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Financial Institutions and Monetary Policy Subcommittee

Hearing on: "Agency Audit: Reviewing CFPB Financial Reporting and Transparency"

Written Testimony of

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Chairman Barr, Ranking Member Foster, and members of the subcommittee, it is an honor to appear today. Thank you for the opportunity to share some thoughts on the Consumer Financial Protection Bureau.

My name is Chris Peterson, and I am the John J. Flynn Endowed Professor of Law at the University of Utah where I teach classes on contract law, constitutional law, and consumer protection. I am also Of Counsel at the public interest law firm of Gupta Wessler LLP here in Washington, D.C.

From 2012 to 2016, I worked in a few different capacities for the Consumer Financial Protection Bureau. From 2012 to 2014, I served as Senior Counsel for Enforcement Policy and Strategy in the CFPB's Office of Enforcement. In this role I led issue teams focused on identifying violations of federal consumer protection law and designing law enforcement investigations related to payday, vehicle title and other similar small dollar loans, retail finance, deposit accounts, payment systems, and related financial services. I also served as a regional liaison between the CFPB's Office of Enforcement and state enforcement and regulatory agencies throughout the western United States. From 2014 to 2016, I served as a Special Advisor in the Office of the Director of the CFPB where I advised Director Richard Cordray on legal and policy issues. During this period, I also worked temporarily at the Pentagon as a Special Advisor in the United States Department of Defense General Counsel's Office of Legal Policy within Office of Personnel and Readiness. In that capacity, I assisted the Pentagon in designing the Military Lending Act regulations that provide a national usury limit on loans to active-duty military service members.

I have been asked to testify on financial reporting and transparency at the CFPB as well as the CFPB's recent final rule reducing the CARD Act safe harbor for late fees. My testimony will: (1) explain why the CFPB's funding structure is constitutional; (2) describe the CFPB's most recent financial audit including a variety of accountability and oversight mechanisms related to the CFPB; and (3) highlight some of the Bureau's recent efforts to reduce junk fees imposed on American consumers.

I. The statute funding the Consumer Financial Protection Bureau is a constitutional exercise of Congress's spending power

Article I, Section 9, Clause 7 of the U.S. Constitution states that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." In *OPM* v. *Richmond*, the Supreme Court explained that this constitutional provision is a "straightforward and explicit command." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990). This command means "simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Id.* (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)). In the case of the CFPB, Congress adopted 12 U.S.C. § 5497—a law—that appropriated funds to the CFPB.

The fact that this law appropriated funds through an on-going mechanism does not render the law unconstitutional. The general appropriations clause does not require Congress to use an annual appropriations process. In contrast to Section 9, Clause 7, the Constitution *does* place a timing restriction on Congress' appropriations power with respect to funding a standing army. Article I, Section 8, Clause 12 states that "no Appropriation of Money" to raise and support an army "shall be for a longer Term than two Years." The contrast between these two sections could not be clearer. The army appropriations provision establishes a durational limit on appropriations, but the more general Congressional appropriations power does not. In the *Federalist Papers*, Alexander Hamilton noted the difference between the two appropriations provisions by describing the Army's durationally limited appropriations clause as a "qualification" of general "legislative discretion" over other appropriations. *See The Federalist No. 24, at 153 (Alexander Hamilton).* The Founders knew how to require durationally limited Congressional appropriations but made a conscious decision not to impose this limit on non-military executive agencies.

As a result, Congress has often chosen to pass laws appropriating funds to executive agencies outside of annual spending bills. For example, the Constitution authorized Congress to establish Post Offices across the United States. U.S. Const. Art. I, Sec. 8, Cl. 7. Instead of establishing Post Office funding through burdensome, iterative annual spending bills, in 1792 Congress made the sensible decision to fund our public mail through that system's own collection of postage assessments.[1] Can anyone seriously maintain that the Post Office has been unconstitutionally selling stamps since the 18th century?

Yet, the Post Office is by no means the only example of an executive agency funded through means other than annual spending bills. Other founding era examples of organic appropriation laws include the following:

[1] *See* Act of Feb. 20, 1792, ch. 7, §§ 2, 3, 1 Stat. 233-234.

- Congress funded the First Bank of the United States through sales of stock to investors. *See* Act of Feb. 25, 1791, ch. 10, § 1, 1 Stat. 191-192.
- Congress partially funded the National Mint through collection of fees. *See* Act of Apr. 2, 1792, ch. 16, §§ 1, 14, 1 Stat. 246, 249.
- Congress funded the Patent Office through fees paid by patent applicants. *See* Act of July 4, 1836, ch. 357, § 9, 5 Stat. 121.
- And Congress funded the Office of the Comptroller of the Currency (the OCC) through assessments levied on banks. *See* Act of Feb. 19, 1875, ch. 89, 18 Stat. 329; 12 U.S.C. 16, 481, 482.

Moreover, following precedent of the OCC, appropriations laws authorizing executive funding outside of annual spending bills became the norm among federal financial services regulatory agencies created since the beginning of the 20th century. When Congress established the Federal Reserve Board in 1913, it provided for funding through assessments on the regional Federal Reserve Banks and collection of revenue from its open market operations.[2] Similarly, Congress appropriated funds with laws providing for financial institution assessments for the Federal Deposit Insurance Corporation (FDIC),[3] the National Credit Union Administration (NCUA),[4] the Farm Credit Administration,[5] and the Federal Housing Finance Agency (FHFA).[6] Modern non-financial regulators with Congressionally appropriated

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[2] *See* Federal Reserve Act, ch. 6, §§ 10, 11, 14, 38 Stat. 260-263, 264-265; 12 U.S.C. 243, 244, 355.
[3] Banking Act of 1933, ch. 89, sec. 8, § 12B(l) and (y), 48 Stat. 172-176, 179-180; 12 U.S.C. 1815(d), 1820(e).
[4] Federal Credit Union Act, ch. 750, §§ 5, 6, 48 Stat. 1217-1218; Act of Mar. 10, 1970, Pub. L. No. 91-206, 84 Stat. 49; 12 U.S.C. 1755(a) and (b).
[5] Farm Credit Act of 1933, ch. 98, § 5(a)(1) and (2), 48 Stat. 258; 12 U.S.C. 2250.
[6] 12 U.S.C. 4516.

fee or assessment-based funding mechanisms include Citizenship and Immigration Services,[7] Customs and Border Protection,[8] and the Animal and Plant Health Inspection Service.[9]

The CFPB's funding mechanism is consistent with laws funding these agencies. Indeed, the CFPB's funding mechanism is indistinguishable from the Federal Reserve Board of Governors' funding mechanism because they both draw upon the same funds. Congress appropriated funds to the CFPB by authorizing the agency to request transfers from the Board in an amount up to the cap defined by Congress in 12 U.S.C. 5497(a). Of course, at any time Congress is free to exercise its power of the purse simply by amending the Bureau's appropriation statute. But, as it stands, the method of appropriation Congress chose for the Bureau is a constitutionally permissible exercise of Congressional spending power.

II. The CFPB's funding mechanism is subject to effective internal controls, appropriate oversight, and appears to be working well

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the CFPB to prepare financial statements annually which are then subject to an audit by the Government Accountability Office.[10] In preparing for my testimony, I reviewed the CFPB's most recent Financial Report as well as the GAO's Financial Audit.

Following its audit, the GAO made the following findings:

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[7] 8 U.S.C. 1356(m) and (n).
[8] 19 U.S.C. 58c (2018 & Supp. III 2021); 8 U.S.C. 1356 (2018 & Supp.II 2020).
[9] 21 U.S.C. 136a(a)
[10] 2 Pub. L. No. 111-203, title X, § 1017(a)(4)(B), (a)(5), 124 Stat. 1376, 1976-77 (2010), codified at 12 U.S.C. § 5497(a)(4)(B), (a)(5). *See also* The Full-Year Continuing Appropriations Act, 2011 Pub. L. No. 112-10, div. B, title V, § 1573(a), 125 Stat. 38, 138 (2011), codified at 12 U.S.C. § 5496a.

- CFPB's financial statements as of and for the fiscal years ended September 30, 2023 and 2022, are presented fairly, in all material respects, in accordance with U.S. generally accepted accounting principles;
- CFPB maintained, in all material respects, effective internal control over financial reporting as of September 30, 2023; and
- CFPB had no reportable noncompliance for fiscal year 2023 with provisions of applicable laws, regulations, contracts, and grant agreements we tested.[11]

In my review of the Bureau's Financial Report and the GAO's Audit, I did not identify any irregularities or areas of concern. The CFPB appears to have a program in place to comply with the Federal Managers Financial Integrity Act. The Bureau appears to have an active program in place to comply with Section 1017(a)(4)(C) the Dodd-Frank Act which requires a financial management system that complies with federal accounting standards. The Bureau has procedures in place to comply with the Federal Information Security Management Act. The Bureau has an annual program to review its activities under the Payment Information Integrity Act of 2019 that seeks to identify processes that could be vulnerable to significant improper payments. And in following White House Office of Management and Budget guidelines to identify and assess fraud risks, the Bureau used its annual internal control assessment to conduct an internal review of fraud risk management activities even though it was not obligated to comply with OMB guidelines on this issue.

In the natural course of politics, we can all expect to have policy disagreements. However, neither I nor the GAO uncovered any evidence of inappropriate financial behavior at the CFPB. Indeed, the CFPB's civil servants should be congratulated for their hard work

[11] U.S. Government Accountability Office, *Financial Audit: Consumer Financial Protection Bureau's FY 2023 and FY 2022 Financial Statements*, November 15, 2023, https://www.gao.gov/assets/D24106737.pdf.

compiling the Bureau's most recent Financial Report, for exercising sound stewardship over public funds, and for receiving a clean bill of health from the GAO.

III. The CFPB has an admirable track record of accomplishments in protecting American consumers—Including its recent amendments to the CARD Act late fee regulations

In the Financial Crisis of 2007-2009 we learned that financial products that do not work well for consumers can threaten our national economy. Congress adopted the Consumer Financial Protection Act as one part of the broader reforms in the Dodd-Frank Wall Street Reform and Consumer Protection Act to prevent future crises and to better protect consumers from unfair, deceptive, and abusive practices. Since the Bureau started its supervision and law enforcement programs, it has provided more than $19 billion in relief to nearly 200 million consumers by illegal practices in the form of monetary compensation, principal reductions, and canceled debts.[12] The Bureau has succeeded in reforming and modernizing our nation's residential mortgage lending regulatory system. And the Bureau has created a modern national consumer finance complaint intake system that allows all consumers to share finance challenges they are facing in their daily lives with their government. The CFPB's consumer response team maintains a web-based intake portal and has staff on hand to communicate with Americans in more than 180 languages. Each week the Bureau forwards around 25,000 customer complaints about financial products and services to companies for their response, acting as a critical conduit of communication and a public force for resolving disputes.[13] These

[12] CFPB, *Enforcement by the Numbers* (Apr. 1, 2024).
[13] CFPB, *See how the complaint process works*, https://www.consumerfinance.gov/complaint/.

are meaningful accomplishments that represent dedication and a profound commitment to public service on the part of the Bureau's staff. Our civil servants deserve thanks from Congress and from the public for their hard work protecting American consumers.

Recently the Bureau announced a new final rule updating consumer protection rules associated with credit card late fees. A year prior to the Dodd-Frank Act, Congress passed the Credit Card Accountability Responsibility and Disclosure (CARD) Act to rein in credit card abuses. In the CARD Act, Congress established a federal law that requires credit card late fees to be *"reasonable and proportional"* to the consumers' failure to pay on time. Because the CARD Act predates the creation of the CFPB, the Federal Reserve Board of Governors was tasked with implementing the CARD Act.[14] The Federal Reserve Board adopted CARD Act rules that included a regulatory "safe harbor" late fee to assist credit card issuers with CARD Act compliance. Over time the Fed's safe harbor has risen with inflation to permit $30 for an initial late payment and $41 for subsequent late payments. For millions of Americans, these late payment penalties can impose a substantial burden especially when they may be struggling with personal, family, or household challenges.

Since Congress transferred responsibility for implementing the CARD Act to the CFPB, the Bureau has been gathering data and learning about how the credit card system functions. In recent years, credit card issuers charged a record-high $130 billion in interest and fees, including more than $14.5 billion in late fees in 2022. And at the same time, there is no evidence that these fees are "reasonable and proportional" to the harms suffered by card

[14] CARD Act section 102, 123 Stat. 1740 (15 U.S.C. § 1665d(a)).

issuers from consumers late payments. On the contrary, a detailed study by the CFPB has demonstrated that among large credit card issuers, late fee revenue is *more than five times* pre-charge-off collection costs.[15] This means that on average, the most actual harm credit card issuers could suffer from late payment is about $8. Accordingly, the CFPB has made the sensible decision to revisit the late fee safe harbor to better conform with the reasonable and proportional principal Congress originally intended in 2009.

Credit card late fees that exceed actual harm suffered by the card issuer are a form of punitive damages that, in effect, grant the bank a windfall every time working families trip up while struggling to make ends meet. The Bureau's recent data show that the Fed's original CARD Act safe harbor was simply too high. The existing regulation is not consistent with federal law because it allows banks to impose late fees that are not reasonable and proportional to harm suffered by the card issuer. Moreover, consumers struggle to shop effectively for late fees and other contingent charges because at the time they enter into a card agreement, they typically do not anticipate making late payments.[16] CFPB's analysis of actual costs borne by

[15] CFPB, Credit Card Penalty Fees: Final Rule, 89 Fed. Reg. 19128, at 19135 (March 15, 2024).

[16] My colleagues at the University of Utah recently explained how unregulated markets do not discipline credit card late fees with the traditional price mechanism:

> Economists recognize that market forces are especially weak when it comes to disciplining the price of ancillary or aftermarket services. The classic teaching example is movie theater popcorn. Customers do not have the price of popcorn on the top of their minds when choosing among theaters; the movie choice and the drive time are paramount. And when they arrive at a theater, customers are not likely to reverse their ticket transaction and find a new theater in response to sky-high popcorn prices: the switching costs would be too steep. The same is true for the price of other common aftermarket services, such as movie rental in hotels, and printer cartridges.

Darren Bush, Mark Glick, Gabriel Lozada, and Hal Singer, *Overdraft Fees, Credit Card Late Fees, and the Lump of Profit Fallacy*, The Institute for New Economic Thinking, April 15, 2025, https://www.ineteconomics.org/perspectives/blog/overdraft-fees-credit-card-late-fees-and-the-lump-of-profit-fallacy#_ftn8.

credit card issuers suggests that too many banks are using customer mistakes as a profitable fee generating opportunity, rather than a means to make the issuer whole.

On balance, the Bureau's amended CARD Act late fee safe harbor represents a thoughtful and creative rule that seeks to make a positive difference for consumers. Unsurprisingly, the public overwhelmingly expressed dedicated support for this rule. Of the 57,000 comments the CFPB received on the proposed rule, more than 56,000 supported the proposal and urged the CFPB to rein in late fees. By correctly implementing 15 U.S.C. § 1665d(a) the new credit card late fee rule will save American consumers $10 billion in late fees per year.

Moreover, the CFPB used a light touch for smaller community banks and credit unions. The Bureau exercised restraint by limiting application of the reformed safe harbor to only the largest credit card issuers—banks with more than one million open credit card accounts. Because these 30-35 companies account for more than 95% of total outstanding credit card balances, the Bureau's revised CARD Act implementation will provide sensible protections for the overwhelming majority of consumers while making a good faith effort to minimize compliance costs and regulatory burden for smaller financial institutions.

In conclusion, while every large public institution has room for improvement, I believe the CFPB is a constitutionally funded agency that is working within traditional government oversight and accountability norms to make a positive difference for the American public. In particular, the CFPB's final rule reducing credit card late fees is a step in the right direction. Thank you to the Subcommittee for your public service and for inviting me to participate in the hearing today.