Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services

Comments
to the
Consumer Financial Protection Bureau

regarding
Docket No.: CFPB–2022–0003
87 Fed. Reg. 5801 (Feb. 2, 2022)

by the
National Consumer Law Center
(on behalf of its low income clients)

and

Americans for Financial Reform,
Center for Responsible Lending,
and
Consumer Federation of America,

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1 Introduction

Americans for Financial Reform (AFR), the Center for Responsible Lending (CRL), Consumer Federation of America (CFA), and the National Consumer Law Center (NCLC) (on behalf of its low-income clients) submit the following comments in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services.[1] We thank you for the opportunity to comment on the issue of junk fees.

It has become increasingly common for businesses to deceptively increase the cost of goods and services through ancillary charges. This is usually done after the consumer has become legally or psychologically committed to a transaction. The fees may be hidden in the fine print of advertisements or complex contracts, hidden in plain sight through overly complex disclosures that lead to information overload, imposed at the last minute before consummation, imposed after the consumer has signed up for a service and begun using it, or triggered in ways or with a frequency that consumers do not expect.

One common thread to these charges is that the vendor imposes them in a manner that is calculated to evade the influence of competition and price shopping. The vendor knows that the consumer will overlook and accept the charge because other factors are more salient, because it is well hidden, or because the consumer has no alternative but to proceed and incur the cost. Other fees are imposed in situations that consumers do not expect or pay attention to when shopping.

Another common thread—and the one that most justly earns them the name "junk fees"—is that these charges almost universally vastly exceed the cost of the service or activity that triggers them. Companies know they can get away with this because junk fees are imposed in a way that people do not focus on them or cannot comparison shop. Well-honed techniques, informed by marketing research, obscure the fee, trick consumers into accepting it, or force them into a position where they cannot say "no."

Hidden fees and costs strip wealth from the most vulnerable consumers who are struggling to make ends meet. The most impacted consumers often come from communities of color already burdened by other predatory practices, further exacerbating racial inequities.[2]

[1] 87 Fed. Reg. 5801 (Feb. 2, 2022).
[2] *See* Section 3.1, *infra*.

In the comments below, we first address the CFPB's authority to regulate junk fees and some common themes across different markets, and then highlight some of the more egregious junk fees plaguing consumer products and services.

In some areas, we provide specific recommendations. Certainly, across the board, the CFPB should look out for, prevent, and address unfair, deceptive and abusive practices. We also recommend that, for every consumer financial product and service, providers should be required to disclose their fees in a clear manner easily findable by the public, i.e., on their website, before a consumer provides any personal information or gets deep into the application process. Fee transparency will promote competition that can help to drive down fees.

2 The CFPB has the authority to regulate junk fees

The CFPB has authority to regulate junk fees—fees that inflate or mask the price of a product or evade disclosure requirements, that inhibit transparent price comparisons and competition, that are imposed in a manner that deceives people about the cost of a product or how it works, that incent practices that injure consumers in ways that are not reasonably avoidable and provide no countervailing benefit to consumers, or that take unreasonable advantage of consumers. All of the fees discussed in these comments are imposed in connection with at least one of the consumer financial products or services within the Bureau's jurisdiction. The Bureau's authority over junk fees for these products and services comes from a variety of sources.

First, the Bureau has statutory authority to adopt rules identifying unfair, deceptive, or abusive acts or practices (UDAAP) and to take actions to prevent such practices.[3] Unfairness, deceptiveness, and abuse are common threads applicable to all of the fees we discuss.

Second, a range of specialized statutes have disclosure and other requirements that impact fees, giving the Bureau specific additional authority. These statues include the Truth in Lending Act (TILA), the Electronic Fund Transfer Act (EFTA), the Truth in Savings Act (TISA), or the Real Estate Settlement Procedures Act (RESPA).

Third, the Bureau has specific authority to "prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances."[4] This authority

[3] 12 U.S.C. § 5531.

[4] 12 U.S.C. § 5532(a).

includes model disclosures that contain a clear and conspicuous disclosures that use plain language comprehensible to consumers; contain a clear format and design, such as an easily readable type font; and succinctly explain the information that must be communicated to the consumer.[5]

In addition, the Bureau may conduct trial disclosure programs to improve model forms to enhance consumer understanding.[6] Those trial disclosure programs may establish a limited period during which the disclosures vary from existing disclosure requirements—including by adding additional or different disclosure requirements.

Making use of these authorities promotes the Bureau's core purpose, which, as set forth in its enabling statute, includes ensuring that "markets for consumer financial products and services are fair, transparent, and competitive."[7] Its objectives, also established by statute, include ensuring that "consumers are provided with timely and understandable information to make responsible decisions about financial transactions,"[8] that "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;"[9] and that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[10] Eliminating junk fees furthers those purposes and objectives.

Importantly, the Bureau's work against junk fees should not stop with disclosures. Clear disclosures are important, and can be most helpful when they are the simplest—such as a single number that reflects the full price tag like the annual percentage rate (APR).[11] But more broadly, the Bureau must prohibit manipulative and anticompetitive practices that abuse consumers. Disclosure is useful but ultimately meaningless if businesses are allowed to engage in practices that interfere with a consumer's ability to understand a contract, or take advantage of consumers inability to protect themselves by negotiating, shopping, or rejecting a charge. Disclosure is intended to give consumers an opportunity "know before they owe." But that knowledge is worthless if charges are imposed under circumstances that most consumers would not expect even if, with hindsight, the fees were disclosed. The Bureau's UDAAP authority is tailor-made to address such misconduct.

The Bureau should also research ways to address the inevitable lack of competition and salience for the smaller fees involved with large or complex credit purchases. The

[5] 12 U.S.C. § 5532(b).
[6] 12 U.S.C. § 5532(c).
[7] 12 U.S.C. § 5511(a).
[8] 12 U.S.C. § 5511(b)(1).
[9] 12 U.S.C. § 5511(b)(2).
[10] 12 U.S.C. § 5511(b)(5).
[11] However, as we discuss below, the APR regulations have many loopholes that need to be closed.

Bureau should actively seek new models of disclosure and regulation that encourage lower prices and greater competition.

3 Common themes across junk fees

3.1 Junk fees harm the financially vulnerable, especially low income and Black and Latino consumers

Exploitative junk fees drain money and resources from households reeling from the financial impact of the COVID-19 pandemic and struggling to recover from the previous financial crises.[12] Lower-wage workers, consumers of color, and other consumers struggling economically pay a disproportionate share of these fees.[13] These consumers are located in communities where financial services companies, including mainstream lenders, charge more fees on average, than in predominantly white communities.[14] Even online, sophisticated algorithmic models steer consumers to high-cost, subprime products instead of a wide array of competitively priced credit options with low fees.[15] In competitive financial markets, companies waive or reverse fees for higher income consumers.

Junk fees contribute to high rates of unbanked or underbanked households of color. According to a 2019 FDIC survey, unbanked rates were higher among lower-income households, less-educated households, Black households, Hispanic households, American Indian or Alaska Native households, working-age disabled households, and households with volatile incomes.[16] This pattern was consistent with the results of previous surveys. In 2019, 13.8% of Black households and 12.2% of Latino households were unbanked, compared to 2.5% of white households.[17] High bank account fees, distrust of banks, and not having enough money to meet the minimum balance

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[12] Center for American Progress, Communities of Color Hardest Hit, Slowest to Recover from Recession (Jan. 28, 2022).

[13] *See* Bankrate, Minorities, Millennials Among Those Who Pay the Most Bank Fees (Jan. 2020). More than three-quarters (78%) of white adults say they pay no bank fees in a typical month compared to 59% of Hispanic consumers, 60% of Black consumers and 73% of other races. Pew Charitable Trusts, Heavy Overdrafters: A Financial Profile (fig. 7) (Apr. 2016). Black consumers are 12% of the US population, but account for 19% of the heavy overdrafters. Financial Health Network, The FinHealth Spend Report 2021.

[14] House Committee on Financial Services hearing briefing, The End of Overdraft Fees? Examining the Movement to Eliminate the Fees Costing Consumers Billions (Mar. 2022).

[15] *See* Carol Evans, Board of Governors of the Federal Reserve System, *From Catalog to Clicks, The Fair Lending Implications of Targeted, Internet Marketing*, Consumer Compliance Outlook 4 (Second Issue 2017).

[16] Federal Deposit Insurance Corp., How America Banks: Household Use of Banking and Financial Services: 2019 FDIC Survey (Oct. 2020).

[17] *Id.*

requirements were the most commonly cited reasons among unbanked households.[18] Junk fees, including overdraft fees, destabilize household budgets, and are an unmanageable financial burden for consumers living paycheck to paycheck.

Junk fees push consumers out of mainstream financial products into fringe financial services and predatory financial products. High-cost lenders are heavily concentrated in Black and Latino communities.[19] Creditors use sophisticated marketing tools to target these consumers online.[20] Companies bait consumers with promises of easy credit, often obscuring the true cost or affordability of the transaction. Payday lenders charge fees that may look manageable for a two-week loan, but trap consumers in exorbitant balloon payment loans with constant rollovers that pile on fees. For example, one online lender hides the 107% effective APR cost of a line of credit in complicated fees that are not required to be disclosed in the APR.[21]

Junk fees can also lead to discriminatory practices when discretion is involved. Car dealers push expensive add-on products, such as service contracts, Guaranteed Asset Protection (GAP) insurance, and window etching, on unsuspecting consumers to pad their profit.[22] The add-on products significantly increase the cost of the car. Latino consumers are charged higher mark-ups on vastly overpriced auto loan add-ons than non-Latino consumers.[23]

We are particularly concerned that junk fees will lead to the loss of consumers' largest asset, their home. Homeowners of color face a heightened risk of foreclosure and displacement as COVID-19 relief programs wind down and federal protections against foreclosure expire. Black households and women of color are particularly at risk of foreclosure. Over 9% of Black borrowers are behind on their mortgage, the highest of any racial or ethnic group.[24] Latina and Black women were significantly more likely to

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[18] *Id*. at Figure ES.3: Reasons for Not Having a Bank Account, Among Unbanked Households.

[19] Delvin Davis *et al.*, Race Matters: The Concentration of Payday Lenders in African American Communities in North Carolina, Center for Responsible Lending (Mar. 2005); Assaf Oron, Easy Prey: Evidence for Race and Military Related Targeting in the Distribution of Payday Loan Branches in Washington State, Department of Statistics, University of Washington (Mar. 2006).

[20] *See* Carol Evans, Board of Governors of the Federal Reserve System, *From Catalog to Clicks, The Fair Lending Implications of Targeted, Internet Marketing*, Consumer Compliance Outlook (Second Issue 2017).

[21] *See* Section 5.2, *infra.*

[22] *See* John W. Van Alst, Carolyn Carter, Marina Levy, & Yael Shavit, National Consumer Law Center, Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary, and Discriminatory Pricing (Oct. 2017).

[23] *See id*.

[24] Federal Reserve Bank of Philadelphia, Examining Resolution of Mortgage Forbearances and Delinquencies (Dec. 2021).

fall behind on mortgage payments than white men, even with access to federal support programs.[25]

Unauthorized delinquency-related fees may present an insurmountable barrier to homeowners seeking affordable loan modifications upon exiting forbearance plans. Moreover, the fees dilute the impact of assistance provided by government relief programs such as the Homeowner Assistance Fund.

Loss of a home is not just devastating for families, but also represents a significant loss of wealth for households of color. Home equity represents 57% of the net worth of Black households and 67% of the net worth of Hispanic households, compared to 41% of net worth of white households.[26] A home lost to foreclosure is an asset that is no longer available for surviving family members in multi-generational households, or to build generational wealth.

Pandemic-related unemployment destabilized household budgets. During the pandemic, Black households were 2.7 times more likely to use pawn loans and 3.8 times more likely to use payday loans than white households. Latino households are 3.1 times more likely to use payday loans than white households.[27] Conversely, other consumers took advantage of low interest rates to refinance into products with competitive rates and low fees.[28] As pandemic aid wanes, households of color which saw the highest rates of mortgage defaults, evictions and unemployment, will be captive to the financial companies that are imposing excessive and exploitive junk fees unless the Bureau takes action to rein in abuses in the market.

3.2 Hidden fees are particularly challenging for limited English consumers

Junk fees are often hidden in the fine print. Though fine print is problematic for all consumers, it is particularly challenging for limited English consumers. Even when fee disclosures are made in a more conspicuous manner, and even when companies describe the circumstances under which those fees may be charged, that information may be lost on limited English proficiency consumers. The Bureau should ensure fee transparency for these communities.

As noted above, the Bureau has authority to prescribe rules to ensure that products and services are "effectively disclosed to consumers in a manner that permits consumers to

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[25] *See* National Women's Law Center, [Black, Non-Hispanic Women and Latinas Use Advance Child Tax Credit to Cover Necessities and Pay Down Debt in the Last Month of Payments]() (Jan. 2022).

[26] Michael Neal & Alanna McCargo, Urban Institute, How Economic Crisis and Sudden Disasters Increase Racial Disparities in Homeownership (June 2020).

[27] Financial Health Network, [The FinHealth Spend Report 2021](), at 7.

[28] *See id*.

understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances."[29] When products are marketed in languages other than English, the CFPB should consider requiring that clear fee disclosures also be made in those languages.

The CFPB should also develop model fee disclosures in the top languages spoken by LEP people in the United States and encourage companies to use them.

3.3 Junk fees obscure price transparency and impede competition

One of the most fundamental ways that the CFPB can address junk fees and fulfill its mandate is to ensure that consumers have simple, clear, complete and understandable information about the price of a product, provided in a consistent manner so that consumers can comparison shop. Unfortunately, all too often, providers use fees to obscure pricing and to prevent consumers from understanding how one product is more expensive than another one. These practices not only harm consumers; they also harm honest industry participants who compete with honest up-front prices.

Thus, it is the CFPB's charge to stop practices the impede price transparency and competition. These practices take a number of forms, and, as discussed above, the CFPB has a number of tools to address them.

In the lending area, the Truth in Lending Act (TILA) was passed in 1968 with the core goal of establishing a uniform price tag—the annual percentage rate (APR)—that could be used to compare different forms of credit that used different price structures. The key to the APR's success is its simplicity—a single price tag that includes all elements of pricing, including periodic interest and fees—and its ability to help consumers compare the costs of credit in different amounts, with different terms, and with different pricing structures over a standard period—annually.

The APR does not assume that a consumer will use credit over a full year; it merely provides a metric to compare the cost of using the same amount of credit for the same period of time from two different lenders. The APR is intended as a comparison metric that generally reflects differences in pricing for the typical consumer.

Consumers do not need to understand how the APR is calculated, which is quite complex. They only need to understand that borrowing $300 for two weeks with a 360% APR payday loan will cost more (about 10 times more) than borrowing that same amount for the same two weeks with a 36% APR credit card.

[29] 12 U.S.C. § 5532(a).

Unfortunately, over the years, the usefulness of the APR has deteriorated. This has happened for two reasons. First, by statute and regulation, a number of fees have been carved out of the finance charge used to calculate the APR.[30] Second, lenders have used a variety of strategies to take advantage of exemptions, loopholes, and ambiguities in TILA and Regulation Z to structure their pricing in ways that understate the APR.

As discussed below, these exemptions, loopholes, and ambiguities allow lenders to charge a number of junk fees in different contexts that distort the APR or enable lenders to avoid disclosing an APR altogether. These include fees on open-end credit generally and a variety of fees on fee harvester credit cards. Other fees, like late fees, fees to "expedite" loan disbursement, and pay-to-pay fees, may fall within exceptions to the finance charge definition that are not of themselves problematic but can be inflated or exploited to disguise the cost of credit. The CFPB should take action to close up loopholes and stop unfair, deceptive, or abusive practices that obscure a transparent price tag for credit and distort the APR.

In the area of deposit accounts, federal law does not require disclosure of a single price metric like the APR that can be used to compare accounts – though perhaps it should. The Truth in Savings Act (TISA) and Electronic Fund Transfer Act merely require that fees be disclosed. The result is that a multitude of fees – including monthly fees, statement fees, overdraft fees, NSF fees, and other fees--can obscure the cost of an account. Banks advertise "free checking" but make money on the back end, which prevents consumers from knowing what an account will cost and how banks compare.

Moreover, even getting clear information on fees charged can be difficult. TISA only requires that fees be disclosed before an account is opened, and the EFTA (except for prepaid accounts) only requires that fees be disclosed before they are incurred. TILA, as interpreted by Regulation Z, also allows lenders to delay disclosing certain fees until before they are incurred, unless they are specific key fees required in the account opening data. TISA and the EFTA do not require companies to disclose their fees clearly on their websites or in apps before consumers turn over personal information and begin the process of setting up an account. Again, that makes comparison shopping difficult.

Only prepaid account providers must give fee information to the general public on their websites. Providers must post agreements—including clear, simple, standardized fee disclosures—on their websites, and the agreements "must be posted in a location

[30] *See generally* Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth in Lending*, 25 Yale J. on Reg. 181 (2008).

that is prominent and readily accessible to the public and must be accessible without submission of personally identifiable information."[31]

Instead, all providers should be required to disclose their fees in a clear manner easily findable by the public before a consumer gets deep into the application process. Fee transparency will promote competition that can help to drive down fees.

Inflated add-on fees added to the base price tag for additional services or features are also a common way of disguising the full price. Often, these add-on fees are essentially required or are otherwise incurred by the vast majority of consumers, so that they are truly a part of the core price. The price of add-ons is also frequently inflated, covering far more than the cost of the additional service provided. Inflated add-on junk fees include credit insurance, add-on products on auto loans, and expedite fees on earned wage access products. These inflated "add-on" fees are another way of disguising the cost of a product and preventing comparison shopping.

3.4 Charging penalty fees as a profit center encourages failure

Some of the fees that we discuss in these comments—such as overdraft fees, nonsufficient fund fees, late fees, over-the-limit fees, and returned item fees—are penalty fees. That is, they are fees imposed for conduct that supposedly constitutes a violation of the underlying credit agreement or otherwise is discouraged. Depending on the amount and context, modest penalty fees may provide a reasonable compensation to the creditor for the costs caused by violation.

But penalty fees should never be a profit center. When companies profit off of late fees, there are several problems:

- They have incentives to push consumers into the penalized conduct, rather than helping them to manage their finances and avoid that conduct;
- The penalty fees become a hidden, back-end form of pricing that prevents price transparency and comparison shopping;
- The fees tend to be imposed on the most vulnerable, struggling consumers and push them further behind;
- The fees are often imposed disproportionately on communities of color, and may be waived less often for people in those communities.

The CFPB should be vigilant in looking out for the use of penalty fees as a profit center and stopping those practices. In the context of credit cards, the CFPB of course has the authority of the Credit CARD Act. In other contexts, there is a strong argument that excessive penalty fees are unfair, deceptive and abusive.

[31] 12 C.F.R. § 1005.19(c)(4).

One of the less-known reasons that junk fees have proliferated in financial services is that federal preemption and other forces have nullified the application of an important common law principle to financial institutions. For three centuries or more, the common law has prohibited contract provisions that impose a penalty greater than the amount of damages caused by a breach of the contract.[32] When those damages are difficult to determine, the common law permits "liquidated damages" provisions that are reasonably related to the actual damages sustained by the party. However, provisions that impose a penalty above a reasonable estimate of those damages are prohibited.[33]

This "anti-penalty" doctrine has thrived for centuries and is codified as part of the Uniform Commercial Code.[34] The doctrine has been applied in modern times—with the glaring exception of consumer financial services offered by financial institutions.[35] This is in part due to the impact of federal preemption, where courts have held that the National Banking Act and other banking laws preempt common law limits on penalty fees.[36]

Ironically, the consumer financial services market is one of the markets in which the anti-penalty doctrine is most needed. Contract provisions allowing for super-compensatory penalty fees are most onerous and harmful when there is the presence of unequal bargaining power or unconscionability. The bargaining power of the parties

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[32] *See* National Consumer Law Center, Restoring the Wisdom of the Common Law: Applying the Historical Rule Against Contractual Penalty Damages to Bank Overdraft Fees (Apr. 2013). *See also* Kenneth W. Clarkson, Roger LeRoy Miller, & Timothy J. Muris, *Liquidated Damages v. Penalties: Sense or Nonsense*, 1978 Wis. L. Rev. 351 (1978); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 Colum. L. Rev. 554, 554 (May 1977).

[33] *See* National Consumer Law Center, Restoring the Wisdom of the Common Law: Applying the Historical Rule Against Contractual Penalty Damages to Bank Overdraft Fees (Apr. 2013). *See also* Kenneth W. Clarkson, Roger LeRoy Miller, & Timothy J. Muris, *Liquidated Damages v. Penalties: Sense or Nonsense*, 1978 Wis. L. Rev. 351 (1978); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 Colum. L. Rev. 554, 554 (May 1977).

[34] U.C.C. § 2-718. As Article 2 of the U.C.C. applies only to contracts for sales, this section would not directly apply to bank accounts. However, it shows that the anti-penalty doctrine is widely accepted and adopted.

[35] National Consumer Law Center, Restoring the Wisdom of the Common Law: Applying the Historical Rule Against Contractual Penalty Damages to Bank Overdraft Fees (Apr. 2013).

[36] *In re* Late & Over-Limit Fee Litigation, 528 F. Supp. 2d 953, 960 (N.D. Cal. 2007) ("any claims that the defendants' [credit card late and over-the-limit] fees violated the contractual doctrines of liquidated damages or the like are pre-empted" by section 85 of the National Bank Act; citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996)).

in the consumer financial services market is not only unequal, it is grossly disproportionate.

Restoring the anti-penalty doctrine to fees in consumer financial services is important not just as a matter of fairness. As an article co-authored by a former FTC Commissioner appointed by President George W. Bush once noted, penalty clauses that overcompensate a non-breaching party are inefficient, because they create incentives for that party to engage in tactics that induce a breach.[37] Tactics designed to encourage overdraft fees are discussed in Section 4.1 *below*.

In the case of credit card penalty fees, such tactics prior to the passage of the Credit CARD Act included:

- Imposing late fees for payments received on the payment due date but after a certain cut-off time.
- Allowing consumers to exceed their credit limits when the lender could have declined the transaction, then imposing a steep over-the-limit fee for doing so.
- When due dates fell on a weekend or holiday, treating payments as late if they were not received by the prior business day.
- Offering multiple low-limit credit cards to overextended borrowers in order to maximize over-the-limit fees.[38]

All of these abuses in bank account overdraft and credit card late fee practices directly resulted from the perverse incentive created by penalty fees that serve as a lucrative source of revenues for banks and other providers. As we discuss in the section on buy now, pay later credit, it is critical to prevent these practices from taking hold in new markets.

Therefore, we urge that the CFPB examine all penalty fees to ensure that are reasonably related to the actual damages sustained by the covered entity. Fees that exceed such amounts inevitability lead to unfair, deceptive and abusive tactics by banks and other financial services providers to trigger violations and breaches, because the providers are too tempted by the large profits generated by out-of-proportion penalty fees.

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[37] Kenneth W. Clarkson, Roger LeRoy Miller, & Timothy J. Muris, *Liquidated Damages v. Penalties: Sense or Nonsense*, 1978 Wis. L. Rev. 351 (1978).

[38] National Consumer Law Center, Consumer Credit Regulation §§ 8.4, 8.6 (3d ed. 2020), *updated at* www.nclc.org/library.

4 Deposit Accounts

4.1 Overdraft and nonsufficient funds fees

4.1.1 Background on overdraft and NSF fees

Overdraft fees are assessed when bank account holders do not have funds available for a debit, check or ACH transaction and the bank covers the transaction. Nonsufficient (NSF) fees may be charged when transactions are returned unpaid. Overdraft and NSF fees have become profit centers for financial institutions that disguise the cost of a bank account, make it impossible to comparison shop, and harm the most vulnerable consumers. They push some consumers out of the banking system, with a disproportionate impact on communities of color. Some voluntary progress has been made at some institutions recently, but the CFPB must enact a rule to stop overdraft and NSF fee abuses across the banking industry.

Historically, financial institutions occasionally covered some account holders' paper checks when the account lacked sufficient funds as a courtesy; sometimes, they charged a fee. The Federal Reserve exempted overdraft fees from definition of "finance charges" under the Truth In Lending Act (TILA) based on the premise that these were for occasional and inadvertent overdrafts, rather than routine extensions of credit. As a result, overdrafts were not subject to credit regulations under TILA.[39]

In the early 2000s, financial institutions extended overdraft fees to debit card transactions, with significant negative effect on consumers. First, these were debit cards, not credit cards—they were not designed to put consumers into debt. Moreover, these transactions, unlike paper checks, could simply be declined at check-out, at no cost to the financial institution, when the customer lacked sufficient funds.[40] The extension of overdraft fees to debit cards—a rapidly growing payment mechanism, with many consumers using their debit card multiple times daily—fueled an

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[39] See the Federal Reserve Board's 2005 rule applying the Truth in Savings Act (instead of the Truth in Lending Act) to overdraft fees: "Paying consumers' occasional or inadvertent overdrafts is a long-established customer service provided by depository institutions. The Board recognized this longstanding practice when it initially adopted Regulation Z in 1969, to implement the Truth in Lending Act (TILA); the regulation provided that these transactions are generally exempt from coverage under Regulation Z where there is no written agreement between the consumer and institution to pay an overdraft and impose a fee. *See* § 226.4(c)(3). The exemption from Regulation Z was designed to facilitate depository institutions' ability to accommodate consumers on an ad-hoc basis." 70 Fed. Reg. 29,582 (May 24, 2005).

[40] This is setting aside for the moment instances of authorized positive, cleared negative transactions, discussed *infra.*

exponential growth in overdraft fees during the 2000s.[41] Though it was clear that overdrafts were neither "occasional" nor "inadvertent"—banks encouraged them—the Federal Reserve continued to exempt them from coverage under Regulation Z, opting in 2004 to regulate them under the Truth In Savings Act instead.[42]

In 2009, the Federal Reserve took a modest step under Regulation E of the Electronic Fund Transfer Act (EFTA) by requiring that financial institutions obtain a customer's one-time "opt-in," or nominal consent, before charging the customer overdraft fees on future debit card point of sale (POS) or automated teller machine (ATM) transactions. This action was based on significant evidence that consumers did not want to be charged overdraft fees on debit card transactions and would have preferred to skip a transaction than be charged the fee.

The Regulation E rule—a bare minimum step to address overdraft abuses—had mixed results. On one hand, it spared some consumers from these fees, and total overdraft fees consumers paid annually decreased somewhat as a result. On the other hand, the rule did nothing to protect consumers from whom financial institutions managed to obtain an "opt-in." It did not address the size of the fee; the number of fees a customer may be charged; practices banks engage in to maximize fees; or the unaffordability of this credit for so many account holders. And it did not address overdraft or NSF fees on checks or ACH transactions at all.

In contrast, the undersigned have no objection to reasonable monthly bank account maintenance fees for consumers and do not consider them junk fees; financial institutions bear a cost in providing customers with checking accounts and should be properly compensated for the service. Even for low-income consumers, a transparent monthly fee that they can compare at different institutions is preferable to much higher back-end overdraft and NSF fees. That said, maintenance fees should be transparent monthly fees and any waivers from paying the fees must be implemented in a nondiscriminatory manner.

The result has been that, today, we continue to have a profoundly dysfunctional bank account market caused and perpetuated by unfair and abusive overdraft programs, which consumers have been navigating for at least the last twenty years.

Some banks have recently made helpful changes to their policies, but many others continue to hesitate to give up their abusive overdraft practices. Forgoing overdraft fee income—which typically ranges from a significant to an extraordinarily significant

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[41] *See* Leslie Parrish, Center for Responsible Lending, Overdraft Explosion: Bank Fees for Overdrafts Increase 35% in Two Years (Oct. 2009).

[42] Federal Reserve Board, Regulation DD (Truth in Savings) Final Rule, 70 Fed. Reg. 29,582 (May 24, 2005).

portion of banks' or credit unions' overall fee income—may mean charging honest fees on checking accounts they have touted as "free," or in the case of large banks, falling behind their peers and disappointing investors. The CFPB must level the playing field by adopting marketwide rules against abusive overdraft fee practices marketwide.

4.1.2 Many financial institutions harm their customers' financial health through overdraft practices

Many banks and credit unions exacerbate the punishing impact overdraft fees have on their customers in a number of ways:

- Unreasonably high fee per overdraft transaction. The overdraft fee for many banks is $35 or even higher for some institutions,[43] and it is this high despite several factors that indicate that any cost to the customer of overdrafting should be very small:

  First, the most common transactions that cause an overdraft are debit card transactions, with a median of $24—many far smaller than the fee itself.[44]

  Second, the risk that the bank will not be able to recover an overdraft is very low.[45] The bank is first in line for repayment—it takes the funds, plus the fee, directly from the customer's next incoming deposit, which typically occurs within three days after the overdraft.[46] Banks only cover overdrafts for consumers from whom they expect repayment. Thus, the bank is very likely to be repaid and will typically have its own funds outstanding for only a very short time. In fact, the CFPB's own data from its first overdraft study found that the amounts charged off due to unpaid overdrafts represented only 14.4% of the net overdraft fees charged by banks in its study.[47]

  Third, the cost to the financial institution of processing an overdraft transaction, particularly in today's highly automated environment, is very low.

- Multiple fees per day. Banks and credit unions will typically charge multiple fees per day for a single overdraft episode. Even banks that "limit" the number

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[43] Rebecca Borné & Peter Smith, Center for Responsible Lending, The State of Lending in America & Its Impact on U.S. Households: High-Cost Overdraft Fees 3 (July 2013).
[44] *Id. See also* Consumer Financial Protection Bureau, CFPB Data Point: Checking Account Overdraft 5 (2014) (finding the median debit card transaction causing an overdraft is $24) [hereinafter *CFPB 2014 Data Point*].
[45] CFPB research found that the amount banks charged off from unpaid overdrafts represented only 14.4% of net overdraft fees. Consumer Financial Protection Bureau, CFPB Study of Overdraft Programs: a White Paper of Initial Data Findings 17 (June 2013) [hereinafter *CFPB 2013 White Paper*].
[46] *CFPB 2014 Data Point* at 23.
[47] *CFPB 2013 White Paper* at 17.

of fees per day often set that limit at three to six per day, adding up to $105–$210 in overdraft fees in a single day, which can mean that consumers could rack up hundreds of dollars of fees, even if their next deposit is within days.

- "Extended" or "sustained" overdraft fees. Many financial institutions charge *additional* overdraft fees when their customer does not bring the account back to a positive balance within a prescribed period of time. These fees embody the notion of kicking a person when they are down and only make it more difficult for a struggling account holder to recover.
- Opaque and often manipulative practices involving deposit clearing, debit holds, and transaction posting order. Frequently, customers incur overdraft fees despite carefully attempting to avoid them, and often believing they have. One practice in particular has garnered increased attention recently: charging overdraft fees on debit card transactions that were authorized when the consumer had sufficient funds in the account but then settled, often a few days later, when the account no longer had sufficient funds (also known as approve positive/clear negative). The Federal Reserve has cited this practice as an unfair practice,[48] and the Consumer Financial Protection Bureau has highlighted this practice with concern.[49] However, many banks continue to employ it. In addition, banks have notoriously re-ordered transactions to drive up the number of overdraft fees incurred; if larger balances are posted first, the account is depleted more quickly, resulting in more transactions for which the bank charges overdraft fees.[50] While many banks have ceased this practice, others have not.

4.1.3 Overdraft fees disproportionately burden low-income, Black, and Latino consumers

Overdraft fees have become a cash cow for financial institutions. This money is mostly made off the backs of some of America's most financially exposed families, including communities of color. The large majority of these fees are shouldered by banks' most vulnerable customers, often driving them out of the banking system altogether.

Banks' overdraft practices cause devastating, lasting harm to the customers whose financial health banks should be supporting. Nine percent of account holders pay 84%

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[48] Federal Reserve Board, Consumer Compliance Supervision Bulletin 11 (July 2018); *see also* 2016 Interagency Overdraft Services Consumer Compliance Webinar 20 ("Unfair Practice: Assessing an overdraft fee based on the available balance at the time a transaction is posted when there were sufficient funds in the available balance to cover the transaction when it was authorized.").

[49] Consumer Financial Protection Bureau, Supervisory Highlights 8–9 (Winter 2015).

[50] *See, e.g.*, Ann Carrns, *Customers Can Lose When Banks Shuffle Payments*, New York Times, Apr. 11, 2014.

of the billions paid annually in these fees.[51] These consumers tend to carry low balances—averaging less than $350.[52]

At one credit union of around 10,000 members, 60 members were charged between 50 and 214 overdraft fees in one year. Assuming conservatively a fee size of $20, that's between $1,000 and $4,280.[53]

The Pew Charitable Trust found that 68% of those who overdrew and incurred a fee would have preferred to have transactions declined rather than pay a $35 fee, and that people are deeply confused and are not making opt-in choices based on correct information.[54]

Many hit by relentless overdraft fees end up having their checking account closed,[55] and reentry into the banking system is difficult.[56] Among people with checking accounts, Black and Latino Americans are more likely than white Americans to incur overdraft fees.[57] African Americans and Latinos—already four to five times more likely

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[51] *CFPB 2014 Data Point* at 12, table 3; *see also* CFPB Data Point: Frequent Overdrafters 16, table 2 (Aug. 2017) [hereinafter *CFPB 2017 Data Point*].

[52] *CFPB 2014 Data Point* at 12, table 3; *see also* CFPB Data Point: Frequent Overdrafters 16, table 2 (Aug. 2017) [hereinafter *CFPB 2017 Data Point*].

[53] Raw data collected by and on file with the Center for Responsible Lending.

[54] Nick Bourke & Rachel Siegel, Pew Charitable Trusts, Customers Can Avoid Overdraft Fees, But Most Don't Know How; Bank Disclosures and Poor Communication Obscure Options Despite Federal Law (Mar. 21, 2018).

[55] The FDIC's 2017 survey of unbanked and underbanked households indicates that over 500,000 households who once had bank accounts are currently unbanked primarily because of high or unpredictable fees. Federal Deposit Insurance Corp., 2017 National Survey of Unbanked and Underbanked Households app. table A.17 (noting that there are 3,854,000 unbanked households who were previously banked; of those, 10.9% cited account fees too high as the main reason they are unbanked, and 2.3% cited account fees unpredictable as the main reason, totaling 13.2%, or 508,728 previously banked households). It is likely that in the majority of those cases, the fees at issue were overdraft/NSF fees, as they are both the largest fee and comprise the majority of checking account service charge revenue.

[56] Once ejected from the banking system, the ejecting financial institution reports the account holder to a database, like Chexsystems or Early Warning Service—a blacklist, essentially, where the consumer's name remains for five years, often preventing the consumer from being offered a checking or savings account with another financial institution. *See* National Consumer Law Center & Cities for Financial Empowerment Fund, Account Screening Consumer Reporting Agencies: A Banking Access Perspective (Oct. 2015).

[57] Financial Health Network, Amid Resurgence of Interest in Overdraft, New Data Reveal How Inequitable It Can Be (Sept. 3, 2021).

to be unbanked than white Americans[58]—are disproportionately harmed by ejection from the financial mainstream.[59] Overdraft fees exacerbate mental health challenges as well.[60]

4.1.4 Financial institutions over-rely on overdraft and NSF fees

The Center for Responsible Lending's 2020 report shows that overdraft and NSF fees played a massive role in the operation of financial institutions in 2019, with institutions receiving as much as 38% of their non-interest income, and as high as almost 90% of their fee income, from overdrafts and NSF fees.[61] According to the report:

> Consistent with 2017 and 2018 data, two institutions, Woodforest National Bank and First Convenience Bank, stand out for their outlying small asset size, and for their high proportion of non-interest income derived from overdraft and NSF fees. Joining these two smaller institutions with a relatively high proportion of non-interest income that comes from fees is TD Bank, a fairly large bank which charged over half a billion dollars in overdraft and NSF fees in 2018. In the final benchmarked variable, USAA Federal Savings Bank stands out as the bank whose overdraft and NSF fee volume makes up the largest proportion of its total fee volume, at 89.2%. This owes largely to their generally low fee volumes, but also shows how significant a portion of service fees some banks derive from these highly punitive fees. The data here demonstrate that, along with big banks, small- and medium-size institutions located across both national and regional markets extract many millions of dollars in these fees from their customers.

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[58] About 17% of African American and 14% of Latino households are unbanked, compared to 3 % of white households. Federal Deposit Insurance Corp., 2017 Survey of Unbanked and Underbanked Households 19, table 3.2.

[59] Civil rights leaders have noted the cost of this financial disenfranchisement when urging reform of bank overdraft practices: "Once a person is ejected from the mainstream financial system, it becomes difficult to reenter. And the unbanked and underbanked are more likely to end up with no choice except alternative financial services, which are often more expensive and less secure than a responsible mainstream checking account." Wade Henderson, President and CEO of The Leadership Conference on Civil and Human Rights, & Hilary Shelton, Washington Bureau Director for the NAACP, *Predatory Overdraft Practices Should Be Stopped*, The Hill, Aug. 20, 2013.

[60] *See* Lucile Bruce, Yale School of Medicine, "Financial Health" Is Good Medicine in Mental Health Care (Mar. 23, 2018) (discussing the work of mental health scholar Annie Harper, finding that overdraft fees are among the hidden costs of poverty detrimental to a person's mental health).

[61] Peter Smith, Shezal Babar & Rebecca Borné, Center for Responsible Lending, Overdraft Fees, Banks Must Stop Gouging Consumers During the COVID-19 Crisis 10 (June 2020).

Other analyses have also noted that some smaller banks have high overdraft fee revenue and may engage in especially aggressive overdraft fee practices.[62]

4.1.5 A number of large financial institutions have made positive strides towards reducing the burden of overdraft and NSF fees

Recently, there has been a notable trend of several large banks eliminating or reducing overdraft and/or NSF fees.[63] The structure has varied, but the most common actions have been limitations on the amount of or frequency of overdraft fees, and the number of times overdraft fees would be charged, limitations on extended or sustained overdraft fees, and/or grace periods before fees were charged.[64] However, of the top twenty banks, only four have completely eliminated overdraft fees; the remainder still charge overdraft fees of $34 or higher.[65] Eight of the top twenty institutions still charge

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[62] Aaron Klein, Brookings, A Few Small Banks Have Become Overdraft Giants (Mar. 1, 2021) (listing Woodforest among six banks whose overdraft revenues accounted for more than half their net income); Polo Rocha, *Small Banks Face Bigger Threat to Overdraft Fees This Time Around*, American Banker, July 27, 2021 (identifying Woodforest as one of sixteen banks that derived 20% or more of their fee income from overdraft-related fees, compared to 4.49% average for other banks with assets of $10 billion or less and 2.78% for larger banks); Office of the Comptroller of the Currency (OCC), News Release 2010-122, Woodforest National Bank Enter Agreement to Reimburse Consumers (Oct. 9, 2010) (OCC concluded the bank engaged in unfair or deceptive practices by assessing excessive amounts of overdraft fees and improperly assessing recurring fees, or "continuous overdraft fees" against certain consumers).

[63] For example, Capital One discontinued overdraft and NSF fees entirely, also allowing consumers a cushion until the next deposit. Press Release, Capital One, Capital One Eliminates Overdraft Fees for Customers (Dec. 1, 2021). Citibank has announced plans to enact a similar policy this summer. Press Release, Citibank, Citi Continues to Bolster Its Focus on Financial Inclusion by Eliminating Overdraft Fees (Feb. 24, 2022). Bank of America announced that overdraft fees were reduced to $10, daily overdraft fees would be limited to four per day. Press Release, Bank of America, Bank of America Announces Sweeping Changes to Overdraft Services in 2022, Including Eliminating Non-Sufficient Funds Fees and Reducing Overdraft Fees (Jan. 11, 2022). Chase eliminated NSF fees and limited daily fees to three per day, and gave consumers a $50 cushion before overdraft fees are charged. Press Release JPMorgan Chase, Chase Helps More than Two Million Customers Avoid Overdraft Service Fees (Dec. 8, 2021).

[64] Rebecca Borne & Amy Zirkle, *Comparing Overdraft Fees and Policies Across Banks*, CFPB Blog, Feb. 10, 2022 (last visited Apr. 25, 2022). *See also* Rebecca Borne & Ashwin Vasan, *Consumers on Course to Save $1 Billion in Funds Annually, But Some Banks Continue to Charge These Fees*, CFPB Blog, Apr. 13, 2022 (last visited Apr. 25, 2022); Consumer Financial Protection Bureau, Overdraft/NSF Metrics for Top 20 Banks Based on Overdraft/NSF Revenue Reported, as of April 1, 2022.

[65] Consumer Financial Protection Bureau, Overdraft/NSF Metrics for Top 20 Banks Based on Overdraft/NSF Revenue Reported, as of April 1, 2022. The four that have completely eliminated overdraft fees are Ally Bank, Capital One, Citibank and USAA Federal Savings Bank.

NSF fees.[66] Many regional financial institutions also continue to charge large overdraft and/or NSF fees and do not materially limit their frequency.[67]

Instead of using overdraft fees as a high-cost form of credit, financial institutions should offer affordable credit products,[68] paired with the elimination of high-cost overdraft and NSF fees, to give their customers a way to advance financially and smooth income gaps. That should be the goal of banks and credit unions, rather than taking advantage of customers' difficult times to hit them with unjustified fees.[69]

4.1.6 Overdraft and NSF fee recommendations

Legislators, regulators, banks, and credit unions should all be taking steps to relieve households from the burden of high-cost overdraft fees. Depositories need not reject transactions when they eliminate overdraft fees. They can cover overdrafts at no charge[70]—so long as another deposit is incoming, the bank should have no difficulty recovering the loan amount—or with reasonably priced lines of credit, as was customary before overdraft fees became the cash cow they are today.

More than three-fourths (77%) of Americans polled in April 2020 support elimination of overdraft fees during the current economic crisis, with 51% strongly supporting it. Support was strong across parties, with 84% of Democrats, 76% of Republicans, and 68% of independents supporting it.[71]

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[66] Arvest Bank, Citizens Bank, First National Bank Texas d.b.a. First Convenience Bank, Huntington National Bank, KeyBank, TD Bank, USAA Federal Savings Bank, Woodforest National Bank. *Id*.

[67] *Id*.

[68] Some banks have provided additional product offerings as a safety net to assist consumers in bridging the gap between deposits, particularly low-cost installment loans. *See, e.g.*, Press Release, Bank of America, Bank of America Introduces Balance Assist, a Revolutionary New Short-Term, Low-Cost Loan (Dec. 1, 2021); Huntington National Bank, Introducing Standby Cash (last visited Apr. 25, 2022).

[69] In addition, an increasing number of financial institutions—over 200 and counting—offer safe "Bank On" accounts with no overdraft or NSF fees and other terms that meet the requirements of Cities for Financial Empowerment's National Account Standards. *See* https://joinbankon.org/accounts/.

[70] Capital One, for example, said when eliminating its overdraft fees: "All customers currently enrolled in overdraft protection will be automatically converted to No-Fee Overdraft on the launch date in early 2022." Press Release, Capital One, Capital One Eliminates Overdraft Fees for Customers (Dec. 1, 2022).

[71] Lake Research Partners and Chesapeake Beach Consulting designed this survey which was conducted online by Engine Insight's CARAVAN between April 15–17, 2020. The survey reached a total of 1004 adults nationwide. Data were weighted slightly by age, gender, region, race, and education. The margin for error is +/- 3.1% and larger for subgroups. Question (combined split sample): Some lawmakers in Congress have proposed enacting new consumer protections for the duration of the coronavirus crisis [as a way of preventing lenders from taking advantage of borrowers and relieving financial pressure on individuals]. Please indicate whether you support or oppose each of the proposals below: Eliminating bank overdraft fees.

The CFPB should issue a rulemaking or take other actions on overdraft fees as follows:

- Issue a rule clarifying that overdraft coverage is credit and that overdraft fees, beyond 6 fees a year to cover occasional courtesies, are finance charges under Regulation Z. When financial institutions routinely pay a customer's transactions when the account lacks sufficient funds, the financial institution is clearly extending credit to that customer, and the product should be regulated under TILA as such. Regulation Z's rationale for exempting overdraft fees (that fees are occasional) no longer holds true in this case and should be reversed, at least with respect to overdraft plans that allow for excessive fees.
- Use of a debit or ATM card or other access device to access overdraft credit should also trigger the CARD Act. CARD Act coverage is consistent with the recognition that these overdrafts are credit and can be approved or denied in real time. CARD Act coverage means, among other things, that credit should only be extended based on a determination that the customer has the ability to repay it, consumers should have a reasonable time to repay an advance and should not be subject to automatic debits, and consumers should get credit disclosures to enable them to compare different forms of credit.
- Require that overdraft and nonsufficient funds fees be reasonable and proportional to cost. Charging overdraft fees that are outsized in proportion to their cost to the financial institution is an unfair and abusive practice. Overdraft fees remain high, even as the cost of processing overdrafts has declined with greater automation. Overdraft fees that are disproportionate to their cost to the financial institution create a strong and perverse incentive for banks to encourage overdrafts.
- Consider multiple overdraft fees during a single day or overdraft episode an unfair, deceptive, and abusive practice. The CFPB has conducted thorough research on overdraft practices and concluded that concerns that regulators have identified for years persist today.[72] CFPB should assess the definition of an overdraft event to avoid excessive extraction of fees from vulnerable consumers. Consumers have no control over the order in which transactions are processed, nor their speed, and as a result, multiple overdraft fees may be assessed on a single day or before a consumer has the opportunity to bring an account positive. Account holders struggling to keep their account positive often do not have the capacity to pay multiple fees, and this practice causes them a harm they cannot reasonably avoid.

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[72] *See CFPB 2013 White Paper*; *CFPB 2014 Data Point*; *CFPB 2017 Data Point*.

4.2 Prepaid and banking app evasions of the CFPB rules on overdraft fees on prepaid accounts

Prior to the enactment of the prepaid accounts rule, a small fraction of prepaid cards had overdraft fees. After reviewing 40 prepaid card account agreements from the 11 largest prepaid card companies, the CFPB found that only three agreements offered overdraft services that could trigger a fee.[73]

Overdraft fees were primarily charged on prepaid cards sold by payday lenders.[74] These cards were designed to facilitate payday loans and to collect both overdraft and other fees triggered when unaffordable loan payments hit.[75] As abusive as overdraft fees are on traditional bank accounts, they were even more of an outrage on prepaid cards, which were aimed directly at the consumers who have struggled with overdraft fees and often been excluded from traditional bank accounts.

The CFPB's prepaid accounts rules under both Regulation E and Regulation Z, while not completely banning overdraft fees on prepaid cards, made important changes to protect these vulnerable consumers. Issuers that offer overdraft features must disclose that fact on the package and wait thirty days before offering overdraft coverage. Hybrid prepaid-credit cards with overdraft or credit features must comply with credit card and "fee harvester" rules, including requirements to determine ability to repay, to limit total overdraft fees in the first year to no more than 25% of the credit line extended, and to give the consumer a choice of whether to permit automatic repayment.

The prepaid accounts rule resulted in the elimination of overdraft fees from prepaid cards. Unfortunately, the very same companies that were charging those fees simply found an evasion by coming out with new accounts that they apparently claim are checking accounts exempt from the prepaid accounts rule[76] (despite the fact that they have no checks).

NetSpend was among the small group of prepaid card providers that charged overdraft fees. In order to evade the overdraft fee limits of the prepaid accounts rule and keep charging overdraft fees, NetSpend came out with an account (with various names, including the ACE Flare Account), that it claims is not a prepaid account and that has overdraft services and fees.[77] NetSpend appears to be steering its prepaid card

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[73] Consumer Financial Protection Bureau, Study of Prepaid Account Agreements 25 (Nov. 2014).

[74] *See* Lauren Saunders, National Consumer Law Center, Payday Lender Prepaid Cards: Overdraft and Junk Fees Hit Cash-Strapped Families Coming and Going (July 2015).

[75] *Id*.

[76] *See* Reg. E, 12 C.F.R. § 1005.2(b)(3)(i)(D)(1).

[77] *See* Press Release, National Consumer Law Center, NetSpend Plans Evasions of CFPB Prepaid Rules to Preserve $80 Million in Overdraft Fees (Oct. 28, 2016). NetSpend offers the its debit cards through

customers towards the new account. Comparing the ACE Cash Express prepaid account with the ACE Flare account, both from NetSpend, Netspend emphasizes the features on the Flare Account and allows prepaid cards to access only $100 in no-fee cash withdrawals from ACE locations compared to $400 on the Flare account.[78]

NetSpend not only found a way to keep charging overdraft fees, it increased them. Previously, NetSpend prepaid accounts were limited to three $15 fees per month ($45 maximum per month). The new NetSpend ACE "Flare Account" sold by the payday lender ACE Cash Express now can incur up to five $20 fees per month ($100 maximum per month).[79] Similarly, the payday lender CURO (SpeedyCash, Rapid cash) now offers the "Revolve Account," which can incur up to five $15 overdraft fees ($75 total) per month.[80]

The CFPB should not countenance these evasions. These accounts are simply a form of prepaid account.

As discussed in Section 7.1.5, *infra*, deposit accounts offered by nonbank companies should be considered prepaid accounts covered by those rules. Other nonbank deposit accounts, such as fintech banking apps, should also be covered by the prepaid account rules, which would also help prevent tips from becoming a new form of overdraft fee.

4.3 Information fees on prepaid and similar accounts

Past surveys by the National Consumer Law Center of payday lender prepaid cards,[81] unemployment compensation prepaid cards[82] and state payroll cards[83] have shown that those cards can come with a variety of fees. While unemployment prepaid cards have shown notable improvements, some concerning fees remain on other cards.

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various outlets, especially payday lenders. *See* https://www.acecashexpress.com/cards/ ("The ACE Flare® Account by MetaBank®") (last visited Mar. 31, 2022); https://www.flareaccount.com/ ("The ACE Flare® Account is a deposit account established by MetaBank®, National Association, Member FDIC. Netspend is a service provider to MetaBank.") (last visited Mar. 31, 2022).

[78] *See* https://www.flareaccount.com/compare-cards/ (last visited Mar. 31, 2022).

[79] *See* https://www.flareaccount.com/ (last visited Mar. 31, 2022).

[80] *See* https://www.revolvefinance.com/overdraft-protection-notice/.

[81] Lauren Saunders, National Consumer Law Center, Payday Lender Prepaid Cards: Overdraft and Junk Fees Hit Cash-Strapped Families Coming and Going (July 2015).

[82] Press Release, National Consumer Law Center, Fees Dropping on State Prepaid Cards for Unemployed Workers (July 26, 2017).

[83] Lauren Saunders, National Consumer Law Center, Rating State Government Payroll Cards (Nov. 2015).

In particular, some payday lender prepaid cards still have $0.50 to $1.00 fees simply to find out the balance at an ATM. In a double whammy, those cards may also charge a fee if an ATM transaction is declined, putting the consumer into a Catch-22.

Although these fees are most common on prepaid cards, they can also be charged by prepaid card companies on their debit cards that are styled as bank accounts to evade the CFPB's prepaid account overdraft fee rules.[84] Indeed, in some cases, the balance inquiry fees are higher on the debit card—perhaps with the goal of discouraging balance inquiries in order to trigger overdraft fees.

Card	Sold/Offered at	Type	Issuer	Program Manager	ATM Balance Inquiry Fee	ATM decline fee	ACH decline fee
ACE Elite Prepaid Debit Card[85]	ACE Cash Express	Prepaid	MetaBank	NetSpend	$0.50	$1.00	$1.00
ACE Flare Account[86]	ACE Cash Express	Debit	MetaBank	NetSpend	$1.00	$0.50	none

Consumers should not be charged fees for simply trying to find out their balance.

4.4 Statement fees

Statement fees are another type of junk fee. Statement fees are most commonly found on bank accounts, but they can also be found on credit cards.

Most commonly, fees are imposed on consumers who wish to receive monthly paper statements by mail rather than to access statements electronically. Fees can also be imposed when consumers request copies of back statements.

For example, the Flare Account by MetaBank (a nonbank account that is an evasion of the prepaid account rules[87]) charges $5.95 per statement requested.[88] Thus, a consumer who does not have access to the internet and wanted to review the last six months' worth of statements would have to pay $35.70.

Statements contain critical information. They:

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[84] *See* § 4.2, *supra*.
[85] *See* https://www.aceeliteprepaid.com/rates/.
[86] *See* https://www.flareaccount.com/rates/.
[87] *See* § 4.2, *supra*.
[88] *See* https://www.flareaccount.com/rates/.

- Provide a record of the consumer's transactions.
- Enable the consumer to check for unauthorized charges or errors.
- Help the consumer look out for junk fees or other fees that the consumer has been charged.
- Provide a way to confirm that proper credit has been given for an item returned or disputed.
- Help consumers balance their accounts and keep track of their finances.
- Are used to qualify consumers for a mortgage or other forms of credit.
- Are necessary when preparing tax returns and when looking for a record of a payment.

Statements for credit cards and other types of credit lines serve all of these functions and more. Most critically, they let the consumer know the payment that is due and start the clock running for the due date. Credit card statements also summarize the charges that month and for the year-to-date.

Electronic statements are not a sufficient substitute for paper statements for many consumers. As detailed in an earlier report:[89]

- Millions of Americans—particularly lower-income, less educated, older, and households of color—are on the other side of the "digital divide," lacking home broadband Internet access. Even if they have a smartphone, a small mobile screen with no ability to save documents for recordkeeping is not the same as a computer at home with a printer.
- For those older consumers who have declining cognitive abilities or limited technological expertise, it may be more difficult to remember passwords, to keep on top of email, to know when a bill is due, and even to operate a computer.
- Electronic statements are easy to overlook due to email overload. Consumers may value a physical mail piece as a record-keeping tool and reminder to pay.
- People may be more likely to review paper statements than electronic ones, which require remembering to go to a website, remembering a password, finding the statement, and downloading the document—as opposed to simply opening an envelope. A study by the CFPB found that over half of consumers who opted for electronic credit card statements are not opening or reviewing

[89] *See* Chi Chi Wu & Lauren Saunders, National Consumer Law Center, Paper Statements: An Important Consumer Protection (Mar. 2016) ("NCLC, Paper Statements").

these statements and concluded that consumers who are "opt-outs [of paper statements] are for the most part opting out of reviewing their statements entirely."[90] Even consumers who review transactions regularly on a mobile app may not see the monthly summary of fees and other information in the monthly statement.

- Paper provides a more permanent record—if statements are saved on a hard drive, computers can crash or become outdated. Institutions often provide statements back only a certain number of months, and not at all after an account has been closed.

Federal law requires that certain types of statements be provided in "written," that is, paper form, and the E-Sign Act provides requirements before electronic information can be substituted.[91] The CFPB should protect consumers' right to get paper statements by prohibiting banks and credit card lenders from:

- Making electronic statements the default choice or a condition of the account for accounts not offered solely online or through a mobile device;
- Compelling consumers to consent to electronic statements by making it a condition of online or mobile app access to an account; or
- Charging a fee for paper statements that are required by federal law.

4.5 Bank account legal process fees

Some banks charge "legal process" or garnishment fees if the bank is served with an order to garnish the consumer's account. For example, both Bank of America[92] and Wells Fargo[93] charge a $125 legal process fee, and Chase charges up to $100.[94]

While financial institutions do bear some costs in processing garnishments, these fees fall on the most vulnerable consumers—those who have debts they are struggling to repay. Even worse, these fees exacerbate the harm to consumers who can have their

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[90] Consumer Financial Protection Bureau, Consumer Credit Card Market Report 134 (Dec. 3, 2015). *See also* Alegra Howard, Consumer Action, Consumer Action Survey: Given the Choice, Consumers Prefer a Paper Trail (Jan. 15, 2019) (finding that recipients of paper statements were more likely to report reviewing transactions than did those who receive bills electronically); Consumer Financial Protection Bureau, The Consumer Credit Card Market 172 (Sept. 2021) (noting that 56% of consumers received statements electronically only, but "[w]hile electronic statements can be a convenient way to access account information, it is important consumers review electronic statements as thoroughly as they would paper statements.").

[91] *See .* NCLC, Paper Statements, at 10-15.

[92] *See* Bank of America, Personal Schedule of Fees (effective Feb. 18, 2022).

[93] *See* Wells Fargo, Consumer Account Fees and Information (effective Oct. 15, 2021).

[94] *See* Chase, Chase Total Checking: A Guide to Your Account (last visited Apr. 25, 2022).

bank accounts suddenly wiped out, leaving them without the funds needed to pay basics like rent, food and medicine. Unless the account receives direct deposits of Social Security or other federal benefits, federal law provides no protection from bank account garnishment. Some states provide limited protection, but only seven states protect $3,000; even then, the protection may not be automatic and may require going to court to assert the protection.[95]

Garnishments, together with associated fees, could lead consumers to become unbanked.

The CFPB should encourage banks to eliminate, waive, or reduce legal process fees. The CFPB should also encourage Congress to pass bank account garnishment protections, which would help spare both consumers and banks from the harms and expense of efforts to garnish funds needed for necessities.[96]

5 Credit cards and other non-home secured open-end credit

5.1 Credit cards fees, generally

5.1.1 History of credit card fees

A historical perspective about the development of credit card penalty and other fees is useful in order to properly contextualize them. The great explosion in fees occurred in the late 1990s and 2000s, after the 1996 Supreme Court decision in *Smiley v. Citibank (South Dakota), N.A.*[97] The *Smiley* case nullified state law limits on fees for credit cards, which resulted in the rapid growth of and reliance on fee income by credit card lenders, especially given that there were no countervailing federal limitations on fees until the Credit CARD Act's passage in 2009.

Prior to *Smiley*, few credit card lenders charged late fees and over-the-limit fees, and if they did, it was for amounts such as $5 to $10.[98] After *Smiley*, lenders grew fee income by making fees higher in amount, imposing them more quickly, and assessing them more often. The average late fee soared from $12.83 in 1995 to over $33.64 in 2005, an

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[95] *See* Carolyn Carter, National Consumer Law Center, No Fresh Start in 2021: Will States Let Debt Collectors Push Families Into Poverty As Pandemic Protections Expire? (Nov. 2021).
[96] *See* Center for Responsible Lending, Protect Against Abusive Debt Collection: Working Families Need Wage Protection and a Chance to Save (Feb. 2021); National Consumer Law Center, A Free Stimulus to Support Struggling Families and the Economy: First Suspend, then Reform, Wage and Bank Account Garnishment (Jan. 2021).
[97] 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996).
[98] Government Accountability Office, GAO-06-929, Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers 14 (Sept. 2006).

increase of 115% adjusted for inflation.[99] Over-the-limit fees similarly jumped from $12.95 in 1995 to over $30.81 in 2005, an increase of 95% adjusted for inflation.[100]

Penalty fee revenue increased nearly nine-fold from $1.7 billion in 1996 to $18 billion in 2007.[101] By 2005, penalty fees constituted about 12% of revenues for credit card lenders.[102] The income from penalty fees, cash advance fees, and annual fees reached $29 billion in 2007.[103]

Part of the reason for the explosion of credit card fees in the late 1990s and 2000s was that credit card lenders were imposing penalty fees as a source of revenue rather than as a way to curb undesirable behavior from consumers. As discussed in Section 3.4 , *supra*, these fees constituted a significant source of revenue for lenders because they greatly exceeded the actual damages caused by any breach.

Not only did the size of fee income for credit card lenders grown enormously over the decades, but the types of fees have mushroomed as well. In addition to late fees, common fees now include:

- Annual fees;
- Cash advance fees;
- Balance-transfer fees; and
- Returned-item fees.

A plethora of other fees exist are associated with subprime specialist or "fee-harvester" credit cards, discussed in Section 5.1.4, *infra*.

The passage of the Credit CARD Act in 2009 imposed new restrictions on penalty fees, requiring them to be reasonable and proportional.[104] The CARD Act also required lenders to obtain the cardholders' opt-in consent to over-the-limit transactions and limit these fees to once per month, with a cap of three fees.[105] As a result of the CARD

[99] *Id.* at 18.
[100] *Id.* at 20.
[101] Robert McKinley, Card Fees, CardTrak.com (Jan. 18, 2008).
[102] Government Accountability Office, GAO-06-929, Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers 67, 72 (Sept. 2006) (citing GAO analysis of 2005 data from the top six issuers, and other studies showing roughly comparable percentages between 9% and 13%).
[103] Robert McKinley, Card Fees, CardTrak.com (Jan. 18, 2008).
[104] 15 U.S.C. § 1665d(a).
[105] 15 U.S.C. § 1637(k)(1).

Act's restrictions, over-the-limit fees virtually disappeared.[106] In contrast, as discussed below, credit card late fees are still very much a thriving revenue source for lenders.

5.1.2 Credit card late fees today

The Credit CARD Act resulted in a dramatic and welcome reduction in penalty fee revenue, a drop of about $16 billion from 2011 to 2014.[107] The CARD Act had some impact in restraining late fees, because $7 billion of those savings were the result of reductions in late fees.[108]

Yet, as the CFPB's own report issued last month indicates, credit card late fees are still costing consumers billions of dollars—$12 billion in 2020 to be exact. This constitutes almost all (99%) of the penalty fees imposed by credit card lenders, and 45% of total credit card fees assessed in 2019.[109]

Subprime customers are the hardest hit, averaging $138 annually in late fees per account as compared to an $11 average for super-prime consumers.[110] Subprime consumers are also more likely to be assessed late fees—in 2019, 48% of deep subprime and 28% of subprime accounts were charged three or more late fees, compared with only 3% of super-prime accounts.[111]

This stark disparity is magnified when one considers that the average balance held by subprime cardholders is lower, so that late fees constitute an average of 11% of their balances, versus only 0.8% for super-prime cardholders.[112] Indeed, the CFPB's data show that late fees appear to be highly regressive. And of course, given that Black and Latino consumers are more likely to have subprime credit scores, and subprime cardholders are more likely to be assessed late fees, there are racial disparities in late fee assessments as well, with consumers in neighborhoods with more Black consumers paying more in late fees.[113]

As the CFPB has noted, with inflation kicking up, if there is no change in the current approach, banks are likely to hike late fees even higher.[114]

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[106] Consumer Financial Protection Bureau, Credit Card Late Fees 13 (Mar. 2022).
[107] *See* Consumer Financial Protection Bureau, The Consumer Credit Card Market 10 (Dec. 2015).
[108] *Id.* at 69.
[109] Consumer Financial Protection Bureau, Credit Card Late Fees 13 (Mar. 2022).
[110] *Id.* at 2.
[111] *Id.* at 7.
[112] *Id.* at 7–8.
[113] *Id.* at 10.
[114] *See* Kate Berry, *Surging Inflation Will Allow Card Issuers to Hike Late Fees: CFPB*, American Banker, Mar. 29, 2022.

With its report last month, the CFPB has yet again done excellent research and reporting around an issue. Now it is time to use this research to do something concrete and substantive, by revamping the rules around late fees.

The argument for reining in credit card late fees is even more compelling given that this is one issue where the CFPB's authority is clear and unassailable. The Credit CARD Act, as amended by Dodd-Frank Act, specifically gives the Bureau the authority to establish what is a "reasonable and proportional" late fee, as well to set what amounts are within a safe harbor that is presumptively lawful.[115]

5.1.3 Recommendations to address inflated credit card late fees

The CFPB can and should reduce that $12 billion in late fees by amending Regulation Z in a number of ways, such as:

- Re-examining whether the current late fee safe harbor amounts of $30 for the first late payment and $41 for subsequent late payments are actually necessary to compensate the lender or whether they are super-compensatory.
- Establishing a sliding scale so that late fees are proportional to the account balance.

Capping the amount of late fees that can be imposed for an account during the year, including setting the cap in relationship to the high balance amount.

5.1.4 Subprime specialist, i.e., fee harvester credit cards

The worst junk fee abuses in the credit card market come are found in products that target subprime consumers, which is why they are called "fee-harvester" credit cards. Prior to the Credit CARD Act, fee-harvester cards often imposed hundreds of dollars in fees while extending minimal available credit.[116] The Credit CARD Act regulated fee-harvester cards by limiting the amount of fees that can be charged to a credit card to 25% or less of the card's limit.[117]

However, fee-harvester cards have evaded the Act's protections by charging fees ostensibly before the account is opened.[118] As we have urged in multiple comments to the various RFIs regarding the CFPB's biannual credit card reports,[119] the CFPB should

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[115] 15 U.S.C. § 1665d(b).

[116] *See* Rick Jurgens & Chi Chi Wu, National Consumer Law Center, Fee-Harvesters: Low-Credit, High-Cost Cards Bleed Consumers 3 (Nov. 2007).

[117] 15 U.S.C. § 1637(n)(1)

[118] *See* National Consumer Law Center, Truth in Lending § 7.8.2 (10th ed. 2019).

[119] *See, e.g.*, National Consumer Law Center, Comment re CARD Act Rules Review Pursuant to the Regulatory Flexibility Act; Request for

re-issue the previous rule requiring pre-account opening fees to be included in the calculation of fees for purposes of the 25% cap.

While the original rule was struck down by a district court in *First Premier Bank v. United States Consumer Fin. Prot. Bureau*,[120] that decision involved a rule promulgated using the Federal Reserve's somewhat more restricted rulemaking authority under the TILA. The Dodd-Frank Act expanded the CFPB's rulemaking authority under TILA by allowing the Bureau to adopt "additional requirements."[121] Also, if necessary, the CFPB could use its UDAAP authority to adopt the pre-account opening rule.

As we pointed out in previous comments, the following issuers charged—and are still charging—pre-account opening fees:

- First Premier Bank charges a pre-account program fee of up to $95.[122]
- The Total Visa offered by Bank of Missouri charges a $89 pre-account opening "programming" fee on top of a $75 annual fee for a $300 credit line.[123] Other credit cards offered by Bank of Missouri that charge a similar $89 pre-account opening fee are the "First Access"[124] and "Milestone" cards.[125]
- Merrick Bank is offering a card with pre-account opening "set up" fees of up to $75.[126]

In addition to pre-account opening fees, subprime specialist cards charge a number of other junk fees in an effort to evade the 25% cap on fees. These include:

- *Credit-limit-increase fee*. Charged if the consumer asks for and receives an increase in the credit limit.[127]
- *Premium Plastic Card Design Fee.* Charged if the consumer chooses certain designs for a credit card.[128]

Information Regarding Consumer Credit Card Market, Docket No. CFPB–2020–0027 (Oct. 27, 2020); National Consumer Law Center, Comments in Response to Request for Information Regarding the Consumer Credit Card Market, Docket No. CFPB-2017-0002 (June 6, 2017).

[120] 819 F. Supp. 2d 906 (D.S.D. 2011).

[121] 15 U.S.C. § 1604(a), *as amended by* Dodd-Frank Act § 1100A(4).

[122] First Premier, Disclosures.

[123] Total Visa, Disclosures.

[124] First Access Card, Disclosures.

[125] Milestone Mastercard, Cardholder Agreement 300.

[126] Merrick Bank Credit, Card Agreement.

[127] First Premier, Disclosures; Total Visa, Disclosures.

[128] Total Visa, Disclosures; First Access Card, Disclosures.

- *Additional card fee*. Charged when the consumer requests a card for a family member or otherwise wishes an additional card.[129]

Note that the list of credit card fees is far from exhaustive because Regulation Z, as revised by the FRB in 2010, only requires certain fees to be disclosed in advance at the time of account opening (e.g., cash advance fees, balance transfer fees, penalty fees).[130] All other fees need only be disclosed before the consumer agrees to pay or becomes obligated for the charge, and the disclosure can be made orally.[131] This gaping fee loophole is something that consumer advocates objected to in our comments to the FRB back in 2007.[132] The CFPB has the authority to revise this rule and we urge it to do so. We also urge the CFPB to analyze whether the fees charged for an additional card or a premium design are reasonable in relation to the actual cost to the issuer, as well as why a fee is appropriate at all to raise a credit limit.

Finally, fee-harvester credit cards appear to be the only cards left on the market that offer debt suspension products.[133] These questionable products were previously prevalent until the CFPB took enforcement actions against a number of major credit card lenders over the products[134] after the Government Accountability Office issued a troubling report about them.[135] We urge the CFPB to investigate and take action against any fee-harvester card lenders if they are engaged in similar abuses, or urge the regulators of such lenders to do so for banks with less than $10 billion in assets. We

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[129] First Premier, Disclosures; Merrick Bank Credit, Card Agreement; Total Visa, Disclosures.

[130] Regulation Z, 12 C.F.R. § 1026.5(b)(1)(ii).

[131] Official Interpretations to Regulation Z, 12 C.F.R. § 1026.5(b)(1)(ii)-1.

[132] National Consumer Law Center, *et al.*, Comments re: NPRM, Review of the Open-End (Revolving) Credit Rules of Regulation Z, Docket No. R-1286 (Oct. 12, 2007).

[133] First Premier, Disclosures ("offering "Premier Credit Protection"); Credit One Bank, WWE Card Disclosures ("Optional Credit Protection Program ("Program") Disclosures").

[134] *See, e.g.*, Consent Order, *In re* Citibank, N.A., Department Stores National Bank, and Citicorp Credit Services, Inc. (USA)., Administrative Proceeding File No. 2015-CFPB-0015 (CFPB July 21, 2015), *available at* www.consumerfinance.gov; Consent Order, *In re* Bank of Am., N.A., Administrative Proceeding File No. 2014-CFPB-0004 (C.F.P.B. Apr. 9, 2014), *available at* www.consumerfinance.gov; Consent Order, *In re* JPMorgan Chase Bank, N.A., Administrative Proceeding File No. 2013-CFPB-0007 (C.F.P.B. Sept. 18, 2013), *available at* www.consumerfinance.gov; Joint Consent Order, Order for Restitution, & Order to Pay Civil Money Penalty, *In re* Discover Bank, Greenwood, DE, Docket Numbers FDIC-11-548b/FDIC-11-551k & 2012-CFPB-0005 (F.D.I.C./C.F.P.B. Sept. 24, 2012), *available at* www.consumerfinance.gov; Stipulation and Consent Order, *In re* Capital One Bank, (USA) N.A., Administrative Proceeding File No. 2012-CFPB-0001 (C.F.P.B. July 17, 2012), *available at* www.consumerfinance.gov.

[135] Government Accountability Office, GAO-11-311, Credit Cards: Consumer Costs for Debt Protection Products Can Be Substantial Relative to Benefits but Are Not a Focus of Regulatory Oversight (Mar. 2011).

also urge the CFPB to establish protections for the offering of such products and examine the reasonableness of the charges.

5.2 Open-end credit fees not in the APR

Junk fees proliferate in open-end credit, including credit cards. One of the key reasons is that they are omitted from the APR price tag disclosure required by TILA is a result of a change to Regulation Z that the Federal Reserve Board (FRB) adopted before the CFPB took over responsibility for Regulation Z. The CFPB should close that loophole by developing an APR disclosure that includes the impact of fees on the cost of open-end credit. Indeed, the CFPB is halfway there given the Bureau's development of a "Total Cost of Credit" metric used in the biannual CARD Act reports. Here are examples of deceptive or nonexistent APR disclosures:

- First Premier Bank charges 36% periodic interest and discloses a 36% APR on its line of credit. But a fee inclusive APR should include the $95 pre-account opening fee charged by First Premier and other fees that result in a 416% APR as calculated under 15 U.S.C. § 1606(a)(2) based on a $300 credit line if the line is fully used.[136]
- Bank and deposit account payday loans, including deposit advance products and newer forms of cash advances on nonbank banking apps from fintechs often disclose no APR.[137] For example, Fifth Third Bank does not disclose an APR on its MyAdvance payday loan, which has a 5% fee,[138] nor does Varo, which charges a fee that varies based on the amount advanced ($5 for a $100 advance).[139] Banking advances can also carry other fees that should be considered finance charges, including "tips" and inflated expedite fees.[140]
- Elevate does not disclose any APR on its Elastic line of credit, and the sample payment schedule even obscures the number of payments. Its website displays a 10% monthly cash advance fee (or 5% bimonthly) as well as a carried balance fee ranging from $5 to $350 depending on the balance carried forward and the

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[136] First Premier, Disclosures. It would be even higher if the effective APR included the annual fee, ranging from $50 to $125, which is currently not considered a finance charge under Regulation Z. For a $300 line of credit, there is a $75 fee that would result in an effective APR of 955% if included for the month in which the account was opened.

[137] In the past, banks offering deposit advance products also disclosed a sample APR that assumed a thirty-day repayment period, when in fact most loans were repaid in fewer than fourteen days upon the next paycheck deposit. Thus, the sample APR reported was less than half what it should have been.

[138] *See* Fifth Third Bank, MyAdvance™ (last visited Apr. 4, 2022).

[139] *See* Varo Money, Varo Advance (last visited Apr. 4, 2022).

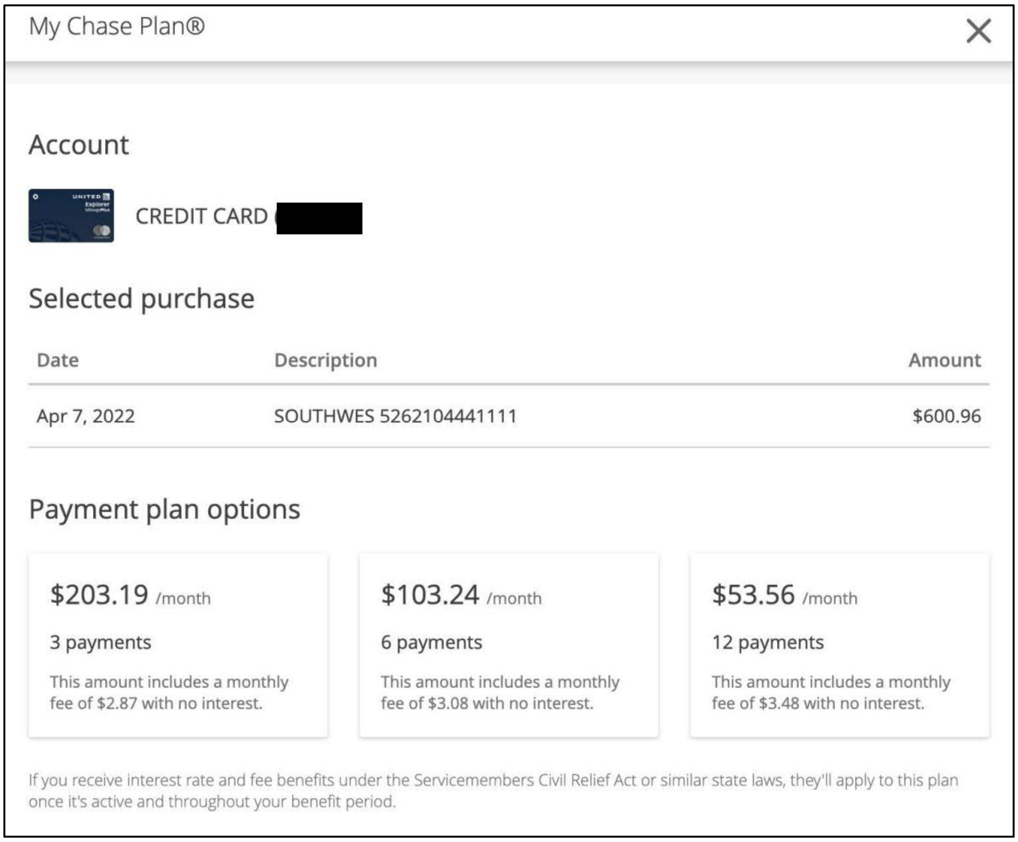
[140] *See* Section 7, *infra*.

billing cycle.[141] But in its SEC filings, Elevate states that the effective APR for a $2,500 draw on Elastic is 107%.[142]

- CreditFresh is a product with a very similar pricing structure as Elevate. It also does not appear to disclose any APR on its website.[143]
- Even general-purpose credit cards use fees as a way to be non-transparent about costs, offering installment plan features that carry fixed fee. For example, Chase offers "My Chase Plan" for purchases over $100, which allows cardholders to pay the amount in monthly installments.[144] Chase promotes that there is no monthly interest for the payment plan, but there is a monthly fee. However, how the fee is calculated is not transparent.[145] In the example below (Fig. A), a $600.96 transaction can incur a $2.87 fee per month for three months, a $3.08 fee per month for six months, or a $3.58 per month fee for one year. While these are not as dramatic in cost as the other examples, how is a consumer to know which amount is the least costly without an APR disclosure?[146]

[141] Elastic, What It Costs (last visited Apr. 25, 2022).
[142] *See* Elevate Credit, Inc., SEC Form 10-K for the Fiscal Year Ended Dec. 31, 2021, at 48.
[143] CreditFresh, Cost of Credit (last visited Apr. 25, 2022).
[144] Chase, My Chase Plan FAQs (last visited Apr. 25, 2022).
[145] *See id.* ("How do you determine the monthly fee? We determine the fee based on the original purchase amount, the number of billing cycles you chose to pay it in full and other factors.").
[146] Calculated as closed-end credit, the APRs are 8.65% for three months, 10.5% for six months, and 12.6% for twelve months.

Figure A



Currently, the only APR disclosure required for credit cards and other open-end credit under Regulation Z is an APR consisting solely of periodic interest.[147] This APR does not include the impact of any fees, whether they be finance charges or not, on the cost of credit for a credit card or most other open-end credit. *This is despite the fact that TILA specifically and explicitly requires disclosure of a fee-inclusive or "effective" APR*.[148] Prior to its elimination, this effective APR was disclosed on periodic statements and included the impact of fees that were finance charges (e.g., cash advance fees).[149]

The FRB eliminated disclosure of the effective APR in 2010, abandoning a core principle of the Truth in Lending Act. It was contrary to one of the fundamental reasons that Congress enacted TILA, i.e., to create a standard disclosure of the cost of

[147] 12 C.F.R. § 1026.14(b).
[148] 15 U.S.C. § 1606.
[149] *See generally* Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth in Lending*, 25 Yale J. on Reg. 181 (2008).

credit that would promote informed shopping.[150] The effective APR was the only disclosure in open-end credit that reflected the price imposed by fees and non-periodic interest finance charges. Its existence and calculation are specifically mandated by TILA for open-end credit. By eliminating it, the FRB contravened the explicit requirements of TILA. Notably, the Department of Defense required used of the effective APR in regulations under the Military Lending Act for determining whether open-end credit exceeds the MLA's 36% rate cap.[151]

The FRB eliminated the effective APR because its focus group testing found that consumers were confused by it and did not understand what it meant. However, if consumers were confused by the effective APR, the proper response would have been to improve the disclosure, not eliminate it.[152] The solution should have been to improve the price tag, not tear it off. Indeed, in its 2013 Credit Card Market report, the CFPB developed a measure somewhat similar to the effective APR for its own research purposes, a "Total Cost of Credit."[153] The CFPB has used this Total Cost of Credit in all of its subsequent biannual reports as required by the Credit CARD Act.[154]

The CFPB's Total Cost of Credit measure attempts to capture an "all-in" price tag for purposes of evaluating the effect of the CARD Act on the credit card market, including the cost of credit.[155] A similar measure could be developed for credit card and other open-end credit disclosures. For example, the CFPB could require an effective APR for periodic statements that consists of a rolling 12-month average of the calculation in 15 U.S.C. § 1606(a)(2). A rolling average would address the phenomenon of a high effective APR in the month that a fee is imposed, which is what sometimes led to

[150] *Id.* (discussing the history of TILA and the effective APR).
[151] *See* 32 C.F.R. § 232.4(c)(2)(ii)(A).
[152] Indeed, it is no wonder that consumers were confused by the effective APR—in its comments to the Federal Reserve Board's 2005 Advanced Notice of Proposed Rulemaking, the Center for Responsible Lending noted the confusion generated by inconsistent terminology around both the rate-only APR (the "corresponding" or "nominal APR" or "corresponding nominal APR") and the fee-inclusive APR, which could also be labeled with different adjectives, such as "effective APR" or "historic APR" or "actual APR." Ctr. for Responsible Lending, Comments on Docket No. R-1217, Advanced Notice of Proposed Rulemaking, Regulation Z Open-end Review 11 (Mar. 28, 2005).
[153] Consumer Financial Protection Bureau, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market 19, 32–33 (Oct. 1, 2013) (CARD Act Report).
[154] Consumer Financial Protection Bureau, The Consumer Credit Card Market (Aug. 2019); Consumer Financial Protection Bureau, The Consumer Credit Card Market (Dec. 2017); Consumer Financial Protection Bureau, The Consumer Credit Card Market (Dec. 2015).
[155] Consumer Financial Protection Bureau, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market § 2.3 (Oct. 1, 2013).

consumer confusion. For an account that has been opened for less than twelve months, this rolling effective APR could be pro-rated.

5.3 The CFPB should also require a fee-inclusive APR for applications and solicitations

Restoring the effective APR would make TILA disclosures more meaningful and truthful. Otherwise, lenders are able to disclose lower APRs that deceptively mask higher costs—or no APR at all.

Restoring the effective APR would also remove incentives for payday lenders and other high-cost lenders to convert their predatory loan products into open-end credit. It would require a more meaningful and truthful APR disclosure for products such as the line of credit offered by CashNetUSA.com. In Utah, CashNetUSA discloses an APR of up to 299%.[156] However, this does not include the 15% "Transaction Fee" imposed each time a borrower obtains a cash advance. Combining the Transaction Fee with the periodic interest translates into an effective APR of 480%.

The CFPB has several options for fee-inclusive APR disclosures in applications and solicitations. It could require disclosure of a "typical APR" that consists of an average of historical effective APRs for a certain time period in a certain credit portfolio. The CFPB could also limit the requirement for a "typical APR" to certain categories of credit, such as those that have fee income that is more than a small percentage of the revenue from periodic interest.

The CFPB needs to address the junk fees found in open end lines of credit and credit cards. The CFPB should close loopholes that omit fees from the finance charge and APR and mandate an APR disclosure that includes the impact of fees on the cost of credit. These acts would make disclosures more meaningful and enhance comparison shopping. Creditor compliance would be simplified and manipulations designed to circumvent consumer protections would be prevented.

5.4 Buy Now Pay Later (BNPL)

5.4.1 BNPL products offer a promise of interest-free payments, but many providers charge late fees, which could be a disguised finance charge

Buy Now, Pay Later (BNPL) credit may provide some consumers with an affordable way to finance purchases, as the business model typically allows consumers to purchase an item by only paying a portion of the price up front and paying the rest of the debt in three equal, interest-free installments over a set period (usually six weeks). However, as we discussed at greater length in recent comments, BNPL credit presents

[156] CashNetUSA, Rates and Terms (last visited Apr. 25, 2022).

cause for concern, including hidden fees, absence of clear disclosures, and a lack of meaningful underwriting for a consumer's ability to repay.[157]

While not all BNPL providers charge late fees, for some of those that do, late fees appear to be a significant revenue source. To the extent that providers are lending to people without considering ability to repay, and are counting on late fee revenues as a profit center, those fees are junk fees and a disguised form of finance charge. The CFPB should address both underwriting practices and use of late fees using its TILA authority over charge cards.[158]

Although reports vary on the rate of late payments, they are clearly significant. More than a third of BNPL borrowers had fallen behind on one or more payments according to a 2021 Reuters-commissioned survey.[159] Research commissioned by the United Kingdom Financial Conduct Authority found that late fee revenue can make up a "significant portion" of the revenue of providers that charge those fees.[160] Australian data showed that Afterpay's total late fees were "very high," amounting to up to a 68% APR.[161]

Although late fees vary depending on the provider, they can reach as high as $25.[162] While some providers cap the total amount of late fees—i.e., at 25% of the amount of credit—that is still very high in terms of annual interest rates.[163] For example, consider a consumer who made a $300 purchase, paid $75 up front and had three biweekly payments of $75. If a $25 late fee was imposed for each of those three payments, that would amount to an APR of about 413%.

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[157] These concerns are discussed in detail in Center for Responsible Lending, Consumer Federation of America, & National Consumer Law Center (on behalf of its low income clients), Comments to CFPB Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later (BNPL) Providers (CFPB-2022-0002) (Mar. 25, 2022) [hereinafter *CRL, CFA, & NCLC, Comments to CFPB re BNPL (Mar. 2022)*].

[158] As we wrote in recent comments, BNPL products are a form of charge card covered by TILA and its CARD Act provisions, including the requirement to consider ability to repay and the requirement that penalty fees be reasonable and proportional. *See id.*

[159] Anna Irrera, *As "Buy Now, Pay Later" Surges, a Third of U.S. Users Fall Behind on Payments*, Reuters, Sept. 9, 2021.

[160] Personal Finances & Funds Team, United Kingdom HM Treasury, Regulation of Buy-Now Pay-Later Consultation (Oct. 2021).

[161] McLean Roche Consulting Group, Submission to Australia Treasury Inquiry, Global Payments 2020-30: A Seismic Shift in the Next Ten Years 20 (2020–2021).

[162] Leticia Miranda, NBC News, *The Hidden Costs of "Buy Now, Pay Later" Loans* (Nov. 4, 2021).

[163] *CRL, CFA, & NCLC, Comments to CFPB re BNPL (Mar. 2022)*.

5.4.2 In addition to late fees, some BNPL providers charge missed payment fees, account reactivation fees, returned payment fees, and rescheduling fees that are not clearly disclosed

In addition to late fees, BNPL providers may charge other fees, including account reactivation fees, returned payment fees, and rescheduling fees.[164] Lack of clear and uniform consumer disclosures make it difficult for BNPL consumers to understand the potential fees, to compare costs among potential financing sources, and to know whether fees are capped.

5.4.3 BNPL recommendations

As seventy-seven organizations recently wrote in response to the CFPB's inquiry into BNPL providers, we urge the CFPB to view BNPL products as charge cards covered by the Truth in Lending Act (TILA) and the Credit Card Accountability Responsibility and Disclosure Act. The CARD Act's ability-to-repay and reasonable penalty fee provisions would help prevent penalty fees from becoming a profit center that both masks the cost of BNPL and leads providers into predatory practices.[165] Applying credit card rules to BNPL credit would also provide consumers with basic protections, such as cost transparency, uniform disclosures and statements, and dispute and chargeback rights.

The CFPB should also issue a larger participant rule to supervise this market, which will enable it to look out for junk fees and other practices that harm consumers.

6 Earned Wage Advances (EWA)

6.1 EWAs are loans that risk of a cycle of re-borrowing and multiplying fees

Earned wage advances (EWA) are an employer-based form of credit[166] that allows workers to take advances ahead of payday based on the wages they have already earned ahead but are not yet scheduled to be paid. Although the fees on EWAs are lower than traditional payday loans, EWAs, like other balloon payment loans, lead to a cycle of re-borrowing that can result in fees multiplying and costing far more than the apparently low cost of a single fee.

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[164] Sezzle, for example, charges both account reactivation and rescheduling fees: Sezzle User Agreement (Apr. 12, 2022); Klarna charges returned payment fees: Klarna Pay Later in 4 Agreement (last visited Apr. 25, 2022).

[165] *CRL, CFA, & NCLC, Comments to CFPB re BNPL (Mar. 2022)*.

[166] For a discussion of why earned wage advances loans are a form of credit covered by TILA, see Letter from National Consumer Law Center & Center for Responsible Lending to Consumer Financial Protection Bureau (Oct. 12, 2021) [hereinafter *NCLC/CRL EWA Letter to CFPB*].

An EWA provider identifies wages that the employee has earned, but that have not yet been paid, through the employer's time and attendance system, and then advances those wages ahead of payday.[167] The worker then repays the EWA provider through a variety of means: by payroll deduction; by granting permission for the provider to offset the next direct deposit to an associated debit or payroll card; by intercepting the wages through an intermediate pass-through account; or by debiting the worker's bank account.

Regardless of how they are structured, these earned wage access products are a form of payday loan—wage advances repaid on payday in a balloon payment—and should be regulated as credit, even if they are lower cost than traditional payday loans. Although some are more problematic than others, advances on pay, even earned pay, are balloon payment loans that often lead to a cycle of re-borrowing.

The growing trend is for employers or payroll companies to offer early access to wages as a benefit, which may help workers if used sparingly, but more study is needed. Employers should focus on savings programs; affordable small dollar installment loans; regular, predictable work schedules; and paying a living wage, rather than encouraging employees to spend next week's pay today.

Some EWA providers offer an option that enables employees to access their earned wages at no cost, and such free EWA loans are likely exempt from TILA. But those that have fees are within its scope, and the fees are finance charges that must be disclosed as an APR. EWA providers may dispute the usefulness of an APR for a small, short-term loan, but so do payday lenders. Like traditional payday loans, EWA loans are balloon payment loans which can lead to a cycle of re-borrowing for consumers. If an expense cannot be covered by this week's paycheck, then a worker is likely to struggle with a hole in the next paycheck. This hole may make it harder to stay on a budget or to cover large monthly bills like rent.

Further, EWA loans may put people into an even more extensive cycle of repeat re-borrowing than traditional payday loans. Most users rely on these products around 24 times a year, with frequency spanning between 12 times to 120 times per year,[168] meaning that typical users of these products use them nearly every pay period. The cycle of re-borrowing earned wage loans is not surprising due to their balloon payment nature.

[167] Companies offering earned wage advances include Branch, Ceridian, DailyPay, Even, Finfit, FlexWage, Gusto, Instant Financial, and PayActiv.
[168] *NCLC/CRL EWA Letter to CFPB* at 5.

The cycle of re-borrowing means that even small fees add up. Therefore, as the law requires, consumers should be provided an APR to help them understand the cost of EWAs and to compare them to other options.

6.2 Expedite fees on EWA loans, which are often inflated, can make the loans more expensive than they appear

In addition to any access fees, almost all EWA providers charge $1 to $2 more per advance for instant access, hiking the cost up even more for those workers who want access to their earned wages immediately.[169] It appears that the vast majority of users—as many as 90%—opt for instant access,[170] which is not surprising given that these are workers who are seeking funds only days ahead of payday. Thus, these fees add up.

Moreover, the fees are inflated, beyond the cost to the provider of sending the money instantly. Many EWA providers have access to the Clearing House's RTP network,[171] and the $1 to $2 price of instant access for consumers severely exceeds the $0.45 cost to the provider for instant transfer.[172] The costs of Visa direct and MasterCard Send are likely in a similar range.[173]

As we previously wrote to the Bureau, workers will likely focus on the cost of standard delivery of a single advance. Yet with expedite fees added and repeat usage, at one provider a worker could pay up to $36 a month at the high end, assuming a repeat user who takes 12 instant accesses in a month.[174] Some providers have even higher cost models.

These fees are of particular concern because they are attached to products that are marketed towards or partner with employers of hourly and low-wage workers for whom every dollar counts. Further, fees may increase in the future, especially if EWA lenders are not sufficiently supervised or are exempted from lending laws. As discussed in Section 7.2 *below*, inflated expedite fees also plague cash advance features on nonbank banking apps.

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[169] Lauren Saunders, National Consumer Law Center, Testimony to Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products" (Nov. 2, 2021).
[170] *Id.* at 9.
[171] Derin Gag, Fintech, JP Morgan Enables Fintech Firm Even With Real Time Payments (Nov. 10, 2021).
[172] The Clearing House, Simple, Transparent, Uniform Pricing for All Financial Institutions (last visited Apr. 25, 2022).
[173] For example, this article noted that Uber drivers paid $0.50 to get instant access to their pay through Visa Direct. Tom Groenfeldt, Forbes, Visa Direct Is The Engine Behind Zelle and Venmo (Mar. 15, 2019).
[174] *See NCLC/CRL EWA Letter to CFPB* at 7.

Inflated expedite fees are junk fees and are disguised finance charges. The Bureau should address inflated expedite fees using its TILA and UDAAP authority.

6.3 EWA recommendations

Last year, ninety-six consumer, labor, civil rights, legal services, faith, community and financial organizations and academics, wrote to the CFPB with a number of recommendations about EWA loans and the CFPB's past actions.[175] With respect to the fees on EWAs, we recommend that the CFPB:

- Treat fee-based earned wage advance products as credit, with fees disclosed as a finance charge and an APR as required under TILA.[176] There is no basis for treating these products as anything other than credit. Moreover, failing to regulate them as credit will invite payday lenders and other high-cost to enter this market—technology increasingly is enabling a wide range of companies to access payroll data and payroll deduction—with even more exploitive rates and practices.
- Address inflated expedite fees using the Bureau's TILA or UDAAP authority.
- Conduct research on the impact on workers' financial security of fees from earned wage advance programs.

7 Fees for credit features on nonbank banking and cash advance apps

7.1 "Tips"

7.1.1 "Tips" are the new junk fee

Increasingly, fintech companies are disguising fees and interest in the form of "tips." The "tips model" is found in freestanding cash advance apps, including those styled as fake earned wage access products or "peer-to-peer" loan platforms, and also in the form of overdraft or credit features of nonbank banking apps. The "tips models" is evasive and deceptive; fintech companies utilize these tips as an attempt to mask finance charges, evade interest rate limits, and hide overdraft fees. Tips added by default can result in APRs that can reach 520% and create cycles of debt. Though purportedly voluntary, companies have continuously evolving ways of pressuring

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[175] National Consumer Law Center (on behalf of its low-income clients), Center for Responsible Lending, Consumer Federation of America, *et al*, Letter to Director Rohit Chopra, Consumer Financial Protection Bureau, Re: Rescind Earned Wage Access Advisory Opinion and Sandbox Approval and Treat Fee-Based Earned Wage Access Products As Credit (Oct. 21, 2021).

[176] Relatedly, we urge the CFPB to rescind the 2020 EWA advisory opinion, or revise it to focus only on whether providers of free programs are "creditors" covered by TILA, and to revoke the PayActiv approval order or disavow its reasoning and make clear that it will not be extended when it expires at the end of this year.

people into "tipping" or making it difficult not to tip. Tips are unlikely to be truly voluntary, and even if they are, the label does not change the cost to or the impact on consumers.

The tips model is used both by free-standing cash advance apps that make deposits to and debits from external, unrelated bank accounts, and also by nonbank banking apps that offer deposit accounts with credit features.

7.1.2 Tips in free-standing cash advance products

Fintech companies utilizing the "tips model" to provide cash advances (loans) disguise the interest on these loans in the form of "tips" and, as discussed in Section 7.2, *infra*, inflated "expedite" fees. The request for and cost of "tips" is typically downplayed in, or sometimes entirely absent from, promotions about these products, implying that loans are free.

Free-standing cash advance apps that use tips model include:

- Earnin, a fake "earned wage access" product,[177] advertises "no hidden fees" to access "the money you've already earned."[178] But Earnin has no connection to payroll and is essentially a payday loan app offered in two different forms: as "Cash Out," to "turn every day into payday,"[179] and as "Balance Shield" feature: "Stay covered with Balance Shield Cash Outs. Get automatic access to $100 of your earnings to keep your balance out of the red.*"[180] Both collect fees in the form of purportedly voluntary tips. (Earnin is also developing a banking app.)
- Klover offers an "instant cash advance," and advertises "No credit check. No interest. No hidden fees;"[181] but Klover collects "voluntary tips," "express fees" up to $9.99 that vary by the amount of the advance, and "subscription fees" of $2.49.[182]

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[177] As we have separately raised with the CFPB, all earned wage access products are loans, and unless they are completely free, they should be subject to TILA.
[178] *See* https://www.earnin.com/.
[179] Earnin, Cash Out (last visited Apr. 25, 2022).
[180] Earnin, Balance Shield (last visited Apr. 25, 2022). Earnin does not, however, have any connection to payroll or actual earnings. Most Earnin services today are not connected to a deposit account, but Earnin is also piloting a banking app. Earnin, Earnin Express (last visited Apr. 25, 2022). The asterisk in the online advertisement refers to this disclaimer: "Disclaimer: Balance Shield Cash Out is subject to your available earnings and daily pay period max. Other restrictions and/or third-party fees may apply. For more information visit earnin.com/tos."
[181] *See* https://www.joinklover.com/ (last visited Apr. 25, 2022).
[182] *See* Klover, Klover Terms and Conditions (last visited Apr. 25, 2022).

- SoLo is a "community" where consumers can access "short-term funds."[183] To solicit lenders, consumers first set a "lender appreciation tip."[184] The sample loans shown are 14–18 days with tips that generally equate to 260% APR, though no APR is shown.[185]

Some of the banking apps described in Section 7.1.3, *infra*, have free-standing versions as well as versions incorporated into their own deposit account.

These are all balloon payment loans, with repayment in full on the next deposit or on a short schedule. Like other balloon payment loans, they are likely to lead to dependency and a cycle of re-borrowing. And like other payday loans, they can trigger overdraft and nonsufficient funds (NSF) fees when preauthorized debits bounce.

7.1.3 Tips in overdraft and credit features of nonbank banking apps

The "tips" model has also surfaced as a disguised finance charge or overdraft fee on nonbank banking apps that offer deposit accounts with overdraft or credit features. As awareness grows about abusive overdraft fee practices and as banks and credit unions reconsider their practices, these fintech banking apps pitch themselves as friendlier than traditional bank accounts, but their "tips"-based credit features are simply a new form of payday loan or overdraft fee.

The fintechs offering these nonbank banking apps are sometimes called "challenger banks" or "neo banks," But they are not banks.[186] Instead, they partner with a bank to offer banking services through an app and associated debit card.

These nonbank banking apps are essentially a form of prepaid account—an account designed by, obtained through, and serviced by an entity that is not a bank and cannot directly offer deposit accounts. But these banking apps style themselves as bank accounts and do not comply with the CFPB's prepaid accounts rules under Regulation E or Regulation Z. In particular, many of these nonbank banking apps have credit and overdraft features that are not allowed on prepaid accounts.

In some cases, they promote "fee-free" overdraft services:

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[183] *See* https://solofunds.com/.
[184] SoLo, Borrowing (under "Your Terms") (last visited Apr. 25, 2022).
[185] Three examples are for a $100 loan with $10 tip for fourteen days and one is a $100 loan with $6 tip for eighteen days.
[186] Chime, for example, was forced to stop calling itself a bank in response to state enforcement actions. *See* Anna Hrushka, BankingDive, California Regulator Orders Chime to Stop Calling Itself a Bank (May 6, 2021); Illinois Department of Financial and Professional Regulation, Settlement Agreement and Consent Order, In re Chime Financial, Inc., No. 2021-DB-01 (Mar. 25, 2021).

- Chime offers "overdraft fee-free up to $200," comparing the "$0" Chime SpotMe fees to a $34 traditional overdraft fee.[187] But Chime collects payments in the form of "tips."

In other cases, tips are used to cover the costs of cash advances, that is, payday loans:

- MoneyLion offers "cash advances up to $250 with no interest." MoneyLion collects "tips" plus "Turbo Fees" of $0.99 to $7.99 for instant delivery.[188]
- Albert's home page states: "We don't believe in overdraft fees. Instead, we help you make ends meet by advancing up to $250 from your next paycheck. No interest. No credit check."[189] But Albert on the next page Albert states that consumers can add an "optional tip" and "a small fee to get your money instantly or get cash within 2–3 days for free.""[190]
- Dave's home page advertises "no overdraft fees" and features an image of a text message: "Your phone bill may cause overdraft! I can spot you up to $250 with 0% interest to prevent it."[191] But Dave collects "tips" and "donations," and also charges an "Optional Express Fee" of $1.99 to $5.99, depending on the amount advanced.[192]

7.1.4 Why the "tips model" is evasive

Companies employ various strategies to make it difficult not to tip or to make the consumer feel compelled to tip. These strategies constantly evolve and can be difficult to spot. Tips enable usurious lending and evasions of usury laws. The cost to the consumer is the same whether the price is labeled as a tip or as interest.

By claiming that they are not charging any fees or interest, companies attempt to evade the requirements of the Truth in Lending Act (TILA) and other laws. Generally, TILA only covers credit for which there is a finance charge or more than four installments.[193] As these tip-based credit products have a single balloon payment and deny having a finance charge, the tip-based credit products do not comply with TILA requirements like disclosure of the APR. Furthermore, these fintech companies may also claim to be outside of CFPB's supervision authority over payday lenders as well as state lending laws, including fee and interest rate caps and licensing requirements.

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[187] *See* https://www.chime.com/.

[188] *See* https://www.moneylion.com/instacash/.

[189] *See* https://albert.com/ (last visited Apr. 8, 2022).

[190] *See* https://albert.com/instant/ (last visited Mar. 28, 2022).

[191] *See* https://dave.com/ (last visited Mar. 28, 2022).

[192] Dave, Dave Terms of Use (Feb. 11, 2022).

[193] TILA also covers the issuers of credit and charge cards regardless of any finance charge and the number of installments.

Fintech cash advance products and nonbank banking apps are aimed at struggling consumers who are living paycheck to paycheck. Users are likely to be disproportionately people of color in communities that have long been deprived of income and assets. Thus, “tips” will come out of the pockets of those least able to afford them and are likely to exacerbate the racial wealth gap.

The tipping model takes advantage of consumers’ lack of awareness of how the tips add up, and how the price easily gets into the territory of payday loan pricing. The supposedly voluntary nature of the tips makes it easier to get sucked into a cycle of debt. As one borrower described:

> Earnin didn’t charge Raines a fee, but asked that he “tip” a few dollars on each loan, with no penalty if he chose not to. It seemed simple. But nine months later, what was originally a stopgap measure has become a crutch.
>
> “You borrow $100, tip $9, and repeat,” Raines, a highway-maintenance worker in Missouri, told me. “Well, then you do that for a bit and they raise the limit, which you probably borrow, and now you are in a cycle of get paid and borrow, get paid and borrow.” Raines said he now borrows about $400 each pay cycle.[194]

Most borrowers likely have no idea the high rate of interest they are paying:

> One former Earnin user, Nisha Breale, 21, who lives in Statesboro, Georgia—another state where payday lending is illegal—said she hadn’t fully realized that, when converted to an annual percentage interest rate, what seemed like a small $5 tip on a $100 advance payment (repayable 14 days later) was actually equivalent to a 130% APR.
>
> “I definitely didn’t think about the payback time and the interest,” Breale, a student at Georgia Southern University, said. “They just portray it as being so simple and so easy.”[195]

A review of the Dave app noted “overall, it was a little too easy to give an optional tip that’s equivalent to a higher APR,” with a default of a 10% tip that was 280.76% APR on a $75 advance for 13 days.[196]

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[194] Sidney Fussell, *The New Payday Lender Looks a Lot Like the Old Payday Lender*, The Atlantic (Dec. 18, 2019).

[195] Cyrus Farivar, NBC News, *Millions Use Earnin to Get Cash Before Payday. Critics Say the App Is Taking Advantage of Them* (July 26, 2019).

[196] Alex Nicoll, Insider, *I Tried Out Dave, the Mark Cuban-Backed App That Wants to Kill Bank Overdrafts–and I Keep Thinking About 1 Oddly Manipulative Feature* (June 27, 2019).

Some users may manage to use tip-based services for free. But for-profit enterprises counting on tips as a profit center, with investors who need a significant return on investment, will not put up with a lot of non-paying users.

Fintech companies employ various strategies to make it difficult not to tip or to make the consumer feel compelled to tip. Earnin users reported having their access to advances restricted if they did not tip enough,[197] though Earnin appears to have changed that practice after it became public. Now, deep in the Terms and Conditions, are these paragraphs explaining how consumers who do not tip will lose their low balance alerts unless they remember to manually turn them back on each time:

> Balance Shield
>
> Allows you to set an alert to have Earnin send you a notification when your Bank Account falls below an amount that you set ($0–$400) to help you monitor your Bank Account's balance. Balance Shield also incorporates Cash Out, by automatically setting a cash out of up to $100 when your Bank Account balance has fallen below $100. Note, that a Balance Shield Cash Out is subject to your available earned wages, your Daily Max and Pay Period Max requirements. You are responsible for monitoring your Daily Max and Pay Period Max to ensure that the Cash Out application of Balance Shield is available to you. We may limit the amount we send you for Balance Shield Cash Out at any given time or over a period of time. We may also decline to offer Balance Shield to you at any time, without prior notice, if we reasonably believe such refusal is necessary or advisable for legal or security reasons, or to protect the Services.
>
> Balance Shield alerts can stay on indefinitely until you turn them off. There is no fee or charge to use Balance Shield alerts. Generally, Balance Shield Cash Out will need to be turned on manually after each Balance Shield Cash Out, however, setting a voluntary tip ($1.50–$14.50) triggers Earnin to automatically keep Balance Shield Cash Out on even after a Balance Shield Cash Out. If you choose to enable Balance Shield Cash Out to activate automatically, Balance Shield Cash Out will stay on indefinitely until you turn it off, and will automatically debit your account for the amount and tip you have set. Earnin will send you an annual reminder that Balance Shield is turned on.[198]

[197] Kevin Dugan, *Cash-Advance App Earnin Gets Subpoenaed by NY Regulator: Source*, New York Post, Mar. 28, 2019 ("Earnin encouraged users to leave a tip of anywhere between zero and $14 on a $100 weekly loan. Users who don't leave a tip appear to have their credit restricted. Meanwhile, a $14 tip would equate to a 730-percent APR—nearly 30 times higher than New York's 25 percent cap.").
[198] Earnin, Terms and Privacy (last updated Sept. 22, 2021) (emphasis added).

This means that, unless the consumer tips, the Balance Shield alert will be turned off if one is sent, and the consumer will have to manually turn it back on. In other words, for consumers who do not tip, the alerts will be turned off for the very consumers who have used them, and Earnin will stop providing advances to those consumers unless they know and remember to manually turn the alert back on each time.

The SoLo app—which requires consumers to designate the "tip" in advance of funding—"notes that loans are much more likely to be funded when users tip the maximum amount."[199]

Default tip amounts are often set in advance and may be difficult to undo. One article describes that Dave includes a 10% default tip and does not let you set a default of zero; if you do, it resets to 10%.[200] An Earnin user reported being completely unable to undo the default tip, even after deleting the app and reinstalling it.[201] An article about SoLo noted that "the only way to avoid [a tip] is through a toggle in SoLo's settings menu, which must be reactivated for each request. There's no way to opt out of donations while making the request itself."[202]

Apps may also use different user interfaces to send psychological signals and encourage quick action without thought about the default tip. On the Dave app: "With no tip, the background has become a desert. Dave [the bear], holding a dead plant, looks clearly upset."[203] Disingenuous statements encourage borrowers to "pay it forward" and to support a "community,"[204] ignoring the large companies and wealthy hedge fund investors who profit from the "tips." Companies also exploit the psychological phenomenon of "reciprocity," i.e., that most people will feel compelled

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[199] Fast Company, *These 2 Black Founders Aim to Offer a Fairer Alternative to Payday Loans* (Feb. 18, 2021).
[200] Alex Nicoll, Insider, *I Tried Out Dave, the Mark Cuban-Backed App That Wants to Kill Bank Overdrafts–and I Keep Thinking About 1 Oddly Manipulative Feature* (June 27, 2019).
[201] Woodstock Institute, Telephone Conversation with Brent Adams.
[202] Fast Company, *These 2 Black Founders Aim to Offer a Fairer Alternative to Payday Loans* (Feb. 18, 2021) ("When requesting a loan, for instance, SoLo asks borrowers to choose a "donation" to the app on top of their tip to the lender, starting at 7% or $3.50 for new borrowers seeking $50 loans. Technically, the donation is optional, but the only way to avoid it is through a toggle in SoLo's settings menu, which must be reactivated for each request. There's no way to opt out of donations while making the request itself. Industry watchdogs have also raised concerns about the tipping model. While SoLo's tips are also voluntary, and about 7% of loans funded on the platform involve no tipping at all, the app notes that loans are much more likely to be funded when users tip the maximum amount. Between tips and donations, users may end up paying a rate that's not much more favorable than payday loans, even if the model for late payments is less predatory.").
[203] Alex Nicoll, Insider, *I Tried Out Dave, the Mark Cuban-Backed App That Wants to Kill Bank Overdrafts–and I Keep Thinking About 1 Oddly Manipulative Feature* (June 27, 2019).
[204] *See* https://www.chime.com/spotme/ (last visited Apr. 25, 2022).

to give a tip and do not recognize actions designed to activate "obligatory giving."[205] Companies may promise donations to charity if people tip, without disclosing that only a small portion of the tip will be donated.

Even without direct messages or policies to disadvantage low tippers, consumers may believe they must make ample tips, or they will be cut off—a threat to people who are caught in a cycle of debt.

Regulators cannot be expected to constantly monitor the subtle and not so subtle back-end ways that companies will employ so that their customers tip. When caught using practices to coerce tips, companies may change their policies and then devise new ways to ensure they get paid.

7.1.5 "Tips" recommendations

Nonbank debit cards and banking apps are a form of prepaid account and should be held subject to the CFPB's prepaid account rules. These rules are designed for vulnerable unbanked and underbanked consumers who have had trouble with overdraft fees on traditional accounts, with protections aimed at overdraft and credit features on banking services. That is the population that nonbank banking apps are aimed at, with their marketing focused on the ability to overdraft. Treating nonbank debit cards as prepaid cards would also stop evasions by traditional prepaid card companies, as discussed in Section 4.2, *supra*.

Like traditional prepaid accounts, these nonbank deposit accounts clearly are capable of being loaded with funds, have the primary function of conducting transactions with multiple unaffiliated merchants or at ATMs."[206] The only question, then, is whether these products fall into the exemption for a checking account.[207] Because nonbanks cannot offer checking accounts and these accounts do not have checks, they do not fall into this exemption.[208]

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[205] *See* Linda & Charlie Bloom, *Honoring the Rule of Reciprocation*, Psychology Today (Oct. 10, 2015).
[206] 12 C.F.R. § 1005.2(b)(3)(i)(D)(1), (2).
[207] 12 C.F.R. § 1005.2(b)(3)(i)(D)(3) (also excluding share draft accounts and negotiable order of withdrawal accounts).
[208] *See* 12 C.F.R. § 1005.2(b)(3)(i)(D)(1) (exempting checking accounts from the prepaid accounts rule). The CFPB created confusion by stating in a small entity compliance guide that "checkless checking" accounts are checking accounts exempt from the prepaid accounts rule. That exception is not supported by the regulation or rulemaking and is not explained. To the extent that "checkless checking" accounts are exempt, the CFPB was referring to safe bank accounts offered directly by financial institutions that do not have overdraft fees or credit features. It could not and did not open up a glaring loophole for prepaid companies and other nonbanks to evade overdraft fee and credit feature rules. *See* National Consumer Law Center, Consumer Banking & Payments Law § 7.2.3.2.5 (6th ed. 2018), *updated at*

There are many reasons to treat deposit accounts offered by nonbank companies as prepaid accounts and as different from bank accounts offered directly by banks:

- Only banks can accept deposits.
- Only banks get direct federal supervision.
- Only banks get FDIC insurance. Funds that nonbanks accept for deposit into a prepaid account/banking app are not insured until they get to the bank.[209]
- Most banks have branches where consumers can open an account and ask questions.
- Most banks have robust live telephone customer service, unlike fintechs that rely on automated channels that are inadequate when there is a problem.[210]
- There is a long history of problems with nonbank deposit accounts, like prepaid cards, having issues such as accounts frozen with people unable to access their money.[211]

Nonbank debit cards and banking apps would benefit from not only the credit/overdraft protections of the prepaid accounts rule, but also its clear fee disclosure requirements, information access rules, and other protections.

In addition, the CFPB should:

- View "tips" on cash advance products and features as finance charges under TILA. There is no firm rule that voluntary payments cannot be finance charges,[212] and "tips" that cover the cost of loans and substitute for fees and interest serve the purpose of finance charges. Moreover, when a particular tip amount is included by default, there is a particularly strong argument for

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www.nclc.org/library (explaining the history of the exemption and why accounts without checks should be viewed as prepaid accounts, especially if they have overdraft fees).

[209] *See* Federal Deposit Insurance Corp., Banking with Apps (Nov. 2020).

[210] *See* Octavio Blanco, *The Big Problem With Online Banks—and What to Do About It*, Consumer Reports (July 29, 2021).

[211] *See* Federal Trade Commission, Press Release, Mobile Banking App Settles FTC Allegations That It Misled Users About Access to Funds and Interest Rates (Mar. 29, 2021) (Beam Financial); Andrew Griffin, *Revolut Down: Online Bank Hit by Major Issues on Black Friday*, Independent, July 26, 2021 (Revolut has a bank charter application pending but is not currently a bank)Carlson Kessler, ProPublica, A Banking App Has Been Suddenly Closing Accounts, Sometimes Not Returning Customers' Money (July 6, 2021); Kevin Wack & Kate Berry, *Prepaid Card Debacles, from BofA to the Kardashians*, American Banker, Feb. 27, 2022.

[212] As the Federal Reserve Board stated before authority over TILA was transferred to the CFPB: "The Board has generally taken a case-by-case approach in determining whether particular fees are 'finance charges,' and does not interpret Regulation Z to automatically exclude all 'voluntary' charges from the finance charge." 61 Fed. Reg. 49,237, 49,239 (Sept. 19, 1996).

viewing it as a compulsory charge.[213] For those who pay them, tips have the same impact as other fees and should be subject to the same disclosure and other legal limits. Moreover, unlike other charges that are excluded when they are voluntary, such as credit insurance,[214] tips do not pay for any additional product or service (and they also do not go to a human being who provided good personal service); they are simply the cost of the original credit.

- Supervise tip-based cash advances as payday loans under the CFPB's supervision authority.
- Enforce the Military Lending Act's 36% rate cap against tip-based credit products.

The CFPB must put a stop to the tips model before it spreads further. Allowing lenders to escape credit or other laws whenever they claim that interest payments or fees are voluntary will only lead to a game of whack-a-mole.

7.2 Inflated expedite fees on nonbank banking and cash advance apps

As discussed in the previous section, a number of nonbank banking and cash advance apps have payday loan features that collected expedite fees if the consumer wants the money instantly. As with earned wage advances, it is likely that most consumers choose instant delivery, as these products, like traditional payday loans, cater to people who want "fast cash" to meet a shortfall.

These apps typically deliver funds for free through standard delivery, from one to five days. That delivery time may be deliberately slowed down beyond the normal delivery time for an ACH payment (or, in some cases, an internal bookkeeping maneuver.) But they charge extra for funds to be delivered instantly.

The fees for instant delivery appear to be far more than the cost to the provider. Instant delivery can happen through two types of channels. If the consumer has a deposit account with the app provider—as is the case of the nonbank banking apps—"delivery" is likely a mere bookkeeping change with no actual money movement; the provider just increases the balance in the account and makes those funds available. Thus, the cost to the provider is essentially zero.

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[213] Under EFTA's ban on compulsory repayment by electronic transfer or on compulsory use of a particular account to receive wages or government benefits, courts have found that if electronic repayment or use of a particular account is a "default" method, then that violates the ban on compulsory use even if the consumer can opt out. *See* National Consumer Law Center, Consumer Banking & Payments Law § 5.9.5.1 & n.1138 (6th ed. 2018), *updated at* www.nclc.org/library.

[214] However, as discussed in Section 8.2.1, *infra*, credit insurance usually is not voluntary and should be treated as a finance charge.

If funds are delivered to an outside account, the provider likely uses one of the instant delivery channels such as The Clearing House's RTP or Visa Direct. As discussed in Section 6.2, *supra*, the cost of those channels is about $0.45, but the expedite fees are far higher.

Inflated expedite fees mask the cost of the advances. They evade TILA disclosure requirements, leading the providers to disclose 0% APR or no APR at all.

Delivery fees often vary based on the size of the advance. Yet RTP has a fixed $0.45 fee regardless of the amount sent,[215] and the other instant delivery options likely also do not vary, at least for the range of advances—$20 to around $300—that these apps offer. Thus, there is a particularly strong argument that expedite fees that increase with the amount of credit are disguised finance charges imposed "as an incident to or a condition of the extension of credit."[216]

For example, MoneyLion offers "CASH ADVANCES UP TO $250 WITH NO INTEREST."[217] MoneyLion states: "Link your checking account to qualify for 0% APR cash advances. No credit check." In addition to tips (discussed above), MoneyLion charges a "Turbo Fee" if people want their advance faster than "regular delivery." Only by scrolling to the bottom of the Instacash page and opening up the answer to the FAQ on "How much does Instacash cost?" does the consumer see this fee schedule:[218]

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[215] *See* The Clearing House, Simple, Transparent, Uniform Pricing for All Financial Institutions (last visited Apr. 25, 2022).

[216] Reg. Z, 12 C.F.R. § 1026.4(a).

[217] *See* https://www.moneylion.com/instacash/ (last visited Apr. 8, 2022).

[218] *Id.*

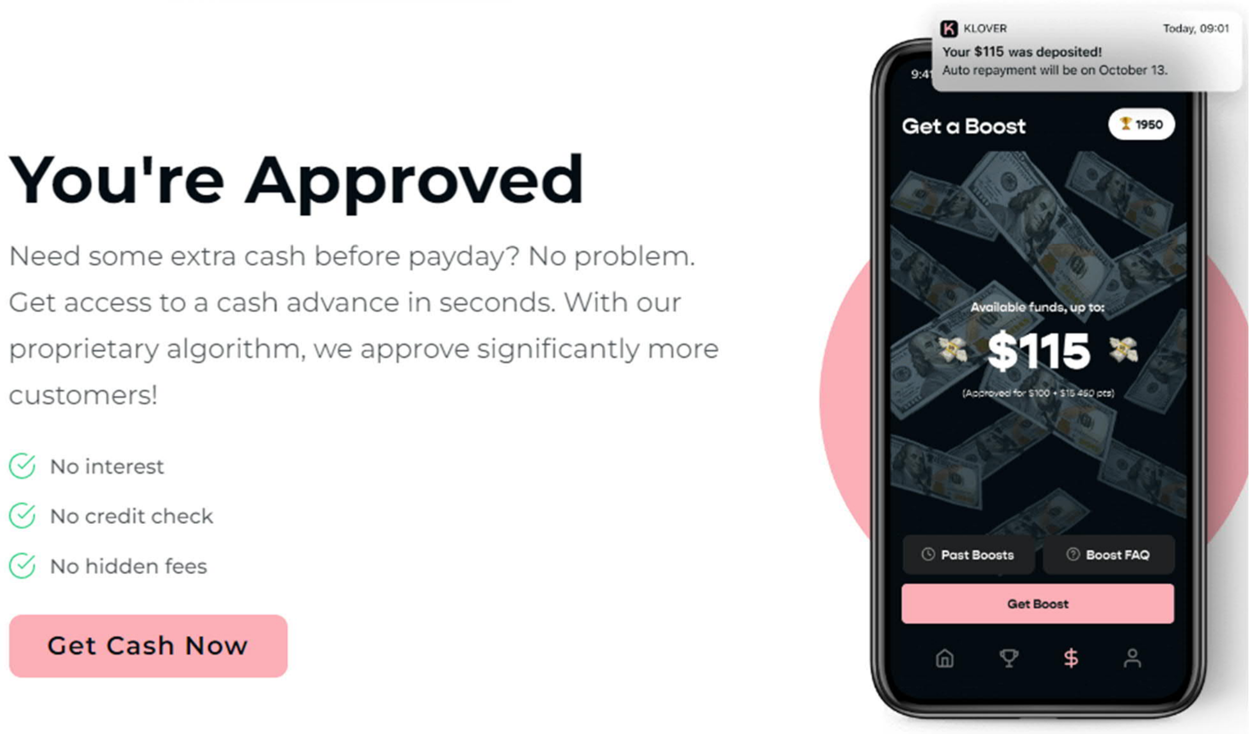
Each time you get an Instacash advance, you can select from these disbursement options, some of which have associated costs:

- Regular delivery (12 – 48 hours) to your RoarMoney account – $0
- Regular delivery (3 – 5 business days) to your external checking account – $0

	Turbo Fee	
Disbursement Amount	RoarMoney account	External debit card
$5 or less	$ 0.99	$ 1.99
$10 to $15	$ 1.49	$ 2.49
$20	$ 1.99	$ 2.99
$25 to $35	$ 2.99	$ 3.99
$40 to $70	$ 3.99	$ 4.99
$75 to $95	$ 4.99	$ 6.49
$100	$ 5.99	$ 7.99

The “regular delivery” times appear to be deliberately slowed down to induce people to choose instant delivery. Delivery to a MoneyLion RoarMoney account is 12 to 48 hours, even though that is an internal move and MoneyLion can probably make those funds available instantly at essentially no cost. Delivery to an external debit card is three to five business days, but that delivery likely takes place through an ACH transfer, which normally takes only one business day.

Other cash advance apps and nonbank bank apps with cash advance features have similarly inflated and varying expedite fees. Klover offers cash advances—which they appear to deny are credit[219]—"in seconds" that have "No interest" and "No hidden fees:"[220]



But in addition to tips and subscription fees, Klover collects expedite fees up to $9.99. Klover states: "While you will generally receive a Balance Boost within three (3) business days depending on processing times, if you choose to pay the Express Fee, the Balance Boost will be delivered to you within 24 hours."[221] Expedite fees are: "Up-to $250, ($9.99); Up-to $50 ($7.49); Up-to$25 ($2.99); Up-to $10 ($1.99)."[222]

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[219] The terms and conditions say: "Klover offers a service that provides advances or 'Balance Boost(s)' based on your anticipated income ('Balance Boost Service'). The Balance Boost Service is a non-recourse sale of future wages to Klover." Klover, Klover Terms and Conditions ¶ 6.1 (last visited Apr. 8, 2022). For a discussion of why "non-recourse" arguments do not take credit out of TILA coverage, see *NCLC/CRL EWA Letter to CFPB* at 16–20. For discussions under state law, see National Consumer Law Center, Consumer Credit Regulation § 9.10.4.4.1 (3d ed. 2020), *updated at* library.nclc.org; Comments of National Consumer Law Center & Center for Responsible Lending to California Dept. of Financial Protection & Innovation re: PRO 02-21, Proposed Rulemaking under the California Consumer Financial Protection Law: Earned Wage at 16–20 (Mar. 15, 2021).

[220] *See* https://www.joinklover.com/ (last visited Apr. 8, 2022).

[221] Klover, Klover Terms and Conditions ¶ 6.2 (last visited Apr. 8, 2022).

[222] *Id.* ¶ 6.3.

Klover makes no mention of its tips or expedite fees in answer to the question "How does Klover make money?"[223]

How does Klover make money? +

Your custom profile enables Klover to show you relevant offers in the form of advertising, to earn or save with our partners, and to gather anonymous market research.

We'll always stay true to our mission of leveraging data to give you access to great financial services.

Dave offers "up to $250 advances without paying a fee."[224] But deep in the terms and conditions is language stating that consumers who want their advances quickly will pay an "Express Fee" of $1.99 to $5.99, depending on the amount advanced:[225]

9.2 Express Fees

You may request that Dave expedite disbursement of your Advance by paying an optional fee (the "Express Fee"). While you can generally receive an Advance within three (3) business days depending on processing times, if you choose to pay the Express Fee, we will use a faster delivery method that will deliver the Advance to you within 8 hours. The amount of the Express Fee is determined by the amount of your Advance:

Advance Amount	Optional Express Fee
$5.00 or less	$1.99

$5.01 to $15.00$2.49

$15.01 to $20.00$2.99

$20.01 to $74.99$3.99

$75.00 to $99.99$4.99

$100 to $200.0$5.99

As described in the tips section, Albert's home page offers advances up to $250 with "No interest. No credit check."[226] The "Learn more" link goes to a page that mentions "a

[223] Klover, FAQs (last visited Apr. 8, 2022).
[224] *See* https://dave.com/ (last visited Apr. 8, 2022).
[225] Dave, Dave Terms of Use (last visited Apr. 8, 2022).
[226] *See* https://albert.com/ (last visited Apr. 8, 2022).

small fee a small fee to get your money instantly or get cash within 2–3 days for free."[227] That same page also announces in large type "No hidden fees. Ever." But in smaller type below the page mentions "one small fee"—the amount of which is hidden. Even the terms and conditions (which are difficult to find) do not say what that fee is, only that there is "one-time non-refundable fee if [the cash advance is] made on the same day of the request."[228]

Earnin offers a Service called "Lightning Speed" to expedite delivery of its advances, as described in the Terms of Service:

> Lightning Speed
>
> Depending on your bank, by providing us your debit card information, or banking routing number and Bank Account information, you may be able to Cash Out with Lightning Speed, a service that enables funds associated with Cash Outs to be expedited. If Lightning Speed is unavailable to you, you will generally receive your Cash Out within the next 2-3 Banking Days after you request a Cash Out in your Bank Account. Otherwise If [sic] there are no issues you provide us with your debit card information, you should be able to receive your Cash Out within the same Banking Day. Fees may apply to Lightning Speed in some instances.[229]

Lightning Speed is required for use of Earnin Express,[230] a deposit account offered by Earnin through Evolve Bank & Trust.[231] While the Earnin Terms of Service state that

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[227] *See* https://albert.com/instant/ (last visited Mar. 28, 2022).

[228] Albert, Albert's Terms of Use (Feb. 10, 2022).

[229] Earnin, Terms and Privacy (last updated Sept. 8, 2021) (emphasis added).

[230] *Id.* ("Because Earnin Express requires Lightning Speed, funds from your Earnin Express Account that are to be credited to your Bank Account, will arrive within the same Banking Day.")

[231] "Earnin Express is a new app feature that gives our community an upgraded Cash Out experience. It's a way for you to potentially reach a higher pay period Max and a possibility to receive your paycheck early by routing your paycheck through Earnin." Earnin, What Is Earnin Express and How Does It Work? (last visited Apr. 8, 2022).

fees may apply to Lightning Speed, those fees could not be found from a skim of both the Earnin terms[232] and the Evolve terms,[233] and both sets of terms denied charging any fees.

The CFPB should take action to ensure that these fintech payday lenders are not disguising their finance charges in inflated and hidden expedite fees.

7.3 Monthly or subscription fees for credit features on banking apps

Some banking and cash advance apps have monthly, membership or subscription fees. These fees typically cover a basket of services that includes the ability to overdraft or take advances.

To the extent that these fees are imposed as an incident to or a condition of the extension of credit,[234] they are finance charges under TILA.[235] The case for TILA coverage is especially strong if the credit feature, or a larger amount of credit, is only available on a higher-priced "premium" version and credit is the primary reason that a consumer would want that version. Depending on the amount of the fee and the other services provided, if credit is the primary benefit of the account, that fee might appropriately be viewed as a finance charge even if credit is available without paying for a higher-level account.

8 Junk fees related to insurance

8.1 The cost of insurance tracking

8.1.1 Overview

The cost of tracking the status of the insurance coverage required by auto and mortgage creditors is a well-concealed junk fee that the CFPB should investigate. The cost of tracking is not part of the business of insurance. Instead, it is a routine loan servicer responsibility for which creditors compensate servicers.[236] But, as explained

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[232] Earnin, Terms and Privacy (last updated Sept. 8, 2021) ("There are no fees or costs associated with Earnin Express.").

[233] Earnin, Evolve Bank & Trust Customer Account Terms ("We do not charge any fees for your Accounts. Earnin may charge you fees separate for its Services, pursuant to the Earnin Terms of Service.") (last visited Apr. 8, 2022).

[234] Reg. Z, 12 C.F.R. §1026.4(a).

[235] We will not, in these comments, get into the question of whether the advances are open-end credit (in which case the fee must be disclosed but not included in the APR) or closed-end credit (in which case the fees would be part of the APR).

[236] We have confirmed that mortgage servicers are paid for insurance tracking but have not been able to do so for automobile financing.

below, servicers and insurers have colluded to transfer this cost to the small portion of borrowers who pay force-placed insurance.

Both insurers and servicers benefit from this arrangement at the cost of borrowers. The servicer benefits by pocketing a portion of the servicing fee that it otherwise would have spent on tracking. The insurer benefits by getting the servicer's business in a market well-known for reverse competition.

The CFPB has no jurisdiction over the business of insurance, but it does regulate consumer creditors and their servicers. The Bureau should use its authority to investigate the extent of this practice and its effect on consumers. We make recommendations for addressing it in Section 8.1.3, *infra*.

8.1.2 Fees for insurance tracking are hidden in the premium for force-placed insurance, resulting in a small subset of borrowers bearing the cost for the creditor's entire portfolio

Nearly all auto finance and home mortgage creditors require property insurance on the credit collateral. While some auto creditors require a Vendor's Single Interest policy, others require the borrower to maintain insurance. If a borrower fails to do so, the servicer will impose coverage on the borrower. This type of insurance coverage is known as force-placed insurance (FPI). Ensuring that every borrower in a portfolio maintains the required insurance is a complex operation, and servicers are justifiably compensated for it by the owner of the portfolio. Due to the complexity and scale of insurance tracking, servicers routinely outsource tracking to third parties. This is where the problem begins, and it requires some background to explain.[237]

There are two categories of FPI: "blanket" coverage, and "standard" coverage. Blanket FPI covers a servicer's entire portfolio and the premium is calculated based on the size of the portfolio. All borrowers share in the cost of blanket coverage and the premium is not affected by whether individual borrowers maintain their own policies or not. Standard FPI is far more common. A servicer using standard FPI purchases a master policy and then adds individual properties to it as needed, when borrowers fail to maintain their own policies. The insurer charges the servicer based on the number of individual properties covered.

With standard FPI, it is vital to actively monitor the status of each borrower's individual insurance policy. The servicer must do so in order to notify the insurer each time it becomes necessary to update the master policy by adding or removing a property. Monitoring a whole portfolio of individual property insurance policies takes significant

[237] This section is submitted by AFR, CFA, and NCLC.

resources. Traditionally, insurance tracking, as it is usually called, is the responsibility of a servicer's escrow department.

According to a treatise on residential mortgage lending,

> The [servicer's] escrow administration department ensures the protection of the security interest by determining whether adequate coverage is in place and is current with a mortgagee-payable clause for required insurances or credit guarantees. This may include the following: hazard, flood, private mortgage, FHA, VA, or other state/federal housing agency insurance or credit guarantee.
>
> . . . .
>
> The escrow administration accomplishes this in one of three ways: it either collects funds from the borrower and disburses payments for all required taxes and policies; it monitors the status of tax payments and required policies, "force-placing" them if it receives notification of cancellation; or, a less common approach is to take out a blanket or umbrella insurance policy—a mortgage impairment policy—to cover any losses sustained as a result of individual loan tax liens or insurance lapses of coverage."[238]

Fannie Mae's servicing guide makes clear that servicers are responsible for tracking the status of borrowers' insurance policies: "The servicer must ensure at all times that any required property insurance coverage is maintained to protect Fannie Mae's interest in the mortgage loan."[239] In addition, "[t]he servicer must . . . [i]mmediately obtain new coverage to meet Fannie Mae's requirements if the borrower allows the insurance coverage to lapse."[240] The owner of a loan portfolio compensates the servicer for this responsibility, along with all the servicer's other duties, with a "servicing fee."[241]

As mentioned above, servicers typically outsource their insurance tracking duties to third parties. But that third party is usually the same insurance company that provides the servicer's FPI.[242] This is not just a convenience. Instead it is a consequence of

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[238] Thomas Pinkowish, Residential Mortgage Lending 507–508 (6th ed. 2011).

[239] Fannie Mae Servicing Guide, B-2-01, Property Insurance Requirements Applicable to All Property Types (Dec. 8, 2021).

[240] *Id.*

[241] *See generally* National Consumer Law Center, Mortgage Servicing and Loan Modifications § 1.3 (2019), *updated at* www.nclc.org/library.

[242] Government Accountability Office, GAO-15-631, Lender-Placed Insurance: More Robust Data Could Improve Oversight 5 (Sept. 2015); Federal Housing Finance Agency, Office of Inspector General, EVL-

reverse competition in the FPI industry.[243] In order to curry favor with servicers, insurers offer to provide portfolio-wide insurance tracking for free. The insurer then recoups the cost of tracking by charging higher FPI premiums. The servicer knowingly pays the inflated FPI premium without complaint or negotiation because the servicer uses its authority under the loan contract to demand full reimbursement from the borrower—who has no control over the cost of the premium or who provides the tracking. As a result, a small group of individual borrowers end up paying to track other borrowers' insurance.

As explained by the Government Accountability Office,

> Insurers typically factor the expenses associated with [monitoring borrower policies] into the [FPI] premium rates. . . . When the servicer places an [FPI] policy, it pays the premium to the FPI insurer and reimburses itself with funds from the borrower's escrow account or by adding the premium amount to the mortgage's principal balance.[244]

In other words:

- The owner of the loan pays the servicer to track borrowers' insurance;
- The servicer contracts with the FPI insurer to do the tracking;
- The insurer conceals the bill for tracking the entire portfolio in the cost of the insurance premium, and bills the servicer for the premium;
- The servicer knowingly pays the premium; and

2014-009, FHFA's Oversight of the Enterprises' Lender-Placed Insurance Costs Evaluation Report, Summary of Findings 8 (June 25, 2014); Fannie Mae, Request for Proposal, Lender Placed Insurance Tracking Voluntary Insurance Lettering Program 2 (Mar. 6, 2012) ("Servicers are responsible for providing tracking services, per Fannie Mae Guidelines. Many large Servicers have chosen to outsource the Insurance Tracking and associated administrative process to third parties, the largest of which are affiliated with Lender Placed Insurers").

[243] *See generally* Birny Birnbaum, Overview of Lender-Place Insurance Products, Markets and Issues, Presentation to National Association of Insurance Commissioners Lender-Placed Insurance Regulatory Working Group Outreach Session § 15 (June 13, 2013), *available at* https://www.naic.org (describing reverse competition in lender-placed insurance industry).

[244] Government Accountability Office, GAO-15-631, Lender-Placed Insurance: More Robust Data Could Improve Oversight 6 (Sept. 2015). *See also id.* at 21 (noting FPI premiums include administrative cost of tracking); *id.* at 23 ("Some state regulators noted that some insurers provided tracking and other services for free or below cost, benefitting the servicer, but included the costs of such services in what they charge consumers.").

- The servicer then recoups the cost from borrower.

As a result, when the servicer bills the borrower for FPI, the servicer is actually billing for two separate items: the cost of insurance and the cost of monitoring. The insurance is a product that is only available from a licensed insurer. But the tracking a contractual responsibility of the servicer, which it has elected to outsource. By passing the cost of tracking along to the borrower, the servicer becomes able to pocket a part of the servicing fee that it would have otherwise needed to spend on tracking. The insurer offers this arrangement to get the servicer's business.

Passing the cost of tracking along to consumers is an unfair and abusive act for a number of reasons:

1) The expense covers monitoring the entire portfolio but is borne pro rata by the comparatively small portion of borrowers whose policies lapse;[245]

2) The servicer has already been paid for monitoring via the servicing fee;

3) The charge is mislabeled and concealed within the inflated FPI premium.

The servicers are not just passive actors at the mercy of insurers. They have alternatives:

- They could purchase blanket FPI, making tracking unnecessary or less costly.
- They could perform the tracking in-house.
- They could contract for tracking from someone other than their FPI insurer.
- They could contract for tracking to be charged separately in return for lower FPI premiums.
- They could require their FPI/tracking provider to identify the percentage of the FPI premium that covers tracking and deduct that amount from the reimbursement they seek from borrowers.

Instead the servicers have rejected all of these options because the current process is more profitable to them.

The McCarran-Ferguson Act[246] does not limit the Bureau's ability to regulate this junk fee because insurance tracking is not part of the "business of insurance." According to the U.S. Supreme Court, whether something is regulated as the business of insurance depends on three factors:

[245] *Id.* at 14 (discussing FPI placement rates).

[246] McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015).

- Whether the practice has the effect of transferring or spreading a policyholder's risk;
- Whether the practice is an integral part of the policy relationship between the insurer and the insured; and
- Whether the practice is limited to entities within the insurance industry.[247]

Especially considering that mortgage servicers are typically paid by investors to handle insurance tracking, there is no argument that it is part of the business of insurance. The fact that servicers and insurers have colluded to pass the cost of tracking along to consumers, concealed within an inflated insurance premium, does not change the service to one subject to the McCarran-Ferguson Act.

8.1.3 Recommendations

We recommend that the Bureau begin by using its supervisory authority to investigate the nature of negotiations and contracts between servicers and FPI providers and to determine the financial impact on consumers. Other sources of data include the National Association of Insurance Commissioners (NAIC), the Federal Housing Finance Agency (FHFA), and the New York, Florida, and California insurance regulators.

In 2015 the Government Accountability Office investigated the force-placed insurance industry and recommended "that NAIC work with state insurance regulators to collect sufficient, reliable data to oversee the LPI market."[248] In 2014 the FHFA Office of Inspector General found that "the Enterprises have suffered considerable financial harm in the [FPI] market . . ." from excessively priced [FPI] coverage."[249] From 2012 to 2014, regulators in New York, Florida, and California investigated FPI providers and found their rates to be excessive. Although the above reports and investigations focused on the insurers and their premiums, the data gathered is likely to show that the premiums were excessive, in part, because the insurers conspired with loan servicers to conceal the cost of free insurance tracking in the premiums, so servicers could pass that cost along to borrowers.

Ultimately, we recommend that the Bureau address this abusive practice by prohibiting servicers from:

- Accepting free or reduced-cost insurance tracking; or

[247] Union Lab. Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982).

[248] Government Accountability Office, GAO-15-631, Lender-Placed Insurance: More Robust Data Could Improve Oversight (Sept. 2015).

[249] Federal Housing Finance Agency, Office of Inspector General, EVL-2014-009, FHFA's Oversight of the Enterprises' Lender-Placed Insurance Costs Evaluation Report, Summary of Findings 8 (June 25, 2014).

- Charging individual consumers more for the cost of insurance tracking than their true, pro rata share.

9 Mortgage servicing fees

The Bureau has correctly observed that mortgage-related junk fees can create a barrier to homeownership and can strip wealth away from existing homeowners.[250] When it comes to unnecessary or inflated mortgage servicing fees, there are three primary areas of concern: property inspection fees, bankruptcy fees, and foreclosure-related fees.

9.1 Property inspection fees

Servicers often begin charging the borrower for property inspections whenever a mortgage is in default. Borrowers are charged even when they continue to communicate with the servicer, continue to make payments (as with a rolling default), or enter into loss mitigation. This practice raises serious questions about whether the charges are reasonably necessary or authorized by the security agreement.[251]

The Fannie Mae and Freddie Mac uniform instrument permits servicers to "do and pay for whatever is reasonable or appropriate to protect Lender's interest in the property and rights under the Security Instrument."[252] Despite this contractual language, mortgage servicers often hire property inspectors to perform exterior and even interior property inspections, and secure and winterize properties, where there is no reasonable basis to believe the property to be abandoned or at risk.[253] Property inspection fees are junk fees to the extent they are not reasonable or appropriate, do not provide value equivalent to the cost imposed on borrowers, or, as is sometimes the case, provide no value at all. Beyond that, they can lead to extensive injury to

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[250] Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services, 87 Fed. Reg. 5801, 5802 (Feb. 2, 2022).

[251] *See generally* National Consumer Law Center, Mortgage Servicing and Loan Modifications § 2.10.2 (2019), *updated at* www.nclc.org/library.

[252] *See, e.g.*, Freddie Mac, Uniform First Lien Security Instruments, *available at* https://sf.freddiemac.com.

[253] *See, e.g., In re* Stewart, 391 B.R. 327 (Bankr. E.D. La.), *overruled in part by* 647 F.3d 553 (5th Cir. 2011); Norboe v. Wells Fargo Bank, 2018 WL 113575 (Conn. Super. Ct. Jan. 31, 2018); Complaint, People of the State of Ill. v. Safeguard Properties, L.L.C., No. 2013- CH-20175, 2013 WL 5290237, at *5 (Ill. Cir. Ct. Sept. 9, 2013); Chris Odinet, *Banks, Break-Ins, and Bad Actors*, 83 Univ. Cincinnati L. Rev. 1155, 1159–1160 (2016). *See also* Jessica Silver-Greenberg, *Invasive Tactic in Foreclosures Draws Scrutiny*, New York Times, Sept. 9, 2013.

homeowners who find their personal property stolen or their home damaged or inaccessible as a result of such inspections.[254]

The CFPB should consult with the government sponsored enterprises and all federal agencies that supervise agency loan programs[255] to ensure that their property inspection requirements are not imposing undue costs on borrowers. Fannie Mae and Freddie Mac require a property inspection once a month when a loan becomes ninety-days delinquent. But servicers are directed *not* to perform ongoing monthly property inspections if the home is occupied by the borrower and either the servicer has made quality right party contact[256] or received a full payment in the past thirty days, or the borrower is performing under a loss mitigation plan or bankruptcy plan.[257] The Bureau should work with the Enterprises to review how servicers are carrying out these policies.

HUD requires servicers of forward FHA-insured mortgages to conduct occupancy inspections every 25–35 days "until the occupancy status is determined."[258] For reverse mortgages, HUD requires servicers to conduct a monthly visual inspection whenever the loan is in "due and payable" status, regardless of whether the property was deemed vacant at any point or whether the borrower is performing on a repayment plan.[259] The reverse mortgage policy goes far beyond what is reasonable and necessary. Even the FHA forward mortgage policy leaves room for excessive, unnecessary inspections.

Servicers of privately held, non-federally-backed mortgages may not have an investor standard to follow. As a result, they may be even more likely to be charging borrowers for excessive property inspections.

The CFPB should review servicer practices and determine whether excessive property inspections are leading to unnecessary costs to borrowers or even greater harms.

9.2 Bankruptcy fees

The Bureau should also closely review fees charged by mortgage servicers in Chapter 13 bankruptcy cases. Many of these fees relate to mortgage servicer compliance with

[254] *See generally id*.
[255] In other words, the VA, FHA, and USDA.
[256] Quality right party contact (QRPC) is the standard for communicating with the borrower about resolution of a mortgage loan delinquency. Fannie Mae Servicing Guide § D2-2-01, Achieving Quality Right Party Contact with a Borrower (Nov. 14, 2018).
[257] Fannie Mae Servicing Guide § D2-2-10, Requirements for Performing Property Inspections (Nov. 17, 2021); Freddie Mac Servicing Guide § 9202.12, When to Order a Property Inspection.
[258] FHA Handbook 4000.1, § III(A)(2)(h)(xi)(B) (page 955).
[259] Draft Home Equity Conversion Mortgage Handbook 4000.1, § III(B)(2)(b)(v) (page 292).

Federal Rule of Bankruptcy Procedure 3001(c)(2)(C) and 3002.1, which were implemented on December 1, 2011 in response to long-standing problems with mortgage servicing and claim documentation in Chapter 13 cases.[260]

Bankruptcy Rule 3001(c)(2)(C) requires disclosure of prepetition default fees and arrearage amounts on the initial proof of claim filed by the mortgage creditor. Rule 3002.1 requires certain disclosures of a mortgage borrower's payment obligations during a chapter 13 bankruptcy, including disclosure of postpetition mortgage payment changes and assessed fees on the account that are required by the mortgage contract and nonbankruptcy law. These rules were intended to give the consumer debtor information needed to avoid further default and to emerge from bankruptcy without being surprised by undisclosed fees and payment amounts due.[261] Compliance with the rules also ensures that debtors and trustees have the information needed to correctly maintain mortgage payments during the Chapter 13 case in accordance with debtors' plans.

When Bankruptcy Rules 3001(c)(2)(C) and 3002.1 were initially adopted, it was intended that most, if not all, of the Rules' requirements would be performed by non-attorney personnel who work for mortgage servicers. Several of the requirements, such as providing payment change notices, rely upon actions that are routinely performed by mortgage servicer employees without attorney involvement, such as preparing annual escrow account statements and interest rate adjustment notices under the Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA). These RESPA and TILA forms are attached to Official Form 410S1, as applicable, when the claim holder complies with Rule 3002.1(b). Similarly, the information required to populate mortgage proof of claim attachment Official Form 410A, including the payment history, is drawn from the mortgage servicer's system of records. In fact, the Advisory Committee Note when the form was revised in 2015 states that "[b]ecause completion of the form can be automated, it will permit claimants to comply with Rule

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[260] See Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008).

[261] *In re* Thongta, 480 B.R. 317, 319 (Bankr. E.D. Wis. 2012) ("Previously, debtors could emerge from bankruptcy facing significant post-petition mortgage obligations that they did not know existed because mortgage creditors, for fear of violating the automatic stay, would not inform debtors of post-petition charges. To combat the problem, courts adopted local rules or confirmed plans requiring mortgage lenders to disclose all post-petition charges. With the enactment of Rule 3002.1, courts nationally are able to ensure that debtors who successfully complete 'cure and maintain' Chapter 13 plans emerge from bankruptcy with either a fully current home mortgage or the knowledge of and ability to object to any claimed amounts due."); *In re* Sheppard, 2012 WL 1344112, at *6 (Bankr. E.D. Va. Apr. 17, 2012) ("Rule 3002.1 is a procedural mechanism designed to effectuate the Chapter 13 policy goal of providing debtors a 'fresh start.'").

3001(c)(2)(C) with efficiency and accuracy." All of these forms can be prepared, filed, and served by mortgage servicer employees with no, or minimal, attorney involvement.

However, servicers have recently begun charging excessive fees for compliance with Rules 3001(c)(2)(C) and 3002.1, claiming that these fees can be passed on to debtors as attorney fees under the fee shifting provision of the mortgage documents. For example, attorney fees for reviewing the initial chapter 13 plan and preparing Official Form 410A until recently had been in the range of $200 to $400. While even those amounts were unreasonable in some cases, debtors are now routinely being charged $1000 to $1500, even in cases that do not involve any objection to the plan. Servicers also charge debtors fees of approximately $50 to send payment change notices during chapter 13 cases based on escrow or interest rate adjustments, fees that they are not permitted to charge for similar notices to consumers outside bankruptcy.[262] While courts have questioned these fees,[263] some courts have approved them.[264] However, most of these fees simply do not get challenged due to the costs of bringing an objection and because debtors rightfully fear that an unsuccessful challenge will result in even more fees.

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[262] Federal law prohibits mortgage creditors from charging fees for providing these TILA and RESPA notices to consumers. 12 U.S.C. § 2610.

[263] *In re* Maldonado, 2019 WL 4410070 (Bankr. N.D.N.Y. Aug. 6, 2019) (reducing $500 fee for proof of claim to $200 on basis that most of the work is administrative and can be completed by a non-attorney); *In re* Ochab, 586 B.R. 803 (Bankr. M.D. Ala. 2018) ($500 proof of claim fee and $400 attorney fee were unreasonable and not supported by adequate description and documentation); *In re* Garcia Rivera, 2018 WL 5281625 (Bankr. D. P.R. Oct. 22, 2018) (fee for filing of a Rule 3002.1(c) notice disallowed in absence of evidence why preparation of notice was not ordinary business function or specific reasons why the assistance of counsel is needed); *In re* Yotis, 2016 WL 502006 (N.D. Ill. Feb. 5, 2016) (disallowing $21,329 in creditor's postpetition attorney fees, which represented over half of the amount creditor asserted was due); *In re* Pittman, 2015 WL 1262837 (Bankr. D.S.C. Mar. 16, 2015) (denying creditor request for $650.00 in postpetition fees where court could not determine from notice whether any attorney was involved or that the fees were allowable); *In re* Roife, 2013 WL 6185025 (Bankr. S.D. Tex. Nov. 26, 2013) (disallowing $50 in legal fees for preparation of the Fee Notice and $75 for preparation of the Notice of Mortgage Payment Change); *In re* Boyd, 2013 WL 1844076 (Bankr. S.D. Tex. May 1, 2013) (same); *In re* Carr, 468 B.R. 806 (Bankr. E.D. Va. 2012) (response statement under Rule 3002.1(g) is not a pleading and its preparation does not involve the practice of law); *In re* Adams, 2012 WL 1570054 (Bankr. E.D.N.C. May 3, 2012) (disallowing $50 charge filing a Notice of Mortgage Payment Change). *See also In re* Hale, 2015 WL 1263255 (Bankr. D.S.C. Mar. 16, 2015) (merely listing "review of plan" and "proof of claim" on the notice did not provide sufficient detail to the debtor and counsel to determine whether the fees were justified).

[264] *In re* Morris, 603 B.R. 127 (Bankr. W.D. Okla. 2019) ($900 attorney fees for proof of claim and plan review approved); *In re* Susanek, 2014 WL 4960885 (Bankr. W.D. Pa. Sept. 30, 2014) (fees allowed because appropriate for Rule 3002.1(c) notices to be reviewed by attorney).

We do not believe it is reasonable for mortgage servicers to retain counsel as a matter of course to perform the claim-filing function in chapter 13 cases. While some limited attorney involvement may be appropriate in cases where there are legitimate objections to the debtor's plan or the claim amounts, we believe that servicers have devised this system of "outsourcing" the claim-filing and Rule 3002.1 functions to law firms primarily to charge debtors for work that would otherwise be done in-house by non-attorneys and therefore not recoverable against debtors. This practice also creates the false impression in the bankruptcy system that the fees charged to consumer debtors represent the provision of legal services and that they are reasonable and recoverable against the borrower under the fee-shifting provisions of the mortgage documents, leading parties involved to believe that the fees are impervious to legal challenge.

We also have concerns about fees that servicers charge directly (not as attorney fees) to debtors in bankruptcy cases. In addition to being actually incurred by the holder or servicer, fees must be reasonable and properly documented in order to be valid.[265] Courts have sometimes disallowed charges when the servicer cannot document the basis for a charge after a debtor's good faith request to do so through formal discovery or other informal means.[266] If the fee is for services that are unnecessary, then it is not reasonable.[267] In most cases it is not necessary for the mortgage holder to do anything

[265] *In re* Williams, 1998 WL 372656 (Bankr. N.D. Ohio June 10, 1998) (bank failed to meet burden of proving its fees are reasonable, by failing to provide adequate documentation); *In re* Good, 207 B.R. 686 (Bankr. D. Idaho 1997) (assessing reasonableness of fees charged by mortgage lender).

[266] *In re* Brumley, 570 B.R. 287 (Bankr. W.D. Mich. 2017) (disallowing postpetition property inspection fees); *In re* Prevo, 394 B.R. 847 (Bankr. S.D. Tex. 2008) (disallowing foreclosure fees and costs, late charges, and broker's price opinion fees when servicer did not comply with basic supporting documentation requirements of Official Form B10 and Bankr. Rule 3001); *In re* Sacko, 394 B.R. 90 (Bankr. E.D. Pa. 2008) (disallowing servicer's charges for property inspections, property preservation costs, and escrow advances, and limiting the assessment of sheriff's sale costs and attorney fees due to servicer's failure to meet burden of production in documenting need for the charges).

[267] *In re* Dalessio, 74 B.R. 721 (B.A.P. 9th Cir. 1987); Wells Fargo Bank v. Jones, 391 B.R. 577 (E.D. La. 2008) (mortgage creditor failed to show that monthly property inspections during chapter 13 case were necessary and reasonable); *In re* Stewart, 391 B.R. 327 (Bankr. E.D. La. 2008) (finding no reasonable basis for assessing multiple drive-by inspection charges and paying for broker price opinion when borrower was current in long-term chapter 13 case and servicer was regularly in contact with borrower); *In re* Payne, 387 B.R. 614 (Bankr. D. Kan. 2008) (rejecting servicer's attempt to charge debtor for twenty-three drive-by inspections made during period when debtor was in open and clear occupancy of home and in constant contact with servicer).

to protect its interest in a bankruptcy case.[268] The fee also may be unreasonable if it exceeds the cost of the services performed.[269]

The Bureau should include a careful review of fees charged to consumer debtors in bankruptcy cases as part of its junk fees inquiry.

9.3 Foreclosure and attorneys' fees

Foreclosure and attorneys' fees are often inflated.[270] The mortgage holder and its servicer have little incentive to minimize them, because they can be passed on to the borrower. Many foreclosure attorneys and law firms use in-house paralegals or outsourced default-service providers (which may be affiliated with the law firm) to generate form documents that may take as little as fifteen minutes of time on a computer. In some cases, the borrower may be charged a fee for this work even though it may not involve the provision of legal services.[271] Such fees are likely unreasonable and not authorized by the underlying loan documents.[272] In some cases, the lender will charge a flat fee for attorney fees as soon as a case is referred to an attorney for foreclosure, even if the foreclosure is not completed or even commenced.[273] Attorneys'

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[268] *In re* Stewart, 391 B.R. 327 (Bankr. E.D. La. 2008) (finding no reasonable basis for assessing multiple drive-by inspection charges and paying for broker's price opinion when borrower was current in long-term chapter 13 case and servicer was regularly in contact with borrower); *In re* Payne, 387 B.R. 614 (Bankr. D. Kan. 2008) (rejecting servicer's attempt to charge debtor for twenty-three drive-by inspections made during period when debtor was in open and clear occupancy of home and in constant contact with servicer).

[269] *See In re* Stewart, 391 B.R. 327, 346 (Bankr. E.D. La. 2008) (servicer falsely represented broker price opinion as pass-through of a charge between $90 and $125, when it actually paid $50 for each opinion; servicer also improperly compounded late fees to charge $360.23 over thirteen months for one $554.11 missed payment).

[270] *See* National Consumer Law Center, Mortgage Servicing and Loan Modifications §§ 2.10.4, 2.10.6 (2019), *updated at* www.nclc.org/library.

[271] *See, e.g.*, Declaration of Stephanie Jeffries, *In re* Crowder, Case No. 06-36030-H4-13 (Bankr. S.D. Tex. filed June 8, 2009) (Exhibit A to Moss Codilis' Response to Oder to Show Cause) (declaration stating that law firm affiliate provides several "non-legal functions" for servicers, including preparing foreclosure notices and bankruptcy proofs of claims and reviewing bankruptcy plans, and that it "did not provide legal services" to the servicer in the case and did not have an "attorney-client relationship with the servicer").

[272] *See In re* Taal, 540 B.R. 24 (Bankr. D.N.H. 2015) (reducing mortgagee's claimed prepetition attorney fees of $11,399 to $4818).

[273] *In re* McMullen, 273 B.R. 558 (Bankr. C.D. Ill. 2001) (flat fee covering attorney fees for entire foreclosure proceeding found excessive when not prorated to cover only services actually performed prior to bankruptcy filing). *See also In re* Hight, 393 B.R. 484 (Bankr. S.D. Tex. 2008) (disallowing creditor's prepetition attorney fees for preparation of foreclosure sale when creditor failed to provide evidence pertaining to what work was done, who did the work, hourly rate, and time spent).

fees must be reasonable and must be actually incurred by the lender in order to be authorized by the contract.[274] However, economic realities and information gaps prevent most homeowners from reviewing or challenging these fees.

The CFPB should review the reasonableness for foreclosure and attorneys' fees passed onto borrowers by mortgage servicers.

10 Auto financing

10.1 Overview of junk fees in auto finance

While the CFPB has limited jurisdiction over auto dealers, the Bureau does have jurisdiction over auto finance entities and Buy Here Pay Here dealers. In most transactions the auto dealer is an originating creditor but the terms and practices of the transaction are closely controlled by another financing entity to whom the financing immediately will be assigned. Virtually all car leases and financing involving a consumer are subject to both TILA and ECOA. The creditors providing the financing are also subject to the Bureau's UDAAP authority.

Many of the problems with auto financing are comparable to those the Bureau has already addressed with mortgages. Typically consumers deal initially with sales personnel. After the consumer has invested considerable time and energy and believes they have a deal, they will be taken to the finance and insurance (or "F&I") office. There the consumer will all too often have their attention directed to portions of a retail installment sales contract or lease on a docupad operated by the F&I personnel or on pages of a lengthy contract flipped through by F&I personnel. Sometimes the overpriced add-ons and mysterious charges, such as service contracts, "GAP," and window etching will be intentionally hidden from the consumer while the document is reviewed. Sometimes consumers will be told the charge such as "VSI," or "doc fees"

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[274] *See* Korea First Bank v. Lee, 14 F. Supp. 2d 530 (S.D.N.Y. 1998) (lender was not entitled to recover more than it paid its attorney or more than was reasonable); *In re* Beach, 2011 WL 4963003 (Bankr. D. Idaho 2011) (under state law, attorney fee awards must be reasonable); *In re* Watson, 384 B.R. 697 (Bankr. D. Del. 2008) (rejecting lender's argument that fees did not have to be reasonable); *In re* Riser, 289 B.R. 201 (Bankr. M.D. Fla. 2003) (attorney fee assessment to debtors' mortgage account when no lender attorney ever appeared in case was "both illegal and fraudulent"). *See also In re* Coates, 292 B.R. 894 (Bankr. C.D. Ill. 2003) (creditor required to disclose agreement between itself and law firm so that court can determine exactly how much creditor is actually being charged for services); *In re* 1095 Commonwealth Ave. Corp., 204 B.R. 284 (Bankr. D. Mass. 1997) (secured creditor fraudulently overstated its claim for legal fees by failing to disclose two-tiered fee arrangement with its attorneys in which attorneys granted bank a discount but bank billed debtors at full standard rate), *aff'd in relevant part, modified in part on other grounds*, 236 B.R. 530 (D. Mass. 1999).

are required. There is often no clear explanation (or an incomprehensible one) of the charge or whether there are alternatives.

Consumers are encouraged to focus on the monthly payment or the sale price of the vehicle itself. They often do not discover they have been unexpectedly charged for things they thought were included in the transaction, such as the preparation of documents, until they get home. Reviewing the documents is often made difficult either by a well-placed F&I agent's hand covering charges not discussed, a quick flip through multiple pages to a signature page, or rapid zooming or flipping on an electronic docupad. Consumers are strong-armed into committing themselves to the transaction without the opportunity to shop for better offers or independently research the charges added to the vehicle price.

While car prices are often advertised, many related costs are not disclosed in advance. They may even be obscured by practices that prevent the consumer from discovering the true cost until it's too late. For example, consumers are often told that ancillary products are included in the sale price, and tactics in the F&I office prevent the consumer from noticing extra charges until they get home and finally have a chance to examine the contract.

Often high fees are charged for things such as the preparation of documents that cost the dealer almost nothing. The costs charged to the consumer for things like service contracts, window etching, tire protection, or GAP are typically much higher, often several times higher, than the cost to the dealer.[275] Sometimes consumers are charged for things like Vendor's Single Interest insurance (VSI) with no clear reason as to why they are being charged and what, if any, alternatives they have. Some fees, such as fees for early termination of leases are incomprehensible even if the consumer tries to understand what costs they may be responsible for when signing the paperwork. Some of these fees are for products such as VSI that the creditor/assignee requires the consumer to obtain.

These problematic fees are described and discussed in the following sections.

10.2 Doc fees, delivery and handling fees, prep fees

Consumers are often charged a document preparation fee, or "doc fee," in connection with car sales and financing. Generally these fees are entirely profit for the dealer or assignee that requires them. Almost all relevant documents are computer generated, so there is minimal actual cost to prepare the sale and financing documents. Fees such

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[275] *See* John W. Van Alst, Carolyn Carter, Marina Levy, & Yael Shavit, National Consumer Law Center, [Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary, and Discriminatory Pricing]() (Oct. 2017).

as a “Delivery and Handling Fee” or “Prep Fees” are also generally excessive. Sometimes these fees are duplicative, as they are already included in the manufacturer’s suggested retail price (MSRP) on which the price of the car is based.

10.3 Vendor’s single interest (VSI) insurance

At origination consumers are sometimes charged for VSI (distinguishable from force-placed insurance purchased after the sale by a creditor if a consumer fails to maintain insurance on the collateral). The “single interest” referred to is that of the creditor/assignee. A VSI policy makes no payments to the consumer if the car is damaged. Instead, it reimburses the creditor to the extent that the damage reduces the value of its lien.

TILA allows the cost of insurance against loss of or damage to property, including traditional VSI premiums, to be excluded from the finance charge, so long as the insurance can be obtained from a person of the consumer’s choice, and the consumer is informed of that fact.[276] In reality consumers have no other option for the purchase of VSI insurance. Some creditor/assignees require the inclusion of VSI coverage in every retail installment contract they fund, set the terms of coverage and customer costs of the VSI policy, and specify that the VSI premium should be included in the calculation of the amount financed rather than the finance charge. The VSI mandated by such finance entities sometimes includes coverage that is not part of traditional VSI and which should not be excluded from the finance charge. Rather than only protecting a vendor’s interest in tangible property, often VSI policies include coverage that is more accurately seen as credit loss insurance. The policies also sometimes include coverage for physical damage to the collateral after repossession, conversion and confiscation of the collateral, conversion by way of embezzlement or secretion of the collateral by the borrower, confiscation of the collateral by a duly constituted governmental authority, skip coverage to locate the borrower or the car, security interest non-filing coverage as the result of inability to effectuate repossession of collateral, and more.

These coverages cannot be excluded from the finance charge, for two reasons: first, they go beyond protection against loss of or damage to the collateral, and, second, they represent types of coverages that consumers cannot get themselves.[277] Determining whether any portion of a VSI charge may be excluded from the finance charge usually requires careful review of the insurance policy. Often agreements between the dealer and the assignee must also be reviewed, to determine whether the VSI charge is mandatory. Consumers almost never have access to these documents.

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[276] Reg. Z, 12 C.F.R. § 1026.4(d)(2)(ii).
[277] Reg. Z, 12 C.F.R. § 1026.4(d)(2).

10.4 Add-ons

Consumers are often charged for add-ons such as window etching, service contracts, and GAP waivers, in car sales and finance transactions. When a vehicle with negative equity is stolen or wrecked, the consumer's insurance coverage typically is limited to the value of the car, and not the remaining amount owed on the car financing. The consumer is then liable to the creditor for the amount of the car's negative equity at the time of the theft or accident. GAP products are advertised as holding the consumer harmless for the difference between the balance on the debt and the amount paid under an automobile physical damage insurance policy in the event that the vehicle is totaled or stolen.

It is common for consumers to owe more on their car than the car is worth. Many consumers drive off the dealer's lot owing substantially more than the car is worth. This "negative equity"—the amount by which the debt on the car exceeds its value—is attributable not just to depreciation, but also to consumers being overcharged for the car and sold expensive add-ons and charged unnecessary fees.

Sometimes GAP sold by dealers is from true, arm's length third parties, but in many states such a transaction would constitute insurance and invite additional scrutiny. So instead sometimes third parties will contract with the creditor/assignee to avail themselves of exceptions to the classification as insurance through a credit waiver exception.

GAP and other add-ons are often charged to the consumer after the consumer is led to believe they are included. The fee for these items is often much higher than the dealer cost. There is great discretion to charge consumers whatever charge the dealer thinks it can get away with. Creditor/assignees are intimately involved in the pricing for these products. They monitor and control the products closely, and often impose caps on total back end charges as well as or instead of caps on specific fees or back end products.

10.5 Early termination fees for leases

When a consumer leases a car, the contract typically imposes an extra fee if the lease is terminated early. These fees may apply if the consumer defaults or trades in the car before the specified termination date.

There are many abuses associated with early termination fees. Even with careful reading, the costs of early termination are often incomprehensible. Often the true cost of early termination is misrepresented or not clearly disclosed. If the lease is terminated, the lessor often misapplies its own early termination formula. Even if correctly applied, the formulas often produce excessive charges and unreasonable results. Often consumers are misled by the dealer as to the cost of early termination when trading in their leased vehicle early.

10.6 Recommendation

As part of its junk fees inquiry, the Bureau should include a careful review of fees charged to consumers in auto finance transactions.

11 Pay-to-pay fees

11.1 Overview of pay-to-pay fees

Pay-to-pay fees impact the most vulnerable consumers who are just trying to pay their bill. These fees, sometimes disingenuously called "convenience fees," are extra charges that creditors impose on customers seeking to pay a bill. Examples are a $5 charge to make a payment online, via the company's website, or a $20 charge to pay by phone.[278] These charges are in addition to the bill being paid.

The amount of these charges is usually far greater than what it actually costs the creditor to provide the service. One mortgage servicer, for example, charged customers $7.50 to make a payment online that appears to have cost the servicer only 40¢ to have Western Union process the payment.[279]

For many customers, it is wrong to portray these fees as voluntary or a convenience. For a significant portion of Americans, it is difficult to avoid pay-to-pay fees. Consumers taking out a loan have no way to know who the loan servicer will be or what fees the servicer will charge. And once an account is opened, most consumers lack the flexibility to refinance if the servicer starts charging these fees later.

Normally the only ways to avoid pay-to-pay fees are to make payments by mail (with a check or money order) or to make an ACH bill payment from the borrower's bank account. But these methods are difficult, slow, or effectively unavailable for many people.

Payments sent by mail require having an account with checks—something not even all bank accounts offer—or taking the time to purchase a money order. The consumer must also have the funds ahead of time and be able to predict when the mail will be received—something increasingly difficult to do given the strain the postal service has been under.

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[278] Consolidated Amended Class Action Complaint, Torliatt v. Ocwen Loan Servicing, L.L.C., No. 3:19-cv-04303-WHO, ¶ 1 (N.D. Cal. Feb. 14, 2020).

[279] Torliatt v. Ocwen Loan Servicing, L.L.C., 2021 WL 2948868, at *1 (N.D. Cal. July 14, 2021) (describing allegations).

Setting up an ACH transfer requires a bank account and can still result in an unpredictable one- to three-day delay in the payment being received, depending on whether a weekend or holiday intervenes.

Multiple surveys find that the majority of Americans live paycheck to paycheck.[280] A 2019 survey by the American Payroll Association asked "How difficult would it be to meet your current financial obligations if your next paycheck were delayed for a week?" Seventy-four percent said it would be "somewhat difficult" or "very difficult."[281]

For these consumers, being able to make a payment by phone or online on the day it is due provides needed control over cash management. Yet these consumers are the ones most likely to incur payment charges every month and the ones least able to afford them.

11.2 Congress recognized the harm of pay-to-pay fees by limiting them in the Credit CARD Act

Pay-to-pay fees first came to the attention of policy makers when credit card companies started charging them. As a result, in 2009, Congress prohibited them as part of the Credit CARD Act,[282] except for payments involving an expedited service by a customer service representative. The motive behind this change was clearly explained by one senator: "Charging folks a fee to pay their bills on time is a travesty, it provides an unjustified windfall to credit card companies, and it shouldn't be allowed."[283]

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[280] Nat'l Endowment for Financial Education, New Years Resolution Survey 2020, at 16 (53% answered "yes" to question "In your opinion, would you say you typically live paycheck to paycheck?"); PYMNTS & LendingClub, Reality Check: The Paycheck-To-Paycheck Report (June 2021) (survey of 29,000 consumers conducted Mar. 2020 to May 2021 finding 54% of Americans live paycheck to paycheck; 70% of millennials); Charles Schwab & Co., Inc., Modern Wealth Survey 7 (May 2019) (survey finding 59% of Americans live paycheck to paycheck); CareerBuilder, Press Release, Living Paycheck to Paycheck Is a Way of Life for Majority of U.S. Workers, According to New CareerBuilder Survey (Aug. 24, 2017) ("More than three-quarters of workers (78 percent) are living paycheck-to-paycheck to make ends meet").

[281] Press Release, American Payroll Association, Survey Finds Majority of Americans Live Paycheck to Paycheck (Sept. 10, 2019) (link to Survey Data).

[282] Pub. L. No. 111-24, 123 Stat. 1740 (2009).

[283] H.R. 5244, *The Credit Cardholders' Bill of Rights: Providing New Protections for Consumers, Hearing Before the Subcommittee on Financial Institutions and Consumer Credit of the House Financial Services Committee* (Apr. 17, 2008), Part IX—Related Hearings: 110th Congress: Document No. 85, at 156 (testimony of Sen. Carl Levin).

Public opinion strongly supported this view. According to a poll taken two years before the Act was passed, 90% of Americans thought it was "unfair" to charge $10 for payment by phone and 72% rated it as "very unfair."[284]

As amended by the Act, 15 U.S.C. 1637(l) says:

> With respect to a credit card account under an open end consumer credit plan, the creditor may not impose a separate fee to allow the obligor to repay an extension of credit or finance charge, whether such repayment is made by mail, electronic transfer, telephone authorization, or other means, unless such payment involves an expedited service by a service representative of the creditor.

11.3 Pay-to-pay fees are spreading to new industries

We are not aware of any data on how widespread pay-to-pay fees are. But, based on communications with consumer advocates nationwide, we believe that these fees—once used only by the credit card industry—are now becoming more common. A number of mortgage servicers are imposing pay-to-pay fees. There have been lawsuits regarding this conduct against Shellpoint,[285] Lakeview Loan Servicing and Loancare,[286] Rushmore Loan Management Services,[287] Nationstar,[288] Carrington,[289] and Gateway.[290] Debt collectors are also charging pay-to-pay fees.[291]

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[284] *Hearing before the Senate Banking, Housing and Urban Affairs Committee, Regarding Modernizing Consumer Protection in the Financial Regulatory System*, at 20 (Feb. 12, 2009) (testimony of Travis Plunkett on behalf of the Consumer Federation of America et al).

[285] Cox v. NewRez L.L.C. d.b.a Shellpoint Mortg. Servicing, No. CC-40-2020-C-169 (W.Va. Cir. Ct.).

[286] Six v. LoanCare L.L.C. & Lakeview Loan Servicing L.L.C., No. 5:21-cv-00451 (S.D.W.Va. filed Aug. 12, 2021).

[287] Fernandez v. Rushmore Loan Mgmt. Services L.L.C., Case No. 8:21-cv-00621-DOC-(KESx) (C.D. Cal. Feb. 14, 2022) (settlement website at https://mortgagepaymentfeesettlement.com/).

[288] Dees v. Nationstar Mortg., L.L.C., 496 F. Supp. 3d 1043, 1045 (S.D. Tex. 2020) (roughly $10 for online payments and between $14 to $19 for phone payments).

[289] Thomas-Lawson v. Carrington Mortg. Services, L.L.C., 2021 WL 1253578, at *1 (C.D. Cal. Apr. 5, 2021) ("Carrington charges a $5 convenience fee to pay online, and it charges a $10 or $20 convenience fee to pay via phone.").

[290] Langston v. Gateway Mortg. Grp., L.L.C., 2021 WL 234358, at *1 (C.D. Cal. Jan. 15, 2021) (charge ranging from $3.50 to $10.00 for online and phone payments).

[291] *See, e.g.*, Manlangit *ex rel.* Manlangit v. FCI Lender Services, Inc., 2020 WL 5570092, at *2 (N.D. Ill. Sept. 16, 2020) (debt collector charging $15.00 fee for paying debt online and $18.00 fee for paying by telephone); Robinson v. Enhanced Recovery Co., 2019 WL 2423142, at *1 (E.D. Pa. June 10, 2019) ($12.95 charge to pay debt by phone); Longo v. L. Offs. of Gerald E. Moore & Associates, P.C., 2008 WL 4425444, at *2 (N.D. Ill. Sept. 26, 2008) ($7.00 fee for making payment by phone).

11.4 American society is moving away from payment by check and increasingly toward electronic payments

The modern trend among businesses and consumers is toward paying bills via electronic methods.[292] According to the Federal Reserve Payment Study, the number of checks written has been steadily declining for over a decade.[293] According to the most recent study, in 2018, there were more ACH debit transfers than check payments.[294] This reflects a long-term trend. In 2000, checks outnumbered ACH transfers by nearly 6.9 to 1. In 2018, that ratio had been reduced to an ACH-to-check ratio of roughly 1.1:1. The Study shows a trend away from checks and toward payments made by phone or online.

Those numbers are undoubtedly understated. The decline in the number of unbanked consumers and the rise of options like prepaid cards and nonbank banking apps with debit cards have increased the number of people who have access to electronic payment methods.

Many creditors accept payments electronically for free. But with more people paying electronically, it is also important to ensure that a growing number of consumers are not being charged hidden fee every for the "privilege" of paying their bills.

11.5 Pay-to-pay fees recommendations

The Bureau should conduct a review of the growing plague of pay-to-pay fees. Among other things, the Bureau should examine whether these fees are authorized by the underlying agreements with the consumer, whether pay-to-pay fees present unfair, deceptive or abusive practices, and whether there are ways that the Bureau can push for these fees to be eliminated.

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[292] Press Release, ACI Worldwide, Americans Pay More Than Half of Their Bills Online (Jan. 24, 2017) (survey finds 56% of all bills are paid online; "[n]early three quarters (72%) of online bill payments are made on a billers' websites, growing 18 percent since 2010." and "Only 32 percent of bills are set up on a recurring basis and the remaining 68 percent are made as one-time payments."); Press Release, Association for Financial Professionals, Survey: 80% of Organizations Are Transitioning B2B Payment from Paper Check to Electronic Payments (undated) (2015 survey finding "nearly 80 percent of organizations are in the process of transitioning their business-to-business payments from paper checks to electronic payments.").

[293] *See generally* Board of Governors of the Federal Reserve System, The Federal Reserve Payments Study: 2020 and 2021 Annual Supplements (last updated Dec. 22, 2021).

[294] Board of Governors of the Federal Reserve System, Federal Reserve Payments Study (2019).

12 Remittances

12.1 International remittances provide critical support to the international community

International remittances are key to helping hundreds of millions out of poverty. Worldwide, remittance flows are three times more than the amount of international aid provided by all governments.[295] Because of this, ensuring the affordable, transparent, and safe flow of remittances is a global public policy objective.

The United Nations has identified a sustainable development goal of reducing remittance costs to 3% by 2030.[296]The G20 has prioritized making cross-border payments cheaper, faster, more transparent, and inclusive to benefit citizens and economies worldwide, support economic growth, international trade, global development, and financial inclusion.[297] The U.S. is the largest source of remittance outflows, sending $71.6 billion each year.[298]

Frequently remittance senders are immigrants. Many who now are citizens in the United States maintain close family ties abroad, sending money to family members in their countries of origin. At the same time, many immigrants are more likely to be targeted for financial predation, and less likely to feel able to fully assert or access legal protections, than are others.[299] As a result, many remittance senders are vulnerable to both the inaccuracies and the deliberate malfeasance of those with whom they do business.

These were the reasons behind Congress's enactment of changes to the Electronic Fund Transfer Act[300] requiring important consumer protections for remittances. Yet, over a decade after passage of the EFTA's reforms to the remittance market, and despite the huge volume of remittances sent from the U.S., the cost of remittances to

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[295] United Nations, Remittances Matter: 8 Facts You Don't Know About the Money Migrants Send Back Home (June 17, 2019).
[296] United Nations, Sustainable Development Goal 10: Reduce Inequality Within and Among Countries (2021).
[297] Financial Stability Board, Enhancing Cross-Border Payments: Stage 3 Report (Oct. 2020). And the international community, led by the International Fund for Agricultural Development (IFAD) at the United Nations, recently produced a seminal remittance policy report with recommendations for governments around the world to ensure accessible and affordable remittance flows. Remittance Community Task Force, Blueprint for Action: Remittances in Times of Crisis (Nov. 2020).
[298] World Bank, Migration and Remittances Data (Oct. 2020).
[299] *See generally* Ruben J. Garcia, Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them Without Protection (2013); UnidosUs, 7 Ways Immigrants Enrich Our Economy and Society (2020).
[300] 15 U.S.C. § 1693o-1; Pub. L. No. 111–203, tit. X, §§ 1073(a)(4), 1084(1), 124 Stat. 2060, 2081 (2010).

U.S. senders remains alarmingly high, with an average cost to U.S. senders of 4.88% on a $200 transfer.[301]

The high cost of remittances is significantly abetted by a lack of transparency in the disclosures for the costs as well as the complexity of the information provided. The World Bank has noted that when too many variables are included in remittance disclosures it "is difficult for consumers to compare prices because there are several variables that make up remittance prices."[302] Yet, the current regulations do not require consistent disclosure of all the costs of remittances in a way that enables senders to appropriately evaluate the different costs of remittances through different providers.

12.2 Congress intended the remittance requirements to provide robust protections

The amendments to the EFTA made by the Dodd-Frank Act created an entirely new federal regulatory regime that subjected "remittance transfer providers," including banks, credit unions, and nonbank money transfer companies, to new important disclosures and meaningful error resolution procedures.[303] These new disclosures were specifically intended to increase price transparency and comparison shopping in the marketplace.[304] Price disclosures are now required both *before* ("pre-payment") and *after* ("receipt"), and the disclosures must include the: a) amount to be transferred; b) fees and taxes; c) total amount of the transaction; d) exchange rate; and e) transfer amount in received currency.

However, there are significant loopholes in the current regulations which must be addressed to meet the intent of the law. Without changes, the different industry pricing strategies in use in the current remittance market will continue to limit the effectiveness of comparison shopping and facilitate increased, and unnecessary, costs in remittances.

12.3 Current remittance disclosures facilitate inflated exchange rates

More than half of the revenue from international payments to banks and other remittance providers comes from marking up exchange rates.[305] Remittance regulations have done nothing to limit the problem of inflated exchange rates. Recent research indicates that, of the $16.3 billion in fees paid by American consumers and

[301] World Bank, Remittance Prices Worldwide Quarterly (Issue 37, Mar. 2021).

[302] World Bank, About Remittance Prices Worldwide (2015).

[303] 77 Fed. Reg. 6194, 6200 (Feb. 7, 2012).

[304] 77 Fed. Reg. 6194, 6222 (Feb. 7, 2012).

[305] Capital Economics, Estimating the Scale of Foreign Exchange Transaction Fees in the U.S. (2020).

small businesses in 2019 on international payments, well over half—roughly $8.7 billion—was hidden in inflated exchange rates.[306]

The lack of competitiveness in the retail remittance market is illustrated by the difference in revenue margin: the margin is only 0.1% on business-to-business cross-border payments, but it is an alarmingly high 6% on consumer-to-consumer transactions.[307] And most consumer remittance senders do not understand the information that they are missing. A survey found that while 55% of consumers said they understood the costs of sending money abroad, only 18% correctly identified exchange rates as one of the costs of a transfer.[308]

The current regulations allow for a range of different pricing strategies to be effectively hidden in the disclosures. The result is that the disclosures are technically in compliance with the regulations, yet still mislead consumers and prevent an apples-to-apples comparison of the full price of the remittance.

For example, under current disclosure rules, there is an incentive for providers to show low-to-no fees, which gives the impression that the transfer is low-cost, even when the exchange rate is significantly inflated. As a result, the actual cost to sender is likely to be much higher than that of another provider who may disclose higher upfront fees, but employ a lower exchange rate. In this situation, the disclosure from a provider would show a $0 fee, yet the actual amount received would be more if the remittance were sent through another provider who charges a fee but does not inflate the exchange rate.

The true cost of the transfer is masked because the consumer is unable to make a comparison between the transfer of identical sums. The disclosure needs to be simplified, allowing the consumer to compare just two numbers—the total amount paid for the remittance, and the total amount to be received by the recipient.

12.4 Current rules facilitate undisclosed third-party fees and bloated estimates

When it passed the remittance legislation, Congress specifically authorized providers to use estimates in only two situations: 1) For a period of ten years, financial

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[306] *Id.* Of the $8.7 billion lost by Americans in hidden fees annually from inflated exchange rates, $2.2 billion was lost by migrant workers sending remittances, $2.1 billion was lost by vacationers, $151 million was lost on tuition payments, $301 million was lost by service members stationed overseas, and $2.3 billion was lost by small businesses in international trade.

[307] *Id.*

[308] YouGov, Consumer Survey: Estimating the Scale of Foreign Exchange Transaction Fees in the U.S. (2020).

institutions were permitted to provide estimates of the amount to be received;[309] 2) For remittances sent to a prescribed list of nations whose infrastructure precludes providers from ascertaining costs imposed by the receiving providers, estimates are also permitted.[310]

However, despite strong objections from consumer advocates[311] based on Congress's express intention to limit the use of estimates in disclosures for remittances and to permit financial institutions to use estimates only for ten years, the CFPB expanded their allowed use. In 2013, the CFPB created a permanent exception for the "optional disclosure of non-covered third-party fees and taxes collected by a person other than the provider."[312] Non-covered third party fees[313] are fees imposed by the designated recipient's institution for receiving the transfer into an account. This regulation is not supported by the statute.

The statute does allow financial institutions to provide estimates rather than fixed costs when the sending institution "is unable to know, for reasons beyond its control" the amount of currency that will be made available to the designated recipient."[314] However, these estimates were expressly permitted only for ten years, to provide an incentive for financial institutions to make arrangements that would ensure certainty and lower costs in these transfers at the end of the ten year period.[315]

Given the near-instantaneous relay of information in this day and age, financial institutions should be required to make every effort possible, using all available modern technology, to determine the fees to be collected by other financial institutions. Yet because the CFPB's regulation allows them to continue to provide estimates, institutions have little incentive to determine this information. The Remittance Rule was designed to facilitate comparison shopping and to encourage

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309 15 U.S.C. § 1693*o*-1(a)(4).

310 15 U.S.C. § 1693*o*-1(c).

311 *See, e.g.,* National Consumer Law Center (on behalf of its low-income clients), Public Citizen, and UnidosUS, Comments to the Proposed Rules on Remittance Transfers Under the Electronic Fund Transfer Act (Regulation E), Docket No. CFPB-2019-0058-0085 (Jan. 21, 2020). *See also id.* at 2.

312 12 C.F.R. § 1005.32(b)(3).

313 "Non-covered third party fees" is defined to mean "fees imposed on the remittance transfer by a person other than the remittance transfer provider except for fees" which are imposed by the recipient's institution for receiving a remittance transfer into an account. 12 C.F.R. § 1005.30(h)(2).

314 15 U.S.C. § 1693*o*-1(a)(4)(A)(ii).

315 15 U.S.C. § 1693o-(a)(4)(B).

meaningful competition, so that compliance with Rule would lead to decreased prices for senders. The allowance of estimates undermines these goals.[316]

Many banks typically rely on SWIFT messaging and correspondent banking to facilitate cross-border payments. Although the Dodd-Frank Act was enacted more than eleven years ago, in 2021 SWIFT generally still does not offer transparent pre-transfer pricing. However, the fact that SWIFT includes this service in its future roadmap[317] demonstrates that it is technologically feasible.

12.5 Remittances recommendations

There is a clear and simple remedy for the current confusing requirements. The disclosures provided to remittance senders should always include—in bolded, highlighted text—two numbers:

- The total amount of funds in U.S. dollars, including the amount to be sent and all fees, to be paid by the sender; and
- The total amount of funds, after the application of the exchange rate and the deduction of all fees and taxes, to be received by the recipient in the foreign currency.[318]

The CFPB should eliminate the dramatic and confusing differences between pricing strategies that lead to consumers getting bad deals and instead should bring transparent pricing to the remittance market. This would enable clear apples-to-apples comparison shopping for the first time under the Remittance Rule, induce further competition, and put significant downward pressure on prices, helping achieve the UN sustainable development goal of 3% remittance costs by 2030 and likely saving American remittance senders billions of dollars.

[316] CRL would permit continuation of estimates where the provider does not know the amount of third-party fees or local taxes. CRL encourages the Bureau and industry to research the feasibility of methods to enable the provider to know the amount of those fees and taxes.

[317] SWIFT, The Future of Payments: Instant, Accessible, Ubiquitous (June 2019). *See id.* at cmts. ("we'll expand the toolset further to enable upfront transparency on fees and schedules so that both originators and beneficiaries will have full predictability on costs and availability of funds").

[318] CRL agrees that the provider should net out the exchange rate and should deduct fees and taxes if it knows the amount of third-party fees and local taxes, but it believes that the provider need not deduct the third-party fees and local taxes if it does not know these amounts. CRL encourages the Bureau and industry to research the feasibility of methods to enable the provider to know the amount of those fees and taxes.

13 Junk fees in debt collection

13.1 Overview

The Fair Debt Collection Practices Act prohibits "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."[319] Nevertheless, some debt collectors seek to add junk fees, including pay-to-pay fees as discussed in Section 11.3, *supra*. Other types of additional amounts that are sought by some debt collectors include interest,[320] collection costs,[321] attorney fees,[322] court costs,[323] dishonored check fees,[324] and late fees.[325] Whether any of these additional amounts may permissibly be added to the amount of the debt by the debt collector depends on whether they were authorized by the agreement creating the debt or permitted by law.

Fees that are added to the total before an account is placed in collection are also problematic in debt collection. First, these amounts inflate the balance that the consumer must repay, adding to the amount that is placed in collection and making repayment more burdensome. Consumers may not have any advance warning about these additional fees. For example, medical debts may contain unexpected facility fees or trauma fees.[326] Such additional fees can also make the amount of the debt unrecognizable to consumers, who are confronted with collection for amounts much greater than the original principal. While Regulation F requires "[a]n itemization of the current amount of the debt reflecting interest, fees, payments, and credits," this is only since the "itemization date,"[327] which could be any one of five dates.[328] The available itemization dates generally fall after the point at which fees will have been added by

[319] 15 U.S.C. § 1692f(1). *See also* National Consumer Law Center, Fair Debt Collection § 8.3.1 (10th ed. 2022), *updated at* www.nclc.org/library.
[320] National Consumer Law Center, Fair Debt Collection § 8.3.3 (10th ed. 2022), *updated at* www.nclc.org/library.
[321] *Id.* § 8.3.4.
[322] *Id.* § 8.3.5.
[323] *Id.* § 8.3.6.
[324] *Id.* § 8.3.7.
[325] *Id.*
[326] Fresh Air, National Public Radio, *Why An ER Visit Can Cost So Much—Even for Those With Health Insurance* (Mar. 13, 2019), *available at* https://www.npr.org.
[327] 12 C.F.R. § 1006.34(c)(2)(viii).
[328] 12 C.F.R. § 1006.34(b)(3) (allowing the debt collector to choose the transaction date, the charge-off date, or the date of the last payment, the last statement, or the entry of a judgment).

creditors, so those fees do not need to be listed as fees by the debt collector in the validation notice.[329] This limits the value of the itemization for consumers.

13.2 Recommendations

The CFPB should be vigilant in spotting and taking appropriate action again junk fees that violate the FDCPA, and should continue supporting an appropriate interpretation of the FDCPA that protects consumers, as it did in the amicus brief in *Thomas-Lawson v. Carrington Mortgage Services, LLC*.[330] Thus, the CFPB should:

- Bring more enforcement actions against unlawful debt collection junk fees;
- Continue to argue for a robust interpretation of section 1692f(1);[331] and
- Continue to engage in consumer testing to evaluate how the itemization portion of the validation can be amended to provide critical and easy to understand information to consumers.

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[329] 12 C.F.R. § 1006.34(b)(2)(3) (listing permissible itemization dates).

[330] The Bureau filed an amicus brief arguing that the FDCPA bars debt collectors from collecting pay-to-pay or "convenience" fees—fees imposed for making a payment online or by phone—unless the agreement creating the debt expressly authorize the collection of pay-to-pay fees, or a law expressly or affirmatively authorizes them. *See* Brief of Amicus Curiae the Consumer Financial Protection Bureau, Thomas-Lawson v. Carrington Mortg. Services, L.L.C., Case No. 20-cv-7301 (9th Cir. Oct. 21, 2021).

[331] *See, e.g.*, Brief of Amicus Curiae the Consumer Financial Protection Bureau, Thomas-Lawson v. Carrington Mortg. Services, L.L.C., Case No. 20-cv-7301 (9th Cir. Oct. 21, 2021).