

June 25, 2018

Acting Director Mick Mulvaney  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities -- **Regulation E and other nonlending regulations**

Dear Acting Director Mulvaney,

The undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its inherited regulations and rulemaking authorities.

These comments focus on Regulation E and other nonlending regulations. Many of our organizations have also joined other comments that discuss Regulation B (Equal Credit Opportunity Act), Regulation X (Real Estate Settlement Procedures Act), and Regulation Z (Truth in Lending Act), as well as electronic communications generally.

After noting our objections to this process in Section 1, these comments are organized as follows.

Section 2 focuses on the critical need to address abusive overdraft fee practices, along with other changes to modernize Regulation E. We are deeply disturbed that the CFPB has dropped the overdraft fees rulemaking from the bureau's regulatory agenda, and we strongly urge the CFPB to limit the number of overdraft fees that may be charged without compliance with Regulation Z and credit laws. We also urge the CFPB to improve fee disclosures for bank accounts; to enhance measures to protect consumers against unauthorized charges in new and existing payment systems; and to prevent evasions of the ban on compulsory use of electronic repayment of credit.

These comments also address the following regulations:

Section 3: Regulation DD (Truth in Savings Act)  
Section 4: Regulation CC (Expedited Funds Availability Act)  
Section 5: Regulation V (Fair Credit Reporting Act)

In general, we support these regulations and urge the CFPB not to weaken them. We do make suggestions for improving them if the CFPB decides to revisit these regulations. We note that Regulation CC in particular is in need of updating to address deposits to prepaid accounts and deposits made through mobile devices.

## **1. Objections to the CFPB's Request for Information Process**

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these

requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the one on adopted regulations. These two RFIs require us to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length. Doing so barely a week after responding to a series of other RFIs has been especially difficult.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

## **2. Regulation E: Electronic Fund Transfers**

Regulation E implements the Electronic Fund Transfer Act and plays an increasingly important role in this age of digital payments and financial services. We understand that Regulation E modernization is on the CFPB's regulatory agenda.

If the CFPB updates Regulation E, it is critical to be faithful the statutory mandate that “the primary objective of this subchapter ... is the provision of individual consumer rights.”<sup>1</sup> In order to implement and enforce the statute and better protect consumers, we offer the following recommendations.

### **2.1. Regulate overdraft credit under Regulation Z.**

We are disheartened by the CFPB's announced decision to drop an overdraft fee rulemaking from the Bureau's regulatory agenda. The Bureau's research, consistent with research by third parties, has clearly demonstrated the abusive nature of bank overdraft programs and the severe impact these fees—totaling an estimated \$14 billion annually<sup>2</sup>—have on working families.

CFPB's research findings include the following:

- Nearly 80% of bank overdraft and non-sufficient funds (NSF) fees are borne by only 9% of accounts, who tend to carry low balances—averaging \$350—and have relatively low monthly deposits.
- For one group of hard hit consumers, the median number of overdraft fees was 37, nearly \$1,300 annually, meaning some pay much more.
- Overdraft fees on debit cards (which can easily be declined at no cost when the account lacks sufficient funds), can lead to extremely high cumulative fees for consumers.

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<sup>1</sup> 15 U.S.C. § 1693(b).

<sup>2</sup> Center for Responsible Lending, *Broken Banking: How Overdraft Fees Harm Consumers and Discourage Responsible Bank Products* (May 2016), [https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl\\_broken\\_banking\\_may2016.pdf](https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_broken_banking_may2016.pdf).

- Consumers whose debit cards could trigger overdrafts were more than 2.5 times more likely to have their accounts involuntarily closed than those who were not “opted in” to debit card overdraft at several study banks.

The diversion of cash needed for living expenses toward fees is alone enough to devastate a family living on the margins. But the consequences do not stop there. For some, overdraft fees prevent them from regaining their footing, marking a lasting economic setback. Overdrafts are the leading reason that consumers lose their checking accounts. The FDIC’s 2013 survey of unbanked and underbanked households indicates that approximately 778,800 households, and well over a million adults, who once had bank accounts are currently unbanked primarily because of high or unpredictable fees. 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.

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. While there are no national data on the number of consumers on bank account blacklists, millions of consumers are affected, with one software company estimating that 2.3 million online applicants were denied accounts based on their screening CRA report in 2012 alone;<sup>3</sup> the large majority of consumers blacklisted are blacklisted because of overdrafts.

The costs of exclusion from the banking system can be profound. A banking relationship is important to household financial stability and asset-building. A checking account protects funds from physical risk, offers a relatively low-cost and convenient way to conduct routine financial transactions, provides mechanisms for savings, and, for many families, is the gateway to a broader banking relationship that includes access to reasonably priced credit.

Furthermore, overdraft fees have fueled the development of a profoundly dysfunctional checking account market. When consumers shop for a bank account, they are likely to consider factors like fixed monthly and annual costs of the account. Thus, they may choose an account that appears “free”—with no upfront monthly fee—but be unaware that they will pay more for the account due to overdraft charges than they would have on an account that has a modest monthly fee but more responsible overdraft fee practices. (We address deceptive “free checking” disclosures in the Regulation DD section below.) Instead, overdraft charges operate as “back-end” or “gotcha” fees that undermine consumer choice and a healthy market and fuel aggressive, deceptive marketing efforts to convince people to “opt-in,” rather than transparent upfront price tags.

Today, some overdraft practices vary significantly by institution, but often not in ways transparent to the consumer. For example, at some banks CFPB studied, “opt-in” rates on point-of-service and ATM overdraft fees were 40%; at others, they were less than 10%. Further, for those customers that incur overdraft fees, consumers at some banks incur double the annual total fees than at other banks. These disparities underscore that opaque choices banks make about how to implement their overdraft program can have a dramatic impact on consumers.

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<sup>3</sup> National Consumer Law Center and Cities for Financial Empowerment Fund, *Account Screening Consumer Reporting Agencies: A Banking Access Perspective* (Oct. 2015) at 6, available at <http://www.nclc.org/images/pdf/pr-reports/Account-Screening-CRA-Agencies-BankingAccess101915.pdf> (internal citations omitted).

A similar dynamic—low upfront costs, high back-end, hidden costs—was once at play in the credit card market, where interest rates were often low, but back-end penalty fees were unrestrained. The CARD Act reined in abusive fees and penalty rates, and the market shifted toward more transparent, upfront pricing.

More upfront pricing for checking accounts would provide incentives for financial institutions to have more responsible checking account models, rather than one that preys upon those with the least resources. And it would likely still permit many to maintain “free” checking accounts—banks often waive fees for those with direct deposit, or other features—but it would make the distribution of costs far more closely correspond to receipt of services.

The CFPB should restore plans to address overdraft fee abuses. In particular, CFPB should:

- **Regulate overdrafts as credit under Regulation Z, subject to an ability-to-repay assessment and repayment through installments.** Overdraft fees have long enjoyed a regulatory pass in many respects because banks have posited that overdraft is not being used as credit but instead is merely an occasional courtesy. However, data showing that many consumers are charged many fees annually belies this argument. 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 as such. This means that it should only be extended based on a determination that the customer has the ability to repay it, and it should be repayable in manageable installments. Overdraft fees on debit card purchases and ATM transactions, in particular—which can easily be declined at no cost to the customer—should be entirely prohibited unless they are covered under Regulation Z.
- **Rein in excessive fees.** The size of the overdraft fee is the engine that drives overdraft abuses. It bears virtually no relation to the cost to the institution of covering the overdraft. The Credit CARD Act required that penalty fees on credit cards – including fees for exceeding the card’s credit limit – be reasonable and proportional to the “violation.” The Federal Reserve determined that this requirement included that the fee must be reasonable and proportional relative to the cost to the institution, and that the fee could not exceed the size of the violation. In the overdraft context, where overdrafts cost the institution very little, this would mean the fee should be significantly less than the average fee today, and should in no case exceed the size of the overdraft itself. Similarly, NSF fees are extraordinarily high in an era when processes are highly automated.
- **Limit overdraft fees to one fee per month, and six per year, and prohibit predatory posting practices.** Once an account has gone negative and the customer has incurred an overdraft fee, the customer should have sufficient time to bring the account back to positive before being charged additional fees. Again, the CARD Act limited over-the-limit fees to one per month, and the Federal Reserve determined in the credit card context that requiring “reasonable and proportional fees” meant that no more than one kind of penalty fee could be charged per single event or transaction. The closest parallel to the typical “violation” in the credit card context is the monthly statement cycle. 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. Thus, CFPB should limit fees to one fee per month, and six per year; prohibit

“sustained” or “extended” fees; and prohibit posting practices that result in unnecessary overdrafts and fees.

## **2.2. Improve Initial disclosures**

The EFTA requires disclosure of fees before a consumer conducts an electronic fund transfer, and requires that all disclosures be “clear and readily understandable.” Yet fee disclosures for bank accounts are far from that standard.

The CFPB should adopt model fee disclosure for bank accounts similar to the ones in the prepaid rule or those recommended by Pew Charitable Trusts.<sup>4</sup> As with the prepaid rule, the CFPB should develop both a short form disclosure that highlights the most commonly incurred fees, along with details about when they are incurred or may be waived, and also a longer form that provides a complete listing of all potential fees and charges. While it is not a substitute for full disclosure of fees through model fee disclosures, “just in time” fee disclosures, such as in-app pop ups that list a fee or fees before they are incurred and that provide options to avoid them, should also be created and tested.

The CFPB should develop model forms for different formats, including paper, websites, and mobile devices. Before they are shared, all model disclosures should undergo extensive consumer testing.

These fee disclosure forms should be provided on websites in a location that is clear and easily accessible for all accounts that may be opened online or that contain pricing information. The fee schedules should be prominent and easy to access before beginning the sign-up process or any personal information is collected from the consumer.

The CFPB should also consider model fee disclosures for domestic money transfer services that are not covered by the prepaid rule.

If any money transfer or stored value service involves virtual currencies and does not fully comply with Regulation E, the CFPB should require prominent disclosures of the risk of loss of funds.

## **2.3. Strengthen authorization requirements.**

Regulation E provides rights against unauthorized transfers but currently provides little guidance for one-time or irregular transfers about what constitutes proper authorization. Authorization requirements are provided only for preauthorized transfers that are expected to recur at regular intervals.

Regulation E should be amended to include authorization requirements for all electronic transfers similar to those required for preauthorized transfers under Regulation E and for ACH transactions under NACHA rules. In general, for debits, the authorization should:

- Be in writing and signed or similarly authenticated by the consumer.
- Evidence both the consumer’s identity and assent to the authorization.
- Be readily identifiable as an authorization and have clear and readily understandable terms.
- Identify the entity (in a clear and understandable way) that is authorized to debit the account.

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<sup>4</sup> See The Pew Charitable Trusts, Issue Brief: The Benefits of Uniform Checking Account Disclosures (Nov. 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/the-benefits-of-uniform-checking-account-disclosures>.

- Identify the specific account to be debited (subject to the rules on varying amounts, discussed below).
- Provide clear and readily understandable information about the amount and timing of the debit. It should not permit a debit at some nonspecific future point in time that might never occur, such as when a consumer defaults and loan principal is accelerated.

The CFPB should provide a model authorization form.

For recurring debits, the authorization form should give the consumer clear information about how long the debits are to continue.

Rules should make clear that debits may not be split up into smaller amounts after a payment is rejected.

The CFPB should also clarify Regulation E to prevent evasions of the rules governing preauthorized transfers that vary in amount and to help consumers anticipate and control those transfers. Consumers should have the option of specifying a maximum range for the debit and the option to choose advance notice of the amount of the debit.

The CFPB should also consider requiring that recurring debits be identified separately on account statements so that consumers can identify and remember those debits, and cancel or change them if they wish.

#### ***2.4. Clarify the right to revoke authorization.***

Regulation E should make clear that, for ACH transactions and other transfers that are not expected to occur immediately after authorization, consumers have a right to revoke authorization. This right to revoke authorization is implicit in Regulation E today but should be made explicit.<sup>5</sup> As under NACHA rules, consumers should be allowed to revoke authorization if they provide notice within a reasonable time. If the authorization was collected directly from the provider of the electronic transfer, one business day should be deemed to be a reasonable time. If the authorization was collected from a merchant, three business days should be deemed a reasonable time.

As under NACHA rules, the authorization form should specify the right to revoke and the manner of revoking in a clear and readily understandable manner. Revocation should be permitted if communicated by any reasonable means, including the manner in which the authorization was obtained. At a minimum, the right to revoke should specify a physical address for mail, a telephone number and an email address that may be used to revoke authorization. This information should also be accessible on the company's website.

#### ***2.5. Protect the ban on compulsory use of electronic repayment as a condition of credit.***

The EFTA and Regulation E prohibit creditors from conditioning credit on repayment by means of electronic fund transfers. This ban on compulsory use is critical for enabling consumers to maintain control over their funds and their deposit accounts. It also helps struggling consumers protect funds needed for necessities from lenders that attempt to take their repayment off of the top of an incoming

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<sup>5</sup> See NCLC, Consumer Banking and Payments Law §5.8.4.2.

deposit, leaving insufficient funds for food, rent or medicine. The rule also gives lenders an incentive to underwrite for ability to repay.

Yet the statutory ban on compulsory use of electronic repayment is widely evaded by lenders that obscure the fact that electronic repayment cannot be required or that impose coercive conditions on payments by other means. The CFPB should clarify Regulation E to make sure that consumers understand their choice of payment methods and do not effectively have their choice taken away by coercive conditions.

The CFPB should require that creditors disclose consumers' choice of payment methods in a clear and readily understandable manner before a choice is selected. The disclosure must make clear alternative payment methods.

Regulation E allows creditors to give consumers a reduced APR or other cost-related incentive to choose electronic repayment. The CFPB should clarify that a discount must be modest and that the cost of choosing another method of payment cannot be so great that no reasonable consumer would choose that method. Acceptable discounts include those offered by credit unions that, for small dollar loans, charge 21% APR without electronic repayment and 19% APR with electronic repayment. For larger loans, such as mortgages or student loans, some lenders offer a reasonable discount of 0.25%. But charges such as a \$100 fee or large increases in the interest rate are so great as to be coercive and to deprive reasonable consumers of a real choice.

As the current Regulation E interpretation provides, the incentive should be "cost-related."<sup>6</sup> A modest increase in cost is related to the risk to the lender of not receiving payment automatically yet does not discourage all consumers from choosing a different method of payment.

But lenders should not be allowed to artificially and deliberately slow down funding of a loan for a consumer who chooses not to repay electronically. For example, some high-cost online lenders will deliver funds electronically immediately if electronic repayment is chosen but will send a paper check that will not arrive for 7 to 10 days if the consumer chooses another means. Sending payment through the mail when the normal delivery method is electronic is merely a means of coercing the consumer. Slowing down funds delivery is especially coercive for lenders who cater to consumers who are likely to need funds quickly.

## ***2.6. Improve electronic periodic statements.***

As discussed at greater length below, the EFTA, Regulation E and the E-Sign Act together generally give consumers a right to paper periodic statements unless they choose to receive statements electronically. However, for consumers who choose electronic statements, and for prepaid accounts where the consumer has no choice, the CFPB should make those statements and the information they contain more accessible, clear and readily understandable.

Consumers who access their balances and transaction history through a website, mobile device or alerts may not understand that the full periodic statement contains additional information that should also be reviewed. Statements are especially important for the summary information and information about fees and charges that they contain. For example, bank account statements summarize total deposits, total

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<sup>6</sup> Reg. E, Official Interpretations § 1005.10(e)(1)).

debits, total of overdraft and nonsufficient fund fees during both the statement period and the calendar year, and other fees itemized by type and dollar amount. Consumers may miss this information if they only view the easily accessible transaction information and not the full statement.

While traditional pdf statements that can be downloaded, saved and printed should continue to be available, the CFPB should also require providers to offer simpler access to the key information that statements contain through a method and form that consumers are more likely to actually see.

Examples could include:

- The consumer's account dashboard on a website must display the summary information from the last statement;
- For consumers who have opted into alerts, alerts should be sent out once a month with the summary information;
- Transaction alerts should include fees and charges;
- Mobile apps should include access to statements formatted in a form easily readable through a mobile device.
- For consumers who opt in to this information, an email announcing the availability of a new periodic statement could include the summary information in the body of the email, as few consumers actually log in to see the statement.

These and other methods should be developed and consumer tested to increase the number of consumers who actually see and understand the key information in their periodic statements.

### ***2.7. Prevent liability for fraudulent transfers in new, faster payments ("push payments")***

In these days of increasing data breaches and identity theft, the protection provided to consumers by the EFTA and Regulation E against liability for unauthorized transfers is more important than ever. The CFPB should clarify and strengthen Regulation E to ensure that consumers can maintain confidence in existing and new electronic transfer systems and receive the protection mandated by Congress.

A number of new, faster payment systems have been launched or are under development. These systems may have security improvements over older payment methods and may make fraud and unauthorized charges less likely. One advantage of many of these systems is that they may require the consumer to take action to initiate ("push") a payment and may not allow an entity to debit ("pull") a payment from the consumer's account based only on a purported authorization.

While push payments can increase security, they do not eliminate the potential for fraudulent and unauthorized payments and in some cases may increase those risks. Today, telemarketing scammers may have to convince a consumer to visit a store in order to pay through an unusual payment method, such as a prepaid reload pack, gift card or wire transfer. This can impede fraud and raise red flags. But with faster payments, an imposter or other criminal can simply tell the consumer to pay quickly through a method that that consumer already uses from the convenience of her home.

We have already seen how faster payment systems can result in more widespread and faster fraud.<sup>7</sup> As one article noted, Zelle's national advertising campaign "sets an expectation that Zelle can be used like a credit card, and scammers have figured out how to exploit this trust."<sup>8</sup>

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<sup>7</sup> Stacy Cowley, New York Times, "Zelle, the Banks' Answer to Venmo, Proves Vulnerable to Fraud" (Apr. 22, 2018), <https://www.nytimes.com/2018/04/22/business/zelle-banks-fraud.html>; Lauren Saunders, American Banker, "Will

The mere fact that the consumer pushed a payment does not mean that the payment is authorized. If that purported authorization is obtained through fraud – such as by claiming that the recipient is the IRS, is a grandson, or is the electric company – the authorization is invalid just as it would be if the consumer provided his bank account and routing number to the scammer (on the telephone or through the internet) for an ACH debit (pull) transaction. Moreover, in some faster payment systems, even if the payment must be pushed, it can sometimes be pushed in response to a request for payment, which may be fraudulent.

The CFPB should clarify that consumers are protected if a purported authorization is obtained through fraud, regardless of the manner in which the purported authorization is obtained or manifested. This is consistent with the EFTA’s mandate that “the burden of proof is upon the financial institution to show that the electronic fund transfer was authorized.”<sup>9</sup>

Consumers should be able to assert their protection against unauthorized push payments in the logical place: against their own institution – the institution that holds the account that was unlawfully accessed. However, the consumer’s institution should of course be entitled to recover against the institution that received the payment and enabled the scammer, directly or indirectly, to access the payment system.

Clarifying protection against unauthorized push payments is not only consistent with the mandate of Regulation E; it also will lead to better fraud prevention efforts by giving incentives to the players who are in the best position to design safe payment systems, and push financial institutions to better authenticate users of those systems.

Relying on warnings to consumers is an old fashioned and ineffective fraud prevention method that cannot be relied on to protect consumers in faster payment systems. Certainly, consumers should be warned only to push payments to entities or persons they know and trust. But scammers can be incredibly deceptive and convincing.

Putting fraud prevention incentives with financial institutions and service providers – both the consumer’s institution and the receiving institution(s) – is far more likely to result in continuing improving methods of preventing fraud. These institutions can aggregate and share data, spot patterns and red flags, develop braking mechanisms in suspicious cases, and develop a variety of other practices all along the payment chain to prevent, spot and remedy fraud.

The payments industry is also far more able than a consumer to absorb the loss of a given fraudulent payment, and if the fraud is widespread, then the problem goes far beyond the consumer to the entities that allowed a scammer access to the payment system.

More information about fraudulent actors will also be available to everyone in the system if consumers have an incentive to report fraudulent push payments. If the answer from the consumer’s bank is

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faster electronic payments mean faster fraud?”(Sept. 17, 2015), <https://www.americanbanker.com/opinion/will-faster-electronic-payments-mean-faster-fraud>.

<sup>8</sup> Kate Fitzgerald, Payment Source, “Are banks doing enough to protect Zelle users?” (Feb. 22, 2018), <https://www.paymentssource.com/news/are-banks-doing-enough-to-protect-zelle-users-from-fraud>.

<sup>9</sup> 15 U.S.C. § 1693g(b).

“Sorry, you authorized it,” then the information will stop there and the receiving institution and payment system will not be able to spot bad actors and identify patterns.

Consumers will have more confidence in new, faster payment systems – which will benefit everyone who provides or uses those systems – if consumers know that they are protected from all types of fraud. Faster payment systems will suffer if they develop a reputation as hotbeds of fraud. Similar considerations have led to changes in Great Britain’s faster payments system to allow scam victims to recover their money more easily.<sup>10</sup>

Robust protection against unauthorized charges has worked well to give consumers confidence in credit and debit cards. Today, the card networks are continually improving fraud detection and often spot fraudulent charges long before the consumer even realizes that fraud has occurred. This strong protection has been critical to preventing consumers from losing faith in cards with increasing news of data breaches and identity theft.

### ***2.8. Enforce Regulation E error resolution rights for misdirected payments***

The advent of multiple new ways to pay, such as using an app to make a person-to-person (P2P) payment, has introduced new opportunities for payments to be misdirected. Sometimes, the misdirected payment may result from user error, such as when a user transposes two numbers when entering an account number to establish a new payee.

More often, the system itself may facilitate or even cause the error. Zelle, a peer-to-peer payment service from Early Warning that enables bank-to-bank P2P transactions, uses phone numbers and email addresses to identify users. If a phone number is assigned to a new party’s phone, but remains mapped to previous owner’s bank account, any funds sent to that number will end up in the old owner’s account, with the intended recipient having no idea where the money is. Similarly, some P2P services use account names, which the users pick, as identifiers. These aliases may be virtually indistinguishable from that of another user. For example, users so frequently send money to the wrong person that all the major P2P services have FAQs or other information about it on their or their affiliate’s websites.<sup>11</sup>

The Regulation E definition of error includes “An incorrect electronic fund transfer to or from the consumer's account.”<sup>12</sup> Yet despite this legal protection, consumers may be told that they must bear responsibility for the mistake.<sup>13</sup>

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<sup>10</sup> Vicky Shaw, Independent, “Bank transfer scam victims could get money back more easily under new plans” (Nov. 7, 2017), <https://www.independent.co.uk/news/business/news/bank-transfer-scam-victims-could-get-money-back-more-easily-under-new-plans-a8041366.html>.

<sup>11</sup> See for example: Venmo: [https://help.venmo.com/hc/en-us/articles/209681208-I-paid-the-wrong-person-;](https://help.venmo.com/hc/en-us/articles/209681208-I-paid-the-wrong-person-) Square: <https://squareup.com/help/us/en/article/5691-how-to-cancel-a-cash-app-payment>; Snapcash: <https://support.snapchat.com/en-US/article/snapcash-issues>; and this from Citizen Bank, as Zelle member bank: <https://www.citizensbank.com/money-tips/checking/zelle-faqs.aspx>

<sup>12</sup> 12 CFR § 1005.11(a)(1)(ii)

<sup>13</sup> Almost all providers ask users who have sent money to the wrong person to ask the recipient to send the money back. See for example: Venmo: [https://help.venmo.com/hc/en-us/articles/209681208-I-paid-the-wrong-person-;](https://help.venmo.com/hc/en-us/articles/209681208-I-paid-the-wrong-person-) Square: <https://squareup.com/help/us/en/article/5691-how-to-cancel-a-cash-app-payment>; Snapcash: <https://support.snapchat.com/en-US/article/snapcash-issues>; and this from Citizen Bank, as Zelle member bank: <https://www.citizensbank.com/money-tips/checking/zelle-faqs.aspx>. That may not be possible if the user does not know where the money went. See for example, this story from Brian Kemm, who sent money to his mother’s

The Bureau should enforce Regulation E by ensuring that providers are following appropriate error resolution procedures when consumers report errors involving misdirected payments. While we believe that Regulation E is clear on this point already and that no regulatory changes are needed, to the extent there is any uncertainty, the CFPB should clarify it.

### ***2.9. Reject calls to create a consumer negligence standard that is not in the EFTA.***

Some in the payments industry have called for Regulation E to be amended to impose consumer liability for unauthorized charges if the consumer was purportedly negligent. That change would directly counter the rule of Regulation E today and would impose a standard that has no basis in the statute.

Regulation E makes clear that consumers still have protection even if they could be deemed negligent, such as by writing a PIN number on a debit card.<sup>14</sup> The official interpretation of Regulation E correctly states that, under the EFTA, the extent of the consumer's liability is determined solely by the consumer's promptness in notifying the financial institution.<sup>15</sup> The CFPB is correct that "[o]ther factors may not be used as a basis to hold consumers liable."<sup>16</sup>

There is nothing in the EFTA that would support a contrary standard. The statute contains no qualifiers on the consumer's protection against unauthorized charges beyond (1) deadlines for reporting those charges, (2) an exception if the consumer authorized a person to use the access device (discussed below), and (3) an exception if the consumer benefited from the charge (making it less likely that the charge was truly unauthorized). The statute makes clear when consumers lose their protection, and it would be outside the CFPB's authority to open up a gaping hole for purportedly negligent transactions. To the contrary, the primary purpose of the EFTA is the creation of consumer rights and the statute is clear that protections cannot be waived.

Unauthorized transfers are far more likely to occur as a result of negligence on the part of financial institutions, merchants and other companies than by consumers. Data breaches, inadequate security and authentication systems, and lax protection of consumer's sensitive personal information can lead to fraud on a widespread basis in far greater numbers than trivial one-by-one losses due to consumers writing their PIN numbers on their cards and then losing them without reporting the loss promptly.

Moreover, a negligence standard would be abused and asserted against consumers even when no negligence occurred. Even today, financial institutions at times resist addressing unauthorized transfers by claiming that the consumer authorized the transfer, at times in ludicrous situations. For example, one bank refused to credit the account of a senior who was in a residential rehabilitation hospital when a card was used at bar and ATM across the country. On another occasion, a bank rejected the claim of a 74-year old senior whose account number was used on an online gaming site after the senior's data was subject to a data breach that she reported to the bank. Ordinary consumers who cannot file a lawsuit over small charges (and most likely are restricted by forced arbitration clauses) are powerless when

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mobile number only to have the funds go missing and be told by the bank there was nothing the bank could do:  
<https://www.nytimes.com/2018/04/22/business/zelle-banks-fraud.html>

<sup>14</sup> 15 U.S.C. § 1693g; Reg. E, Official Interpretations § 1005.6(b)-2.

<sup>15</sup> 15 U.S.C. § 1693g; Reg. E, Official Interpretations § 1005.6(b)-3.

<sup>16</sup> Consumer Fin. Prot. Bureau, CFPB Consumer Laws and Regulations: Electronic Fund Transfer ACT 23 (Oct. 2013), available at [www.consumerfinance.gov](http://www.consumerfinance.gov) (CFPB Supervision and Examination Manual; original emphasis).

banks reject their claims, and these problems would increase if banks could claim the consumer must have been negligent.

### **2.10. Enforce consumers' EFTA rights when consumers authorize access to their own data.**

The Dodd-Frank Act gives consumers a right to access and use their own account information and other data.<sup>17</sup> In recent years, through the growth of services by data aggregators, consumers have been able to use that data for a variety of useful purposes, including avoiding fees, better managing their funds and multiple accounts, and finding more affordable and appropriate services that fit their unique needs.

Data aggregation does pose security and privacy risks. And not every service that seeks access to consumers' data will use that data in ways that ultimately benefit the consumer. Concerns about data aggregation have been discussed in other comments.<sup>18</sup>

In these comments, we limit ourselves to the concern that some financial institutions are violating the EFTA and Regulation E by telling consumers that they are not protected if they authorize a data aggregator or other entity to access the consumer's data.

We do not believe that amendments to Regulation E are necessary. But we urge the CFPB to enforce the EFTA and Regulation E by reminding institutions that liability protections are not waived or breached when consumers share access to their data. We also encourage the CFPB to work with the financial industry to develop and promote safe ways of sharing access to data.

Some institutions may include a provision in an account agreement that purports to waive liability protection if the consumer provides the account credentials or other information to a data aggregator. We understand that sharing of account credentials creates risks, and we applaud institutions that are developing safer ways of providing access to account data.

But EFTA rights may not be waived.<sup>19</sup> Any provision of an account agreement that purports to waive liability protection or other EFTA rights not only is void; that provision is itself a violation of the EFTA.<sup>20</sup>

Some banks may also believe that the sharing of account credentials brings any resulting unauthorized charges within the exception that transfers by "a person who was furnished the access device to the consumer's account by the consumer ...."<sup>21</sup> However, that exception does not cover a rogue employee at a data aggregator or a criminal who obtains the credentials through a data breach; neither that employee nor the criminal were furnished the access device by the consumer.<sup>22</sup>

### **2.11. Clarify the time to dispute initial unauthorized charges on statements**

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<sup>17</sup> 12 U.S.C. § 5533.

<sup>18</sup> See, e.g., NCLC, Comments in Response to Requests for Information: Consumer Access to Financial Records, Docket No. CFPB-2016-0048 (Feb. 21, 2017), <https://www.nclc.org/images/pdf/rulemaking/comments-response-data-aggregator.pdf> (NCLC Consumer Access Comments).

<sup>19</sup> 15 U.S.C. §1683j; see NCLC, Consumer Banking and Payments Law §5.1.2a (Digital Library 2017).

<sup>20</sup> See, e.g., *Murphy v. Law Offices of Howard Lee Schiff, P.C.*, 2014 WL 710959 (D. Mass. Feb. 26, 2014); *Baldukas v. B & R Check Holders, Inc.*, 2012 WL 7681733 (D. Colo. Oct. 2, 2012), adopted by 2013 WL 950847 (D. Colo. Mar. 8, 2013); NCLC, Consumer Banking and Payments Law §5.1.2a (2013).

<sup>21</sup> 12 C.F.R. §1005.2(m).

<sup>22</sup> For a longer discussion, see NCLC Consumer Access Comments, *supra*.

The EFTA and Regulation E limit consumers' protection against unauthorized charges or errors in certain circumstances if not reported promptly. Consumers have no protection against unauthorized charges that are not reported within 60 days of a periodic statement if – and only if – the charges “would not have occurred but for the failure of the consumer to report within sixty days.”<sup>23</sup> A similar rule applies to charges that could have been prevented if the loss or theft of an access device is not reported within two business days.<sup>24</sup>

Yet some institutions have a policy of not permitting consumers to contest charges if not reported within 60 days. That policy violates the specific and careful language of the statute that removes liability protection only for charges that could have been prevented if reported within that time period. As noted above, EFTA rights may not be waived.

There is no specific deadline in the statute for contesting an unauthorized charge. But the one-year statute of limitations in the EFTA would limit consumers' rights.<sup>25</sup> The CFPB should reject any effort to impose a shorter deadline, whether in the account agreement or by bank policy.

It is important to note that the most widespread unauthorized charges may be small charges that are easily overlooked. Scammers and criminals know that large charges will be quickly noticed and disputed. But small charges of \$5, \$10 or \$20 are harder to notice or identify as unauthorized. The difficulty of spotting such charges is compounded by the brief, cryptic identification of many charges appearing on a statement and by the growing number of charges on each statement as electronic payments are increasingly used even for small payments previously made in cash.

The one year limit provided by the statute of limitations, and the exemption for subsequent unauthorized charges that could have been prevented with prompt reporting, appropriately balance consumer protection with certainty and limits for financial institutions. The CFPB should not stray from this statutory scheme.

### **3. Regulation DD (Truth in Savings Act)**

Regulation DD implements the Truth in Savings Act, which governs disclosures and periodic statements for bank accounts, including checking and savings accounts. Some of TISA's provisions overlap with those in Regulation E regarding disclosure of fees and provision of periodic statements. Those issues are discussed above.

As discussed above, we also urge the CFPB to restore plans to address overdraft fees abuses. As part of that effort, the CFPB should update the provisions of Regulation DD that govern advertising of “free checking.” Regulation DD prohibits misleading or inaccurate advertisements, and prohibits advertisements that refer to an account as “free” or “no cost” if any maintenance or activity fee may be imposed. Banks that advertise “free checking” but derive substantial revenue from overdraft fees are engaging in misleading and inaccurate advertising. Banks should be prohibited from advertising “free checking” if the bank charges overdraft fees on ATM or one-time debit card transactions, otherwise encourages consumers to incur overdraft fees, or has a substantial amount of overdraft fee revenues.

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<sup>23</sup> 15 U.S.C. § 1693g(a)(2).

<sup>24</sup> 15 U.S.C. § 1693g(a)(2).

<sup>25</sup> 15 U.S.C. § 1693m(g).

The CFPB should address fees that reduce savings and make any disclosures inherently deceptive. Regulation DD sets out the method of calculating and disclosing the interest rate, reflected as an annual percentage yield (APY). The APY disclosures are based entirely on the interest rates paid and do not account for fees charged. Yet some banks charge monthly fees on savings accounts. In this low interest rate environment, when balances are low, those fees can easily exceed any interest earnings. Not only does this make the APY deceptive, but it even makes the term “savings” misleading, as consumers can actually lose money if they put their funds in a savings account. This is exacerbated by the fact that some banks charge inactivity fees that can begin accruing even on accounts that are not dormant and abandoned. Consumers – especially those who struggle to but should be encouraged to save – should not be misled about the usefulness of a savings account.

#### **4. Regulation CC (Expedited Funds Availability Act)**

Regulation CC implements the Expedited Funds Availability Act (EFAA). The EFAA ensures that consumers have prompt access to deposited funds.

The EFAA and Regulation CC generally require that, for most checks deposited in person to an employee of the financial institution, consumers must be given access to the first \$200 within one business day and another \$200 by the second business day.<sup>26</sup> Funds availability may be delayed by one day for deposits made at a proprietary ATM of the financial institution and for five days for deposits to nonproprietary ATMs.<sup>27</sup> Consumers are entitled to full next day funds availability for in person or proprietary ATM deposits of certain low risk checks, including government checks and checks written on and deposited to the same institution.<sup>28</sup>

However, it is unclear whether prepaid accounts are encompassed within the “accounts” that are within the scope of Regulation CC. Some companies that offer prepaid cards place holds as long as 10 days on funds deposited to prepaid accounts.

Similarly, Regulation CC specifies the funds availability schedule for deposits made in person and at ATMs but does not explicitly address funds deposited by uploading an image through a mobile device by way of remote deposit capture (RDC). Regulation CC’s definition of ATM is broad enough to encompass mobile apps used to permit RDC, and then the question arises whether RDC or the mobile app is a proprietary ATM or a nonproprietary one.<sup>29</sup> However, some financial institutions or other companies that offer RDC take the position that funds deposited by RDC are not covered by Regulation CC’s funds availability schedule.

Consumers need the same prompt access to their check deposits whether those deposits are made to a prepaid account or a checking account and whether the deposit is made in person, at an ATM or through RDC. Indeed, consumers who hold prepaid accounts are more likely to be lower income or to

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<sup>26</sup> 12 U.S.C. § 4002(a)(2)(D). The CFPB should also update Regulation CC to reflect the inflation adjustment adopted by Congress in 2010. Regulation CC inaccurately states that only the first \$100 must receive next day availability. 12 C.F.R. § 229.10(c)(1)(vii).

<sup>27</sup> Regulation CC, 12 C.F.R. §§ 229.10(c)(2), 229.12(f).

<sup>28</sup> 12 U.S.C. § 4002(a); Regulation CC, 12 C.F.R. § 229.10.

<sup>29</sup> See NCLC, Consumer Banking and Payments Law, § 4.5.2 (online edition).

struggle to make it paycheck to paycheck. Those consumers especially need prompt access to their funds.

We have been asking the FRB and the CFPB to update the funds availability schedule for nearly five years.<sup>30</sup> Prepaid accounts and RDC have been used for many years and it is long past time to update Regulation CC to encompass these technological changes.

The same availability schedule should apply to checks deposited to prepaid accounts and to those deposited to checking accounts. Similarly, we generally believe that the same schedule should apply to funds deposited through RDC as for deposits at the bank's ATMs. A check deposited by RDC is done so through an app or website provided by the consumer's bank, and is transmitted immediately.

However, we recognize that RDC deposits present fraud concerns. If – and only if – necessary to address serious fraud risks, the CFPB may wish to consider permitting a one day delay in funds availability from the schedule required for deposits at proprietary ATMs. As experience with RDC grows and fraud prevention techniques improve, hopefully any delay can be eliminated.

## **5. Regulation V (Fair Credit Reporting Act)**

The Fair Credit Reporting Act (FCRA), implemented by Regulation V, provides critical protections when information is collected about consumers for use in providing credit, pricing insurance, considering employment and other uses. Consumers have no choice over the company that collects their information or provides consumer reports. Thus, competitive forces play a limited role in making sure that information is accurate, that consumers are dealt with fairly when errors are discovered, that consumers have access to their own information, and that information is used appropriately.

While there are serious problems in the credit reporting area, many of these stem from failure to comply with existing rules rather than gaps in those rules. Thus, the most critical task for the CFPB is to ensure vigorous supervision of larger participant consumer reporting agencies, as discussed in the consumer coalition comments to the Bureau's RFI on its Supervision Program. While we would urge that FCRA regulations be issued to set strong standards for accuracy and provide better access for consumers to their own reports, such rulemaking should only be conducted after a cautious, deliberative process that brings in the multitude of stakeholders to exchange data and feedback in thoughtful conversation. Moreover, we especially urge that FCRA regulations not be weakened.

To the extent there are focused, limited improvements for Regulation V that can be made without the benefit of a deliberative process, we have the following suggestions.

### ***5.1. The CFPB Should Adopt the FTC Staff Summary***

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<sup>30</sup> NCLC et al., Supplemental comments to the Fed and CFPB, 12 CFR Part 229, Regulation CC, Docket No. R-1409 (submitted Sept. 18, 2013), [http://www.nclc.org/images/pdf/rulemaking/comments-regulation\\_cc\\_rcc\\_efaa\\_9-18-2013.pdf](http://www.nclc.org/images/pdf/rulemaking/comments-regulation_cc_rcc_efaa_9-18-2013.pdf), attached as Exhibit 3 at 27 ("Sept. 2013 Comments"); *see also* Comments of NCLC et al. To FRB on Regulatory Review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Docket ID OP-1491 (May 14, 2015), [http://www.nclc.org/images/pdf/banking\\_and\\_payment\\_systems/nclc\\_egrpra\\_fed\\_rule\\_review\\_comments\\_on\\_cr\\_a\\_reg\\_cc05142015.pdf](http://www.nclc.org/images/pdf/banking_and_payment_systems/nclc_egrpra_fed_rule_review_comments_on_cr_a_reg_cc05142015.pdf).

One simple measure that the Bureau could take to ensure clarity and reduce confusion is to adopt the Federal Trade Commission’s report entitled “40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations” (herein referred to as the “FTC Staff Summary”). The FTC Staff Summary replaced the prior FTC Statement of General Policy or Interpretation, also known as the FTC Staff Commentary. The FTC updated the Staff Summary in 2011 as part of handing off the authority over most of the FCRA to the CFPB.

For over 40 years, the FTC Staff Commentary was the cornerstone of regulatory guidance for the FCRA. Both consumer advocates and industry members relied on the FTC Staff Commentary in interpreting the FCRA. Even though the FTC never had plenary general rulemaking authority over the FCRA, the FTC Commentary was often regarded as persuasive by consumer advocates, industry, and the courts. Indeed, for nearly 30 years, the authors of the Fair Credit Reporting manual published by the National Consumer Law Center cited the FTC Staff Commentary dozens (if not hundreds) of times in its text.

The Bureau should adopt the FTC Staff Summary to avoid uncertainty in interpreting the FCRA. Such adoption will benefit both consumers and industry members, for whom guidance is essential for compliance purposes. Indeed, members of industry have also advocated for the Bureau to adopt the FTC Staff Summary.<sup>31</sup>

The absence of the FTC Staff Summary risks confusion and additional compliance costs as stakeholders are faced with a lack of authoritative interpretations of the FCRA. One example is the joint user exception. In the FTC Staff Summary, the exception for “joint users” of consumer reports was removed as a permissible purpose;<sup>32</sup> however, the Bureau Examination manual still includes the joint user exception.<sup>33</sup> Thus, it is unclear whether the joint user exception is still valid or not.

We recommend that the FTC Staff Summary be adopted in a wholesale fashion. Certainly, there are provisions that consumer advocates would urge be changed, as well as changes that industry would advocate. But revisiting the substance of the commentary at this time is not a priority for Bureau resources and would delay making the adoption of the commentary. A simple and fair way to deal with this is to first adopt the FTC Staff Summary, and then at a later point in time make any changes after notice and comment rulemaking or guidance.

## ***5.2. Protect Consumers Who Dispute Medical Debt Due to Billing Errors or Insurance Disputes.***

Medical debt can have a significant impact on a consumer’s credit history. The Bureau’s own research found that over half (52.1%) of debt collection entries on consumer credit reports were for medical debt and that nearly one in five consumers with credit reports had an entry for medical debt.<sup>34</sup>

Many times a medical bill will be sent to a debt collector as a result of a billing error or an insurance dispute (e.g., wrong code, inadequate documentation), which can be of extended duration. Some

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<sup>31</sup> Saltmarsh, Cleaveland, and Gund, Comment, 2012.

<sup>32</sup> FTC, 40 Years Staff Report Accompanying FTC Staff Summary 10–11.

<sup>33</sup> CFPB, “Joint User” Rule, CFPB Supervision and Examination Manual, at FCRA 10, updated March 2018, available at [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_supervision-and-examination-manual.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf).

<sup>34</sup> Consumer Fin. Prot. Bureau, Consumer credit reports: A study of medical and non-medical collections, at 5, Dec. 11, 2014.

providers will automatically refer a bill to a debt collector in as little as sixty or even thirty days even though the bills are ultimately paid by insurers.<sup>35</sup> This damages the consumer's credit history and credit score even after the bill is paid, as an account reported as a collection matter may remain on a credit report even after the balance is paid off.<sup>36</sup> These types of debt collection items say nothing about the consumer's creditworthiness.

Thus, we recommend that, if a consumer disputes a collection item on his or her credit report because it is the result of a billing error or insurance dispute, that debt should be specially marked as such with a specific code of "insurance/medical billing dispute." Furthermore, the CFPB should require that such debts be excluded from any credit score and not be considered by lenders. The CFPB has authority to adopt such a rule under Section 604(g)(2) of the FCRA, 15 USC § 1681b(g)(2), which prohibits creditors from using medical information in considering a consumer's eligibility for credit unless permitted by Regulation V.

Currently, Regulation V permits the consideration of medical debt. However, the CFPB has the authority to amend Regulation V, and to exclude consideration of medical debt that is the subject of provider-insurer billing errors and disputes. Permitting the consideration of this type of disputed debt, particularly when the dispute has nothing to do with credit worthiness, is to use the existence of a medical condition adversely in considering a consumer's eligibility for credit.

***5.3. The CFPB should require employers to give 35 days between providing a copy of a credit report and any adverse action based the report.***

Another measure that the Bureau could take to ensure clarity in consumer reporting is to amend Regulation V to set a firm time period between when an employer sends a pre-adverse action disclosure and when the employer may take the adverse action. This time frame should be 35 days so that, if the worker finds an error in the report, he or she has time to correct it.

Section 604(b)(3)(A) of the FCRA, 15 U.S.C. § 1681b(b)(3)(A), requires that, before an employer can take an adverse action based on a consumer report, the employer must send a copy of the actual report and the Summary of Rights to the worker, also known as the "pre-adverse action" disclosure. However, the FCRA does not set forth a definitive amount of time between the pre-adverse action disclosure and the adverse action.

Currently, the FTC Staff Summary provides that there be a "reasonable time" between the pre-adverse action disclosure and the adverse action.<sup>37</sup> Previously, an FTC Staff Opinion provided that the employer must send the pre-adverse action notice five days prior to taking the adverse action.<sup>38</sup> Neither of these options is adequate to protect workers, especially those harmed by an error or inaccuracy in a consumer report.

If there is an error in a consumer report, five days is simply not sufficient for an employee to correct the report. A consumer reporting agency has a full 30 days to correct an error in a consumer report—

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<sup>35</sup> *Id.* at 26.

<sup>36</sup> National Consumer Law Center, Collection Actions § 9.3.5.1 (4th ed. 2017), *updated at* [www.nclc.org/library](http://www.nclc.org/library).

<sup>37</sup> FTC Staff Summary § 604(b)(3) item 5, at 52.

<sup>38</sup> Weisberg, FTC Informal Staff Opinion Letter (June 27, 1997).

twenty-five days past the five days that an employer could take the adverse action. And a “reasonable” time frame is no better for workers, as it still does not provide enough time for workers to have errors corrected. For example, the court in *Johnson v. ADP Screening* held that 14 days would meet a “reasonable” standard, even though the consumer did not have time to fix the error in that time frame.<sup>39</sup>

We recommend the Bureau set a clear, bright-line 35-day time period between the pre-adverse action notice and the adverse action. With 35 days, the consumer will have five days to discover the error and request its correction, and the background check agency will have 30 days to correct the report, so it will be possible to correct the error before the employer can take the adverse action based on the erroneous report.

#### ***5.4. The Bureau Should Eliminate the Credit Score Disclosure Exceptions to the Risk-Based Pricing Rule.***

Under the FCRA, a creditor must send a risk-based pricing notice whenever, based on a consumer report (including a credit score), the creditor provides credit on terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers. However, two currently existing exceptions to this risk-based pricing notice do not make sense in light of the credit score disclosure requirement of the Dodd-Frank Act.

When the FTC and Federal Reserve Board first issued regulations implementing the risk-based pricing notice in January 2010, they created exceptions in which a creditor is not required to provide a risk-based pricing notice if either: (1) the loan is secured by residential real property and the creditor provides a mortgage score disclosure to the consumer; or (2) the creditor provides every consumer with a copy of her credit score. 12 C.F.R. § 1022.74(d) and (e).

Subsequently, in July 2010, Congress passed the Dodd-Frank Act. Section 1110F of that Act amended the risk-based pricing notice requirement by requiring that, if the credit decision is based on a credit score, the creditor must provide the credit score that it actually used in the risk-based pricing notice.

When the FTC and FRB issued regulations to implement the Dodd-Frank score disclosure requirement, they kept the pre-existing credit score disclosure exceptions, despite the fact these exceptions no longer made sense in light of the Dodd-Frank Act. Prior to the Dodd-Frank Act, the fact that creditors could choose the credit score disclosure exception was justifiable in that consumers would be receiving a benefit—a free credit score—in lieu of the risk-based pricing notice. Indeed, the FTC and Board specifically cited this benefit as the reason for allowing the exception.<sup>40</sup>

However, with the addition of Dodd-Frank’s credit score disclosure requirement, there is no longer any such tangible benefit to consumers who were subject to risk-based pricing. The exceptions should be removed, as they no longer meet the legal standard under Section 615(h)(6)(iii) of the FCRA, 15 U.S.C. §

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<sup>39</sup> *Johnson v. ADP Screening and Selection Services, Inc.*, 768 F. Supp. 2d 979 (D. Minn. 2011).

<sup>40</sup> The FTC and Board stated: The credit score disclosure provides tangible value to consumers because free credit scores typically are not available to consumers in connection with non-mortgage transactions. Consumer reporting agencies and other sellers of credit scores typically charge consumers between \$6 and \$10 for a credit score. 73 Fed. Reg. 28,966, 28,983 (May 19, 2008).

1681m(h)(6)(iii), because they no longer represent classes of transactions for which the risk-based pricing notice will not significantly benefit consumers.

The problems with the pre-existing credit score disclosure exceptions are exacerbated by the fact that they do not require the disclosure of the credit score used by the creditor, but permit disclosure of a generic score. These provisions create a loophole to the Dodd-Frank credit score disclosure, which requires disclosure of the actual credit score “used by such person in making the credit decision.” 15 U.S.C. § 1681m(h)(5)(E). A creditor that engages in risk-based pricing could avoid sending the risk-based pricing notice, instead sending a notice to all applicants that only discloses a generic score. This notice would not disclose the actual credit score upon which the creditor relies, and yet the creditor would be in compliance with the regulation. This contravenes both the letter and intent of Section 1100F of the Dodd-Frank Act, which was specifically written to require disclosure of the actual score used by the creditor.

In 2012, the FTC and Board stated they would not remove the pre-existing credit score disclosure exceptions in part because of the transfer of authority over the FCRA to the Bureau. Now that it is years after the transfer of authority has taken place, we recommend that the exceptions to the risk-based pricing notice for credit score disclosures be removed.

## **6. Regulation M (Consumer Leasing Act)**

A high percentage of new motor vehicle sales are through leases and a surprisingly large number of used vehicles are also sold through leases. Other consumer product transactions also are leases covered under the Consumer Leasing Act, 15 USC 1667(1). The Act primarily sets out general standards for disclosure of the terms of the lease, what warranties accompany a lease, purchase options, what happens at lease termination, and the like.

Differences in both the operation and the terminology of lease transactions compared to credit sales led to much confusion in the marketplace, and the Consumer Leasing Act was intended to clarify the nature of lease transactions. The Act though just provides general standards, leaving the particulars to be provided by regulation.

Regulation M on Consumer Leasing as first enacted provided little specification for these general standards. This lack of specificity led to extensive litigation over whether lease disclosures complied with the Act and provided for little uniformity between different lessors’ disclosure forms. The lack of uniformity made it difficult for consumers to comparison shop, and led to certain lessors drafting lease disclosures and engaging in advertising that took unfair competitive advantage against other leasing companies.

In 1996 and 1997, primarily in response to requests from the industry, the Federal Reserve Board extensively amended Regulation M to provide model disclosure forms and far more guidance as to the proper form of disclosure. These changes were generally supported by the leasing industry.

We support clear disclosures of leasing terms. While Regulation M could undoubtedly be improved should the CFPB choose to revisit it, it is not a priority, and we oppose any efforts to weaken the rule. The disclosures follow a standardized format allowing consumers to compare apples with apples. Most members of the industry appear to have little difficulty complying with Regulation M and there has been little litigation concerning Regulation M disclosure requirements.

\* \* \*

Thank you for considering these comments.

Respectfully submitted,

Allied Progress  
Americans for Financial Reform  
Arizona Community Action Association  
Arkansans Against Abusive Payday Lending  
Atlanta Legal Aid Society, Inc.  
CASH Campaign of Maryland  
Center for NYC Neighborhoods  
Consumer Action  
Consumer Federation of America  
Consumers Union  
Equal Justice Society  
Heartland Alliance for Human Needs & Human Rights  
Housing Options & Planning Enterprises, INC.  
Illinois People's Action  
Main Street Alliance  
Maryland Consumer Rights Coalition  
Mississippi Center for Justice  
National Association of Consumer Advocates  
National Association of Social Workers  
National Consumer Law Center (on behalf of its low income clients)  
National Fair Housing Alliance  
New Jersey Citizen Action  
People's Action Institute  
Public Counsel  
Public Justice Center (Baltimore, MD)  
Public Law Center (Santa Ana, CA)  
Texas Appleseed  
U.S. PIRG  
West Virginia Center on Budget and Policy  
Woodstock Institute