BANK POLICY INSTITUTE

March 31, 2022

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

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

Ladies and Gentlemen:

The Bank Policy Institute[1] is providing these comments in response to the Consumer Financial Protection Bureau's request for information on fees charged by banks and other financial companies. Banks provide products and services that help consumers meet their financial needs, and BPI members take very seriously the important role they play in the financial lives of consumers, families, businesses, communities, and the nation's economy. Banks are continuously innovating to better meet their customers' needs in this highly competitive marketplace.

BPI supports any Bureau efforts to protect consumers from exploitative practices across consumer finance markets as well as to promote transparency, consumer choice and competition in financial products. We are concerned, however, that the RFI, without substantiation or supporting evidence, presents a misleading portrait of banking and the consumer financial services market, reflecting a prejudgment that all fees are "junk fees." The RFI, for example, omits any reference to the detailed disclosure requirements that must be followed by consumer financial services providers to provide consumers transparency and foster competition. In addition, the RFI states that the Bureau is interested in hearing about consumers' experiences with fees only when such experiences have been negative. As set forth below, in this letter, BPI highlights some of the unsupported assertions in the RFI and provides responses thereto.

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[1] The Bank Policy Institute is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

The prejudgment that all fees are "junk fees" in the RFI appears to be based on four misconceptions. First, as noted, the RFI seems to assume that fees are not transparent to consumers and may therefore come as a "surprise." However, the RFI does not acknowledge the expansive, congressionally mandated disclosure framework[2] that requires detailed, upfront cost and fee disclosures for virtually all consumer financial products and services. These disclosures enable consumers to select the bank products and services that best meet their needs, thereby enhancing consumer choice and competition. This framework has been administered and further refined by the Bureau through multiple regulations, which, in many cases, include model disclosures designed and extensively consumer-tested by the CFPB.[3] The RFI makes no mention of this disclosure scheme and solicits no comment from consumers on how well it is working or how it might be improved to help them compare banking services and pricing.

Second, the RFI presumes that the consumer financial services industry is non-competitive, and therefore seeks information on why banks do not compete on fees – not *whether* they compete on fees.[4] In reality, due in part to the entry of online banks, fintechs, and other providers of consumer financial products and services, this industry has seen a significant increase in competition and innovation in recent years, and a corresponding increase in consumer choice. Further, banks must actively market the products and services they offer to compete for new customers and expand and retain existing customer relationships. For example, with respect to deposit accounts, fees that prove unpopular in connection with those accounts – such as monthly fees or charges for teller access – are often reduced or eliminated through competition. In recent years, this same dynamic has driven and continues to drive many institutions to eliminate or substantially curtail overdraft fees. As a result, consumers report a high level of satisfaction with their banks, including with respect to product offerings and fees.[5]

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[2] For example, Regulations DD and E (deposit account and electronic fund transfer fees), TILA/RESPA (mortgage origination and settlement service fees), and Dodd-Frank UDAAP principles all require clear disclosures of fees to consumers to ensure fees are not "hidden" or "back-end". Many banks have also adopted the Pew Charitable Trust model fee disclosures for checking accounts following their creation in 2014, which provides consistency for consumer comparison shopping.

[3] Prior to the establishment of the Bureau by the Dodd-Frank Act in 2010, other federal regulatory agencies administered these disclosure requirements. Thus, this disclosure regime has been developed and refined over many years.

[4] Other recent RFIs have sought information in a more unbiased, neutral manner than this RFI. For example, the Bureau recently issued a Notice and Request for Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later Providers posing the following questions: (i) What is the consumer experience with BNPL products?; (ii) What are the benefits and risks to consumers from BNPL products?; (iii) What is the merchant experience with BNPL products?; (iv) What perspectives do regulators and Attorneys General have with respect to BNPL products?; and (v) Are there ways in which the BNPL market can be improved? 87 Fed. Reg. 3511, 3512 (Jan. 24, 2022). For specific questions related to BNPL fees, see CFPB, *In re Market Monitoring, Buy Now, Pay Later*, Order to File Information at 9-10 (Dec. 16, 2021), https://files.consumerfinance.gov/f/documents/cfpb_bnpl_sample-order_2021-12.pdf.

[5] *See*, *e.g.*, *ABA Unveils New Consumer Polling Data on Major Bank Policy Issues at 2022 Washington Summit*, American Bankers Association (March 8, 2022), available at https://www.aba.com/about-us/press-room/press-releases/aba-unveils-new-consumer-polling-data-on-major-bank-policy-issues-at-2022-washington-summit; *Consumer opinions on fees, overdraft and cannabis banking*, American Bankers Association (March 8, 2022), available at: https://www.aba.com/news-research/research-analysis/consumer-opinions-on-fees-overdraft-and-cannabis-banking; *U.S. Retail Banks Nail Transition to Digital during Pandemic, J.D. Power Finds*, J.D. Power (April

A prime example of the market's response to consumer demand in the deposit account market is the recent development of a new type of low-cost bank transaction account, called Bank On.[6] These accounts are certified by a non-profit organization and do not include most of the deposit account fees criticized in the RFI; as a trade-off, they also do not come with a full range of account benefits and features. Bank On certified accounts are now offered by over 110 banks and credit unions at more than 39,000 branches nationwide.[7] Bank On accounts have proven to be highly popular with consumers: over 3.8 million accounts were open and active in 2020 at just 17 institutions that reported data, and growth increased in 2021.[8] Rather than condemning deposit account fees, the Bureau could solicit consumer input on how these low-fee, limited-feature accounts are serving consumer needs and whether or how they could be improved or expanded.

The dynamic, competitive nature of consumer financial markets is also evident in the market for credit cards. For example, the Bureau's own biennial credit card report has consistently documented that there is robust competition and broad consumer satisfaction within the credit card industry, despite a temporary spike in credit card complaints during the height of the COVID-19 pandemic.[9] The Bureau's most recent report stated: "In 2019 and 2020, innovation continued to reshape the credit card market for both users and providers. New providers, including large and small financial institutions as well as startup and mainstream technology companies have entered—or are in the process of entering—the market with competing products, features, and methods for issuing credit cards."[10]

27, 2021), available at: https://www.jdpower.com/business/press-releases/2021-us-retail-banking-satisfaction-study.

[6] For more information about Bank On, see https://joinbankon.org/.

[7] *See* Written Testimony Submitted to the U.S. House Committee on Financial Services, House Subcommittee on Consumer Protection and Financial Institutions. Hearing on "Banking the Unbanked: Exploring Private and Public Efforts to Expand Access to the Financial System," (July 21, 2021), Submitted by David Rothstein, Senior Principal, Cities for Financial Empowerment Fund, available at: hhrg-117-ba15-wstate-rothsteind-20210721.pdf (house.gov); Accounts – BankOn (joinbankon.org); The Bank On National Data Hub: Findings from 2020, available at: bankonreport_2020findings.pdf (stlouisfed.org).

[8] The Bank On National Data Hub: Findings from 2020, available at: bankonreport_2020findings.pdf (stlouisfed.org).

[9] *See,* e.g., CFPB, *The Consumer Credit Card Market* at 14-15 (December 2017) ("The quantitative and qualitative indicators outlined above generally suggest a positive picture for consumers in the credit card market. Direct surveys of consumers support that proposition. J.D. Power reported that in 2017 consumers reported their highest levels of satisfaction with this market" *citing* "Press Release, J.D. Power, Cash-Back Credit Cards Score Highest as Banks, Card Companies Wage Incentive War, J.D. Power Finds (Aug. 17, 2017), available at http://www.jdpower.com/press-releases/2017-jd-power-credit-cardstudy (reporting that "overall customer satisfaction with credit card issuers reaches its highest level in the history of the study . . ."))." *See also* CFPB, *The Consumer Credit Card Market* at 6 (August 2019), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2019.pdf ("Consumer satisfaction with credit cards remains high," noting that "J.D. Power reported that in 2018 consumer satisfaction with credit cards remained near its record high," *citing* "Press Release, J.D. Power, Credit Card Rewards Battle Continues as Customers Seek Better Programs, J.D. Power Finds (Aug. 16, 2018), available at https://www.jdpower.com/business/press-releases/2018-credit-card-satisfaction-study).

[10] CFPB, *The Consumer Credit Card Market* at 6 (Sept. 2021), available at: https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

Third, the RFI fails to acknowledge the benefits that accrue to consumers from their bank's consumer financial products and services and the complex set of factors that determine how these benefits get priced. The discussion of deposit accounts in the RFI illustrates our concern. For example, a deposit relationship with a bank brings consumers multiple benefits. The largest benefit is access to a payment system that works twenty-four hours a day, every day of the year, around the world. Furthermore, many consumers are paid interest on the money they hold in their accounts. And consumers are insured by the FDIC against loss on that money, with the premiums for that insurance paid not by consumers but by the bank. Yet, the RFI does not mention any of these benefits. Similarly, the consumer benefits by opening a credit card account with the ability to pay merchants anywhere in the world, and at a 0% rate if the balance is repaid monthly; fraud protection; and travel, cash back and other rewards. As then-Acting Director David Uejio stated in the Bureau's most recent biennial credit card report in September 2021: "Credit cards are one of the most commonly-held and widely-used financial products in America — over 175 million Americans hold at least one credit card. During the COVID-19 pandemic, credit cards played a vital role as both a source of credit in emergencies and a payment method as more transactions occurred online."[11]

Providing these benefits to consumers requires banks to incur costs, including costs to provide 24-hour-a-day customer service and other personnel, maintain branches and other real estate, provide online banking capabilities and other digital products and services through continuous research and innovation, and ensure compliance required to operate in this highly regulated industry. To cover the costs of providing consumers these benefits, a bank must earn revenue on the account, just like any business must earn revenue to enable it to provide products and services to its customers. The types and amounts of fees charged to cover a bank's costs of providing consumer financial services, including deposit accounts, are the result of robust competition to attract customers, within an existing regulatory regime that ensures disclosure and transparency of pricing and fees.

For example, banks generally do not charge a single, monthly fee for deposit-related services, such as payments services and other transactions, because such fees have proven unpopular with consumers, who prefer a menu of fees for component services. Charging a flat fee would impose costs on some customers for products or services that they do not use. For example, charging all customers a flat fee that would include insufficient funds ("NSF") or overdraft fees would impose costs on some consumers that never overdraw, or attempt to overdraw, their account. Therefore, banks generally charge fees for (i) use of a particular product or service – for example, foreign ATM or safety deposit fees – in order to keep unavoidable charges low, and (ii) behavior that indicates risk – for example, NSF fees – that if provided free of charge could harm the safety and soundness of the institution, put consumers at risk of account closure or entering a debt spiral, or both. Further, if banks were not able to charge for services, or were limited as to the amount they could charge, the result could be harmful to consumers, as banks may simply cease offering certain products or services or charge more to consumers for other services. If banks were to cease offering certain products or services, consumers may be forced to turn to non-bank providers of certain products and services that, as the CFPB has acknowledged, may "charge higher fees and interest rates."[12]

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[11] *Id.* at 1.

[12] Shawn Sebastian, CFPB Blog, "New effort focused on financial issues facing rural communities," (Mar 10, 2022), available at: https://www.consumerfinance.gov/about-us/blog/new-effort-focused-on-financial-issues-facing-rural-communities/.

Fourth, the assertion in the RFI that the majority of revenues earned by banks is from fees is incorrect; bank earnings derive primarily from their basic financial intermediation functions, including the funding of loans through deposits. In addition, banks earn revenue from interchange fees, although these fees for debit card transactions have been capped by Congress for banks with $10 billion or more in total assets.[13]

Reprinted below is the RFI in total, followed by BPI's responses. Any action by the CFPB on fees, whether by rulemaking or enforcement or otherwise, based on the RFI's prejudgments and factual and analytical shortcomings would risk being found arbitrary, capricious, and not well-grounded in fact. However, BPI would welcome the opportunity to work with the CFPB and the federal banking agencies should they determine that it is appropriate to evaluate whether there are ways to improve fee disclosures for consumer financial products and services or otherwise improve the customer experience.

RFI

Background

Consumers can only realize the benefits of competition if companies transparently advertise the true price of their products or services, and the full price is subject to the competitive process. Both empirical studies and theoretical models suggest that when companies use hidden back-end fees – which are mandatory or quasi-mandatory fees added at some point in the transaction after a consumer has chosen the product or service based on a front-end price – it can lure consumers into making purchasing decisions based on a perceived lower price.[14] *In addition, when a company charges for individual activities that are typical attributes of a product or service, it can give the company the power to substantially overcharge for those activities because consumers are not choosing a provider at the time they choose to engage in the activity. Well-known examples of such "junk fees" include resort fees added*

[13] In 2010, Congress passed the "Durbin Amendment" as part of the Dodd-Frank Act, which instructs the Board of Governors of the Federal Reserve System to promulgate regulations ensuring that the amount of any interchange transaction fee that an issuer may receive or charge in an electronic debit card transaction is "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. §§ 1693o-2(a)(2) and (3)(A). Based on this standard, the Board set the interchange fee cap to 21 cents plus an ad valorem component of 5 basis points of the transaction's value (.05 percent of a transaction's value), supplemented by a fraud prevention adjustment of no more than 1 percent of the transaction if certain conditions are met. 12 CFR §§ 235.3(b) (interchange fee cap) and .4(a) and (b) (fraud prevention adjustment); *see also* 76 Fed. Reg. 43,394, 43,404 and 43,467 (July 20, 2011); 77 Fed. Reg. 46,258, 46,262-63 and 46,280 (Aug. 3, 2012). In 2014, in *NACS v. Board of Governors of the Federal Reserve System*, the D.C. Circuit upheld the Board's regulation as a reasonable construction of the Durbin Amendment's limits on debit card interchange fees and network exclusivity, reversing a lower court decision concluding that regulation implementing the interchange fee cap violated the Administrative Procedure Act. 746 F.3d 474, 477, and 496 (D.C. Cir. 2014).

[14] *See*, Huck & Wallace, *The impact of price frames on consumer decision making: Experimental evidence*, University College London (October 15, 2015), available at: https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf; Gabaix & Laibson, *Shrouded attributes, consumer myopia, and information suppression in competitive markets*, The Quarterly Journal of Economics, Volume 121, Issue 2 (May 2006), available at: https://pages.stern.nyu.edu/~xgabaix/papers/shrouded.pdf.

to hotel bills and service fees added to concert ticket prices. Government agencies and economists have raised concerns about the ways in which America's growing "fee economy" undermines competition.[15]

BPI's Response

- We agree that consumers benefit from transparency of price and terms, which is why banks fully disclose fees as required by applicable laws and regulations.
  - Indeed, the laws and regulations administered by the CFPB comprise an extensive disclosure regime for virtually all consumer finance products and services that requires lenders to disclose fees before a consumer has chosen a product or service.[16] In most cases since the mid-2000s, these disclosures, whether new or revised, have been subject to extensive consumer testing to ensure clarity of terms and consumer understanding.[17]
    - For example, nearly all deposit account-related fees, including without limitation overdraft, returned item, and stop payment fees, are required to be disclosed before an account is opened or a service is provided, whichever is earlier, and on consumer request, regardless of whether the requester is an existing customer or a prospective customer.[18]
  - The RFI defines "hidden back-end fees" as "mandatory or quasi-mandatory fees added at some point in the transaction after a consumer has chosen the product or service based on a front-end price."
    - The support provided by the RFI for "hidden back-end fees" in the footnote consists of a self-described "laboratory experiment," an

[15] *See*, National Economic Council (U.S.), *The Competition Initiative And Hidden Fees* (December 2016), available at: https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf.

[16] Comprehensive consumer fee disclosure statutes and regulations administered by the CFPB include: (i) the Truth in Lending Act ("TILA") and Regulation Z, 15 U.S.C. § 1601 *et seq.* and 12 CFR part 1026; (ii) the Real Estate Settlement Procedures Act ("RESPA") and Regulation X, 12 U.S.C. § 2601 *et seq.* and 12 CFR part 1024; (iii) the Electronic Fund Transfer Act ("EFTA") and Regulation E, 15 U.S.C. § 1693 *et seq.* and 12 CFR part 1005; (iv) the Truth in Savings Act ("TISA"), 12 U.S.C. § 4301 *et seq.* and 12 CFR part 1030; and (v) Consumer Leasing Act ("CLA") and Regulation M, 15 U.S.C. § 1667 *et seq.* and 12 CFR part 1013. TILA requires fee disclosures for all types of consumer credit products including credit cards, mortgages, auto loans, and installment loans, while TILA and RESPA collectively require mortgage and mortgage closing disclosures. The EFTA and TISA collectively require fee disclosures related to deposit products, electronic fund transfers, overdrafts, remittance transfers, prepaid cards, and gift cards. The CLA requires fee disclosures related to consumer leases.

[17] *See, e.g.,* 81 Fed. Reg. 83,934, 83,954-56 (Nov. 22, 2016) (discussing extensive consumer testing of prepaid card disclosures "to gather in-depth information about how consumers shop for prepaid cards and the factors they consider when acquiring such products" and noting that "[g]enerally, participants were able to understand the basic fee information presented in all of the prototype disclosure forms."); 78 Fed. Reg. 79,730, 79,732 & n.26, 79,742, 79,746-50, 79,753, 79,756 (Dec. 31, 2013) (discussing extensive consumer testing conducted in developing the TILA-RESPA integrated disclosure forms); 77 Fed. Reg. 6194, 6200, 6227-28, 6230, 6232-33. 6269-70 & n.88 (Feb. 7, 2012) (discussing reliance on consumer testing in developing remittance transfer disclosures); 75 Fed. Reg. 7658, 7669, 7679-81, 7690, 7694, 7728, 7742, 7762, and 7769 (Feb. 22, 2010) (summarizing consumer testing conducted in developing credit card disclosures); 74 Fed. Reg. 59,033, 59,034-36, 59,039, 59,047-49 (Nov. 17, 2009) and 74 Fed. Reg. 5584, 5586-88 (Jan. 29, 2009) (discussing consumer testing for overdraft fee and opt-in disclosures).

[18] 12 CFR § 1030.4; 12 CFR § 1005.7(b)(5).

analysis of banking disclosures in the United Kingdom as of the year 2000, and the pricing of ink-jet printers in 2003.

- Similarly, the RFI cites examples of "exploitative junk fees" in the hotel and concert industries.
  - The request for comment does not extend to hoteliers or concert promoters, however, and it is unclear why the RFI refers to examples outside of consumer financial services, although the use of those examples would seem to indicate a lack of examples in the consumer financial services marketplace.
- These examples are irrelevant to the current, highly regulated disclosure regime governing the provision of consumer financial products and services in the United States.

- The RFI states that unnamed "government agencies and economists" have raised concerns about how the "fee economy" undermines competition.
  - The sole document cited in support of this assertion is a fact sheet issued by the Obama Administration in 2016 describing its accomplishments over the prior eight years. That document, however, makes no reference to a "fee economy."
- The RFI criticizes cases where a company "charges for individual activities that are typical attributes of a product or service," which "can give the company the power to substantially overcharge for those activities," but provides no examples of such products or services in consumer finance.
  - The RFI thus ignores the extensive benefits provided to consumers without fees - by banks and other financial institutions, such as the ability to open and maintain certain checking accounts and credit cards.
  - Further, in those cases in which fees are assessed, depending on the fee, the fees either cover the cost of the relevant service, supporting bank services more generally, or create a disincentive for transactions that harm consumers, drive up bank costs for everyone, and pose safety and soundness risks to the bank.

RFI

Background, cont'd.

The Consumer Financial Protection Act (CFPA) directs the CFPB to enforce Federal consumer law for the purpose of ensuring consumer financial markets are fair, transparent, and competitive.[19] *The CFPB has grown increasingly concerned that consumer finance has become part of this "fee economy." Exploitative junk fees charged by banks and non-bank financial institutions have become widespread, with the potential effect of shielding substantial portions of the true price of consumer financial products and services from competition. The CFPB is concerned about fees that far exceed the marginal cost of the service they purport to cover, implying that companies are not just shifting costs to consumers, but rather, taking advantage of a captive relationship with the consumer to drive excess profits. Excessive and exploitative fees, whether predictable and transparent to the customer or not, can add up and pose significant costs to people, especially those with low wealth and income.*

BPI's Response

[19] 12 U.S.C. § 5511(a).

- The RFI claims that "exploitative junk fees" shield the true price of consumer financial products, but provides no examples from consumer finance.
  - This claim also ignores the fact that fees charged in relation to financial services are clearly disclosed, and the terms and forms of these disclosures have been designed by the CFPB through extensive rulemaking and consumer testing processes.[20]
- The RFI states that the CFPB is concerned about fees that "far exceed the marginal cost of service they purport to cover."
  - However, the Bureau has not identified any fees that "far exceed the marginal cost" or provided evidence to support this assertion.
  - Nor has the Bureau identified any law that requires that prices for services be set according to their marginal cost.
- Furthermore, the RFI fails to note a key fact about how competitive and cost pressures have shaped the fee structure for banks: many products and services are offered with no account fee, and fees generally reflect underlying costs or related factors (such as incentivizing consumers to not overdraw accounts and thereby drive up their own and the bank's costs).
  - For example, many institutions offer a selection of accounts that either have no fee to open or maintain the account or an automatically waivable fee if certain conditions (disclosed pursuant to the CFPB's regulations) are met.
    - Thus, while consumers pay monthly electric, phone, and cable bills for a bundle of services, they pay no fixed fee for use of the payments system. They can maintain a transaction account, write checks, and make payments with their debit card and incur no monthly account fee.
  - Similarly, the credit card market is extremely competitive, with multiple providers offering a wide variety of cards with different benefits and fee structures.
    - For example, some providers offer no-late-fee credit cards to certain consumers.[21]
  - In addition, the RFI provides no support for its assertion that consumers have a captive relationship with their banks. While surveys find that consumers tend to remain loyal to their primary bank for long periods of time, the reasons are varied, and generally indicate satisfaction with or convenience and cost benefits offered by their current bank. However, consumers increasingly are finding it easy to move money between their primary bank and other financial institutions with which they have relationships.[22] The rapid growth of new, online-only banks is a clear and recent example of consumers moving among financial institutions with relative ease.[23]

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[20] *See* notes 16 and 17, above.

[21] *See, e.g.,* Holly Johnson, *The best credit cards with no late fees for 2022,* Business Insider (Nov. 19, 2021), available at: https://www.businessinsider.com/personal-finance/credit-cards-with-no-late-fees.

[22] *See*, Mary Wisniewski, *Survey: While checking fees vary wildly by race and age, Americans stay loyal to their banks*, Bankrate (January 15, 2020), available at: https://www.bankrate.com/banking/best-banks-consumer-survey-2020/; Ron Sheclin, *Why People Don't Switch Banks Anymore*, Forbes (May 1, 2019), available at: https://www.forbes.com/sites/ronshevlin/2019/05/01/why-are-fewer-consumers-switching-banks-because-checking-accounts-have-become-paycheck-motels/?sh=528a8d222aa9.

[23] *See, e.g.*, Will Hernandez, *A battle royal for online deposits*, American Banker (Oct. 6, 2019), available at: https://www.americanbanker.com/list/a-battle-royal-for-online-deposits; Ryan Browne, *Banks must behave 'more like technology companies' to survive, finance execs say*, CNBC (Nov. 18, 2019), available at: https://www.cnbc.com/2019/11/18/banks-must-behave-like-tech-companies-to-survive-amid-fintech-threat.html;

RFI

Background, cont'd.

Many Americans have experienced inflated or surprise fees that, however nominally voluntary, are not meaningfully avoidable or negotiable in the moment. These fees in consumer finance can take many forms: penalty fees such as late fees, overdraft fees, non-sufficient funds (NSF) fees, convenience fees for processing payments, minimum balance fees, return item fees, stop payment fees, check image fees, fees for paper statements, fees to replace a card, fees for out-of-network ATMs, foreign transaction fees, ACH transfer fees, wire transfer fees, account closure fees, inactivity fees, fees to investigate fraudulent activity, ancillary fees in the mortgage closing process, and more. These fees have become the norm among financial services that Americans rely on every day, and a substantial amount of the revenue earned by financial services companies comes from these fees. The following are a few examples from select products and markets:

BPI's Response

- The RFI does not define "inflated" or "surprise" fees. The RFI says that such fees "can take many forms" and then provides a long list of traditional bank fees. But it provides no evidence or analysis for how any of those fees is "inflated" or "surprise".
- The RFI's assertion that "inflated or surprise fees that, however nominally voluntary, are not meaningfully avoidable or negotiable in the moment" is inaccurate with respect to certain fees referenced in the RFI.
    - For example, fees such as late fees, overdraft fees, and NSF fees are only assessed when consumers engage in certain behavior and are thus avoidable by consumers.
    - Further, as described below, many banks provide numerous free services to help consumers avoid incurring these behavior-related fees, such as sending text or other notifications when a customer's balance decreases to a certain level, sending monthly statements, and providing numerous digital tools, such as apps, that consumers can use to access their account balances, payment due dates, and other account-related information instantly.
    - These fees serve a deterrence purpose analogous to the deterrence effect of late fees on consumer debt—they provide an incentive for consumers to monitor and manage their account balances and expenditures.[24]

Ryan Browne, *Big Tech will push deeper into finance this year — but avoid the 'headache' of being a bank*, CNBC (Jan. 3, 2020), available at: https://www.cnbc.com/2020/01/03/big-tech-will-push-into-finance-in-2020-while-avoiding-bank-regulation.html; Taylor Locke, *JP Morgan Chase CEO Jamie Dimon: Fintech is an 'enormous competitive' threat to banks*, CNBC (Apr. 7, 2021), available at: https://www.cnbc.com/2021/04/07/jpmorgan-chase-ceo-jamie-dimon-why-fintech-is-a-big-threat-to-banks.html; Till Lauer, *How fintech will eat into banks' business*, Economist (May 6, 2021), available at: https://www.economist.com/special-report/2021/05/06/how-fintech-will-eat-into-banks-business; Misyrlena Egkolfopoulou, *Fintech's Pitch: We're Cheaper, More Mobile, More Focused*, Bloomberg (Jan. 13, 2022), available at: https://www.bloomberg.com/news/articles/2022-01-13/fintech-winning-young-consumers-by-being-cheaper-and-better-banking-alternative.

[24] Robust empirical evidence has demonstrated the deterrence effects of credit card late payment penalties. For instance, Grodzicki et al., finds that a late fee "reduces the likelihood of paying late, indicating that cardholders incorporate the late fee into their optimal repayment choice - as opposed to paying late purely by accident." This study also finds that, in the case of subprime borrowers, the direct effect is augmented by an indirect effect of inducing them to also borrow less, further lowering their likelihood of delinquency. Grodzicki et al., *Consumer Demand for Credit Card Services* (March 1, 2018), Consumer Financial Protection Bureau Office of Research

  - Relatedly, these fees also serve a risk-mitigating purpose: if they were not assessed, consumers could be put at risk of account closure or entering a debt spiral, or both, and the bank's safety and soundness could be undermined if all consumers overdrew their accounts frequently.
  - Finally, if fees were not assessed for these services or were subject to price controls, banks may no longer provide them, or the cost of other products and services would increase.
    - Indeed, the GAO recently reported that multiple studies and market participants had concluded that the limits on interchange fees imposed by the Durbin Amendment and Regulation II "are associated with increases in the costs of checking accounts."[25]
    - In addition, as noted previously, if banks were to cease offering certain products, consumers may be forced to turn to non-bank providers of certain products and services that, as the CFPB has acknowledged, may "charge higher fees and interest rates."[26]
- Furthermore, the fees listed in the RFI, including late fees, overdraft fees, and NSF fees, cannot be a "surprise" to consumers because they are disclosed to consumers in accordance with a detailed disclosure regime administered by the CFPB.
  - Indeed, as the Bureau has explained, "The purpose of Regulation DD [which implements the Truth in Savings Act] is to enable consumers to make informed decisions about their accounts at depository institutions through the use of uniform disclosures. The disclosures aid comparison shopping by informing consumers about the fees, annual percentage yield, interest rate, and other terms for deposit accounts."[27]
- Furthermore, the Bureau has issued model disclosure forms and language for banks to follow in making transparent the cost of various products and services provided by financial institutions.[28] As noted above, since the mid-2000s, most new or revised consumer disclosures have been developed following extensive consumer testing to ensure such disclosures are effective and understandable for consumers. Consumer testing has been conducted on disclosures for mortgages, credit cards, overdrafts, remittance transfers, and prepaid cards.

Working Paper No. 2018-03, available at: https://ssrn.com/abstract=3135421. Agarwal et al. find that that the "negative feedback" from paying a late fee teaches consumers to avoid triggering future fees: "Paying a fee last month reduces the likelihood of paying a fee in the current month by about 40%. Controlling for account fixed effects, monthly fee payments fall by 75% during the first three years of account life." While we are not aware of any studies evaluating the deterrence effects of overdraft fees, it seems reasonable to conclude that they would have a similar effect. Agarwal et al., *Learning in the Credit Card Market* (February 2008), NBER Working Paper No. w13822, available at: https://ssrn.com/abstract=1093660.

[25] Government Accountability Office, Report to Congressional Requesters, Banking Services, "*Regulators Have Taken Actions to Increase Access, but Measurement of Actions' Effectiveness Could Be Improved*," GAO-22-104468 (February 2022), 22-26, available at: GAO-22-104468, BANKING SERVICES: Regulators Have Taken Actions to Increase Access, but Measurement of Actions' Effectiveness Could Be Improved.

[26] *See* note 12, above.

[27] CFPB, Supervision and Examination Manual, TISA-1, available at: 102012_cfpb_truth-savings-act-tisa_procedures.pdf (consumerfinance.gov).

[28] *See, e.g.,* 12 CFR part 1030, Appendix B; 12 CFR part 1005, Appendix A; 12 CFR part 1026, Appendices G and H; 12 CFR part 1013, Appendix A.

- Model and sample disclosure forms allow information to be presented in a standardized manner, enabling consumers to easily compare products, services, and fees, where relevant, across institutions.
    - For example, Regulation DD provides "Model Clauses for Account Disclosures" on which banks may rely in making the required disclosures under the Truth in Savings Act.[29]
    - Regulation E provides "Model Disclosure Clauses and Forms" for banks to use in providing account opening disclosures, overdraft notices, prepaid card disclosures, and remittance transfer disclosures, among other things.[30]
- However, the RFI does not acknowledge the extensive disclosure framework, contend that it is somehow deficient, or request input for whether or how this framework should be enhanced or improved.

RFI

***Deposit Accounts*.**

The price of a deposit account is made up of, among other fees, account maintenance fees, minimum balance fees, savings transfer fees, NSF fees, overdraft fees, and ATM fees. Overdraft and NSF fees are back-end fees that make up the majority of total revenue banks derive from deposit accounts. Overdraft and NSF fees exceeded $15.4 billion in 2019.[31] By comparison, banks make only about $1 billion annually in account maintenance fees. Since the back-end fees are the bulk of the price, there is effectively no price competition amongst the major banks for deposit accounts. Only recently have companies started to substantially vary their overdraft practices. This is of course a positive development, but these changes will not reverse the trend of pricing deposit accounts primarily through back-end fees.

BPI's Response

- The statement that "Overdraft and NSF fees . . . make up the majority of total revenue banks derive from deposit accounts" is false. As noted, the predominant source of revenue that banks derive from deposit accounts is not fees, or those two fees, but rather net interest income.
- Banks earn net interest income by using deposit funding to make loans to consumers and businesses, and the difference between the interest rate paid on the deposit and the interest rate earned on the loans is called net interest income.
- The banking industry earned $76.8 billion[32] in net interest income in the first quarter of 2021 alone, and that income came at a time when low interest rates have reduced net interest margins to historical lows.[33] Fee income is dwarfed by net interest income.

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[29] 12 CFR part 1030, Appendix B.

[30] 12 CFR part 1005, Appendix A.

[31] See, *CFPB Finds CARD Act Helped Consumers Avoid More Than $16 Billion in Gotcha Credit Card Fees,* CFPB (December 3, 2015), available at: https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-card-act-helped-consumers-avoid-more-than-16-billion-in-gotcha-credit-card-fees/.

[32] *See*, *FDIC-Insured Institutions Reported Net Income of $76.8 Billion In First Quarter 2021,* FDIC (May 26, 2021), available at: https://www.fdic.gov/news/press-releases/2021/pr21048.html.

[33] See, FRED, *Net Interest Margin for all U.S. Banks (DISCONTINUED)*, Federal Reserve Bank of St. Louis, available at: https://fred.stlouisfed.org/series/USNIM

- Also, as noted previously, banks earn revenue from debit interchange fees, although these fees have been capped by Congress for banks with $10 billion or more in total assets.[34]
- The statement that "there is no price competition amongst the major banks for deposit accounts" also is patently false.
  - Price competition is not determined by simply counting the number of fees, particularly when the number includes fees that most consumers rarely incur. Rather, it is more a function of the degree to which fees are transparent and the degree to which consumers choose to shop for accounts based on the entire menu of services and fees.
  - First, these fees are not added after a consumer has chosen a product or service based on a front-end price. Rather, TISA/Regulation DD require the disclosure of virtually any account-related fees, including overdraft fees, NSF fees, and returned item fees, at the earlier of account opening or when a service is provided, or at a consumer's request, whether or not the consumer is an existing bank customer, with respect to deposit accounts.[35]
  - Innumerable websites assist consumers in comparison shopping for deposit accounts.[36] Consumers who are primarily looking to minimize overdraft or other fees can find numerous resources providing that information instantly.[37]
    - Indeed, the RFI acknowledges that banks are substantially varying their overdraft practices, which is another way to say that they are competing on overdraft practices.
      - In addition, banks provide various services, such as monthly statements and text messages and other notification services, to help consumers *avoid* various fees triggered by the consumer's behavior, such as NSF and late fees.
    - Competition in this market can also be seen in the fact that banks (and non-banks) are marketing their overdraft practices to consumers.[38] And competition here is nothing new.
      - Even those who have criticized bank overdraft fees have noted that they vary widely, with community banks deriving a significantly higher portion of their total revenues from overdraft fees.[39]
  - In addition, the existence of innumerable websites and other resources that make their business providing deposit price information to consumers belies the assertion that there is no price competition among banks for deposit accounts.
  - A large, robust empirical literature shows how price competition among banks for deposit accounts impacts interest rates and fees for consumers, a dynamic that would not be

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[34] *See* note 13, above.

[35] 12 CFR § 1030.4(a)(1) and (2).

[36] *See, e.g.,* Lendingtree, Compare Bank & Credit Union Rates, available at: https://www.depositaccounts.com/.

[37] *See, e.g.,* GOBankingRates, available at: https://www.gobankingrates.com/.

[38] *See, e.g.,* Capital One, *Banking with no overdraft fees*, available at: https://www.capitalone.com/bank/overdraft-options/?external_id=360B_MM_SEM_71700000084658431_GOOGLE_58700007610835145_43700068769263603&06136_SE001336_Overdraft=&gclid=Cj0KCQiA_8OPBhDtARIsAKQu0gbCFKs8RyMVxNtVdzMN4Tcyr1u6QejqK-NdZbY_jhhjce98-0k89EkaAmehEALw_wcB&gclsrc=aw.ds; Chime, SpotMe, available at: https://www.chime.com/spotme/.

[39] *See*, Aaron Klein, *A few small banks have become overdraft giants*, Brookings (March 1, 2021), available at: https://www.brookings.edu/opinions/a-few-small-banks-have-become-overdraft-giants/.

present if there was banking market concentration or a lack of competition or consumer choice. To the extent that bank deposit markets have become less local, depositors can shop for deposit accounts more widely, ensuring even greater competition among banks.[40]

- Furthermore, in recent years banks have greatly diversified their deposit account offerings to provide more options for low- and no-fee accounts, demonstrating competitive forces at work to attract and retain customers, such as the Bank On accounts.[41]
- The RFI also fails to account for evidence of consumer demand for, and satisfaction with, their banks' overdraft services and fees charged.
    - For example, a recent survey conducted by Morning Consult on behalf of the American Bankers Association found that 9 in 10 consumers (89%) found their bank's overdraft protection valuable, and 3 in 4 consumers (74%) who have paid an overdraft fee in the past year were glad their bank covered their overdraft payment, rather than returning or declining payment. Sixty-one percent of consumers think it's reasonable for banks to charge a fee for an overdraft, and three-quarters of consumers (74%) view overdraft fees as reasonable when large payments like mortgages or rent payments are covered and paid on time. Significantly more consumers indicated they would oppose (54%) rather than support (26%) a government proposal to prevent banks from offering overdraft protection.[42]

RFI

Credit Cards.

Fees represent about 20% of the total cost of credit cards. Card issuers charged $23.6 billion in fees in 2019 alone and nearly $14 billion of those fees were late fees not subject to competitive pricing pressure.[43] Nearly every bank charges the same for late fees – the maximum allowed by law of $30 for the first late payment and $41 for subsequent late payments – and the average late fee has increased to $31, nearing the average of $33 before the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009.[44]

BPI's Response

- The RFI is based on the flawed premise that there is something inherently wrong with card issuers charging late fees.

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[40] *See*, *e.g.*, Berger, Allen N., and Timothy H. Hannan, "The Price-Concentration Relationship in Banking," *The Review of Economics and Statistics* 71, no. 2 (1989): 291–99; Allen, Linda, and Anthony Saunders, and Gregory F Udell, "The pricing of retail deposits: Concentration and information," *Journal of Financial Intermediation*, Volume 1, Issue 4, (Dec. 1991), pp. 335-361; and Brewer, Elijah and William E. Jackson, The 'Risk-Adjusted' Price-Concentration Relationship in Banking (December 2004). FRB of Atlanta Working Paper No. 2004-35.

[41] *See* note 6, above

[42] *See* note 5, above. In addition, a Federal Reserve Bank of New York study found that limits on overdraft fees have adverse effects on the supply of overdraft credit and on financial inclusion. *See* Douglas et al.*, Who Pays the Price? Overdraft Fee Ceilings and the Unbanked*, Federal Reserve Bank of New York (December 2021), available at: https://www.newyorkfed.org/research/staff_reports/sr973.

[43] *See* note 10, above, at 46.

[44] *See* note 10, above, at 54-57.

- This premise is in direct contravention with the CARD Act of 2009, where Congress acknowledged that late fees are appropriate and specified that rules governing late fees must consider the costs incurred by issuers as a result of consumers failing to make timely payments, deterrence, consumer behavior, and any other factors deemed appropriate.[45] The CFPB has acknowledged repeatedly the CARD Act's positive impact on consumers and on competition in the credit card market. On March 29, 2022, a CFPB press release stated: "The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) created a range of protections for cardholders, including limiting how much credit card companies could charge for penalties such as over-the-limit fees and late fees, as well as limits on interest rate increases. Many of these protections have been effective in reducing the total cost of credit for consumers, improving competition, and creating transparency on pricing."[46] The underlying report on credit card late fees notes that "The Credit Card Accountability, Responsibility, and Disclosure Act of 2009 ("CARD Act") required late fees be "reasonable and proportional" and the implementing regulation (Regulation Z) sets a "safe harbor" for specific fee amounts, which the CFPB adjusts for inflation annually."[47] In its biennial credit card report from 2017, the CFPB made clear that it "did not see any evidence that the Act had negatively affected the consumer cost of credit cards. In fact, we found that all-in costs to cardholders had fallen in the wake of the Act's passage and continued to fall through its implementation."[48] As noted previously, robust empirical evidence has demonstrated the deterrence effects of credit card late payment penalties.[49]
- The CFPB's Regulation Z sets forth the appropriate fee limitations, including fee safe harbors, based on the statutory standards.[50]
- In the CARD Act, Congress acknowledged that some penalty fees, such as late fees, are appropriate in the credit card market, requiring that they be "reasonable and proportional" to the relevant violation of account terms.[51]
  - CFPB regulations implement this mandate.[52] As recently as last year, the CFPB noted, "CARD Act pricing restrictions have resulted in a substantial decline in overall fee costs to consumers since the pre-CARD Act period."[53]
- The RFI also does not discuss that, in relation to penalty fees for credit cards (i.e., late fees, over-the-limit fees, returned payment fees, declined convenience check fees, declined transaction fees, inactivity fees, and termination fees), the CFPB's Regulation Z sets and adjusts the safe-harbor

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[45] 15 U.S.C. § 1665d(a)-(c).

[46] CFPB Finds Credit Card Companies Charged $12 Billion in Late Fee Penalties in 2020 (March 29, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-credit-card-companies-charged-12-billion-in-late-fee-penalties-in-2020/.

[47] CFPB, *Credit card late fees*, at 4 (March 2022), available at: https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf.

[48] CFPB, *The Consumer Credit Card Market*, at 6-7 (December 2017), available at: https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf.

[49] *See* note 24, above.

[50] 12 CFR § 1026.52(b).

[51] 15 U.S.C. § 1665d(a).

[52] 12 CFR § 1026.52(b).

[53] *See* note 10, above, at 52 n. 94.

amounts for these fees to account for inflation, thereby recognizing the appropriateness of fees up to certain levels in this market.[54]

- The RFI asserts incorrectly that every bank charges the same late fees of $30 and $41 and incorrectly ascribes that situation to a lack of "competitive pricing pressure" for late fees.
    - In fact, while some card offerings state that up to $40 may be charged in late fees, a close reading of various account agreements shows that there is variation.
        - For example, some banks forgo the first late fee; some banks charge $29 for the first late fee, and then escalate; and others charge according to a sliding scale based on how many times a consumer misses a payment.[55] The CFPB, again, ignores its own recognition of the variation in fee practices across providers.[56]
    - These various fee structures reflect, again, a highly competitive market for consumer credit.
- In addition, if late fees were not assessed or were subject to price controls, banks may cease providing credit cards (or certain categories of credit cards) to higher-credit-risk consumers, may reduce or eliminate rewards or other card benefits, or may have to charge or increase annual or other fees for certain cards.
- Although the Bureau has previously highlighted the relief credit card providers provided to consumers during 2020 during the COVID-19 pandemic when consumers experienced economic hardships, the RFI does not acknowledge this fact.[57]
    - For example, "over 25 million consumer credit card accounts representing approximately $68 billion in outstanding credit card debt entered relief programs in 2020, figures vastly higher than in prior years."[58]
    - Issuers also waived late and NSF fees.[59]
- Indeed, the CFPB's own analysis shows that late fee income decreased in 2020, due to voluntary relief provided by issuers to consumers.[60]
    - While 2020 is obviously unique, the CFPB Card Report's data on the efforts of the card industry to provide relief to consumers on late fees is important in presenting a balanced view of the industry and its flexible and competitive fee practices and should be recognized.
- Further, the RFI does not reference Regulation Z's extensive disclosure requirements, in any application or solicitation for a credit card account, of any late payment or other fee, which allows consumers to comparison shop based on these different fee structures.
    - This fee variation, coupled with the requirements in Regulation Z requiring disclosure, in any application or solicitation for a credit card account, of any late payment or other fee, allows consumers to comparison shop based on these different fee structures.[61]

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[54] 12 CFR § 1026.52(b)(1)(ii).

[55] *See* note 21, above.

[56] For example, the Bureau's most recent Card Report notes that "issuers may as a courtesy offer to reverse late fee charges if the cardholder has a history of paying on time, particularly for cardholders with superprime scores." *See* note 10, above, at 56.

[57] *Id.* at 5 ("In response to pandemic-related hardship, issuers provided a considerable number of payment deferrals and fee waivers to their cardholders in 2020.").

[58] *Id.* at 9.

[59] *Id.* at 54, 56, and 116-18.

[60] *Id*.

[61] 12 CFR § 1026.60(b).

- Furthermore, the RFI fails to note any *benefit* for holding a credit card and paying fees: the credit risk that banks take on, for example, facilitates the ability to pay merchants anywhere in the world; access to credit for those purchases, and at a 0% rate if the balance is repaid monthly; travel and other rewards; and fraud protection. As the Bureau noted in the past, consumers generally also receive free access to their credit scores.[62]
- Credit cards remain quite popular with consumers, as the Bureau's biennial credit card report has consistently documented.[63]

<u>RFI</u>

Remittances and Payments.

Financial institutions charge "convenience" fees on payment transfers, return item fees, stop payment fees, check image fees, online or telephone bill pay fees, ACH transfer fees, and wire transfer fees. International transfers are subject to a significant number of fees as well. In 2017, after observing many abuses, the CFPB issued a Compliance Bulletin on unfair, deceptive, and abusive acts or practices relating to fees for making payments over the telephone, and potential violations of the Fair Debt Collection Practices Act (FDCPA).[64] These kinds of convenience fees are still common.

<u>BPI's Response</u>

- Fees charged by entities that send international remittance transfers on behalf of consumers are required to be disclosed under the Electronic Fund Transfer Act, and subpart B of the Bureau's Regulation E.[65] The rule mandates that remittance transfer providers generally must disclose the exact exchange rate, the amount of certain fees, and the amount expected to be delivered to the recipient.[66] The RFI provides no evidence to conclude that these fees are charged in violation of law.
- The remittance transfer fees are governed by these CFPB-prescribed disclosure requirements that apply both before and after the transfer is sent. These detailed and prescriptive disclosure requirements were subjected to consumer testing.[67]
    - Unrelated to any of the fees above, and without mentioning its own regulation, the RFI cites a single enforcement action it initiated under the Fair Debt Collection Practices Act.
- International transfers or remittances are a complicated topic. It is worth noting that banks have largely been forced out of this market by regulators, and the market is now dominated by companies like Western Union and MoneyGram. Through Diem, Facebook, now Meta, announced

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[62] *See* note 31, above.

[63] *See* note 10, above, at 46; CFPB, *The Consumer Credit Card Market,* at 6 (August 2019), available at: cfpb_consumer-credit-card-market-report_2019.pdf (consumerfinance.gov).

[64] CFPB Compliance Bulletin 2017-01, Phone Pay Fees (July 31, 2017), available at: https://files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf.

[65] 12 CFR §§ 1005.30-36 and Appendix A, Model Forms A-30(a) to A-41.

[66] 12 CFR §§ 1005.30-36.

[67] *See* 12 CFR part 1005, Appendix A, Model Forms A-30(a) to A-41; 77 Fed. Reg. 6194, 6200, 6227-28, 6230, 6232-33. 6269-70 & n.88 (Feb. 7, 2012).

its intention to revolutionize this market, but it has experienced problems and is now liquidating Diem.[68]

- In addition, fees for remittance transfers often originate with foreign banks handling or receiving remittances or foreign jurisdictions and are simply passed through to consumers by domestic remittance transfer providers.
- BPI would be pleased to work with the CFPB and the federal banking agencies on ways to allow banks to reenter the international remittances market, expanding choice and lowering costs for consumers.
- In addition, we are not aware of any bank that calls a check image or other fee listed in the RFI a "convenience fee."
    - In our experience, banks label fees according to what product or service the fee is for – thus, a fee for a check image is called a "check image fee," a stop payment fee is called a "stop payment fee," and so on. And, as noted throughout, these fees are disclosed.[69]
    - A check image fee and the other fees listed in this section are simply fees charged for a particular product or service that costs money for the institution to provide.
    - As noted previously, banks do not charge a flat fee for a bundle of services because such practices are disfavored by consumers, as some would end up paying for services they do not use.
    - Providing and pricing product and service fees individually allows institutions to keep charges for products and services low and provides consumers with the ability to choose which products and services to use and the respective benefit of using such a product or service pursuant to the consumer's own circumstances.

<u>RFI</u>

***Prepaid Accounts*.**

Prepaid cards represent a way for many unbanked consumers and individuals with limited resources to have access to basic financial services—yet many accounts carry fee structures that make it challenging for consumers to pick the right product based on their needs. Consumers frequently select a product based on a monthly rate only to find out that the "add-on" fees for regular activities such as transaction fees, cash reload fees, balance-inquiry fees, inactivity fees, monthly service fees, and card cancellation fees, among others, overshadow the quoted monthly charge.

<u>BPI's Response</u>

- The RFI lists a series of fees that it alleges are hidden from consumers and that "many accounts carry fee structures that make it challenging for consumers to pick the right product based on their needs." This is incorrect. The CFPB's 2016 Prepaid Card Rule was adopted after the Bureau issued an advance notice of proposed rulemaking, held a field hearing, issued a proposed rule, and then finalized the rule – all on the Bureau's own initiative and without a statutory mandate to adopt the rules that it did.[70]

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[68] *See,* Baker, Hamilton & Kharif, *Mark Zuckerberg's Stablecoin Ambitions Unravel With Diem Sale Talks*, Bloomberg (January 25, 2022), available at: https://www.bloomberg.com/news/articles/2022-01-25/zuckerberg-s-stablecoin-ambitions-unravel-with-diem-sale-talks.

[69] *See* 12 CFR part 1030, supp. I, § 1030.4(b)(4)-1.iv (stop payment fee).

[70] 81 Fed. Reg. 83,934 (Nov. 22, 2016).

- Thus, contrary to the statement that consumers only learn about fees after selecting a product, the Bureau announced that "Under the [Bureau's 2016 rule on prepaid cards] you will get clear, upfront information about prepaid account fees so you can know before you choose a card and shop for the best deal."[71]
    - Then-Director Cordray stated, "This rule closes loopholes and protects prepaid consumers when they swipe their card, shop online, or scan their smartphone. And it backs up those protections with important new disclosures to let consumers know before they owe."[72] Under the final rule, financial institutions must generally provide both a "short form" disclosure and a "long form" disclosure before a consumer acquires a prepaid account.[73]
- Furthermore, as described by the Bureau in 2016, "To make comparison shopping easier, the rule requires prepaid account issuers to post on their websites the prepaid account agreements they offer to the general public.[74]
- Additionally, with a few exceptions, issuers must submit all agreements to the CFPB, which intends to post them on a public, Bureau-maintained website at a future date. Also, issuers must make any agreement not required to be posted on their website available to applicable consumers.[75]
- This publication thus makes it even easier for consumers to comparison shop, incentivizing providers to compete on clearly disclosed terms.

RFI

***Mortgages**.*

Mortgages facilitate homeownership for millions of people, and, through homeownership, allow millions of families to build and maintain intergenerational wealth. But priced into most mortgages are thousands of dollars in application fees and closing costs, which few people are well-positioned to shop on. These fees can act as a barrier to homeownership, strip wealth from homeowners accessing their equity through refinancing or home sales, and deter some homeowners from refinancing when doing so would lower total housing costs and be financially advantageous. Advocates and reporters have noted that many closing costs, like title 8, may not always be subject to standard or appropriate competitive forces. Even aside from inflated and padded fees rolled into the mortgage at closing, homeowners can find themselves forced to pay fees for making payments over the phone or online or even for the servicer's bill pay service. Borrowers who face financial hardship and struggle to make mortgage payments can find themselves unable to catch up due to the snowballing of a plethora of fees related to the mortgage delinquency. Monthly property inspection fees, new title fees, legal fees, appraisals and valuations, broker price opinions, force-placed insurance, foreclosure fees, and miscellaneous, unspecified "corporate advances" can all price a homeowner out of a home.

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[71] CFPB, New Protections for Prepaid Accounts, available at: https://www.consumerfinance.gov/prepaid-rule/.

[72] CFPB, Press Release, *CFPB Finalizes Strong Federal Protections for Prepaid Account Consumers* (Oct. 5, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-strong-federal-protections-prepaid-account-consumers/.

[73] 12 CFR § 1005.18(b)(2)-(4).

[74] *See* note 72, above.

[75] 12 CFR § 1005.19.

<u>BPI's Response</u>

- The RFI presents an incomplete and inaccurate portrait of the mortgage market and cites unnamed "advocates and reporters" rather than research or data to support allegations of widespread misconduct.
- The reality is that the mortgage closing process in the U.S. is highly regulated, governed by multiple laws and their implementing regulations, including the Real Estate Settlement Procedures Act (Regulation X), the Truth-in-Lending Act (Regulation Z), the Equal Credit Opportunity Act (Regulation B), the Homeowner and Equity Protection Act, the Secure and Fair Enforcement for Mortgage Licensing Act, the CFPB's Ability-to-Pay/Qualified Mortgage Rule, and the CFPB's TILA-RESPA Integrated Disclosure ("TRID") Rule, among others.[76]
- Regulation B, as revised by the CFPB in 2014, requires that creditors, free of charge, "provide an applicant a copy of all appraisals and other written valuations developed in connection with an application for a credit that is to be secured by a first lien on a dwelling."[77]
- TILA and Regulation Z contain comprehensive, consumer-tested closed-end mortgage disclosure requirements to ensure consumers are adequately informed in a timely manner of closing costs and mortgage pricing. In 2013, the CFPB issued its TILA-RESPA Integrated Disclosure Rule and related "know before you owe" disclosure forms.[78] When issuing the rule, the CFPB proclaimed: "The new "Know Before You Owe" mortgage forms will replace the existing federal disclosures and help consumers understand their options, choose the deal that's best for them, and avoid costly surprises at the closing table."[79]
    - The CFPB cited an extensive study confirming the benefits of the new CFPB forms.
    - Third-party mortgage origination fees are disclosed as "Closing Costs" on the Loan Estimate and Closing Disclosure, including loan costs (origination costs and settlement service fees) and other costs (taxes and government fees, prepaids, and escrow).[80] All fees paid to the lender or an affiliate for mortgage origination are also disclosed on the Loan Estimate and Closing Disclosure and are held to a 0% tolerance for errors except in limited changed circumstances (fees cannot increase without justification as defined under the TRID rule).[81]
- RESPA ensures that consumers are provided "greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges

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[76] For a summary of the extensive federal legal and regulatory provisions applicable to mortgage lending, *see* FDIC, Bank Resource Center, Mortgage Lending, available at: https://www.fdic.gov/resources/bankers/consumer-compliance/mortgage-lending/.

[77] 12 CFR § 1002.14.

[78] The TILA-RESPA Integrated Disclosure Rule, promulgated by the CFPB in 2013, prescribes detailed disclosure requirements for closed-end mortgage loan fees and closing costs, is codified at 12 CFR §§ 1026.37 and .38, and is supplemented with multiple model disclosure forms at Appendices H-24 through H-28 of Regulation Z. These disclosures combined and supplemented existing closed-end mortgage fee disclosures previously required by TILA and Regulation Z and RESPA and Regulation X and were subject to extensive qualitative and quantitative consumer testing involving nearly 1,000 consumers to ensure the disclosures were understandable and did not result in information overload. *See* 78 Fed. Reg. at 79,741-50.

[79] CFPB Press Release, CFPB Finalizes "Know Before You Owe" Mortgage Forms (Nov. 20, 2013), available at: https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-know-before-you-owe-mortgage-forms/.

[80] 12 CFR §§ 1026.19(e)-(f), .37(d) and (f)-(h), and .38(d) and (f)-(i).

[81] 12 CFR §§ 1026.19(e)(1)(i), (e)(3)(i), and (e)(3)(iv).

caused by certain abusive practices."[82] RESPA's stated purposes include providing more effective advance disclosure to home buyers and sellers of settlement costs, eliminate kickbacks or referral fees that tend to increase unnecessarily the costs of settlement services, and reduce escrow requirements for home buyers.[83]

- The few lender-specific fees on mortgages, such as rate lock fees, origination fees, processing fees, and discount points, are generally driven by borrower choice, pricing or risk factors, or collateral issues.
- Mortgage servicing fees are virtually all passed through to third-party service providers. The exception may be late fees, which are subject to state laws relating to timing and amount and which are disclosed in the note. Unspecific corporate advances – in connection with non-escrowed home equity and home mortgage servicing – cover taxes if the borrower doesn't keep property in compliance. No interest accrues and banks do not make money from advances.
- Most mortgages originated to low- and moderate-income households are insured by the Fair Housing Administration or Veterans' Administration, or are sold to Fannie Mae or Freddie Mac, and must conform to procedures and requirements set by these government or government-sponsored entities.
- Many mortgages originated by banks to lower-income households are associated with community reinvestment initiatives and designed to be as affordable as possible.
- Further, the allegation that servicers are profiting through a variety of fees is harshly at odds with the fact that banks have increasingly exited the mortgage origination and mortgage servicing business because it is unprofitable,[84] as reflected in banks' share of FHA/VA and GSE mortgage originations declining from two-thirds to one-quarter of the market since 2013.[85] Non-banks now

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[82] 12 U.S.C. § 2601(a).

[83] *Id.* § 2601(b).

[84] *See*, Laura Alix, *Santander will exit U.S. home lending, review commercial segments*, American Banker (February 2, 2022) available at: https://www.americanbanker.com/news/santander-will-exit-u-s-home-lending-review-commercial-segments; WFMZ-TV 69, *Outsourcing to impact Santander Bank workers in Berks* (May 10, 2017), available at: https://www.wfmz.com/news/area/berks/outsourcing-to-impact-santander-bank-workers-in-berks/article_5dd68ec4-63a1-5f92-8a3e-129d081440c0.html; Jon Prior, *Expect more banks to exit national mortgage lending*, American Banker (May 29, 2019), available at: https://www.nationalmortgagenews.com/news/expect-more-banks-to-exit-national-mortgage-lending; Michele Lerner, *The mortgage market is now dominated by non-bank lenders*, The Washington Post (February 23, 2017), available at: https://www.washingtonpost.com/realestate/the-mortgage-market-is-now-dominated-by-nonbank-lenders/2017/02/22/9c6bf5fc-d1f5-11e6-a783-cd3fa950f2fd_story.html; Andrea Riquier*, Mortgages? Big banks may be throwing in the towel*, MarketWatch (April 17, 2019), available at: https://www.marketwatch.com/story/mortgages-big-banks-may-be-throwing-in-the-towel-2019-04-16; Keith Larsen, *These banks are pulling back from mortgage lending. Here's what that means to the housing market*, The Real Deal (April 20, 2020), available at: https://therealdeal.com/2020/04/20/banks-want-out-of-mortgage-lending-heres-what-that-means-to-the-housing-market/; Dennis Dean*, Realty Views: Are banks leaving the home mortgage market?*, Long Beach Business Journal (May 6, 2019), available at: https://lbbusinessjournal.com/realty-views-are-banks-leaving-the-home-mortgage-market.

[85] *See*, FDIC Quarterly, *Trends in Mortgage Origination and Servicing: Nonbanks in the Post-Crisis Period*, FDIC (2019), available at: https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2019-vol13-4/fdic-v13n4-3q2019-article3.pdf; Andy Peters, *Banks counting on GSE reform to stop mortgage share erosion, American Banker* (September 24, 2019), available at: https://www.americanbanker.com/news/banks-counting-on-gse-reform-to-stop-mortgage-share-erosion; John Bancroft, *Nonbank Share of GSE MBS Business Up Sharply in 2019*

service 61% of all mortgages.[86] According to a study conducted by the Bureau, the share of loans originated by independent, non-bank mortgage companies has increased sharply in recent years. Based on 2019 HMDA data, these lenders originated 56.4 percent (2.1 million divided by 3.7 million) of first-lien, owner-occupied, one-to-four-family, site-built, home-purchase loans, down slightly from 57.2 percent in 2018 and up from just 35.0 percent in 2010. Independent non-bank mortgage companies also originated 58.1 percent (1.8 million divided by 3.1 million) of first-lien, owner-occupied, one-to-four family site-built refinance loans, an increase from 56.1 percent in 2018.[87]

- In another study based on 2020 HMDA data, the Bureau found that independent non-bank mortgage companies further increased their share of the mortgage market and originated 60.7 percent (2.5 million divided by 4.1 million) of all closed-end (excluding reverse mortgage) first-lien, owner-occupied, site-built, one-to-four-family, home-purchase loans. They also originated 63.1 percent (5 million divided by 7.8 million) of all first-lien, owner-occupied, one-to-four family site-built refinance loans.[88]
- Fees for title insurance, one of the most expensive closing cost items, are regulated by state agencies.
- Other, significant closing fees are imposed by local governments. Still other fees are disclosed by lenders but imposed by third parties.

Conclusion

As we have explained in detail in this letter, the RFI paints an incorrect and incomplete picture of the consumer financial services marketplace. There is robust competition in the consumer financial services market and transparency as to the terms and conditions of consumer financial products, including with respect to fees, in accordance with the detailed disclosure regime required by federal and state law. Many regulations requiring disclosures of fees were based on extensive consumer testing, and CFPB reports have highlighted the regulations' effectiveness in fostering transparency, competition, and consumer benefits. Any action by the CFPB on fees, whether by rulemaking or enforcement or otherwise, that perpetuates the RFI's prejudgments and fails to address its factual and analytical shortcomings would risk being found arbitrary, capricious and not well-grounded in fact. However, BPI stands ready to work with the CFPB and the federal banking agencies to evaluate whether there are ways to improve disclosures to consumers regarding the terms, including fees, of consumer financial products and services or the customer experience overall.

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(January 31, 2020), available at: https://www.insidemortgagefinance.com/articles/217032-nonbank-share-of-gse-mbs-business-up-sharply-in-2019?v=preview.

[86] *See*, John Bancroft, Nonbank (Agency) *MSR Market Share Just Shy of 61% at Yearend*, Inside Mortgage Finance (January 13, 2021), available at: https://www.insidemortgagefinance.com/articles/223502-nonbank-agency-msr-market-share-just-shy-of-61-at-yearend?v=preview

[87] CFPB, Data Point: 2019, Mortgage Market Activity and Trends at 57-58 (June 2020), available at: https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf.

[88] CFPB, Data Point: 2020, Mortgage Market Activity and Trends at 49 (August 2021), available at: https://files.consumerfinance.gov/f/documents/cfpb_2020-mortgage-market-activity-trends_report_2021-08.pdf.

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