are more likely to be denied admission due to criminal history, as —despite similar rates of crime commission with whites—they are arrested, convicted and incarcerated at rates disproportionate to their share of the overall population.[55] An increasing body of evidence shows that Black women, especially those with children, disproportionately experience eviction,[56] and multiple studies have shown how various forms of credit scoring and credit history-based decision-making tend to disadvantage people and communities of color as well.[57] Research by Zillow.com found that Black and Latinx renters must typically submit 50% more rental applications in a housing search than the typical white or

---

53. Email from Amy Hall, Att'y, Mont. Legal Servs. Ass'n, to Hous. Just. Network (Sept. 20, 2021, 7:17 PM) (on file with author and Nat'l Hous. L. Project).

54. The method by which a landlord would profit through this practice is likely to refrain from screening or conduct only partial screenings of some applicants, or screening only the most-desired applicant first (and retaining other fees if that applicant is accepted). *See* Drost, *supra* note 40; *see also* McCain, *supra* note 40 ("Application fees are not meant to be a profit center. The fact that some landlords used application fees as profit centers resulted in the legislature adding [limitations] to the Landlord/Tenant Laws of many states."). Yet as of 2009, only 13 states had imposed any limits whatsoever on application fees. *See* Marley, *supra* note 10.

55. *See, e.g.*, ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 6–11 (2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/; *see also* ELIZABETH HINTON ET AL., VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 1–2 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

56. Peter Hepburn et al., *Racial and Gender Disparities among Evicted Americans,* EVICTION LAB (Dec. 16, 2020), https://evictionlab.org/demographics-of-eviction/; Catherine Lizette Gonzalez, *Women of Color Living in Poverty Face Highest Risk of Eviction,* COLORLINES (Apr. 9, 2018, 2:13 PM), https://www.colorlines.com/articles/study-women-color-living-poverty-face-highest-risk-eviction; TIMOTHY A. THOMAS ET AL., THE STATE OF EVICTIONS: RESULTS FROM THE UNIVERSITY OF WASHINGTON EVICTIONS PROJECT § 4.5 (2020), https://evictionresearch.net/washington/why.html (finding "Black adults are evicted 5.5 times more than Whites in King County [and] 6.8 times more in Pierce [County.]").

57. *See generally* U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY (FHEO) GUIDANCE ON COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT IN MARKETING AND APPLICATION PROCESSING AT SUBSIDIZED MULTIFAMILY PROPERTIES 6 (2022); *see also* Sarah Ludwig, *Credit Scores in America Perpetuate Racial Injustice. Here's How,* THE GUARDIAN (Oct. 13, 2015, 10:14 PM), https://www.theguardian.com/commentisfree/2015/oct/13/your-credit-score-is-racist-heres-why.

Asian renter—and that 38% of Black and Latinx renters must submit five or more applications, compared with 21% of white renters.[58]

Paying successive application fees considerably more often than members of other racial groups is not the only way this phenomenon harms BIPOC renters. Since BIPOC renters are more likely to have the kinds of background information that dooms a rental application, the people whom rental application fees deter from applying to certain properties are more likely to be people of color, and possibly women or families with children. Such deterrence can be expected to steer such renters to lower quality properties where they perceive higher chances of admission.[59] Though the question has yet to be academically interrogated, this dynamic likely drives residential segregation—or, at the very least, inhibits neighborhood integration.

## IV. Legislative Solutions to the Policy Problems Rental Application Fees Pose

The preferred way to resolve the various public policy concerns rental application fees pose would be through targeted legislation. Rental application fees are not an especially difficult problem to solve, with at least three promising legislative approaches available.

### *A. Prohibiting Rental Application Fees*

The simplest and most resolute solution to harms associated with rental application fees is a straight prohibition, such as those the states of Vermont and Massachusetts (as well as the United Kingdom) have enacted.[60] Note the clarity of Vermont's prohibition is critical to the success of that law; Massachusetts prohibits application fees through the less direct manner of listing the permissible charges a landlord may collect "prior to the commencement of any tenancy," and omitting application fees from that list.[61] Though this provision effectively prohibits landlords from collecting application fees, in Massachusetts many rental properties are leased through realtors—who are regulated under a different code and may impose fees on rental housing applicants so long as the applicant agrees to the fee in writing.[62] A clear and comprehensive ban like Vermont's, however, substantially eliminates all the problems rental application fees impose on renters and communities.

---

58. Garcia & Berchick, *supra* note 8.

59. *See, e.g.*, Ryan Leonard, *Why Every Landlord Should Charge Rental Application Fees*, Wolfnest Prop. Mgmt. Blog (Apr. 9, 2019), https://www.wolfnest.com/blog/why-every-landlord-should-charge-rental-application-fees ("Deter Unqualified Renters: Sometimes the rental application fee can serve as a qualifying process by itself. This ultimately saves you time by weeding out potential tenants who don't think they will qualify before they even fill out the application.").

60. *See* Vt. Stat. Ann. tit. 9, § 4456a (2022) ("A landlord or a landlord's agent shall not charge an application fee to any individual in order to apply to enter into a rental agreement for a residential dwelling unit."); Mass. Gen. Laws ch. 186, § 15B(1)(b) (2022); *see also* Tenant Fees Act 2019, c. 4 (UK), https://www.legislation.gov.uk/ukpga/2019/4/contents/enacted/data.htm.

61. *See* Mass. Gen. Laws ch. 186, § 15B(1)(b) (2022).

62. *See* 254 Mass. Code Regs. 7.00(3) (2016).

Prohibiting application fees has no drawbacks for renters. Landlords will likely oppose such a prohibition on the claim that allowing prospective tenants to apply without paying fees will cause landlords to incur costs (whether financial or in terms of lost time and effort) associated with "tire-kickers."[63] The validity of this concern is suspect; searching for rental housing is often a laborious and time-consuming activity for renters, and there is little incentive to apply at properties in which a person is not sincerely interested. Vermont has prohibited application fees for more than twenty years, and there do not appear to be any studies or other reports of less-than-serious rental applicants imposing significant costs on landlords in that state. Though some landlords might conceivably be inconvenienced in this manner from time to time, requiring landlords to absorb this incidental cost associated with the business of leasing housing appears well justified by the societal benefits in improving access to housing, consumer protection, and reduction of discrimination and segregation.

Landlords also have ample other means of deterring "tire-kickers."[64] Simply requiring applicants to fill out a written application may deter some. Running a tenant-screening report can entail a "hard inquiry"[65] of the applicant's credit report, which can lower the person's FICO score;[66] informing applicants of this possibility may also deter marginally interested applicants. In almost every jurisdiction most landlords may collect a reasonable "holding deposit" from applicants—an amount of money taken in return for removing a dwelling unit from the market during the application process; should an applicant choose without a good reason not to lease the unit after being approved, the landlord may retain the holding deposit in compensation.[67] Indeed, holding deposits are common in many rental markets already.[68] Eliminating rental application fees from those

63. *See* Kristi Mergenhagen, *Automated Pre-Screening Tenants Saves Time: RentPrep Guide*, RENTPREP (Feb. 15, 2022), https://rentprep.com/tori-vs-harry/automate-prescreening-process-tenant-applicants-2/ ("Tenant pre-screening refers to any process that ensures all tenant applicants who fill out a rental application are thoroughly informed on the rent, property policies, and other key parts of the rental process. Often, applicants submit their forms without being fully prepared or qualified to rent the property. This leads to wasted time and money for everyone involved. By pre-screening tenants, you can limit the number of wasteful applications that you receive.").

64. *See id.*

65. *See* Brianna McGurran, *What Is a Hard Inquiry and How Does It Affect Credit?*, EXPERIAN (Nov. 5, 2019), https://www.experian.com/blogs/ask-experian/what-is-a-hard-inquiry/ ("While a hard inquiry will stay on your credit report for two years, it will usually only impact your credit for a few months. Too many hard inquiries in a short time could make it look like you're seeking loans and credit cards that you may not be able to pay back.").

66. *See* Adam Hayes, *What is a FICO Score*, INVESTOPEDIA, https://www.investopedia.com/terms/f/ficoscore.asp (last updated Feb. 9, 2021) ("A FICO score is a credit score created by the Fair Isaac Corporation (FICO). Lenders use borrowers' FICO scores along with other details on borrowers' credit reports to assess credit risk and determine whether to extend credit.").

67. *See Holding Deposits for Rental Property*, JUSTIA, https://www.justia.com/real-estate/landlord-tenant/information-for-tenants/choosing-a-place-to-rent/holding-deposits/ (last visited Oct. 27, 2022).

68. The legality of replacing holding deposits with non-refundable "administrative fees" likely varies extensively according to the nuances of state law and is beyond the scope of this article.

jurisdictions would be unlikely to have any discernable effect on the frequency by which non-serious prospects apply to rental properties.

Shifting the cost of screening rental applicants to landlords is also more just for the reason that rental admission screening only benefits landlords. Rental applicants receive nothing of value from admission screening; at best the landlord finds nothing to disqualify them, and at worst the screening will cause an application to be denied (and the screening fee forfeited). Application fees are not often framed as a charge that a consumer pays for a chance at being denied the opportunity to lease an apartment, but that is precisely what the fees amount to.

In other words, since the landlord is the only party who benefits from tenant screening, the landlord ought to be the one to pay for it. Landlords may claim doing so would cause rents to increase, but this contention incorrectly assumes landlords will not generally charge as much rent for their dwelling units as the market will bear, but instead some modest premium over their actual costs.[69] Forcing landlords to absorb an expense they alone desire and incur has no effect on the market value of the premises, only the amount of the landlord's profit.

### *B. Allowing Application Fees Only to Applicants Who Are Accepted*

A second legislative approach to rental application fees is to allow landlords to charge such fees only to applicants who are accepted as tenants. Though somewhat more complicated than a straightforward prohibition, this approach significantly advances most of the same public policy objectives as a ban—though it does not fulfill them entirely. From a consumer protection standpoint, applicants still have minimal insight into the amount of the application fees compared with the landlord's actual costs—so the possibility of overcharging remains. Yet an applicant faces no risk of being charged an application fee without receiving an opportunity to lease the housing, so at least an applicant receives actual value in return for the payment. The possibility that the landlord might decide to reject an applicant restores some incentive to avoid unnecessary screening costs, and a landlord cannot profit from a vacancy by charging application fees to multiple applicants who are not then offered the housing.

Such a scheme would also reduce the deterrent impacts of application fees, though by how much could depend significantly on the mechanics of the law. Preferably, the measure would prohibit a landlord from collecting an application fee until the prospective tenant was offered the dwelling unit, effectively making the application fee part of the initial payment due at the start of a lease. Since a rejected applicant would never owe or tender a fee, this approach would likely eliminate application fees as a deterrent to those who fear rejection based on adverse background information.

---

69. *See generally What really determines rents and house prices?*, PROPERTYGEEK, https://www.propertygeek.net/blog/determines-rents-house-prices/ (last updated Mar. 13, 2017) ("market rents are determined by two main factors: local wage levels, and the balance of supply and demand").

Landlords might argue that, without an up-front fee, some prospective tenants could be offered housing (thus becoming liable for the application fee)—yet then decline the offer and be reluctant to tender the fee. Whether this would happen often enough to pose a significant concern appears unlikely, though ultimately unknown. An alternative that eliminates this problem would be allowing landlords to collect the application fees up front, then give refunds to applicants whom they later turn down. But these added steps create opportunities for housing seekers to experience delays in receiving their refunds, bleed costs for services such as check-cashing fees, or not receive the refunds at all. The deterrent effect of application fees could remain significant if applicants come to expect long delays or lack confidence their money will be returned.

### *C. Prohibiting Application Fees When Portable Screening Reports Are Available*

Multiple companies now enable housing seekers to purchase so-called portable tenant screening reports—that is, background reports prepared about those consumers themselves, which the screening company uploads to a secure, password-protected website.[70] By sharing that password with a housing provider, a rental applicant can provide access to that screening report at zero additional cost. For a single fee, the screening company will maintain the report for a specified duration—usually thirty days—within which time the person could, in theory, use that password to apply at an unlimited number of properties without paying an additional fee. In practice, however, few landlords offer to waive application fees and use portable screening reports instead—perhaps in part because of the persistent myth that applicants can tamper with the contents.[71]

The use of portable tenant screening reports could offer yet another practical solution to the problems posed by duplicative screening fees. But tenants have little incentive to purchase portable reports when landlords will not accept them. Were jurisdictions to prohibit landlords from charging rental application fees to applicants who provide access to portable reports, then housing seekers could avoid duplicative fees. As of now, only New York prohibits landlords from charging screening fees to tenants who have portable screening reports available.[72]

Since rental applicants select which portable screening reports to purchase, landlords may oppose such laws because the particular portable report an

---

70. *See, e.g.*, MY SCREENING REPORT.COM, https://www.myscreeningreport.com/ (last visited Oct. 27, 2022); *Online Rental Applications Frequently Asked Questions*, ZILLOW, https://www.zillow.com/z/rental-manager/rental-applications-faq/ (last visited Oct. 27, 2022); *see also Share Applications with Other Landlords*, AVAIL, https://support.avail.co/hc/en-us/articles/115004087294-Share-Applications-with-Other-Landlords (last visited Oct. 27, 2022).

71. *See* Nicho Mauricio, *What is a Comprehsive Reusable Tenant Screening Report?*, POPLAR HOMES (Jul. 21, 2022), https://www.poplarhomes.com/rental-property-management/what-is-a-comprehensive-reusable-tenant-screening-report/; *see also Dispelling the myths of the portable tenant screening report,* MOCO, INC. (June 20, 2016), https://www.moco-inc.com/blog/dispelling-the-myths-of-the-portable-tenant-screening-report/.

72. *See* N.Y. REAL PROP. LAW § 238-a(1)(b) (McKinney 2022) ("the landlord, lessor, sub-lessor or grantor shall waive the fee or fees if the potential tenant provides a copy of a background check or credit check conducted within the past thirty days.").

applicant has available may lack a type of information the landlord considers important, or come from a company the landlord does not trust. But state legislatures could ensure portable reports offer at least a minimum set of basic components through establishing statutory definitions for what constitutes a portable screening report. Washington State, for example, passed a law in 2016 defining "comprehensive reusable tenant screening reports" as a tenant screening report prepared at the applicant's direction within thirty days, "made available directly to a prospective landlord at no charge," and containing the applicant's credit report, criminal history, eviction history, employment verification, and address and rental history.[73] Maryland enacted a similar law in 2021,[74] and California in 2022.[75] And prohibiting rental application fees would not obligate landlords to actually utilize or even review a portable report—a landlord could still order and use whichever screening reports the landlord prefers at the landlord's own expense.[76]

Prohibiting application fees for applicants with portable reports incentivizes landlords to use portable reports instead of paying unnecessarily for duplicative information (as tenants currently do). This in turn could attract even more tenant screening companies to offer portable screening reports. Either way, such a law would substantially alleviate the burden of repeat application fees, and the associated sociological impacts, on tenants and families.

## V. Litigation Approaches to Rental Application Fees

State legislatures and city councils should ideally take proactive steps to mitigate and prevent the problems associated with rental application fees through legislation. But rental application fees may already be amenable to challenges under some existing consumer protection laws—whether because landlords charge excessive amounts, collect fees without actually considering applications, or engage in other deceptive or exploitative practices associated with the application fees. Charging rental application fees likely violates anti-discrimination laws as well—both because the fees are charged disproportionately more often to Black and Latino renters, and because of the probable steering effects rental application fees produce. Advocates should seek out and make use of strategic

73. Wash. Rev. Code Ann. § 59.18.030(4) (West 2022). The terms "criminal history" and "eviction history" are also defined under the Washington statute. *See* Wash. Rev. Code Ann. § 59.18.030(5), (11) (West 2022). The Washington law limits rental application fees to a landlord's actual screening costs and requires landlords to disclose whether they accept comprehensive reusable tenant screening reports, but does not prohibit a landlord who rejects the portable reports from charging application fees for the cost of obtaining a different report. *See* Wash. Rev. Code Ann. § 59.18.257(b) (West 2022).

74. Md. Code Ann., Real Prop. § 8-218 (West 2022).

75. *See* A.B. 2559, 2021-22 Assemb., Reg. Sess. (Cal. 2022) (to be codified at Cal. Civ. Code § 1950.1).

76. Such a law should also prohibit landlords from denying or treating an applicant less favorably for using a portable screening report.

opportunities to curb egregious abuses associated with rental application fees, and potentially challenge the use of such fees altogether where possible.

### *A. Challenging Rental Application Fees as Unfair or Deceptive Consumer Practices*

Most states have adopted consumer protection statutes which, despite great local variation in specific details and text, generally prohibit "unfair or deceptive acts or practices in the conduct of trade or commerce."[77] "Deceptive" practices generally mean those being likely to mislead,[78] while "unfair" practices tend to be those which are exploitative or anti-competitive, whether or not any deception is involved. Consumers injured by such unfair or deceptive practices can typically bring actions for damages and attorney fees under such statutes, and often also seek injunctive relief designed to protect other consumers from the same misconduct.

As discussed above, rental application fees tend to be exploitative and produce a series of deleterious public policy consequences. The specific manner and procedures by which they are imposed may also be confusing or deceptive to consumers. Note that rental application fees are specifically authorized by statute in some jurisdictions, and presumably not amenable to consumer protection act challenges insofar as the fees charged comport with the statutory authorization.

#### 1. Excessive or Illusory Application Fees

Numerous reported decisions have held that fees charged to consumers violated state consumer protection acts where the business collecting the fee either did not perform any service to justify the fee, or where the consumer received nothing in return.[79] Many of the common methods landlords use to pad their revenues through the collection of rental application fees can be objectively characterized as deceptive or unfair in this way. For example, representing to a prospective tenant that an application fee covers only the landlord's out-of-pocket costs for a background check is deceptive when the fee exceeds those costs,[80] or when no

77. Donald M. Zupanec, *Practices forbidden by state deceptive trade practice and consumer protection acts*, 89 A.L.R. 3d 449, §2(a) (1979).

78. *See* Rollins, Inc. v. Butland, 951 So. 2d 860 (Fla. Dist. Ct. App. 2006); Harty v. Underhill, 710 S.E.2d 327 (N.C. Ct. App. 2011).

79. *See, e.g.*, People ex rel. Hartigan v. Knecht Servs., Inc., 575 N.E.2d 1378, 1387 (Ill. App. Ct. 1991) (upholding consumer protection violations against plumbing company that charged for services that were not rendered, charged for service people that were not needed or not present, defendants were in superior bargaining position and used intimidation to collect payment, and where defendants charged excessively high prices).

80. *See, e.g.*, McKell v. Washington Mut., Inc., 49 Cal. Rptr. 3d 227, 241 (Cal. Ct. App. 2006) (claim that bank led "borrowers to believe it is charging them for the cost of certain services it provides, when in reality it is charging them substantially in excess of such costs" stated a claim for unfair business practices).

actual background check is purchased.[81] Retaining any application fee at all is deceptive when the applicant has no meaningful chance at the vacancy—as might occur, for instance, where a landlord receives multiple applications and leases the premises to one applicant without ever considering others.

A handful of states have responded to these specific abuses by restricting the amount of application fees to the landlord's actual cost in obtaining background information (hence a landlord who never actually screens an application has actual costs of $0).[82] But enforcing such laws can be challenging because a rental applicant usually only knows how much the landlord charged her to apply—but not how much the landlords paid to obtain the background information.[83] Other such laws avoid this problem by limiting screening fees to a flat amount, even though that cap may not track the landlord's costs exactly.[84]

Depending upon its specific wording, a law intended to prevent landlords from charging excessive rental application fees can also have a negative unintended consequence of effectively authorizing rental application fees up to a specified amount even if other circumstances might reveal those fees to be objectively unfair or unreasonable. In Virginia, for instance, a 2008 law capped application fees at $50—but that $50 charge is "exclusive of any actual out-of-pocket expenses paid by the landlord to a third-party performing background, credit, or other pre-occupancy checks on the applicant."[85] As originally intended, this law imposed a reasonable limit on the amount landlords could bill applicants for

---

81. *See, e.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 387 (1965) ("It has long been considered a deceptive practice to state falsely that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price even if the offered price represents the actual value of the product and the purchaser is receiving his money's worth."); Green v. Morgan Properties, 73 A.3d 478 (N.J. 2013) (lease clause obligating tenant to pay fixed sum for attorney fees in the event of a summary eviction lawsuit violated NJ Consumer Fraud Act because the amount of the fees bore no relation to the actual fees that were or could be incurred in such a proceeding).

82. *See* WASH. REV. CODE ANN. § 59.18.257 (West 1991).

83. In some jurisdictions, landlords who are entrusted with tenant funds to cover certain third-party payments, the amounts of which being within the landlord's exclusive knowledge, have been held to owe a limited fiduciary duty not to retain excess funds beyond the contemplated payment. *See* P.V. Properties v. Rock Creek, 549 A.2d 403, 409 (Md. Ct. Spec. App. 1988) ("Remedies at law are inadequate and an accounting is due where one party has exclusive control over financial records showing how much is owed to another."); Harlem Cap. Ctr., LLC v. Rosen & Gordon, LLC, 44 N.Y.S.3d 36 (N.Y. App. Div. 2016) (holding security deposit from tenant imposes fiduciary duty on landlord); State v. Lasecki, 946 N.W.2d 137 (Wis. Ct. App. 2020) (landlord's failure to provide statement of charges withheld from security deposit was unfair practice). *But see* Carroll v. Yankwitt, 250 A.3d 696 (Conn. App. Ct. 2021) (failure to provide itemized statement of security deposit withholdings not an unfair trade practice where landlord asserted sum total of charges exceeded deposit). While no case appears to have applied this rule to application fees, the same rationale would seem to apply if an applicant entrusts funds to a landlord for purchase of a third-party screening report, or even to cover the landlord's costs of performing its own background investigation.

84. *See, e.g.*, N.Y. REAL PROP. LAW § 238-a (McKinney 2021) ("In relation to a residential dwelling unit: . . . (b) A landlord, lessor, sub-lessor or grantor may charge a fee or fees to reimburse costs associated with conducting a background check and credit check, provided the cumulative fee or fees for such checks is no more than the actual cost of the background check and credit check or twenty dollars, whichever is less. . .").

85. *See* VA. CODE ANN. § 55.1-1203(C) (West 2022).

reviewing application materials, calling references, and making their own decisions on tenants. But for a landlord that uses fully automated screening, the statute seemingly authorizes a landlord who performs no screening functions itself to nevertheless retain a gratuitous surcharge on top of actual costs paid to a third-party screener.

2. Collecting Fees for Futile Rental Applications

Another practice potentially actionable as deceptive is collecting an application fee from someone the landlord already knows will not be accepted, whether due to disqualifying background information or other cause. Many landlords inquire into income and resources, past evictions, rental debts, criminal history, and other such matters orally or on written application forms—and might learn of disqualifying information without the need for purchasing a formal screening report.

A promise made without the intent to fulfill that promise being a form of fraud,[86] a landlord would undoubtedly commit a deceptive and unfair practice by accepting a rental application fee (and thereby promising the consider admitting the applicant as a tenant) despite having already subjectively decided to reject the applicant. Likewise, a landlord who accepts a fee despite knowing with certainty the application would be rejected under a relevant admission policy or an automated screening procedure that the landlord abides by could be deceptive, particular if no exceptions in that policy are made. Only if a landlord truly intends to actually consider information obtained through the screening process in deciding whether to admit the prospective tenant could there be any justification for collecting an application fee.

Housing seekers with problematic background information commonly adopt a strategy of spontaneously disclosing those matters before paying application fees, in hopes that the landlord or leasing agent will let them know whether they will face automatic disqualification.[87] Landlords often decline to cooperate with these inquiries of this kind. Yet if a landlord's admission policy contains categorical exclusions (i.e., conditions that result in automatic denial of admission without exception), then a landlord who is informed that an applicant falls into one of the excluded categories can be reasonably certain the applicant will be rejected. In at least some such scenarios, allowing a prospective tenant to pay an application fee only to then be rejected—rather than notifying the prospective tenant of the categorical exclusion—would seem to constitute an unfair or deceptive

86. 5 Am. Jur. Proof of Facts 2d 727, § 2 Promissory Fraud (Aug. 2022 update) (A promise to do something necessarily implies the intention to perform, and, where such intention is absent, there is an implied misrepresentation of fact, which is actionable fraud.").

87. *See, e.g.*, Peggy O'Hare, *Tenants' criminal histories pose potential legal snag for housing providers*, SAN ANTONIO EXPRESS-NEWS (Aug. 5, 2017), https://www.expressnews.com/news/local/article/Tenants-criminal-histories-pose-potential-11736804.php ("After one of his rental applications was denied during his search for a new place, Fonseca said he started telling landlords upfront about his criminal history so he wouldn't waste money submitting more applications that might be rejected.").

practice.[88] Indeed, even if an applicant does not spontaneously disclose adverse background information, arguably the landlord should first inquire about information bearing on any automatically disqualifying criteria (thus giving the housing seeker a chance to avoid the fee), or at least make clear the circumstances under which an application will be unconditionally rejected.[89]

One way for landlords to avoid deceiving or exploiting applicants in this manner would be to disclose any categorical exclusions (or the certainty of rejection as to that specific applicant) to prospective tenants before collecting application fees. But this a problematic solution because the types of information on which categorical exclusions are most often based tend to cause discriminatory effects on racial and ethnic minorities.[90] Indeed, often the reason landlords encourage applicants to apply anyway despite knowing about an applicant's disqualifying eviction record, criminal history, bankruptcy, landlord-tenant debt, or other item certain to result in denial is consistent with the notion of "treating everyone the same" to supposedly guard against fair housing liability.[91]

That is, discouraging persons from applying for rental housing because of their membership in a protected class violates the Fair Housing Act.[92] This can occur, for instance, if a leasing agent routinely deters members of a particular group from applying if they report having adverse background information, while encouraging people outside that group to apply regardless. Fair housing testing around criminal history screening has repeatedly uncovered evidence of property management firms discouraging Black applicants who report criminal history from continuing with the application process, for example, while encouraging white applicants to move forward despite similar criminal history.[93]

---

88. *See generally* Sager v. Hous. Comm'n of Anne Arundel Cnty., 957 F.Supp.2d 627 (D. Md. 2013) (inability to avoid a harmful consumer practice as a factor in establishing unfairness).

89. Many tenant-screening and property management firms recommend using "pre-screening" questions to ascertain potential disqualifiers from prospective tenants before running a formal background check. *See, e.g.*, *20 Questions To Ask Potential Tenants*, RENTPREP, https://rentprep.com/tenant-screening/questions-to-ask-potential-tenants/ (last visited Oct. 27, 2022); *see also* Mergenhagen, *supra* note 63, at 17.

90. *See* U.S. DEP'T. OF HOUS. & URB. DEV., *supra* note 57, at 6 ("Screening criteria, such as those related to criminal records, credit, and rental history, may operate unjustifiably to exclude individuals based on their race, color, or national origin.").

91. *See* HOUS. JUST. CTR., *supra* note 29, at 6–7.

92. 24 C.F.R. § 100.70(c) (2020).

93. *See, e.g.*, EQUAL RIGHTS CENTER, UNLOCKING DISCRIMINATION 22 (Oct. 2016) ("Sixteen out of forty-seven tests, approximately 34% of tests, displayed differential treatment in this category that favored the white tester . . . The most frequent type of differential treatment uncovered through testing occurred when matched pair testers were provided different information about criminal records screening policies and practices. In one DC test, both testers disclosed to the same agent that she had a conviction on her record from approximately 15 years ago related to being in an abusive relationship. After the African American tester disclosed this information to the agent, he 'shook his head no, and stated "Yeah. They won't approve you. Anyone with a felony on their record will be declined.'" After the white tester disclosed the same information about her criminal record during her test part, the same agent responded that a 'third party conducted the background check and made a decision, and that it really depended on the type of crime and how long ago it had occurred.'").

Fully screening and considering every applicant under the landlord's formal admission policy avoids the risk of this discrimination—but comes at the cost of some housing seekers paying screening fees for applications that have no chance of being approved. Rental application fees in this context are thus superfluous and dishonest: applicants pay the screening fees in the belief they will be considered for rental housing. But, in fact, such are fees paid merely for a futile application conducted only to bolster a landlord's defense against potential housing discrimination claims.

3. Rental Application Fee Schemes May Amount to Illegal Lotteries

Applicants who pay application fees or associated administrative fees and are not approved for the housing receive nothing of any material value in return. At most they receive *a chance* at being approved for the housing. In this way, paying rental application fees carries many characteristics of gambling: the applicant bets the fee on securing the housing. In some circumstances, such rental application fee schemes could potentially amount to unlawful wagers or lotteries.

Gambling occurs when a person risks "any money or thing of value for gain, contingent in whole or in part upon lot, chance, or the happening of an event over which the person taking a risk has no control."[94] The "gain" to be realized through gambling may be anything of value—certainly including a coveted opportunity to lease a dwelling unit.[95] Bets and wagers are unenforceable and contrary to public policy in many jurisdictions—especially those "bargains in which only one side faces any risk."[96] Most states also prohibit or tightly regulate participation in so-called "lotteries," a form of gambling in which participants pay a fee (or give other consideration) to enter and a winner is selected by chance among the entrants.[97] States control such schemes because "[t]he evils attending a system of lotteries, and against which the statutes are directed, consist in the risk which people are willing to take in hazarding their money with a high probability that they will lose it, without any or but little benefit, and with a very remote prospect of gain."[98]

Charging an application fee involves a payment of consideration for a chance at a prize (i.e., admission to the rental housing), so the question of whether a rental application fee constitutes an illegal gambling transaction turns on whether the outcome is sufficiently determined by chance.[99] This might occur, for

94. 38 C.J.S. *Gaming* § 5 (2022) (citing Sniezek v. Colo. Dep't. of Revenue, 113 P.3d 1280 (Colo. App. 2005)).

95. *See also* Williams v. Weber Mesa Ditch Extension Co., 572 P.2d 412, 413–15 (Wyo. 1977) (scheme where entrants paid $5 for chance to win 40-acre land parcel constituted illegal lottery).

96. 7 WILLISTON ON CONTRACTS § 17:1 (4th ed. 2022).

97. Barry M. Benjamin, *Sweepstakes, Contests, and Other Promotions*, 20191018A NYCBAR 156 (Oct. 18, 2019).

98. 7 WILLISTON ON CONTRACTS § 17:4 (4th ed. 2022).

99. *See* Stephen J. Leacock, *Lotteries and Public Policy in American Law,* 46 J. MARSHALL L. REV. 37, 78–79 (2012).

instance, in a property where large numbers of prospective tenants seek to lease a single vacant unit if the landlord collects application fees from all the interested applicants and then chooses the winner through some random means. Note the winner need not be determined solely by chance; a scheme may nevertheless constitute a lottery if "the element of chance predominates."[100] Chance could seemingly predominate in such a scheme even where the landlord screened applicants for a set of minimum criteria, then drew randomly from among those remaining.[101] On the other hand, "when the award is made on the basis of quality, skill or superior accomplishment, the transaction is legal. . . ."[102]

4. Unfair Application Fees as Contrary to Public Policy

Though numerous practices with respect to rental application fees could violate consumer protection acts if carried out in misleading ways or accompanied by false statements, rental application fees can be abusive and violate existing laws even if fully disclosed to applicants in a timely and forthright manner, limited to a landlord's actual costs or other defensible amount, and used to actually process rental applications. This is because a violation of a state consumer protection law can often be established by demonstrating that the challenged practice runs afoul of established public policies.[103]

In the context of rental housing that typically costs hundreds or even thousands of dollars per month, a one-time application fee of $40, $60, or even $100 might not appear sufficiently significant to constitute a potentially oppressive or substantially injurious practice. Yet the manner in which rental application fees present genuine consumer harms and policy problems is not often through payment of the single, one-time fee. Rather, it is the repeated payment of those fees for successive applications to different properties—or, at least, the specter of denial and the deterrent effect of such repeated charges—that makes rental application fees truly oppressive and injurious. By deterring people in need of housing from applying to suitable rental properties, or by extracting fees from such persons without providing any housing in return (thereby diminishing resources

100. 7 WILLISTON ON CONTRACTS § 17:4 (4th ed. 2022).

101. *See, e.g.*, State *ex Inf.* McKittrick v. Globe-Democrat Pub. Co., 110 S.W.2d 705, 713 (Mo. 1937) ("a contest may be a lottery even though skill, judgment, or [research] enter thereinto in some degree, if chance in a larger degree determine the result. . . [Whether] the chance factor is dominant or subordinate is often a troublesome question.").

102. 7 WILLISTON ON CONTRACTS § 17:6 (4th ed. 2022).

103. *See, e.g.*, Donald M. Zupanec, Annotation, *Practices forbidden by state deceptive trade practice and consumer protection acts*, 89 A.L.R.3d 449, § 3[c] (1979) (discussing Podolsky v. First Healthcare Corp., 50 Cal. App. 4th Supp. 632, 647 (1996) (unfair practice is one that "offends an established public policy, or [that] is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers")); *see also* Philips v. Berner, 789 So. 2d 41, 48–49 (2001) (unfair practice is one that "offends established public policy and . . . is unethical, oppressive, unscrupulous, or substantially injurious") (underline added); In re Bozzano, 183 B.R. 735, 738 (Bankr. M.D.N.C. 1995) (applying N.C. law).

needed to secure housing elsewhere), application fees counteract important public policies such as reducing housing insecurity and ending homelessness.

Accordingly, one potentially meritorious legal theory concerns landlords who charge rental application fees to applicants who offer free access to a portable tenant screening report.[104] If the portable report is current and contains substantially all the same information the landlord ordinarily considers in deciding whether to offer the applicant a lease, then imposing a fee to order another, duplicative report could amount to an excessive or unreasonable charge.

Probably the main challenge advocates would face in bringing this type of claim is that any two tenant-screening reports will seldom be exactly identical, even if they are close in time and concern the same rental applicant. Screening reports may differ in the types of reports included, the sources of information searched, the "lookback" periods applied to each item, the manner in which the report contents are arranged and displayed, and even the exact personal identifiers used to search for matching records.[105] Importantly, a report from a landlord's preferred provider will likely contain a score, admission decision, or other analytical component that may even be uniquely generated based on the landlord's admission criteria—whereas a portable report might contain only a generic credit score[106] or might not include any analytical information at all.[107] Hence, landlords would likely respond to such claims by pointing to differences between the portable report and the landlord's preferred report and claiming those differences justify the refusal of the portable report. To overcome this defense, advocates would likely need to demonstrate either (i) that the differences between the portable report and the landlord's preferred report are immaterial (either objectively or immaterial to the specific landlord in question), or (ii) that the adverse public policy implications of refusing portable reports render the practice unfair, even if some important differences may exist between the landlord's preferred report and the contents of a portable report.

Since only landlords benefit from admission screening, landlords ought rightly to bear the associated costs fully. Yet an applicant who purchases a portable report already shoulders some of that cost; by refusing portable reports, landlords avoid bearing any screening costs whatsoever—shifting those costs entirely to applicants, while still retaining the ability to choose the specific screening product used. This one-sidedness is also anti-competitive behavior because it not

---

104. *See supra* notes 70–76 and accompanying text (regarding portable tenant screening reports).

105. *See* PASLEY ET AL., *supra* note 23, at 4–8 (comparing contents, sources, and formats of tenant screening reports from nine different providers).

106. *See, e.g., Dispelling the myths of the portable tenant screening report*, *supra* note 71 ("MyScreeningReport.com® reports include an Experian credit report and credit score – fully visible to the applicant and the landlord.").

107. *See, e.g., What is included with the online rental application and third-party reports?*, ZILLOW (Feb. 2022), https://zillow.zendesk.com/hc/en-us/articles/360000963727-What-is-included-with-the-online-rental-application-and-third-party-reports- (describing contents of Zillow tenant-screening reports, which do not include scores or analytical materials).

only imposes unnecessary costs on rental applicants, but also stifles innovation by suppressing the market for more efficient portable reports.

Steering renters away from higher-quality rental opportunities because they have damaged credit, eviction records, or criminal history has its own implications for individuals and families directly affected no matter who they are. But in many communities, the renters most heavily deterred by application fees from applying to certain properties will more likely be people of color, and possibly women or families with children.[108] Such deterrence can therefore be expected to undermine established public policy by driving residential segregation or, at the very least, inhibiting residential integration.[109] Rental application fees that produce such discriminatory outcomes might violate consumer protection laws, and might be susceptible to challenge under housing discrimination laws as well.

### *B. Possible Fair Housing Challenges to Rental Application Fees*

The natural collective consequence of application fee-driven residential steering is racial segregation by race and color because the most common grounds for housing denial are not evenly distributed across racial and ethnic lines. Housing providers who charge significant application fees likely deter people saddled with such admission barriers from applying in the first place.[110] And this strongly implies that BIPOC renters, who more frequently have such impediments, are disproportionately more likely to be deterred.[111]

As the tenant-screening company TransUnion SmartMove reported in 2017, based on a survey of 669 landlords throughout the United States, the five most important factors landlords considered in screening rental applicants were (in order) income and employment history, eviction history, criminal background, credit history, and references.[112] Since the key factors that lead landlords to reject rental applications are disproportionately common among BIPOC renters, one would naturally expect the application fees to disproportionately steer BIPOC applicants away from rental opportunities with stiffer admission standards. Basic supply and demand principles suggest those rentals would tend to be higher-quality properties clustered in areas of greater opportunity—i.e., with better schools and job opportunities, a cleaner environment, safer streets, and superior public spaces and amenities—while admission requirements would tend to decline as the quality of the housing itself and the surrounding community diminishes. With genuine data and analysis to confirm and better explain this phenomenon,

---

108. *See* Hepburn et al., *supra* note 56; *see* THOMAS ET AL., *supra* note 56.

109. *See* 24 C.F.R. § 100.70 (2020) (describing various housing practices that are unfair because they "perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.").

110. *See, e.g.*, Collatz, *supra* note 35; White, *supra* note 34; Manolas, *supra* note 37; Leonard, *supra* note 59.

111. See U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 57, at 6.

112. *See* TRANSUNION *supra* note 14.

advocates could likely curtail the oppressive and discriminatory impacts of rental application fees through fair housing litigation.

Though the effects of deterrence and steering have not been empirically verified, some data does show that BIPOC renters pay successive application fees considerably more often than members of other racial groups. Significantly, the typical white or Asian renter submits an average of two rental applications in a housing search, while Black and Latinx renters typically submit three.[113] And 38% of Black and Latinx renters must present five or more applications, compared with 21% of white renters.[114] While these rates may differ across marketplaces, already these data show that BIPOC renters are disproportionately harmed by the cost of rental screening fees—whether or not any steering effects can be proven.

Charging rental application fees is an outwardly neutral practice—i.e., one that does not expressly discriminate on the basis of race, ethnicity, or other protected characteristics. But if rental application fees can indeed be proven to have a disproportionate adverse effect on BIPOC renters, then a housing provider may lawfully impose such fees only if necessary to achieve a substantial, legitimate interest.[115]

Some of the reasons landlords might give for imposing rental application fees cannot be justified as substantial or legitimate. Deterring applicants with criminal history or eviction records, for example, is unlikely to be justifiable both for the lack of evidence showing that such screening actually makes rental properties any safer or more profitable, as well as the availability of "individualized review" as a less-discriminatory alternative to rigid admission rules.[116] Profiting from housing seekers who are charged fees to apply for housing and never actually considered may further the landlord's interest in financial gain, but is an illegitimate and exploitative method of doing so.

---

113. Garcia & Berchick, *supra* note 8 (also finding "[t]he typical white renter reported paying $35 in application fees on their rental, while the typical Black, Latinx, and Asian renters all reported spending $50 on application fees").

114. *Id.*

115. 24 C.F.R. § 100.500(c)(2) (2013); *see also* U.S. DEP'T OF HOUS. & URB. DEV., REINSTATEMENT OF HUD'S DISCRIMINATORY EFFECTS STANDARD, 86 Fed. Reg. 33590 (proposed June 25, 2021) ("In 2020, HUD published a rule titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" ("2020 Rule"). Prior to the effective date of the 2020 rule, the U.S. District Court for the District of Massachusetts issued a preliminary injunction in *Massachusetts Fair Housing Center v. HUD,* staying HUD's implementation and enforcement of the rule. Consequently, the 2020 Rule never took effect. After reconsidering the 2020 Rule, HUD is proposing to recodify its previously promulgated rule titled, "Implementation of the Fair Housing Act's Discriminatory Effects Standard" ('2013 Rule'), which, as of the date of publication of this Proposed Rule, remains in effect due to the preliminary injunction.").

116. *See* U.S. DEP'T OF HOUS. & URB. DEV, OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (Apr. 16, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF; *see also* 24 C.F.R. §100.500 (2013).

Some of the other core reasons for imposing rental application fees, such as deterring "tire-kickers" or recouping genuine expenditures cannot be immediately dismissed as illegitimate. Again, however, less-discriminatory alternatives abound. Non-financial burdens, such as written application requirements or the prospect of a "hard" credit pull may be sufficient to deter non-serious applicants, and even if some charge is necessary the amount could be nominal (in place of the current $50 per adult average).[117] Note that the burden of justifying a discriminatory practice with evidence is on the housing provider.[118]

## VI. Conclusion

As the United States emerges from a lingering pandemic that saw more than 11 million renter households fall behind on rent, and during which as many as 40 million people faced a risk of eviction,[119] the need for tenant-screening restrictions to ensure families who acquired eviction records, landlord-tenant debts, or other adverse rental history can still secure safe and suitable housing could not be more pressing. But even where such protections are enacted, the persistent fear of forfeiting rental application fees will deter and ultimately prevent many tenants from even applying to high-quality housing in the first place. And those rental application fees will have their deepest effects in discriminatorily steering BIPOC renters away from better rental properties in the more highly-desirable areas. If we are to have any hope of preserving what residential integration we have achieved, we must disrupt the harmful dynamics that rental application fees impose on the housing search process.

This means scholars and social science researchers in the housing sphere should investigate rental application fees and verify whether the likely steering effects actually occur. Policymakers should adopt new laws to limit and, better yet, prohibit rental application fees. And housing advocates should pursue legal challenges to rental application fees available now under existing consumer protection and fair housing theories.

---

117. Garcia & Berchick, *supra* note 8.

118. 24 C.F.R. § 100.500(b)(2) (2013) ("A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.").

119. *See* Emily Benfer et al., *The COVID-19 Eviction Crisis: an Estimated 30-40 Million People in America are at Risk*, Aspen Inst. (Aug. 7, 2020), https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/.

# PREPARED STATEMENT OF BRIAN JOHNSON

MANAGING DIRECTOR, PATOMAK GLOBAL PARTNERS

JULY 26, 2023



Chairman Warnock, Ranking Member Tillis, and members of the subcommittee, thank you for the opportunity to testify today about the fee practices of financial institutions and the appropriate federal regulatory response.

My name is Brian Johnson. I am Managing Director of Patomak Global Partners, a financial services regulatory consultancy, where I advise clients on matters relating to compliance with federal consumer financial laws. I previously served as the Deputy Director of the Consumer Financial Protection Bureau (CFPB or Bureau), where I provided strategic direction to the agency's rulemaking, supervision, and enforcement efforts. Prior to that, I served as the Chief Financial Institutions Counsel for the House Committee on Financial Services.

Today's hearing is timely. For over two years now, the American people have suffered from abnormally high inflation, which has worked as a hidden tax eating away at our savings and purchasing power. In February 2021, the Consumer Price Index stood at just 1.7 percent, but then spiked to 5.0 percent just three months later, on its way to a peak of 9.1 percent by June 2022, marking a historic 40-year high.[2] According to the Bureau of Labor Statistics, because of inflation, a dollar today can only buy 86 percent of what it could buy, on average, just over two years ago.[3] According to the Census Bureau, real median household income in 2021 was $70,784.[4] Thus, inflation has eroded about $9,909 of median household purchasing power in the last two years alone, placing an acute strain on many household budgets. Frustration with inflation likely contributes to the mood of the electorate, with public polling now finding that approximately 74 percent of registered voters feel that things in the nation are "on the wrong track."[5]

---

[2] Bureau of Labor Statistics, *12-month percentage change, Consumer Price Index*, https://www.bls.gov/charts/consumer-price-index/consumer-price-index-by-category-line-chart.htm. This spike correlates with American Rescue Plan Act (Pub. L. No. 117-2), the $1.9 Trillion stimulus spending plan that became law in March 2021. The inflationary effect of this law was predicted. See, e.g., Larry Summers, Op-Ed, *The Biden Stimulus Is Admirably Ambitious. But It Brings Some Big Risks, Too,* THE WASHINGTON POST (Feb. 4, 2021), https://www.washingtonpost.com/opinions/2021/02/04/larry-summers-biden-covid-stimulus/.

[3] Bureau of Labor Statistics, *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm. Stated another way, the purchasing power of the dollar has declined about 14 percent between February 2021 and June 2023.

[4] U.S. Census Bureau, *Median Household Income* (Sept. 13, 2022), https://www.census.gov/library/visualizations/2022/comm/median-household-income.html.

[5] NBC, *NBC News Survey* (June 16-20, 2023), https://s3.documentcloud.org/documents/23858265/230169-nbc-june-2023-poll_625-first-release.pdf.

Considering these recent events, it is not surprising that the Administration would seek to demonstrate that it is "taking inflation very seriously by enacting policies to bring down costs for people."[6] Accordingly, and as relevant to today's hearing, last year President Biden announced an initiative to combat so-called "junk fees," calling on federal agencies "to reduce or eliminate hidden fees, charges, and add-ons for everything from banking services to cable and internet bills to airline and concert tickets."[7] The campaign to combat these fees has become a significant part of the Administration's political rhetoric. The characteristic feature of the initiative thus far has been the application of political pressure to companies to secure commitments regarding changes to fee disclosure practices.[8] Fee disclosures are of course not fee reductions, but the argument seems to be that all-in pricing disclosures will encourage more comparison shopping, which will in turn encourage greater competition among providers, which will in turn reduce costs for consumers over time.

The CFPB, for its part, has been the most enthusiastic among federal financial regulators in heeding the President's call to action. The CFPB Director has joined the President at the White House and delivered remarks for a press conference about Administration's efforts,[9] and the President prominently featured a CFPB initiative in his most recent State of the Union address to the nation.[10] The CFPB has also taken several recent regulatory actions regarding many of the fees under consideration today. While the President's agenda is more far reaching

---

[6] The White House, *Remarks by President Biden at the Third Meeting of the White House Competition Council* (Sept. 26, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/26/remarks-by-president-biden-at-the-third-meeting-of-the-white-house-competition-council/.

[7] Brian Deese, Neale Mahoney, Tim Wu, *The President's Initiative on Junk Fees and Related Pricing Practices* (Oct. 26, 2022), https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/. According to reporting about this initiative, the White House is convinced it is "good politics," particularly as the President "tries to improve his standing with the public on the economy as the U.S. rebounds from 40-year high inflation." See Joey Garrison, *Biden muscles Ticketmaster, SeatGeek to scrap hidden ticket fees after Taylor Swift debacle* USA TODAY (June 15, 2023), https://www.usatoday.com/story/news/politics/2023/06/15/live-nation-seatgeek-scrap-hidden-fees-amid-pressure-from-biden/70319147007/.

[8] See, e.g., Emma Kinery, *Ticketmaster parent Live Nation, others agree to show 'junk fees' after Biden pressure*, CNBC (June 15, 2023), https://www.cnbc.com/2023/06/15/biden-pushes-ticketmaster-seatgeek-to-show-junk-fees-upfront.html.

[9] Emma Kinery, *White House hammers economic issues with attack on 'junk fees' two weeks out from Election Day* CNBC (Oct. 26, 2022), https://www.cnbc.com/2022/10/26/white-house-hammers-economic-issues-with-attack-on-junk-fees-two-weeks-out-from-election-day.html.

[10] President Biden, *State of the Union Address* (Feb. 7, 2023), https://www.whitehouse.gov/state-of-the-union-2023/.

than the CFPB and fees among financial service providers, I will focus my remarks on the CFPB's activity based on my first-hand experience at the Bureau and in the field.

When I testified before a House Financial Services Subcommittee in March, I argued that the primary metric by which the CFPB's actions should be judged is the extent to which the CFPB has adhered to the rule of law.[11] By this measure, the CFPB's recent actions are deeply concerning.

But before examining each of the CFPB's actions in turn, I will make a few general observations regarding financial institution fee practices. First, I think we can agree that all consumers generally desire the highest quality products and services for the least possible amount of money. Financial institutions, like all companies, engage in various pricing strategies to try to discover consumer preferences and best satisfy consumer demand. Sometimes the price is presented as an all-inclusive, up-front cost; sometimes the price is partitioned. These pricing strategies evolve over time to meet changing consumer preferences, and different firms competing within the same industry may adopt different pricing strategies.

I would assert that fees or other costs to a consumer that are not optional and are material to a consumer's decision to obtain a financial product or service should be disclosed up-front, and consumers should not be charged for products or services they did not agree to purchase. However, that is not to say that an all-inclusive pricing structure is necessarily preferable to a partitioned pricing structure.[12] When evaluating policy relating to firm fee or pricing strategies, it is useful to remember the iron law of economics that there is no such thing as a free lunch. In our highly complex and dynamic financial services markets, any isolated effort to reduce or eliminate a particular fee will typically benefit one group of consumers and burden other less-favored groups.[13] Relatedly, any claim that a fee price control will result in consumer savings should be scrutinized because its true economic effect is usually a mixed result involving cross-

---

[11] Brian Johnson, *Testimony before the Subcommittee on Financial Institutions and Monetary Policy of the House Committee on Financial Services* (March 9, 2023), https://docs.house.gov/meetings/BA/BA20/20230309/115384/HHRG-118-BA20-Wstate-JohnsonB-20230309.pdf

[12] Sometimes government regulation even effectively prohibits all-in pricing, such as with the various fees that must be separately disclosed and assessed during the home-buying process.

[13] For example, the Durbin amendment's price ceiling on debit interchange fees adversely affected millions of households, particularly lower-income households. *See* Todd J. Zywicki, Geoffrey A. Manne, and Julian Morris *Unreasonable and Disproportionate: How the Durbin Amendment Harms Poorer Americans and Small Businesses* https://laweconcenter.org/images/articles/icle-durbin_update_2017_final.pdf

subsidies that transfer wealth between different groups of consumers.[14] Whenever government policymakers intervene in the market to fix prices, they predictably tout the expected cost savings to intended beneficiaries but often omit reference to other consumers who are made worse off by the decision, whether through lower investment returns or through higher prices for, lower quality of, or diminished access to financial products and services. These consumers must be accounted for in honest consideration of the costs and benefits of a regulatory action.

Second, the most important goal for public policy in a market economy must be ensuring that consumers are free to choose the products and services that best serve their individual needs. Consumers must have adequate information to make informed decisions, and Congress has enacted laws to reduce information search costs for consumers, promoting consumer choice and reinforcing the market economy.[15] Congress has also played a critical role in enacting market-reinforcing laws to support private property rights and to combat fraud, deception, anti-competitive behavior, and discriminatory conduct, all of which undermine consumer choice.[16] Correlatively the government should refrain from engaging in market-replacing price-fixing or product design, which takes away choice from consumers. The failure of planned economies in the 20th Century and associated human misery demonstrates the superiority of the price mechanism in allocating capital efficiently to satisfy consumer demand, and that misguided government price controls generally make consumers worse off.[17]

There has been a troubling trend in recent years of Congress empowering executive agencies to engage in these practices, such as by establishing price-fixing schemes for debit card interchange fees or credit card late fees or by imposing "plain vanilla" mortgage product requirements under the Ability-to-Repay/Qualified Mortgage rule. Accordingly, to preserve consumer choice and the market economy, Congress should scrutinize executive agency regulatory proposals seeking to intervene in the free operation of markets. This scrutiny is

[14] See Daniel Heil, *What Goes Wrong When Government Interferes with Prices*, THE HOOVER INSTITUTION (Jan. 12, 2021), https://www.hoover.org/research/what-goes-wrong-when-government-interferes-prices.
[15] See Brian Johnson, *Toward a 21st century approach to consumer protection: Remarks to Consumer Action* (Nov. 15, 2018), https://www.consumerfinance.gov/about-us/newsroom/toward-21st-century-approach-consumer-protection/.
[16] Id.
[17] Id.

especially critical where the specific focus of the effort is ambiguously defined, as is the case with the President's "junk fee" initiative.

Indeed, the term "junk fee" is not defined in statute or in regulation. In fact, to date, President Biden has offered at least four different meanings of the phrase.[18] His former White House National Economic Council Director, Brian Deese, provided still another,[19] while the Federal Trade Commission led by Chair Khan has supplied at least three more,[20] and the CFPB led by Director Chopra has supplied another two.[21] None of these ten proffered definitions are fully consistent, and each is subjective. The term thus functions primarily as a pejorative label to be attached to any lawful fee the Administration now disfavors. The lack of a precise and fixed definition of a "junk fee" has sown confusion among market participants, which needlessly complicates the task of regulatory compliance.

---

[18] See *Competition Council Remarks*, supra note 6 ("unnecessary hidden fees"); The White House, *FACT SHEET: President Biden Highlights New Progress on His Competition Agenda* (Feb. 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/01/fact-sheet-president-biden-highlights-new-progress-on-his-competition-agenda/ ("unfair hidden fees"); *State of the Union Address*, supra note 10 ("those hidden surcharges too many companies use to make you pay more"); The White House, *Remarks by President Biden on Protecting Consumers from Hidden Junk Fees* (June 15, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/15/remarks-by-president-biden-on-protecting-consumers-from-hidden-junk-fees/ ("hidden charges these companies sneak into your bill to make you pay more and without you really knowing it initially").

[19] *The President's Initiative*, supra note 7, ("fees designed either to confuse or deceive consumers or to take advantage of lock-in or other forms of situational market power").

[20] Chair Lina Khan, *Statement Regarding the Advanced Notice of Proposed Rulemaking on Unfair or Deceptive "Junk" Fees* (Oct 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/R207011ChairJunkFeesStatement.pdf ("extra charges associated with unnecessary or worthless services"); FTC Press Release, *Federal Trade Commission Explores Rule Cracking Down on Junk Fees* (Oct. 20, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees ("unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value"); FTC Advance Notice of Proposed Rulemaking: Unfair or Deceptive Fees Trade Regulation Rule (Nov. 8, 2022), 87 Fed. Reg. 67413, https://www.govinfo.gov/content/pkg/FR-2022-11-08/pdf/2022-24326.pdf ("fees for goods or services that are deceptive or unfair … whether or not the fees are described as corresponding to goods or services that have independent value to the consumer").

[21] CFPB, *Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services* (Feb. 2, 2022), 87 Fed. Reg. 5801, 5802 https://www.govinfo.gov/content/pkg/FR-2022-02-02/pdf/2022-02071.pdf ("exploitative, back-end, hidden, or excessive fees"); CFPB, Deputy Director Martinez's Prepared Remarks at the Consumer Law Scholars Conference (Mar. 3, 2023), https://www.consumerfinance.gov/about-us/newsroom/deputy-director-martinezs-prepared-remarks-at-the-consumer-law-scholars-conference/ ("any unnecessary, unavoidable, or surprise charge that inflates a product or service's price, while adding little value to no value").

But the indeterminate and subjective nature of the definition has not prevented the CFPB from taking significant action on "junk fees."

Overdraft and Returned Deposited Item Fees

*CFPB Blog Posts*

On February 1, 2023, the White House released a fact sheet highlighting the President's "new progress on his competition agenda."[22] This fact sheet contained an extraordinary statement. Regarding the CFPB's efforts to support the Biden agenda, the White House reported: "The CFPB targeted overdraft and bounced check fees …, driving 15 of the 20 largest banks to agree to put an end to bounced check fees." What the White House took credit for can best be described as an *ultra vires* campaign to coerce institutions into abandoning lawful practices; at worst it is an example of the Bureau using the implied threat of regulation and enforcement to do the same. And unfortunately, the White House's description of the CFPB's activities is accurate.

Beginning in December 2021, the CFPB began to publish a series of blog posts purporting to compare the overdraft and non-sufficient fund (NSF) practices of the nation's largest banks. But the true purpose of the posts was quite clear: to apply political pressure to named institutions until they changed their practices.[23] The CFPB was not particularly coy about what it was doing, either. For instance, in a February 10, 2022 post, CFPB staff stated that "[a]s the CFPB has been focusing on this issue again, there has been a notable trend of banks announcing changes to their overdraft programs" to include "eliminating NSF fees" and "reducing the size of the overdraft fee."[24] CFPB staff stated that "these changes represent an

[22] The White House, *FACT SHEET: President Biden Highlights New Progress on His Competition Agenda* (Feb. 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/01/fact-sheet-president-biden-highlights-new-progress-on-his-competition-agenda/

[23] This public pressure was backed by non-public pressure applied by the CFPB in the confidential process of supervisory examination. See, e.g., CFPB, *Prepared Remarks of CFPB Director Rohit Chopra on the Overdraft Press Call* (Dec. 1, 2021), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-overdraft-press-call/ ("I've asked the CFPB's bank examiners to prioritize examinations of banks that are heavily reliant on overdraft. Financial institutions that have a higher share of frequent overdrafters or a higher average fee burden for overdrafting should expect us to be paying them close supervisory attention.").

[24] Rebecca Borné and Amy Zirkle, *Comparing overdraft fees and policies across banks* (Feb. 10, 2022), https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/

encouraging step by some banks in the right direction."[25] In another blog post dated April 13, 2022, CFPB staff stated that "[i]n recent months, a number of large banks have announced that they are eliminating [NSF] fees on their checking accounts. This is a positive development."[26] CFPB staff lamented, however, that "many banks are continuing to charge these fees," warning that the CFPB "is closely scrutinizing whether and when charging these fees may be unlawful" and committing to "work to ensure that banks continue to evolve their businesses to reduce the impacts of overdraft and NSF fees."[27]

Notably, none of the CFPB's posts assert that the services provided by the named institutions were unlawful. Rather, the posts measured the progress of the CFPB's initiative by estimating the overall reduction in fee revenue, notwithstanding that existing regulations permit institutions to provide "overdraft service[s],"[28] that consumers must affirmatively opt-in to receiving overdraft protection,[29] that overdraft services can serve as an source of liquidity for cash-strapped consumers, and that many institutions offer features such as grace periods to bring accounts positive, limits on the number of daily charges, and cover *de minimus* transactions without incurring fees. So considerations of consumer choice took a back seat to political imperative.[30] The inappropriate coercive tactics being employed by the CFPB should be universally condemned as a violation of due process and contrary to our democratic norms.

---

[25] Id. This post explicitly tied the pressure campaign to the junk fees initiative, stating: "Our work on overdraft/NSF fees is part of a larger CFPB initiative to save Americans billions of dollars by promoting competition and reducing junk fees."

[26] Rebecca Borné and Ashwin Vasan, *Consumers on course to save $1 billion in NSF fees annually, but some banks continue to charge these fees* (Apr. 13, 2022), https://www.consumerfinance.gov/about-us/blog/consumers-on-course-to-save-one-billion-in-nsf-fees-annually-but-some-banks-continue-to-charge-them/.

[27] Id.

[28] See, e.g., Reg E (12 C.F.R. 1005.17) which implements the Electronic Fund Transfer Act and Reg DD (12 C.F.R 1030.11), which implements the Truth in Savings Act.

[29] 12 C.F.R. 1005.17(b).

[30] In fact, empirical research presented to the CFPB as part of its 2021 Research Conference finds that overdraft restrictions come at the cost of reducing banking services for low-income households. See, e.g., Jennifer L. Dlugosz, Brian T. Melzer, and Donald P. Morgan, *Who Pays the Price? Overdraft Fee Ceilings and the Unbanked*, working paper (Apr. 15, 2021), https://files.consumerfinance.gov/f/documents/cfpb_morgan_overdraft-fee-ceilings-and-the-unbanked.pdf.

*CFPB Bulletin 2022-06*

On October 26, 2022, the CFPB issued an enforcement bulletin on returned deposited item fee assessment practices.[31] Specifically, the bulletin sets forth the CFPB's legal analysis and conclusion that fees incurred when checks are deposited but do not clear are "likely unfair" under the Consumer Financial Protection Act.[32] In its discussion, the CFPB focuses on the fact that a customer depositing a check may not know that the check is "bad," so returned deposit item fees are not "well-tailored to recoup costs from the consumers actually responsible for the costs to depository institutions of expected losses."[33] What the CFPB fails to acknowledge is that in many circumstances, as a convenience to check-depositing customers, receiving banks will make funds available before the check actually "clears." This customer convenience shifts the clearance risk to the bank. Accordingly, the returned deposited item fee is intended to offset some of the bank's costs that occur when bad checks are deposited, and this offset supports the receiving bank's continued ability offer deposited funds more quickly to customers or free checking accounts without annual fees or account minimums. By curbing this offset, the CFPB's Bulletin will foreseeably jeopardize these customer benefits and the availability of lower cost accounts.

As a procedural matter, the CFPB claims that the Bulletin is a "general statement of policy under the Administrative Procedure Act [APA]."[34] But this statement mischaracterizes the substance of the Bulletin. For APA purposes, statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[35] The Bulletin considers a practice (returned deposited item fees), applies the elements of an applicable law (the "unfairness" prong of UDAAP) to that practice, and concludes that blanket policies of engaging in the practice likely violates the law. By construing UDAAP to prohibit the imposition of certain returned deposited item fees, the

---

[31] CFPB, *Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices* (Oct. 26, 2022), https://files.consumerfinance.gov/f/documents/cfpb_returned-deposited-item-fee-assessment-practice_compliance-bulletin_2022-10.pdf (hereinafter, "Bulletin").

[32] Bulletin at 1.

[33] Bulletin at 5.

[34] Bulletin at 8.

[35] See, e.g., Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947); *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) ("An agency action that merely explains how the agency will enforce a statute or regulation … is a general statement of policy.").

Bulletin functions not to describe how the CFPB will exercise its discretion in bringing enforcement actions, but rather to advise the public of its view of what the law means. The Bulletin is therefore best categorized as an "interpretive rule," which is defined for APA purposes as a "rule or statement issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[36] Notably, the most consequential difference between these two forms of guidance under the APA is that true statements of policy are not subject to judicial review, while interpretive rules are.[37] By mislabeling its Bulletin as a statement of policy rather than an interpretive rule – but shrewdly appreciating that industry will view the statement as a change in law – the CFPB reduces the likelihood that its interpretation of law will be challenged on a pre-enforcement basis in federal court.

*CFPB Circular 2022-06*

On the same day the CFPB issued its Bulletin, it also issued another guidance document that it calls a "Circular" on "[u]nanticipated overdraft fee assessment practices."[38] The Circular focuses on instances in which a customer initiates and the bank authorizes a transaction when the customer's account balance is positive, but the transaction later settles when the account balance is negative, triggering an overdraft fee. This situation arises because of the order in which all pending debits from and credits to a customer's account are settled, which can create different available balances and ledger balances for the account. In its Circular, the CFPB asserts that such overdraft fees are not reasonably anticipated by the account holder, even if they are fully disclosed in the account agreement, and are therefore "likely unfair," even if permissible under TILA and Reg Z and EFTA and Reg E.[39]

---

[36] Attorney General's Manual on the Administrative Procedure Act 26 n.3 (1947).
[37] *Nat'l Min. Ass'n*, supra note 30, at 251 ("The APA divides agency action, as relevant here, into three boxes: legislative rules, interpretive rules, and general statements of policy. A lot can turn on which box an agency action falls into. In terms of reviewability, legislative rules and sometimes even interpretive rules may be subject to pre-enforcement judicial review, but general statements of policy are not.") See, e.g., *Whitman v. American Trucking Associations*, 531 U.S. 457, 477-49 (2001) (reviewable interpretive rule); *National Park Hospitality Association v. Department of the Interior*, 538 U.S. 803, 809-11 (2003) (non-reviewable policy statement).
[38] CFPB, *Consumer Financial Protection Circular 2022-06: Unanticipated overdraft fee assessment practices* (Oct. 26, 2022), https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf (hereinafter, "Circular").
[39] Circular at 1.

Like the Bulletin, the CFPB has labeled its Circular a general statement of policy.[40] And like the Bulletin, the Circular presents a legal question, provides legal analysis, and supplies a legal conclusion, construing UDAAP to likely apply to "unanticipated" overdraft fees, including so-called "authorize-positive, settle-negative" overdrafts.[41] Accordingly, the Circular (and indeed all Circulars issued by the CFPB to date) should at a minimum be recategorized as an interpretive rule under the APA. However, unlike the Bulletin, which technically governs only the CFPB's own enforcement efforts, the CFPB specifically issues its Circulars "to the broad set of government agencies responsible for enforcing federal consumer financial law" in order "to promote consistency among enforcers."[42] The Circular is therefore designed to limit the discretion of these various enforcers to conclude that fully disclosed overdraft fees are not unanticipated or unfair, which means that it intends for its Circular to speak with the force of law. Thus, in substance the CFPB's Circular likely meets the definition of a legislative rule under the APA and was issued without following required notice-and-comment procedures.[43]

Convenience Fees

On June 29, 2022, the CFPB issued a guidance document called an "advisory opinion" that interprets the language in Section 808(1) of the Fair Debt Collection Practices Act (FDCPA).[44] At issue is whether the FDCPA permits debt collectors to collect convenience fees from borrowers. In relevant part, the FDCPA prohibits a "debt collector" from collecting "any amount…unless such amount is expressly authorized by the agreement creating the debt or permitted by law."[45] Convenience fees that are not prohibited by law and are agreed to by a borrower in a contract recognized as valid under state law would seem to fit the definition of

[40] Circular at 13
[41] Circular at 1.
[42] See CFPB, *Consumer Financial Protection Circular 2022-01: System of Consumer Financial Protection Circulars to agencies enforcing federal consumer financial law* (May 16, 2022), https://www.consumerfinance.gov/compliance/circulars/circular-2022-01-system-of-consumer-financial-protection-circulars-to-agencies-enforcing-federal-consumer-financial-law/.
[43] *Nat'l Min. Ass'n*, supra note 30 at 251-52 ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties … is a legislative rule.").
[44] CFPB, *Debt Collection Practices (Regulation F); Pay-to-Pay Fees (June 29, 2022)*, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_convenience-fees_advisory-opinion_2022-06.pdf (hereinafter, Advisory Opinion). An advisory opinion is a type of interpretive rule for APA purposes. See CFPB, *Final Advisory Opinions Policy*, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_policy_2020-11.pdf.
[45] 15 U.S.C. 1692f(1).

"permitted by law." However, in its advisory opinion, the CFPB interpreted the phrase "permitted by law" in the FDCPA to mean "*expressly* permitted by law,"[46] meaning that such fee is prohibited unless state law specifically authorizes the convenience fee. The CFPB simply read an additional word into the statute.[47] Congress used the word "expressly" in the very same sentence to modify the phrase "authorized by the agreement creating the debt;" it did not use this word to modify the phrase "permitted by law." The CFPB's interpretation is a naked act of legislation.

Additionally, the CFPB went through an extensive rulemaking process to write Reg F, the FDCPA's first implementing regulation. In its Small Business Regulatory Enforcement Fairness Act (SBREFA) outline of proposals for the regulation, the CFPB stated it was "considering clarifying that incidental fees, including payment method convenience fees, that are collected either directly or indirectly by the collector are permissible only if…state law expressly permits them."[48] However, the CFPB's final regulation issued in 2020 declined to adopt this interpretation, and so the resulting language of Reg F closely tracks the statute.[49] Accordingly, by reading the word "expressly" into the FDCPA, the CFPB's interpretive rule also effectively amends Reg F without going through the necessary APA notice-and-comment rulemaking process.

Even worse than these interpretive and procedural errors, the CFPB's advisory opinion will hurt consumers. It is helpful to understand the context in which the CFPB issued the opinion, which was to bolster an amicus brief it had filed with the 9th Circuit Court of Appeals in support of a class action.[50] The underlying case involved a challenge to the validity of a $5 convenience fee charged by a mortgage servicer to enable a borrower to avoid late payments by

---

[46] Advisory Opinion at 6.

[47] The CFPB's interpretation essentially inverts the legal maxim that "everything which is not forbidden is allowed," to mean "everything which is not allowed is forbidden."

[48] CFPB, *Small Business Review Panel for Debt Collection and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* (July 28, 2016), at Appendix H, pg. 2, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf

[49] See 12 C.F.R 1006.22(b).

[50] Brief for CFPB as Amici Curaie Supporting Plaintiffs-Appellants, *Thomas-Lawson et al. v. Carrington Mortgage Services, LLC*, Case No, 21-55459 (9th Cir. 2021), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_thomas-lawson-v-carrington-mortgage-services-llc_amicus-brief_2021-10.pdf.

submitting payments online or by telephone rather than sending a check in the mail.[51] To be clear, there was no legal obligation for the servicer to provide these additional payment options to borrowers. Moreover, the servicer fully disclosed the fee to the borrowers, the borrowers affirmatively consented to the fee, and borrowers could always avoid the fee by sending their checks by mail early enough to ensure they are received by the due date.[52] The expedited payment options, however, helped borrowers who realized that they forgot to send in their check, especially since there was a late fee equal to 4 percent of the monthly mortgage payment (which would have been $58.49 for the lead plaintiff), not to mention adverse credit reporting.[53]

The CFPB's amicus brief took the position that the convenience fee was impermissible under the FDCPA because the underlying loan agreement between the borrower and the mortgage originator did not expressly authorize online or telephone payments, and state law, while not prohibiting the convenience fee, did not *expressly* authorize the fee either.[54] While the case ultimately settled, let's understand the consequences of the CFPB's new legal position for mortgage borrowers and other consumers. By prohibiting convenience fees in most circumstances, servicers and debt collectors will be less likely to voluntarily assume the costs of maintaining staff and systems to provide expedited payment options, and borrowers will therefore be more likely to make late payments outside of the grace period, to pay higher late fees, and harm their credit.

Additionally, because mortgage originators (much less mortgage servicers) have limited ability to make changes to uniform loan agreements with borrowers and because most mortgages have a term of 30 years, prohibiting a mortgage servicer from contracting separately with a borrower to accept new and more convenient forms of payment effectively locks a borrower into making payments using technologies only in existence at the time of origination (unless and until state laws are amended to specifically permit each and every new technology). Today's first-time homebuyers could conceivably be making payments until 2053. Should they be locked into using only today's existing payment technologies to pay their mortgage until then? The CFPB's answer is "yes."

---

[51] *Thomas-Lawson v. Carrington Mortg. Servs., LLC*, 2021 WL 1253578, at *1–2 (C.D. Cal. Apr. 5, 2021).
[52] Id. At *3.
[53] Id.
[54] CFPB Amicus Brief, supra note 43, at pp. 12-23.

Credit Card Late Fees

On February 1, 2023, the CPFB issued a notice of proposed rulemaking (NPRM) regarding credit card late fees.[55] Specifically, this proposed rule would (if finalized) amend Section 1026.52(b) of Reg Z, which implements Section 149 of the Truth in Lending Act, which was amended in 2009 by the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) to require that the amount of any penalty fee imposed by a card issuer for violating the cardholder agreement, including any late payment fee or any other penalty fee or charge, must be "reasonable and proportional" to the violation.[56] The CARD Act originally assigned the Board of Governors of the Federal Reserve System (FRB) responsibility for implementing this price-fixing provision, and in 2010 the FRB promulgated a rule that established a $25 (and $35 for subsequent violations) threshold for credit card late fees (adjusted annually for inflation), where fees assessed for late payments in amounts at or below the threshold are presumed to be "reasonable and proportional."[57] The Dodd-Frank Act subsequently transferred TILA rulemaking authority to the CFPB.[58] The CFPB's NPRM would lower the current credit card late fee safe harbor threshold from the current inflation-adjusted level of $30 (and $41 for subsequent late payments) to $8, eliminate annual inflation adjustments to this dollar amount, and cap late fee amounts at 25 percent of the required minimum payment.[59]

The CFPB's rulemaking suffers from several significant flaws, as explained below.

*Predetermined Outcome*

One significant flaw in the CFPB's rulemaking is that the rushed timeline established for the rulemaking process as well as public statements made to date strongly support the conclusion that the CFPB has already predetermined the outcome of the rulemaking, which contravenes the requirements of the APA.[60]

---

[55] CFPB, *Notice of Proposed Rulemaking: Credit Card Penalty Fees (Regulation Z)*, 88 Fed. Reg. 18906 (Mar. 29, 2023), https://www.govinfo.gov/content/pkg/FR-2023-03-29/pdf/2023-02393.pdf.

[56] Id.

[57] Board of Governors of the Federal Reserve System, *Final Rule: Truth in Lending*, 75 Fed. Reg. 37526 (June 29, 2010), https://www.govinfo.gov/content/pkg/FR-2010-06-29/pdf/2010-14717.pdf.

[58] Pub. L. No. 111-203 (2010).

[59] CFPB NPRM, supra note 49.

[60] After publishing a required notice of proposed rulemaking, an agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C.

Regarding the rushed process being employed, it is worth noting that the CFPB submits its regulatory agenda to the White House Office of Management and Budget (OMB) twice annually for inclusion in the unified regulatory agenda released to the public. In the preamble of its Spring 2022 submission to OMB dated April 1, 2022, the CFPB indicated that the five regulatory actions listed in its submission (none of which related to credit card late fees) were the only actions that it "reasonably anticipates having … under consideration during the period from June 1, 2022 to May 31, 2023."[61] It therefore came as a complete surprise when on June 22, 2022, the very day after OMB published the unified agenda,[62] the CFPB issued an Advance Notice of Proposed Rulemaking (ANPR) seeking comment on credit card late fees.[63]

Additionally, the deadline established by the CFPB for submitting public comments in response to the ANPR was unreasonably short. The CFPB typically selects comment submission deadlines of 60 to 90 days after the ANPR is published in the *Federal Register* to allow adequate time for the public to comment.[64] For the credit card late fee ANPR, however, the CFPB imposed a comment deadline only 30 days after its initial announcement (July 22, 2022). On June 24, 2022, just two days after the CFPB issued its ANPR, several trade associations representing card issuers wrote to the CFPB requesting a 60-day extension to the comment

---

553(c). The opportunity for comment must be a meaningful opportunity. See *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002). And to satisfy this requirement, an agency must also remain sufficiently open-minded. See, e.g., *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988).

[61] CFPB, *Preamble to Semiannual Regulatory Agenda*, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202204/Preamble_3170_CFPB.pdf

[62] The White House, *The Spring Regulatory Agenda* (June 21, 2022), https://www.whitehouse.gov/omb/briefing-room/2022/06/21/the-spring-regulatory-agenda/

[63] CFPB, *Advance Notice of Proposed Rulemaking: Credit Card Late Fees and Payments* (June 22, 2022), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_anpr_2022-06.pdf.

[64] See CFPB, *Advance Notice of Proposed Rulemaking Relating to Home Mortgage Disclosure (Regulation C) Data Points and Coverage* (May 8, 2019), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_anpr_hmda-comment-period-extension.pdf (Provided a 60-day comment period, extended 99 days); CFPB, *Advance Notice of Proposed Rulemaking: Debt Collection (Regulation F)* (Nov. 12, 2013), https://www.federalregister.gov/documents/2014/01/14/2014-00453/debt-collection-regulation-f (Provided a 90-day comment period, extended 18 days); CFPB, *Advance Notice of Proposed Rulemaking: Property Assessed Clean Energy Financing* (Mar. 4, 2019), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_anpr_residential-property-assessed-clean-energy-financing.pdf (Provided a 60-day comment period); CFPB, *Advanced Notice of Proposed Rulemaking: Dodd-Frank Act Section 1033 – Consumer Access to Financial Records* (Oct. 22, 2020), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_section-1033-dodd-frank_advance-notice-proposed-rulemaking_2020-10.pdf (Provided a 90-day comment period).

period, citing the surprise nature of the CFPB's announcement and the additional time needed to gather, validate, and analyze the large and complex volume of information being requested.[65] The CFPB did not publicly respond to the request until July 18, a mere four days before the comment submission deadline, when it extended the deadline by only ten days, to August 1.[66] There was no legitimate reason for the CFPB to arbitrarily limit its ANPR comment period to just 40 days. Doing so seemed calculated to ensure that the public did not have sufficient time to submit information to inform the rulemaking process.

The CFPB also conducted an inadequate regulatory flexibility analysis in its NPRM. The Regulatory Flexibility Act,[67] as amended by the SBREFA,[68] requires the CFPB to convene a small business review panel to consider its proposal unless the Director certifies that the proposal, if adopted, would not "have a significant economic impact on a substantial number of small entities."[69] Convening such a panel obviously lengthens the rulemaking process. In its NPRM, the CFPB stated that "the proposed rule would affect small entities that issue credit cards most directly by reducing late fee revenue from credit cards."[70] Accordingly, it stated that "[t]o assess whether the proposed rule would have a significant economic effect on small entities, the Bureau considers the significance of credit card late fee revenue as a share of the total revenue of affected small entities."[71] However, the CFPB then admitted that it "does not have data with which to precisely estimate the effect of the proposed rule on late fee revenue."[72] Despite this admission, the Director still provided the certification, meaning that the CFPB would not convene a small business review panel to provide feedback on its rulemaking. The CFPB even seemed to invert the burden of proof needed for certification by blaming its lack of data on ANPR commenters, stating "these commenters did not provide specific data that leads the Bureau to doubt the conclusions from the analysis."[73] The Bureau thus used its decision to

[65] See *Letter of Associations to Director Chopra* (June 24, 2022), https://www.nafcu.org/system/files/files/Request%20for%20Extension%20of%20CFPB%20Late%20Fees%20ANPR.pdf

[66] 87 Fed. Reg. 42662 (July 18, 2022), https://www.govinfo.gov/content/pkg/FR-2022-07-18/pdf/2022-15245.pdf

[67] 5 U.S.C. 601 et seq.

[68] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. 601 et seq.

[69] 5 U.S.C. 609(b).

[70] 88 Fed. Reg. 18940.

[71] Id.

[72] Id.

[73] Id. At 18941.

deprive commenters of a reasonable period to respond to its ANPR to further justify its decision not to convene a small business review panel. Notably, the Small Business Administration's Office of Advocacy filed a comment letter with the CFPB asserting that "the information provided [in support of the Director's certification] is insufficient" and concluding the CFPB "does not have the necessary data to develop an adequate factual basis for its certification."[74]

A review of public statements made regarding the CFPB's rulemaking provides further evidence that its outcome is predetermined. For instance, on February 7, 2023, President Biden delivered his State of the Union Address before both houses of Congress.[75] In his Address, the President referred to the CFPB's NPRM, emphatically stating: "We're cutting credit card late fees by 75 percent, from $30 to $8."[76] The President has since been similarly emphatic on social media, for instance stating that "We're cutting credit card late fees by 75%."[77] Because Director Chopra serves at the President's pleasure,[78] the Director now has no discretion to finalize the rule other than substantially as proposed without breaking the President's promises. Accordingly, his ability to consider the public comments submitted in response to the NPRM with an open mind has been fundamentally compromised.

Finally, further evidence that the CFPB's rulemaking is predetermined can be found in the CFPB's inexplicable failure to follow its own regulation. Reg Z, which implements TILA as well as the CARD Act, requires that the CFPB annually adjust the credit card penalty fees safe harbors to reflect changes in the Consumer Price Index.[79] Although the CFPB dutifully published rules in years past to make this adjustment along with other HOEPA and ATR/QM threshold adjustments, the rule that the CPFB released to adjust the amounts in effect for 2023

---

[74] U.S. Small Business Administration Office of Advocacy, *Comment Letter re Credit Card Penalty Fees (Regulation Z), Docket No. CFPB–2023–0010, RIN 3170–AB15*, pp. 3-4 (May 3, 2023), https://advocacy.sba.gov/wp-content/uploads/2023/05/Comment-Letter-CFPB-Credit-Card-Penalty-Fees-508c.pdf.

[75] *State of the Union Address*, supra note 10.

[76] Id. It is unlikely that the President's statement was made off-the-cuff or in error; being part of a major Presidential address, White House speechwriters and policy staff likely chose the words carefully and vetted them with relevant agencies for accuracy. It is therefore likely that the CFPB received an advance draft of the Address for review and comment. It is also possible that the CFPB supplied the language itself to the White House. Reviewing communications between the CFPB and the White House about the language in the Address could provide further evidence of the state of mind of decision-makers regarding the rulemaking.

[77] President Joe Biden (@POTUS), Twitter (Mar. 1, 2023, 5:15 PM), https://twitter.com/POTUS/status/1631055470831054852?lang=en.

[78] See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

[79] 12 C.F.R. 1026.52(b)(1)(ii).

conspicuously omitted the adjustment for the credit card penalty fees safe harbor.[80] Because the CFPB had already released its credit card late fees ANPR and would soon release its NPRM, which proposed to eliminate annual inflation adjustments, one possible explanation for the CFPB's failure to make the required annual adjustment is that it had already determined such adjustments would not be required in the future and were acting as though the proposed rule had already been finalized.

*Unrepresentative Data*

Another significant flaw in the CFPB's rulemaking is that the data it used to generate the cost estimates supporting its proposed $8 safe harbor dollar amount is not representative and excludes small issuers. The CFPB used a Y-14 (and Y-14+) data set from the Federal Reserve Board of Governors for its analysis.[81] However, this data set only covers bank holding companies with total consolidated assets exceeding $50 billion, which accounts for less than 70 percent of the outstanding balances of U.S. consumer credit cards as of the end of 2020.[82] The Bureau itself admitted in its 2021 CARD Act report that "the Y-14 data cover a large but not representative portion of the credit card market … the remaining uncovered portion is still substantial, and the Y-14+ data should similarly not be considered representative of that uncovered portion."[83] Because the CFPB's data was not representative, the Bureau could not ascertain whether the costs or other characteristics of smaller issuers were meaningfully different from the larger issuers in the data set. Rather than take the time to obtain the necessary data and to carefully study this vital segment of the market, the CFPB's NPRM simply admitted that "the data and research are not sufficient to fully quantify the potential effects of the proposal for consumers and issuers."[84]

---

[80] See CFPB, *Final Rule: Truth in Lending (Regulation Z) Annual Threshold Adjustments (Credit Cards, HOEPA, and Qualified Mortgages)* (Dec. 23, 2022), https://www.govinfo.gov/content/pkg/FR-2022-12-23/pdf/2022-28023.pdf.
[81] 88 Fed. Reg. 18901.
[82] Id.
[83] CFPB, *The Consumer Credit Card Market*, pg. 17, fn. 29 (Sept. 2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.
[84] 88 Fed. Reg. 18931-32

*Improper Exclusion of Costs*

Another significant flaw in the CFPB's rulemaking is its improper exclusion of costs in its analysis. Section 149(b) of TILA requires the CFPB to issues rules to "establish standards for assessing whether the amount of any penalty fee or charge … is reasonable and proportional to the omission or violation to which the fee or charge relates."[85] TILA further specifies four factors the CFPB must consider in setting the standards, one of which is "the cost incurred by the creditor from such omission or violation."[86] Accordingly, the costs incurred by a card issuer as a result of late payments may include the costs associated with the *collection* of late payments, but such collection costs are not the *exclusive* costs that may be considered in determining a reasonable and proportional late fee. However, the CFPB's NPRM impermissibly limits consideration to collection costs, and then further limits permissible costs only to pre-charge-off collection costs, reasoning that "any cost in collecting amounts owed to a card issuer that are incurred post-charge-off is related to mitigating a loss as opposed to the cost of a violation of the account terms."[87] But this interpretation defies common sense; the costs incurred for collecting against a charged-off account necessarily relate to the customer's missed payments. Congress provided the CFPB no authority in TILA to limit consideration of costs in this manner, and the CFPB's impermissible exclusion of costs in its analysis enabled it to propose a lower safe harbor dollar threshold (of $8) than would otherwise be supported by the data when all costs are appropriately considered.

*Admission of Consumer Harm*

Perhaps the most concerning flaw in the CFPB's rulemaking is the CFPB's admission that the proposed rule, if finalized, will harm most credit-card holding consumers. As part of the 1022 analysis within the NPRM, the CFPB states:

> "Any offsetting changes, like the decrease in late fees, would affect different consumers differently depending, for example, on how often they pay late and whether they carry a balance. Cardholders who never pay late will not benefit from the reduction in late fees and could pay more for their account if

[85] 15 U.S.C. 1665d(b).
[86] 15 U.S.C. 1665d(c).
[87] 88 Fed. Reg. 18913

> maintenance fees in their market segment rise in response—or if interest rates increase in response and these on-time cardholders also carry a balance. Frequent late payers are likely to benefit monetarily from reduced late fees, even if higher interest rates or maintenance fees offset some of the benefits. Cardholders who do not regularly carry a balance but occasionally miss a payment would benefit from the proposed changes so long as any increase in the cost of finance charges (including the result of late payments that eliminate their grace period) is smaller than the drop in fees. Cardholders who carry a balance but rarely miss a payment are less likely to benefit on net."[88]

According to the CFPB's own "Credit Card Late Fees" report issued March 2022, approximately 74 percent of credit card accounts incurred no late fees in 2019.[89] The NPRM does not define "frequent late payers," but if defined as accounts that incurred three or more late fees in 2019, these frequent late payers comprised only 10.43 percent of credit card accounts in 2019.[90] Using card accounts as a proxy for cardholders, these figures provide a rough estimate of how the CFPB expects that different groups of consumers will be affected by its rulemaking. In sum, the many cardholders across the country who pay their credit bills on time will be made to subsidize the relatively few who repeatedly pay their bills late.[91] There is no such thing as a free lunch. When the CFPB claims in its press releases that "the proposal could reduce late fees by as much as $9 billion per year,"[92] its representation is deceptive because it omits the material fact that its own economic analysis expects that the costs of the late fee reduction will ultimately be transferred to and borne by most cardholders who never incur late fees.

---

[88] 88 Fed. Reg. 18934.

[89] CFPB, *Report: Credit Card Late Fees*, pg. 7, fig. 3 and 4 (Mar. 2022, https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf.

[90] Id.

[91] Economic research demonstrates that regulation of late fees makes consumers overall pay higher interest rates to compensate for charge-offs. See Nadia Massoud, Anthony Saunders, and Barry Scholnick, *The Cost of Being Late? The Case of Credit Card Penalty Fees*, 7 J. OF FIN. STABILITY 49 (2011). The CFPB also expects that the frequency of late payments will increase because of its rule. See 88 Fed. Reg. 18921. Recent research also supports this expectation, finding that when the size of late fees is reduced, the frequency of late payments increases. See Daniel Grodzicki, et al., *Consumer Demand for Credit Card Services*, 63(3) J. OF FIN. SERVS. RES. 273 (June 2023).

[92] CFPB, *Press release: CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees*, https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/.

Conclusion

Today's hearing explores the important topic of "Taking Account of Fees and Tactics Impacting Americans' Wallets," and efforts to eliminate what some label as "junk fees." In my testimony, I have urged Congress to look more closely at the negative effect those efforts may have on the vast majority of consumers who meet their financial obligations and on the consumers the efforts claim to benefit. Further, Congress should pay special attention to agency efforts that privilege certain consumers over others and run afoul of rules and laws that make the system fair for everyone. I applaud the Committee's effort to shine a light on the burden shouldered by consumers under the weight of inflation. In doing so, Congress should evaluate the efforts of each agency based on that agency's compliance with the laws that govern it. As my testimony shows, in the case of the CFPB, the Bureau has strayed time and again based on its own convenience in executing a political agenda that amounts to price fixing in a manner that ultimately hurts consumers and subverts the orderly function of the marketplace.

Thank you, again, for the chance to testify on this important issue, and I welcome the opportunity to answer any questions that you may have.

## RESPONSES TO WRITTEN QUESTIONS OF CHAIR WARNOCK FROM MICHELLE A. HENRY

**Q.1.** In your work, what are some common characteristics of the bad actors utilizing predatory, hidden, and other junk fees?

**A.1.** We have seen junk fees across a variety of marketplaces: consumer finance, housing, event ticketing, hotels, and vacation rental. The most common characteristic is that the bad actor engages in what has been coined "drip pricing" or more accurately "drip, drip, drip pricing": meaning the actor advertises its products and obtains consumer leads on the internet, where consumers, search engines, and lead generators often sort by price. The bad actor advertises an artificially low price at the point when the consumer is shopping around. In the case of vacation planning or event ticketing, consumers and their families and friends may spend hours, days, or weeks comparing options and prices across a variety of websites. Eventually the consumers settle on what they think is the best option for them—and, of course, the price is a critical factor for nearly all consumers.

Then, at the end of all this research and shopping, the consumer moves forward to book the hotel, short term rental, or event tickets, only to find that the price is much higher than advertised. Consumers are forced to either accept the higher price or go back to the drawing board, wasting hours of their time and the time of their family and friends with whom they plan to vacation or attend an event. In the case of resort fees, because of inadequate disclosure on booking websites, consumers may not learn about the fees until they are checking into the hotel. Faced with this dilemma, many consumers simply pay the junk fees. This harms consumers, and it harms the honest businesses that do not charge junk fees.

In the financial services space, I described in my testimony our lawsuit against Mariner Finance, which charges consumers enormous hidden fees. Mariner, like the ticketing and vacation companies, does not advertise its hidden fees on its website. Our investigation found that most consumers who get a loan with add-on products from Mariner have no idea they are being charged for add-ons, because Mariner rushes them through the loan closing process. And the cost that these hidden add-ons is staggering: an average of nearly $1,100 per loan for one random sample of Pennsylvania consumers.

Given the sky-high interest rates and hidden add-on fees that Mariner charges, most consumers would be better off getting an auto refinance loan or an installment loan at their local credit union or community bank. But consumers who shop online are steered to lenders like Mariner because community banks and credit unions do not buy online loan leads in the same volume that Mariner does. And other consumers end up with a Mariner loan after the company mails them unsolicited "live checks" that merely require endorsement and deposit to trigger a loan transaction. After a consumer cashes a live check, Mariner immediately begins soliciting the consumer by phone, email, and other methods to come into the branch and borrow additional money by refinancing the loan. Consumers who refinance are typically charged hundreds or thousands of dollars for hidden add-on products.

We must continue to take action to stop junk fees in all these markets. If Congress and enforcement agencies fail to act, honest businesses will lose market share and be pressured to copy the bad actors to make their prices look as low as the dishonest competition. This "race to the bottom" is what happened in the mortgage market in the early 2000s, when—while many regulators failed to act—mortgage lenders lost market share and felt pressure to copy the predatory and unsustainable practices of the bad actors (such as pay-option adjustable rate mortgages with high prepayment penalties). This ultimately led to the mortgage foreclosure crisis and the Great Recession.

**Q.2.** Do victims of those that utilize predatory fees tend to share similar income levels, backgrounds, or levels of education attainment?

**A.2.** In general, I think junk fees affect consumers across the economic spectrum. Hotel companies, short term rentals, event ticketing websites—they cater to consumers of all incomes and education levels.

In the financial services space, junk fees for hidden add-on products and overdraft fees have a disproportionate impact on low-and-moderate income consumers. For example, as alleged in our lawsuit, Mariner Finance targets its loans and aggressive sales tactics at the most vulnerable borrowers, offering low-and-moderate income consumers small dollar personal loans with high interest costs. These are often subprime and deep subprime borrowers with FICO scores of 629 or less. They often already have significant credit card, installment loan, and/or student loan debt.

Similarly, in the rental housing market, we have seen predatory landlords take advantage of younger tenants, many of whom are first-time renters in places like State College, Pennsylvania. In the rental and hotel markets, more experienced consumers may challenge junk fees and have them waived or removed. This is another reason that harm from junk fees falls disproportionately on the most vulnerable consumers, such as elderly, low-income, and younger consumers.

**Q.3.** In your testimony, you discussed how junk fees often harm honest businesses that utilize up-front pricing. Do you see examples of consumers regularly paying more than the advertised price due to these business practices? Would you provide other examples of these types of fees that disadvantage honest businesses that provide consumers with transparent pricing?

**A.3.** Yes, we routinely see consumers paying more than the advertised price due to junk fees. Nearly every time consumers purchase a concert ticket or reserve a short term rental, they are paying junk fees. Concert ticket and short term rental websites force consumers to take extra steps to see the price with the mandatory fees—if they make it available at all before checkout. That's not right. And these mandatory fees are not small—they often add hundreds of dollars to the cost of the ticket or the vacation.

Thanks to our settlement, Marriott now has a policy in place to be upfront and transparent in the disclosure of mandatory fees, including resort fees, as part of the total price of a hotel stay—allowing consumers to compare total costs for hotels and find the one

that is the best fit for them. Marriott was the first hotel chain to formally commit to the upfront disclosure of resort fees as part of the initial advertised price.

In the short-term rental market, the biggest companies charge huge fees to renters. When consumers are shopping for short-term rentals, they may think initially that the advertised price is the total price, and they may rely on it in choosing a property. In fact, the same exact property may be available for a far lower price through a different property manager or broker, since the smaller managers charge far lower fees than the leading websites.

Even within the same site, "hosts" might charge their own junk fees by advertising an artificially low "nightly rate" in order to appear higher in the search, while charging a high "host fee" or "cleaning fee." This disadvantages the honest host who charges a more reasonable fee that reflects the actual costs of cleaning and turning over the rental unit. [1]

If a fee is mandatory, companies should include it in the price of the product, period. And they should be straight forward about the fee from the "get go."

**Q.4.** When businesses include hidden fees in the final cost to consumers, it can create an unfair economic advantage for the businesses engaging in these practices and disadvantages businesses that engage in more transparent and customer-friendly practices. How can State and Federal regulators level the playing field to encourage all businesses to advertise all-inclusive, up-front pricing?

Another issue involving junk fees being charged to a captive audience is on college campuses, where we are seeing instances of financial institutions forming partnerships with colleges and universities to market the financial products to students. This disproportionately affects young people, especially those who are the first in their family to go to college and who may not have had prior opportunities to open a bank account or credit card.

**A.4.** Charging hidden fees is already illegal. But many businesses operate in a gray area—they list the full price, but only on the last page (ticket sellers), which prevents consumers from shopping. Or they list the full price in much smaller print (short-term rentals) but sort search results based on a "nightly rate" which may have little relationship to the full price.

State and Federal regulators should continue to enforce the laws that prohibit unfair, deceptive, and abusive acts and practices. And Congress and State legislatures could consider adding stiffer penalties—and banning class action waivers—to enable consumers who are ripped off by junk fees to have their day in court.

New rules would also help. We submitted a comment letter to the Federal Trade Commission in support of the regulations it is writing to mandate transparent pricing in the new and used car markets. We would also support new Federal rules or legislation to

[1] For example, on one short-term rental website that sorts the search results by nightly rate, a host was recently offering to rent a 3-bedroom house for $179 per night. But a two-night stay in this home actually costs $811—nearly five times the nightly rate—after adding a $355 "host fee," a $98 "service fee," and $68 in taxes. (Of the $811, the booking site keeps approximately $134: the "service fee" and up to 5 percent of the nightly rate and host fee.) The more transparent and fair way to structure the price would be for the booking site to include the (mandatory) service fee in the nightly rate and for the site to sort the search results by the average nightly price including all fees and taxes.

mandate that websites include all mandatory fees and charges in the advertised price. Consumers should not have to check a box or change the search filters to see the true price. If a fee is mandatory, it should also be disclosed as part of the price.

College students are particularly vulnerable because they are just learning how to live on their own and manage their finances independently. We have seen landlords and banks take advantage of them. Overdraft fees are a particular problem for young people who are just getting started financially.

**Q.5.** Are you seeing trends emerge in this sector?

**A.5.** One alarming trend is the recent increase in the size of so-called "service fees" that event ticketing companies charge. As described above, these fees are typically added only at the very end of the shopping experience, during "check out." Whereas the fees used to be around 2–3 percent to cover the cost of the credit card processing, we have seen event companies tack on fees of between 7 and 11 percent on top of the advertised price.

The only way to stop these fees from continuing to grow is for event organizers to insist that all fees need to be included in the advertised, upfront price. But there seems to be a race to the bottom among event organizers and ticketing companies. Without pressure from Congress, State legislatures, and enforcement by Attorneys General, this trend will only get worse.

**Q.6.** What sort of long-term damage could these fees do to the ability for students and young people's ability to finance their education and participate in the economy both during and after college?

**A.6.** The Nation's crushing student loan burden has reduced many Americans' ability to save and spend as they see fit. It also harms the Commonwealth's larger economy because it diminishes these consumers' purchasing power, forcing them to delay buying a home, creating a business, or starting a family. In short, an entire generation is being held back by the shackles of student loan debt.

Junk fees push consumers who are struggling to repay their student loans even deeper into debt. In some cases, such as the Mariner Finance hidden add-on products, junk fees can add nearly $1,100 to the cost of a loan. This harm can significantly delay younger Pennsylvanians from buying a home, starting a business, or having children.

I am completely committed to stopping junk fees and requiring all companies to be transparent about their pricing. My message to the industry is simple: consumers should be able to shop on the Internet and buy a product for the advertised price. If all businesses had to be honest and upfront about their pricing, consumers would have a much easier time finding the best deal for them, and businesses that offer the best prices and products would thrive.

---

## RESPONSES TO WRITTEN QUESTIONS OF CHAIR WARNOCK FROM LINDSEY SIEGEL

**Q.1.** In your work, what are some common characteristics of the populations bad actors are targeting with junk fees?

**A.1.** At Atlanta Legal Aid, we represent only low-income clients. Our low-income tenants are especially vulnerable to these bait and switch junk fee schemes. These tenants identify potential housing based on advertised rents. They cannot afford application fees at multiple complexes so tend to focus their applications on one apartment. When they are offered a tenancy, they give notice at their existing housing because they cannot afford to pay double rent for any period of time. They generally do not have an alternative place to go if the apartment they have identified and started the leasing process on suddenly reveals that it is more expensive than advertised because of junk fees. They therefore often have to complete the rental because they simply have no other option. The population of low-income tenants is especially vulnerable to junk fee schemes and is therefore relentlessly targeted. The targeted population is also disproportionately people of color and that population suffers most from these abuses.

**Q.2.** Do victims of businesses that utilize predatory fees tend to share similar income levels, backgrounds, or education levels?

**A.2.** At Atlanta Legal Aid, we represent only low-income clients. We therefore do not have broad experience with all income levels. We can certainly say that landlords are targeting people with low incomes for these junk fees.

The tenants most victimized by these junk fee schemes are tenants who are least able to afford to pull the plug on a rental that reveals itself to be far more expensive than initially advertised late in the leasing process. As noted above, consumers with low incomes are particularly vulnerable to these predatory fees because they do not have the economic flexibility to walk away from deceptive schemes.

Less sophisticated renters are also more likely to be subject to these predatory fees. However, our observation is that all categories of consumers are vulnerable to the deceptive misrepresentation of rental cost facilitated by these junk fee schemes. It is often expensive and inconvenient for any individual renter to walk away from a rental property they have anticipated moving into. Landlords employing these junk fee schemes therefor have unfair leverage to extract excessive rents from consumers. The harm of these excessive rents is felt more strongly by people with low incomes who have less ability to absorb concealed costs.

**Q.3.** How does the imposition of junk fees affect overall economic participation among low- and middle-income consumers? What is its effect on socioeconomic mobility?

**A.3.** Economic participation among low income consumers involves their personal spending and their employment. Both of these activities are disrupted, often severely, by the bait and switch effect of junk fees.

As noted above, unplanned additional spending on housing expenses unfairly elevates rents and means consumers have less money to spend on other needs. This artificially shifts spending to unscrupulous landlords and away from all other sectors of the economy. The victims of these schemes have less money to spend on food, medicine, clothing, transportation to work, doctor's visits, or internet that their children need to complete school assignments.

They will forgo other basic needs to avoid becoming homeless. They also have even less opportunity to accumulate wealth for long term needs such as saving to purchase a car, home or higher education.

Potentially even more devastating to low- and middle-income consumers' economic participation are the cases where the unfair excess charges from junk fees lead to a need to relocate or an eviction. First, this usually imposes an additional large cost on the tenant and further depresses their ability to spend on other needs. Second, having to relocate in midlease or unexpectedly can also make it impossible to work for a period of time and may cause job loss. Job loss can lead to other catastrophic results. The unanticipated and unfair expense created by junk fees can lead to a spiral of economic problems.

The unfair costs imposed by junk fees at a minimum cause extra expenditures directed toward rent. Because many middle- and low-income consumers have a precarious balance of income and expenditures, these extra charges can cause catastrophic results for some consumers including moving, evictions, and loss of job with devastating effects on economic participation. All these effects negatively affect socioeconomic mobility of these consumers.

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

## STATEMENT SUBMITTED BY THE AMERICAN BANKERS ASSOCIATION

**Statement for the Record**

*On Behalf of the*

**American Bankers Association**

*before the*

**Subcommittee on Financial Institutions and Consumer Protection**

*of the*

**Senate Banking, Housing, and Urban Affairs Committee**

July 26, 2023

The American Bankers Association (ABA) appreciates the opportunity to submit this Statement for the Record for the hearing of the Subcommittee on Financial Institutions and Consumer Protection entitled, "Taking Account of Fees and Tactics Impacting Americans' Wallets."

Banks believe that fees should be clearly disclosed and comply with the law. Transparency should form the basis of the relationships between companies and consumers. Bank fees are fully disclosed in advance and are subject to significant government regulation. Moreover, the fees charged by regulated financial institutions serve legitimate economic purposes are not "junk fees." Properly disclosed fees recover costs, encourage sustainable financial behavior, support the affordable pricing of financial services, and are consistent with prudent risk management.

Despite these realities, the Consumer Financial Protection Bureau ("Bureau") is pursuing a campaign against legal, disclosed, and fairly-assessed fees. The Bureau's untested and unvalidated assumptions about credit card late fees are wrong, particularly with regard to the deterrence effect of late fees, and these flawed inputs will result in a flawed policy.

One of the major prongs of the campaign is the Bureau's Notice of Proposed Rulemaking (NPRM or Proposal) regarding credit card late fees and late payments.[1] Specifically, the Bureau is proposing to amend Section 1026.52(b) of Regulation Z (Truth in Lending Act), which implements Section 149 of the Truth in Lending Act (TILA) and requires that credit card penalty fees, including late payment fees (late fees), be "reasonable and proportional to [the] omission or violation."

In the NPRM, the Bureau proposed to: (1) lower the safe harbor dollar amount for late fees to $8 and eliminate a higher safe harbor dollar amount for late fees for subsequent violations of the same type; (2) eliminate the annual adjustment for the late fee safe harbor; (3) prohibit

[1] 88 Fed. Reg. 18,906 (Mar. 29, 2023).

issuers from including any collection costs that are incurred after an account is charged off from the costs that can be used for purposes of the Section 1026.52(b)(1)(i) cost calculation; and (4) cap late fee amounts at 25 percent of the required minimum payment. The NPRM also requests information on a wide range of far-reaching restrictions on credit card account terms.

This statement consolidates some of the key points made in several comment letters from organizations representing community financial institutions. A joint letter signed by ABA that examines these issues in greater depth can be found here.

Currently, as an alternative to the cost-based fee calculation set forth in Section 1026.52(b)(1)(i), Regulation Z offers a safe harbor amount that issuers may charge in the event of late payment. The safe harbor amount, which the Bureau has adjusted annually for inflation from 2011 to 2021, currently allows issuers to charge $30 for the first late payment and $41 for a second late payment in the six billing cycles following the initial violation.

According to the Bureau, 175 million Americans have credit cards, making them one of the most common financial products in the United States.[2] Credit card issuers go to great lengths to provide quality products and a good consumer experience. Credit card issuers compete aggressively on terms, services, and products that ultimately benefit consumers at all income levels. There are good reasons for credit cards' popularity and ubiquity. Credit cards provide valuable consumer benefits, including income and consumption smoothing, unparalleled convenience that allows consumers to make purchases and obtain credit at the time and place they need it, safety and security, fraud protection, merchant dispute rights, credit-building opportunities, and cardholder benefits and rewards.

In addition, credit card terms and conditions are well known to, and understood by consumers. Consumers receive repeated disclosures about the key terms, including any late payment fee, in easy-to-read, consumer-tested formats before they open an account and again after account approval but before they are obligated on the account. Periodic statements highlight late payment fees and indicate fees incurred for the period and year to date.

In consideration for extending credit, consumers contractually agree to pay their bills on time. Credit card issuers rely on this promise to manage their risks and sustain their business of providing credit. To be clear, credit card issuers want consumers to pay on time. On-time payments help consumers and card issuers to manage their respective finances. Card issuers have made significant investments to provide tools to promote on-time payments and good financial management. They want consumers to have a good experience with their product. However, tools such as due date alerts and voluntary automatic payments alone are insufficient to encourage on-time payments.

As with many obligations, late fees provide an important incentive to pay on time and help cover the costs and risk of people failing to pay. Late fees are designed to recover at least part of the issuer's costs associated with late payment, encourage on-time payments, minimize

[2] *See* Consumer Fin. Prot. Bureau, Blog Post, As Outstanding Credit Card Debt Hits New High, the CFPB is Focusing on Ways to Increase Competition and Reduce Costs (Apr. 17, 2023), https://www.consumerfinance.gov/about-us/blog/credit-card-debt-hits-new-high-cfpb-is-focusing-on-ways-to-increase-competition-and-reduce-costs/.

defaults and delinquencies, and promote good credit management. As discussed further herein, consumers understand and support this construct.

Unrecognized by the Bureau, assessing fees for failure to pay on time (or other violations of contractual obligations) is a universal market practice and is a proven deterrent. Deterrence is an appropriate purpose of late fees, as Congress recognized. Fees assessed for violation of a contractual obligation are common and exist across federal, state, and local governments and the economy. Indeed, the CARD Act specifically requires the Bureau to consider deterrence in determining the standards for "reasonable and proportional" late payment fees for credit cards.[3] The statutory considerations are in furtherance of the CARD Act's mandate that the fee be reasonable and proportional to the omission or violation, rather than the Bureau's misinterpretation that penalty fees be reasonable and proportional to the cost of the violation.

State and federal governments routinely impose penalties for failure to pay taxes and other obligations on time. Condominium associations commonly levy late fees to ensure income to manage budgets. Most loans, such as mortgage and auto loans, have late payment fees. The late fees are imposed because they work to deter late payment. Indeed, most cardholders pay on time—many so as to avoid a late fee. In 2010, when the Federal Reserve Board implemented CARD Act amendments to create the safe harbor, the Board acknowledged that "as a general matter, the imposition of a fee for particular behavior (such as paying late) can reduce the frequency of that behavior."[4]

***The vast majority of consumer cardholders will be harmed by the Proposal.***

Limiting the ability of issuers to allocate the cost and risk of late payments to the late paying population will force issuers to spread these costs across all consumer cardholders. Moreover, without an effective incentive to pay on time, late payments and associated costs will increase. As a result, the cost of credit will increase, credit availability will drop, and rewards and other credit card features will decline, and some may disappear. The Bureau expressly acknowledges these consequences with no rebuttal. In fact, the Bureau failed to study the true cost of the Proposal to consumers, neglecting fundamental cost-benefit analysis requirements.

By the Bureau's own admission, "[c]ardholders who never pay late will not benefit from the reduction in late fees and could pay more for their account if maintenance fees in their market segment rise in response" to the Proposal.[5] Cardholders who pay at least their minimum payment in a timely manner will **pay more** for existing and new credit because issuers will have to adjust rates and fees to manage new risks and recover costs (including potential losses) related to late payments. The cost of credit for these timely payers, who account for the vast majority of the consumer cardholder population, will increase with no corresponding benefit. In other words,

---

[3] 15 U.S.C. § 1665d(c)(2).

[4] 75 Fed. Reg. 12,334, 12,342 (Mar. 15, 2010).

[5] 88 Fed. Reg. at 18,934-35 ("Sophisticated consumers, inasmuch they would have been cross-subsidized by naïve customers' costly mistakes, may pay higher maintenance fees or interest or collect fewer rewards if the issuer offsets the revenue lost to naïve consumers. The Bureau considers that to the extent there are offsetting changes to card terms, some of these changes are likely but has not quantified their magnitude…").

the NPRM gives short-term preferential treatment to a small minority of frequently late paying consumers at the expense of the vast majority of consumers who pay their bills on time.

Cardholders who pay on time but carry a balance from month-to-month will be particularly harmed. Indeed, the Bureau acknowledges that annual percentage rates (APRs) could rise 2 percentage points for most cards, and that "[c]ardholders who carry a balance but rarely miss a payment are less likely to benefit on net."[6] The NPRM also admits that "if interest rates increase in response [to the NPRM] and these on-time cardholders also carry a balance," they will not benefit from the NPRM, and indeed would be harmed if the cost of credit increases as a result.[7] Because issuers are restricted from raising interest rates on existing balances, issuers principally would need to adjust APRs for new transactions and newly opened accounts.[8]

The Bureau and the White House have claimed that "the proposal could reduce late fees by as much as $9 billion per year," but this is a misleading and irresponsible mischaracterization of the true impacts and costs of the Proposal.[9] Similar price regulation has led to increased costs for other banking products and forced consumers to seek credit from less regulated non-bank providers. As the Bureau found after enactment of the CARD Act, which limited certain fees and risk-based pricing adjustments, credit card APRs increased as issuers adjusted pricing to manage portfolio risks and losses.[10] Additionally, following the enactment of debit card interchange fee caps, independent academic research determined that financial institutions fully offset losses through other account fees to support the cost of providing accounts and that consumers were ultimately not helped by the regulation.[11] We expect that the only cardholders who would not see an increase in the cost of their credit card accounts are those cardholders that do not pay late and do not carry a balance—and even those consumers may be adversely impacted by reduced card account features, lost rewards, or increased credit card annual fees. Regrettably, it will be the very consumers who need access to credit the most, who will be harmed most by this Proposal.

---

[6] 88 Fed. Reg. at 18,934.

[7] *Id.*

[8] Under existing late fee regulation, issuers rarely utilize penalty APRs for late payers; however, if the late fee safe harbor is reduced to $8, more issuers may exercise this option.

[9] Press Release, Consumer Fin. Prot. Bureau, CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees (Feb. 1, 2023), www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/.

[10] *See* Consumer Fin. Prot. Bureau, The Consumer Credit Card Market Report, 30-31 (Oct. 2013), https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf. This report found that credit card interest rates increased after the CARD Act at a time when market interest rates declined. This change was due in part to the inability of credit card issuers to adjust prices based on cardholders' changing risk profiles, as well as on the Act's prohibition on interest rate floors. Prior to the CARD Act, some issuers used floors to hedge against the risk that a variable rate card pegged to the prime rate would fall below the level required to maintain profitability. As of July 2009, approximately 9 percent of bank-issued credit cards had a minimum rate requirement (up from 1 percent of accounts seven months earlier), while 40 percent maintained floors on variable interest rate for cash advances (up from 10 percent at the end of 2008). After the CARD Act's implementation, issuers that relied on floors predictably raised rates in response to this new restriction. The changes brought about by the CARD Act resulted in higher interest rate margins (i.e., the difference between the average consumer credit card interest rate and the prime rate) as issuers sought alternative ways to manage portfolio-wide risk.

[11] *See* Mukharlyamov, Vladimir and Sarin, Natasha, The Impact of the Durbin Amendment on Banks, Merchants, and Consumers (2019), Faculty Scholarship at Penn Carey Law. 2046, https://scholarship.law.upenn.edu/faculty_scholarship/2046/.

Under the guise of transparency and a forced front-end fee structure, the Bureau's proposed late fee cap is a heavy-handed attempt to eliminate fees based on individual cardholder payment behavior and to shift the costs and risks associated with individual payment behavior to the entire cardholder base. In effect, this market manipulation forces consumers who manage their credit card well, and pay on time, to subsidize those who do not.

***More consumers will pay late if the Proposal is finalized.***

Timely payment helps cardholders better manage their finances and avoid becoming overleveraged and overwhelmed as their balance and minimum payment requirements increase due to missed payments. By lowering the current late payment fee below any meaningful deterrence threshold, and expressly acknowledged by the Bureau, more consumers will pay late. Specifically, the Bureau noted that it "acknowledges the possibility that consumers who were more likely to pay attention to late fees than to other consequences of paying late, like interest charges, penalty rates, credit reporting, and the loss of a grace period, might be harmed in the short run if a reduction in late fees makes it more likely that they mistakenly miss payments."[12]

The long-term impacts of late payment are not easily understood by consumers.[13] More late payments could harm creditworthiness and put consumers at a greater risk of default, higher interest rates, and lower credit scores. Altogether, these consequences will lead to reduced consumer credit opportunities and higher costs for credit.

Payment history is the most heavily weighted factor for both FICO and Vantage credit scores.[14] For example, a payment that is more than 30 days late will typically cause a credit score to decline. The lower score may increase the cost of credit not only for credit card credit but other loans such as mortgage and auto loans.[15] The increased cost of credit for many will be greater than any cost savings achieved from lowering a late payment fee from $30 to the lower of $8 or 25 percent of the minimum payment. For example, a consumer with Prime credit, taking out a $30,000 new vehicle loan at 4.9 percent interest for 48 months will pay $3,096.99 in interest on a car loan for a new vehicle. If that same consumer's credit falls to Near Prime (e.g., because of late payments on a credit card account), the interest rate will increase to 7.25 percent and they will pay $1,552.87 more in just interest over the life of the same $30,000 loan.[16]

In the long term, the Bureau's goal to provide consumers with more money to pay their credit card bill by lowering the late payment fee will be frustrated because many will pay more

---

[12] 88 Fed. Reg. at 18,935.

[13] 88 Fed. Reg. at 18,935 (noting that "consumers may not fully consider late fees when shopping for a credit card.").

[14] *See, e.g.*, FICO, What's In My FICO Scores?, https://www.myfico.com/credit-education/whats-in-your-credit-score, VantageScore, The Complete Guide to Your VantageScore, https://vantagescore.com/press_releases/the-complete-guide-to-your-vantagescore/.

[15] For example, credit scores are utilized by landlords when evaluating a potential renter application. *See* Experian, Can My Credit Score Affect Renting? (Sept. 9, 2021), https://www.experian.com/blogs/ask-experian/can-my-credit-score-affect-renting/.

[16] For the purposes of this exercise, Prime was defined as a credit score of 661 to 780, and Near Prime as a credit score of 601-660. Average new vehicle loan interest rates from Experian State of the Automotive Finance Market Q3 2022.

for credit generally or will be cut off from access to responsible credit.[17] Thus, the Bureau's position distorts the true cost of consumer credit. Further, credit card credit might become unavailable for some late paying consumers, and to meet their credit needs, they will be forced to higher-cost, less-regulated credit alternatives such as payday loans.

***The CFPB failed to comply with SBREFA.***

As a "covered agency" designated by the Dodd-Frank Act,[18] the Bureau must comply with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[19] Under SBREFA, the Bureau must convene and chair a Small Business Review Panel (Panel) if it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities.[20] Any reduction in the late fee safe harbor would have a significant adverse impact on a substantial number of community banks and credit unions, with assets below $850 million. In declining to convene a Panel, the Bureau is failing to account for foreseeable harm to small businesses and consumers, as generally required by the Regulatory Flexibility Act (RFA) and SBREFA.[21]

SBREFA requires the Bureau to collect the advice and recommendations of Small Entity Representatives (SERs) concerning whether the proposals under consideration might increase the cost of credit for small businesses and whether alternatives exist that might accomplish the stated objectives of applicable statutes and that minimize any such increase.[22] SBREFA also expressly requires the Bureau to consider any projected increase in the cost of small business credit.[23] Reducing the amount issuers may charge for late payments could increase the cost of and reduce access to credit by small businesses, many of which use personal credit cards for business purchases. Of the approximately 805 credit card-issuing banks, more than half (451) have assets of less than $850 million, and of the 3,127 credit card-issuing credit unions, 85 percent (2,670) have assets of less than $850 million.[24] Reducing the amount issuers may charge for late payments will have a significant adverse impact on all issuers and cause them to alter their business models. The impact on small depository institutions would be greater.

---

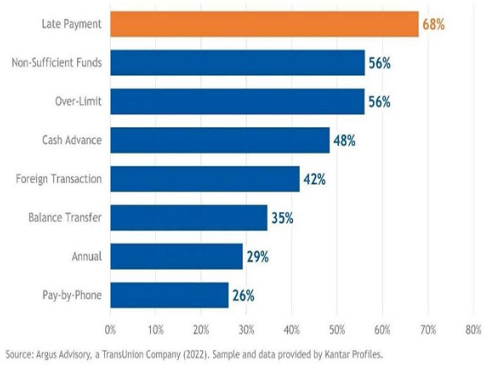
[17] 88 Fed. Reg. at 18,919 (". . . the Bureau has preliminarily determined that some cardholders may benefit from the proposed $8 safe harbor threshold amount in terms of a greater ability to pay revolving debt.").
[18] *See* 5 U.S.C. § 609(d), as amended by Dodd-Frank Act § 1100G.
[19] *See* 5 U.S.C. § 603.
[20] 5 U.S.C. § 609(b).
[21] Notably, the Small Business Administration Office of Advocacy, a member of a required Panel, has expressed serious concern that the CFPB does not have necessary data to certify that the Proposal will not have a SISNOSE. U.S. Small Bus. Admin. Off. of Advoc., Comment Letter on Notice of Proposed Rulemaking on Credit Card Late Fees and Late Payments (May 2, 2023), https://www.regulations.gov/comment/CFPB-2023-0010-0170 (hereinafter the SBA Letter) (stating that "[i]t is unclear why CFPB lacks the data necessary to evaluate the cost of this rule for the small financial entities that it regulates" and that "[w]ithout a factual basis, the agency may not certify under Section 605(b) and must publish an Initial Regulatory Flexibility Analysis under Section 603 of the RFA.").
[22] 5 U.S.C. §§ 609(b)(4), 603(c).
[23] 5 U.S.C. § 603(d).
[24] The number of card-issuing depository institutions is based on an analysis of bank, credit union, and thrift balance sheets. Those with non-zero credit card loan balances were included as card issuers.

***ABA surveys show late fees encourage on-time payments.***

When set appropriately, late fees encourage consumers to pay on time and develop good financial and credit management habits that lead to financial well-being. Indeed, several governmental bodies have recognized the positive impact late fees have on payment behavior. In 2010, the Federal Reserve Board acknowledged that "as a general matter, the imposition of a fee for particular behavior (such as paying late) can reduce the frequency of that behavior."[25]

Late fees are judged to be fair by the public. The Bureau's repeated mischaracterization of late payment fees as so-called "junk fees" ignores the well-understood and accepted value of late fees as a deterrent and undermines the significance of the role of these late fees in the credit market.[26] Penalty fees deter bad behavior and are avoidable. Indeed, a majority, 57 percent, of consumers recently surveyed think it is reasonable for financial institutions to charge late fees and even more, 78 percent, believe that paying on time is a personal responsibility.[27] Consumers who comply with their contractual obligations by making timely payments do not incur late fees.

*Figure 1: Share of Consumers Who Feel it is Reasonable for Issuers to Charge Various Fees*

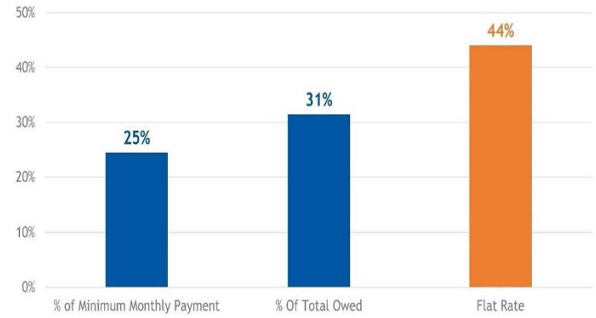



Source: Argus Advisory, a TransUnion Company (2022). Sample and data provided by Kantar Profiles.

A plurality said that a flat fee is the fairest fee structure, compared to the percent of total balance and the percent of minimum monthly payment, indicating little consumer support for the limit of 25 percent of the minimum payment (see Figure 2).

[25] 75 Fed. Reg. 12,334, 12,342 (Mar. 15, 2010).
[26] *See* Media Release, Consumer Bankers Association, New Poll: Majority of Americans Believe Credit Card Fees are Legitimate (Apr. 5, 2023), https://www.consumerbankers.com/cba-media-center/media-releases/new-poll-majority-americans-believe-credit-card-late-fees-are.
[27] *Id.*

*Figure 2: Consumer Opinions on Fairest Fee Structure*




Source: Argus Advisory, a TransUnion Company (2022). Sample and data provided by Kantar Profiles.

***The Bureau improperly relied upon non-public data that are ill-suited for this rulemaking.***

The Bureau utilizes Y-14 data as the principal basis for the cost estimates in the Proposal. As a preliminary matter, these data are confidential, and the Bureau's reliance on data and analysis that it has not disclosed, and has no authority to disclose for public input, violates bedrock principles of administrative law.[28] As the D.C. Circuit has explained, it "is the agency's *duty* to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules."[29] In addition "[a]n agency commits serious procedural error when," as the Proposal does here, "it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."[30] What we do know about these confidential data is that they are not fit for the purpose of evaluating the efficacy of late fee safe harbors. According to the Federal Reserve Board, Y-14 data are used to "assess the capital adequacy of large firms" and "to support supervisory stress test models and continuous monitoring efforts," as well as to "inform the [Federal Reserve Board's] operational decision making to implement the Dodd-Frank Act."[31]

Utilizing Y-14 data as the sole and principal basis for the proposed safe harbor is concerning because the data were collected for an entirely different purpose and are not reconciled. Moreover, the Bureau does not have insight into the specific inputs that are factored into the total costs. What is clear, however, is that the Y-14 data are limited to what an issuer

[28] *See, e.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, to a critical degree, is known only to the agency."); *see also* Letter from BPI *et al.*, re: NPR on Credit Card Penalty Fees (Regulation Z) to CFPB, March 16, 2023, https://bpi.com/wp-content/uploads/2023/03/CFPB-CC-Late-Fees-NPR-Data-Publication-3-16-23-final-for-transmission.pdf.

[29] *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) (emphasis added) (citation omitted).

[30] *Id.* (citations omitted).

[31] Fed. Rsrv. Sys., FR Y-14 Information Collection Q&As (Capital Assessments and Stress Testing information collection), https://www.federalreserve.gov/publications/fr-y-14-qas/y-14-qas.htm.

may report as "costs incurred to collect problem credits…[including] total collection cost of delinquent, recovery, and bankrupt accounts."[32] As discussed elsewhere, even if a card issuer's late fee could be based solely on "costs" as defined above, there are *additional* costs associated with a late payment that exceed those solely related to collections. Furthermore, the Y-14 data are limited to "problem credits" (*i.e.*, accounts 30 days or more past due), and there are a large number of costs associated with late payments on accounts that are not yet problem credits. The Y-14 data are, therefore grossly underinclusive. Accordingly, the Bureau cannot conclude that this metric is representative of costs permitted to be considered under the rule and, as discussed further in section 3 below, reliance on it represents a limitation on the statutory cost consideration not expressly contemplated by Congress.

***The Bureau's methodology in calculating costs for late payments is incomplete.***

When considering the amount of late fees that should be charged, the Bureau only considers certain costs related to the violation or omission. There is no basis in the CARD Act to exclude certain costs that the Bureau excluded from its analysis.[33] The Bureau's proposed amendments to amounts excluded from cost analysis exclude actual costs associated with late payments beyond collection costs, such as direct post charge-off costs. These post-charge-off costs include recovery of the charged-off balance and commission paid to collections agents.

In addition, the Bureau's analysis excludes attributable expenses and overhead and funding costs related to consumer credit card accounts. Attributable expenses include indirect operating expenses related to accounts that are delinquent, including systems expenses and risk department expenses. These indirect costs represent real and reasonable expenses associated with late and delinquent accounts. Funding costs are related to the cost of funding delinquent accounts. While these resources are needed when an account becomes delinquent, issuers do not know which accounts will become delinquent (or when). However, issuers need these functions to maintain the orderly management of the entire credit card programs, so it is appropriate for these costs to be a part of the late fee calculation.

***Late fees allow issuers to manage safety and soundness risk.***

Lower late fees will affect issuers' ability to manage safety and soundness risk. Effective late fees allow issuers to extend credit knowing that consumers have an incentive to make timely payment. If consumers decide that a "penalty" is less troublesome than making a payment, issuers cannot accurately assess when a consumer pays late whether the consumer is in early stages of financial distress or whether the late fee was simply insufficient to serve as a deterrent to late payment. The aggregate impact of large swaths of consumers missing their payments, anticipated by the Bureau, will have a cascading adverse impact on the integrity of issuer portfolios. This lack of information inhibits issuers from effectively monitoring their credit

[32] *See* Consumer Fin. Prot. Bureau, Credit Card Late Fees: Revenue and Collection Costs at Large Bank Holding Companies, at 2 (Feb. 23, 2023), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees-revenue-collection-costs-large-bank_2023-01.pdf.

[33] *See* ABA et al. Comment Letter on Notice of Proposed Rulemaking on Credit Card Late Fees and Late Payments, Docket No. CFPB–2023–0010 (May 3, 2023).

portfolios. Additionally, the lack of information will also impair the efficacy of issuers' predictive models on credit risk.

Depository institutions must ensure adequate liquidity and capital to cover expected and unexpected losses for performing and non-performing credit card portfolios. The Office of the Comptroller of the Currency highlights that "[c]redit risk poses the most significant risk to banks involved in credit card lending" because "repayment depends primarily on a borrower's *willingness* and capacity to repay."[34] As the Bureau expressly acknowledges, there will be a direct correlation between a significantly reduced late fee and a cardholder's willingness to pay late. In safety and soundness examinations, regulators test liquidity and capital adequacy and review expected cash flow from credit card assets to ensure there is sufficient cash flow to cover the liabilities. The capital adequacy can shift and decline when loans are paid late.

The Bureau failed to adequately consider the consequences of reducing the safe harbor to $8 or less. As discussed above, the proposed safe harbor no longer provides a meaningful incentive to pay on time. As the Bureau acknowledges in the NPRM, "a lower late fee amount for the first or subsequent late payments might cause more consumers to pay late."[35] As discussed above, ABA data show that 83 percent of consumers said that a $10 fee (let alone an $8 fee) would not be high enough to deter them from paying a credit card bill late, and only 15 percent said that worrying about their credit rating was the most important reason to pay on time.

Inexplicably, for an agency charged with promoting responsible use of financial products and services, the Bureau refers to a violation of the terms of a cardholder agreement as "flexibility" about what bills to pay on time.[36] Setting clear contractual obligations and expectations was the very hallmark of the CARD Act and is a foundational element of American jurisprudence and the economy. Any rulemaking that is designed to allow any party to avoid a contractually agreed-upon deadline that is legally permissible, may constitute a taking.[37] The NPRM fails to analyze whether this "flexibility" would be contrary to the constitutional right to be free of uncompensated takings of private property.

Small issuers that collect fee revenue through agent bank relationships will be adversely impacted in the same way as those that directly issue cards. Moreover, those banks and credit unions that do not collect fee income would be indirectly affected by a reduction in late fees. Partner issuers and agent banks, like all credit card issuers, may be forced to increase APRs or decrease credit access to make up for the costs and increased risk associated with late payments. Agent issuers could also be forced to reduce the share of revenue provided to participating

---

[34] Comptroller of the Currency, Comptroller's Handbook: Credit Card Lending, V. 2.0, at 8 (2021), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/credit-card-lending/pub-ch-credit-card.pdf (emphasis added). Similarly the National Credit Union Administration highlights "situations where a credit union distributes funds before it has them" as a primary risk of credit card lending. *See* Nat'l Credit Union Admin, Examiner's Guide: Electronic Payment Systems (Sept. 2017), https://publishedguides.ncua.gov/examiner/Content/ExaminersGuide/ElectronicPaymentSystems/EPS_PrimaryRisks.htm.

[35] *See* 88 Fed. Reg. at 18,919.

[36] *See id.* at 18,933.

[37] *See, e.g.*, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken ... provided that just compensation is paid.").

community banks. These changes would negatively impact both the revenue provided by these products to small institutions and the customer relationships that these credit cards helped establish.

In its dismissal of impacts to small depository institutions, the Bureau also ignores the fact that lower late fees will compel issuers to absorb the costs of those late payments in other ways, including by increasing interest rates reducing credit card availability. Smaller entities, in particular, have less flexibility and fewer resources to make those adjustments. Moreover, while raising APRs may be an option for large issuers, some smaller card issuers may not be able to raise rates due to state usury laws, as the Bureau notes.[38] The Bureau's Proposal would also limit small issuers' ability to compete with larger issuers on the basis of fees.

***Conclusion***

Credit cards are widely popular financial products that provide valuable consumer benefits. Unlike the Bureau's mischaracterization of late fees, consumers understand late fees and recognize the importance of late fees in promoting responsible consumer behavior and more efficiently allocating costs. As discussed above, the Bureau's Proposal is based on flawed assumptions, which would create similarly flawed policy. If finalized as proposed, the Proposal will harm the vast majority of consumers by raising the cost of credit and limiting access to new and existing credit. In addition, as discussed above, the Bureau has violated various process and procedural requirements, which must be remedied before proceeding.

* * *

We urge Congress to conduct robust oversight of the Bureau's Proposal and its "junk fees" campaign to ensure that it is following the law and not pursuing policies which will harm consumers. Thank you for the opportunity to share our views.

[38] 88 Fed. Reg. at 18,935.

## LETTER SUBMITTED BY THE NATIONAL ASSOCIATION OF FEDERALLY INSURED CREDIT UNIONS

NAFCU
3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
f: 703.524.1082
nafcu@nafcu.org | nafcu.org

**National Association of Federally-Insured Credit Unions**

July 25, 2023

The Honorable Raphael Warnock
Chairman
Subcommittee on Financial Institutions
and Consumer Protection
United States Senate
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Subcommittee on Financial Institutions
and Consumer Protection
United States Senate
Washington, DC 20510

**Re: Subcommittee on Financial Institutions and Consumer Protection Hearing: "Taking Account of Fees and Tactics Impacting Americans' Wallets"**

Dear Chairman Warnock and Ranking Member Tillis:

I write to you today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) ahead of tomorrow's Subcommittee hearing, "Taking Account of Fees and Tactics Impacting Americans' Wallets." As you are aware, NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve nearly 137 million consumers with personal and small business financial service products. NAFCU and our members appreciate the continued work of the Subcommittee in examining fees imposed on consumers. Ahead of tomorrow's hearing, we would like to share some thoughts on the role the Consumer Financial Protection Bureau (CFPB) plays in the mischaracterization of junk fees and the potential impact it has on consumers.

NAFCU and our member credit unions appreciate the opportunity to provide input to the Subcommittee. We are concerned with the CFPB's efforts to diminish commonsense incentives that promote financial responsibility, such as overdraft fees and credit card late fees, as well as reasonable and legal business service charges. These efforts are a complete mischaracterization of "junk fees" and will unnecessarily cause financial harm to American consumers.

Last year, the CFPB launched an initiative to target standard fees charged by credit providers that included sensible payment guardrails such as overdraft and credit card late fees. This initiative has been mislabeled, and in the CFBP's most recent Request for Information (RFI), lawful payment incentives are called "junk fees," "excessive or exploitative fees," and "inflated or surprise fees." These fees bear no resemblance to the type of hotel and resort fees referenced in the RFI and, in contrast, are all subject to comprehensive federal or state laws and regulations. Sensible payment guardrails are not unfair, deceptive, or abusive, and there are mechanisms in place to ensure consumers are well informed of the fees. The CFPB's guidance falsely suggests that these fees are for the sole benefit of the financial institution; however, these fees are used to help the consumer make responsible financial decisions and encourage on-time payments or otherwise prevent violations of the terms of financial agreements. These fees also enable companies to offset the costs of late payments and their associated risks so that

they can continue to offer the financial products that people want and need, particularly to financially vulnerable communities and individuals trying to build credit. The CFPB's targeting of overdraft protection programs has failed to take into account that these programs are often opted in to by the consumer and are often a product consumers want.

NAFCU supports fair, transparent, and competitive markets for consumer financial services and is happy to work with the CFPB to improve consumers' understanding of financial products and services. We caution, however, that increasing the required disclosures or mandating that contingent fees be included in a lump-sum price would only further confuse and frustrate consumers who may have varying demands for convenience. NAFCU has urged the CFPB to continue to study the markets and products listed in its RFI before taking any supervisory or regulatory action, as the Bureau's current data and analyses do not suggest an unfair or underregulated environment. NAFCU now recommends that you closely scrutinize the Bureau's alleged authority to make changes to its regulatory framework to limit the fees described in the RFI.

While we understand the significance of required disclosures and the positive impact they have on consumers' understanding of financial product pricing, sensible payment guardrails provide for better comparison shopping and improved consumer repayment behavior. To claim that fees which must be disclosed are in fact surprise or junk fees is a mischaracterization and one that undercuts the Bureau's own efforts to develop effective disclosures. NAFCU's members often report that they are frustrated and confused by the volume of required disclosures, despite their best efforts to educate consumers about the importance of these disclosures and the information they contain regarding the terms and fees of products and services. To this end, instead of pushing the bounds of statutory authority to regulate fees in connection with consumer financial products and services, the CFPB should be engaged in broad consumer education initiatives regarding financial disclosures. For example, providing toolkits to develop optional, real-time disclosures compatible with mobile banking applications may serve as a practical and effective resource.

We thank you for the opportunity to share our thoughts and we look forward to continuing to work with the Subcommittee on these important issues. Should you have any questions or require any additional information, please contact me or Amber Milenkevich, NAFCU's Senior Associate Director of Legislative Affairs, at (703) 402-2330 or amilenkevich@nafcu.org.

Sincerely,

Brad Thaler

Brad Thaler
Vice President of Legislative Affairs

cc: Members of the Subcommittee on Financial Institutions and Consumer Protection

**STATEMENT SUBMITTED BY THE COMMUNITY HOME LENDERS OF AMERICA**

**Community Home Lenders of America**
**Written Statement for the Record:**
**Hearing: "Taking Account of Fees and Tactics Impacting Americans' Wallets"**

The Community Home Lenders of America (CHLA) appreciates this opportunity to submit this statement into the hearing record.

In June 2023, CHLA sent a **letter** to the Justice Department and the Federal Trade Commission (FTC) opposing the proposed purchase by ICE Mortgage Technologies of Black Knight. CHLA took this action on behalf of our small and mid-sized independent mortgage bank (IMB) lenders, who are deeply concerned both about the pricing power capabilities of this proposed combined entity in the mortgage origination services area (LOS) - and are concerned about the leverage the combined entity could have to engage in anti-competitive, anti-consumer practices.

Specifically, LOS mortgage services are integral to the mortgage origination process and lenders are therefore are extremely vulnerable to a loss of such services, because a transition to a competitor is extremely difficult, posing a significant financial and reputational risk to a lender.

In our letter, which CHLA copied Consumer Financial Protection Bureau Director Chopra, we identified various anti-competitive, anti-consumer practices. One in particular is the charging by ICE of vendor fees, which CHLA has appropriately labeled "junk fees."

We understand that these fees are technically being charged to mortgage loan originators. However, make no mistake about it - as a cost of originating the loan, the piling on of these junk fees in connection with these vendor fees will be passed along to consumers in the form of higher mortgage rates and costs, just as surely as if they were charged directly to the consumer.

These junk fees are charged each time a mortgage lender needs to access certain vendor information in the LOS process. Examples include separate vendor fees for access under the LOS system for, for example, the appraisal, the credit report, title insurance, and flood certification.

These charges are for information from vendors that the lender has retained and to which the lender is already legally entitled to have. Thus, these charges - which can often total $50 to $100 per mortgage loan - provide no incremental value to the lender - or to the consumer.

Effectively, they are merely toll fees - which can be charged because of ICE's dominant market share and the extreme difficult of a lender shifting to a competitor.

The mortgage industry has made tremendous strides in the last decade in streamlining the mortgage origination process, both with respect to reducing time frames and reducing costs.

However, we bring this information to the attention of the Committee because these charges are hidden, and we believe they are anti-consumer and anti-competitive. Therefore, we ask the Committee to take a look at these mortgage services junk fees.

**LETTER SUBMITTED BY THE CONSUMER BANKERS ASSOCIATION**

CBA CONSUMER BANKERS ASSOCIATION

July 26, 2023

The Honorable Raphael Warnock
Chairman
Subcommittee on Financial Institutions and Consumer Protection
Senate Committee on Banking, Housing, and Urban Affairs
416 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Thom Tillis
Ranking Member
Subcommittee on Financial Institutions and Consumer Protection
Senate Committee on Banking, Housing, and Urban Affairs
113 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Warnock and Ranking Member Tillis:

The Consumer Bankers Association (CBA) is pleased to submit this letter for the hearing entitled "Taking Account of Fees and Tactics Impacting Americans' Wallets" focused on fees assessed to consumers for banking and non-banking products. CBA is the voice of the retail banking industry whose products and services provide access to credit to millions of consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans, and collectively hold two-thirds of the country's total depository assets.

In conjunction with President Biden, the Consumer Financial Protection Bureau (CFPB or Bureau) Director Chopra has launched a campaign to rein in "junk fees," which seeks to reduce fees in several industries, including but not limited to hotel and lodging, transportation, and entertainment. In this letter, CBA seeks to address the Bureau's actions with regard to two banking-specific fees: overdraft and credit card late fees. It is essential to note that all bank-specific fees are by statute and regulation, transparent, and the consumer is notified at the time of an account/product opening and then annually, in advance, of the amount of fees associated with any banking product.

## Credit Card Late Fees

On February 1, 2023, the CFPB announced a Notice of Proposed Rulemaking (NPRM) on credit card late fees that would drastically alter the credit card late fees landscape. Comments were due on May 3, 2023.

Under current Federal Reserve regulations, (1) the credit card late fee safe harbor is $30 for the first late payment and $41 for a subsequent late payment, (2) these safe harbor amounts are adjusted annually for inflation, and (3) late fees cannot be more than 100% of the required minimum payment. The NPRM proposes to (1) reduce the safe harbor amount to $8, (2) eliminate the annual inflation adjustment, and (3) cap late fees at 25% of the required minimum payment.



1225 New York Avenue, NW, Suite 1100, Washington, DC 20005
consumerbankers.com

CBA | CONSUMER BANKERS ASSOCIATION

On the surface, this proposal sounds good– no one likes to pay for "junk"– but the reality for consumers isn't so simple and could have significant long-term consequences.

As proposed, this rule would have significant negative impacts on both credit card customers and issuers. In fact, according to the Bureau, the only consumers who would benefit from the proposal are credit card users who routinely pay late. The Bureau acknowledged that cardholders who never pay late– which the CFPB's own data indicates is 74 percent of all Americans with credit cards [1] will not benefit from the reduced fees and could experience "…higher maintenance fees, lower rewards, or higher interest on interest-paying accounts," and increased costs could completely negate any benefits.[2] Banks are required by their prudential regulators to manage and offset credit risk, and a reduction of the ability for financial institutions to recoup costs would result in a tightening of credit availability for some consumers.

Reducing the safe harbor for the penalty fee from its current $30 and $41 amounts to $8 would significantly reduce the deterrent effect of the late fee, likely resulting in a greater share of late-paying and delinquent accounts. The potential effects of this likely reality are twofold: (1) more consumers will have delinquent accounts and face higher penalty APRs and be reported to credit bureaus, leading to lower credit scores, and (2) many card issuers may not be able to cover the costs associated with funding card operations or balance their credit risk portfolios and may have to exit the market entirely.

Credit card late fees are a necessary cost of providing financial products and services, and a majority of Americans agree. A February 2023 study[3] conducted by CBA found that 57% of Americans believe that credit card late fees are legitimate, nearly half of all Americans, 48%, are unaware of the consequences associated with paying a credit card bill late, and 76% agree that paying your bill on time is a personal responsibility.

The Washington Post's Fact Checker, Glenn Kessler, recently pushed a column[4] debunking the CFPB's claims that consumers would save $9 billion as a result of this proposal. It specifically highlights concern that the $8 fee may not cover bank expenses and says the CFPB's calculation excluded key expenses and losses. The article also states, "a lower fee might harm some cardholders… In the noticed on the proposed rule, [the CFPB] acknowledged that a peer-review paper published in 2022[5] found that consumers are conscious of late fees, with some deliberately trading off paying the late fee with the cost of meeting the minimum payment requirement."

Aside from the deeply flawed policies in the proposed rule, it is also procedurally deficient. The CFPB did not conduct a thorough analysis of the available economic literature on the effects or late fees, and the analysis that the CFPB did perform was not done in a transparent and consistent manner. The Bureau's flawed assumptions and deficient analysis have resulted in incorrect

[1] https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf
[2] https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/
[3] https://www.consumerbankers.com/cba-media-center/media-releases/new-poll-majority-americans-believe-credit-card-late-fees-are
[4] https://www.washingtonpost.com/politics/2023/06/09/about-that-9-billion-credit-card-late-fees-profit/
[5] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135421



1225 New York Avenue, NW, Suite 1100, Washington, DC 20005
consumerbankers.com

conclusions about the benefits and harm to consumers, as well as the costs issuers face in the marketplace.

Finally, a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel is required when a rulemaking will have a significant economic impact on a substantial number of small entities. CBA and other trades stated in their joint trades response to the ANPR on credit card late fees that a SBREFA panel should be required because "[o]f the approximately 824 credit card-issuing banks, more than half (452) have assets less than $750 million, and of the 3,172 credit card-issuing credit unions, nearly 85 percent (2,682) have assets less than $750 million."[6] Despite this, the Bureau has failed to hold a SBREFA panel. The Small Business Administration Office of Advocacy ("Advocacy") agrees, and stated in a public comment letter[7] to the Bureau that the CFPB had a lack of data to support its conclusion that the rule will not have a significant economic impact on a substantial number of small entities. In addition, Advocacy raised questions about the CFPB's lack of data on small depository institutions. Advocacy also stated that the rulemaking may be harmful to consumers, including small businesses, who rely on small depositories, should small depositories decide to exit the credit card market. Ultimately, Advocacy recommended that the CFPB maintain the status quo until it has sufficient data to ascertain the economic impact of this action on small entities.

## Overdraft Fees

Policymakers continue to scrutinize fee-based bank products like overdraft that are valued by millions of consumers in times of need. The criticism of overdraft products fails to account for the growing number of innovative overdraft products and policies introduced over the past several years by America's leading banks. These changes have significantly reduced costs, all while providing consumers with greater choice and flexibility to meet their needs within the highly competitive and well-regulated banking system.

Banks have proactively implemented new overdraft polices such as elimination of overdraft fees, elimination of account transfer fees to coverage overages, de minimis exceptions to cover small overages (avoiding an overpriced cup of coffee), grace periods for customers to make accounts whole before overdraft fees are assessed, access to small dollar loans (discussed more fully below), elimination of extended overdraft fees, elimination of returned items fees, and more. These changes, in conjunction with clear disclosures, add continued benefit to consumers who rely on overdraft services to cover short-term gaps in finances and provide a viable service that will come at minimal or no cost.

As policymakers examine short-term liquidity products such as overdraft, it is essential to have a better understanding of consumer demand for the products, their use as a form of emergency liquidity or a financial safety net, and the evolution of the overdraft product by financial institutions. Limiting access to overdraft could hinder the ability of a consumer to pay unexpected bills or family emergencies. This would drive consumers toward less regulated and more expensive non-bank

[6] https://www.consumerbankers.com/cba-issues/comment-letters/joint-trades-comment-letter-late-fees-anpr
[7] https://advocacy.sba.gov/wp-content/uploads/2023/05/Fact-Sheet-CFPB-Credit-Card-Penalty-Fees-508c.pdf



1225 New York Avenue, NW, Suite 1100, Washington, DC 20005
consumerbankers.com

lenders to meet their financing needs and deprive them of the high level of consumer protections they deserve.

Research by Curinos, "Competition Drives Overdraft Disruption,"[8] found consumers make highly informed choices about when to use overdraft services. These decisions are based on real-time access to account information, clear disclosures, and personal experience. Policymakers should keep in mind that the existing regulatory framework for overdraft services acknowledges the role of informed individual choice and responsibility and is a voluntary action that is "opt in."

Specifically, the study found:

- ***Significant consumer savings:*** Newly announced changes to overdraft programs are projected to save consumers $18.3 billion from 2021 to 2025, more than $3.5 billion per year. Overdraft fees are projected to have declined by 82% since 2008, or $167 of annual savings per U.S. adult.
- ***Consumers understand overdraft***: Consumers, especially overdraft users, continue to demonstrate a deep understanding of overdraft and available alternatives. More than 60% of overdrafts come from consumers who intend to use the service. More than 80% of overdraft transactions come from consumers who opted into debit card overdraft programs with the clear intention of using it to cover their payments. And two-thirds of consumers indicate that they will incur the cost to ensure no reduction in their access to services.
- ***There are fewer frequent use of overdraft, in part as a result of bank-led innovations***: The percentage of regular overdraft users (those with 10 or more transactions annually) fell by 40% to 4.9% of the population between 2010 and 2020.
- ***Consumers use overdraft for purchases of increased size***: Bank-led initiatives aimed to help consumers avoid an unintended fee have dramatically reduced the number of small purchases tied to overdraft. Since 2008, as a result of banks' innovations, overdraft fees per U.S. adult have declined by 77%, with the average size of purchases triggering overdraft fees quadrupling from $50 to almost $200.

America's leading banks listened to consumers and policymakers, leading them to unveil new innovations for popular overdraft products which are designed to reduce or avoid fees to meet the needs of the consumer.

## Conclusion

Consumers are only protected when financial products and services are subject to consistent consumer protections based on data and market realities, not changes to regulation and policy based on an unsupported ideological view. We appreciate the Senate Banking Committee's focus on the CFPB's campaign on "junk fees," and urge the Committee to consider the real-world impacts the

[8] https://curinos.com/our-insights/competition-drives-overdraft-disruption/



1225 New York Avenue, NW, Suite 1100, Washington, DC 20005
consumerbankers.com

CBA | CONSUMER BANKERS ASSOCIATION

proposed changes would have on consumers along with the potential safety and soundness implications the campaign on "junk fees" could have on banks across the country. CBA stands ready to work with Congress to ensure any approach to banking fee structures is well thought out and focuses on common-sense goals to allow consumers to continue access these important financial products.

Sincerely,

Lindsey D. Johnson
President and CEO
Consumer Bankers Association



1225 New York Avenue, NW, Suite 1100, Washington, DC 20005
consumerbankers.com