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TESTIMONY OF

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of the

U.S. HOUSE COMMITTEE ON FINANCIAL SERVICES

HEARING ON

BUREAUCRATIC OVERREACH OR CONSUMER PROTECTION? EXAMINING THE CFPB'S LATEST ACTION TO RESTRICT COMPETITION IN PAYMENTS

MARCH 13, 2024

[1] The views expressed in this testimony are my personal views and do not represent the views of Patomak Global Partners LLC or any other organization with which I am affiliated.

Chairman Hill, Ranking Member Lynch, and members of the subcommittee, thank you for the opportunity to testify today about the Bureau of Consumer Financial Protection's ("CFPB's" or "Bureau's") proposed rulemaking to subject larger participants of a market for "general-use digital consumer payment applications" to CFPB examinations (hereinafter, the "Proposed Rule").[2]

My name is Brian Johnson. I am Managing Director of Patomak Global Partners, a financial services regulatory consultancy. I am an attorney and Certified Regulatory Compliance Manager. I previously served as the Deputy Director of the CFPB, where I provided strategic direction to the agency's rulemaking, supervision, and enforcement efforts. Prior to that, I proudly served for over five years as a member of the Financial Services Committee's professional staff, where I focused on banking and consumer finance matters.

I will address my comments today first to the Proposed Rule, second to the broader context of recent CFPB actions, and third to suggest a path forward.

The Proposed Rule

I am pleased to discuss aspects of the Proposed Rule, which the CFPB announced on November 7th. This rulemaking, if finalized, would define a market for "general-use digital consumer payment applications," which would cover providers of funds transfer and wallet functionalities through digital applications for consumers' general use in making payments to other persons for personal, family, or household purposes. Larger participants of this market, as defined by the rulemaking, would be subject to CFPB supervision.

Relevant Context Regarding the Stated Justification for the Rulemaking

Let me start by explaining why we are here today. This Proposed Rule is but the latest step taken by the CFPB regarding the relationship between technology and payments. The CFPB's efforts began in October 2021, when the CFPB issued so-called "1022 orders" to surveil the internal product development plans of six companies: Amazon, Apple, Facebook, Google,

[2] Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197 (proposed Nov. 17, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-11-17/pdf/2023-24978.pdf.

PayPal, and Square.[3] The CFPB issued its orders pursuant to its statutory market monitoring authority, which specifies that its collection of information must be for the purpose of monitoring for risks to consumers "in the *offering or provision* of consumer financial products or services, including developments in markets for products or services."[4] Products still under development are, by definition, not being offered or provided in the marketplace, so the CFPB exceeded its authority in seeking this information. Moreover, market monitoring authority was intended by Congress to be used in a cooperative manner to gather information from financial institutions to be used in public aggregated (anonymized) reports about broad market trends and developments, not to target specific companies by name.[5] Congress gave the CFPB a different investigative tool, a civil investigative demand, or CID, that it may use to compel information from individual companies.[6] However, Congress provided important procedural safeguards for targets of CFPB enforcement investigations, including the obligation for the CFPB to provide the targeted company fair notice of the alleged violation which is under investigation[7] and the right of the target to petition the CFPB to limit or set aside the demand.[8] Congress did not provide similar protections for recipients of 1022 orders, likely because it never anticipated that the CFPB would abuse its market monitoring authority to publicly target individual companies.

In a statement accompanying the 1022 orders, Director Chopra expressed concern that payments businesses and network businesses can "gain tremendous scale and market power, potentially posing new risks and undermining fair competition."[9] He further expressed concern about how data on consumer behavior can be "monetized by companies that seek to profit by

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[3] See the Draft Order, which compelled production of "all decks, presentations, reports, memos, and similar documents that pertain to PLANNED PRODUCTS that were EITHER: (a) provided or otherwise made available to the Product Executive for any PRODUCT at any point in the Relevant Period; OR (b) generated as part of ongoing significant activity or investment, during the Relevant Period, into COMPANY's development or assessment of any PLANNED PRODUCT," available at https://files.consumerfinance.gov/f/documents/cfpb_section-1022_generic-order_2021-10.pdf
[4] 12 U.S.C. 5512(c)(1).
[5] 12 U.S.C. 5512(c)(2)
[6] 12 U.S.C. 5562(c).
[7] 12 U.S.C. 5562(c)(2). It should be noted that federal courts have found that the CFPB violated this important protection on at least two occasions. See *CFPB v. ACICS*, No. 16-5174 (D.C. Cir. 2017), https://cases.justia.com/federal/appellate-courts/cadc/16-5174/16-5174-2017-04-21.pdf?ts=1492785107; *CFPB v. The Source for Public Data, L.P.*, No. 17-10732 (5th Cir. 2018), https://cases.justia.com/federal/appellate-courts/ca5/17-10732/17-10732-2018-09-06.pdf?ts=1536255032.
[8] 12 U.S.C. 5562(f). CIDs are also not self-enforcing, so an aggrieved recipient may challenge the CID in court.
[9] Rohit Chopra, *Statement Regard the CFPB's Inquiry into Big Tech Payment Platforms* (Oct. 21, 2021), available at https://www.consumerfinance.gov/about-us/newsroom/statement-regarding-the-cfpbs-inquiry-into-big-tech-payment-platforms/.

behavioral targeting."[10] His statement went on to speculate whether "Big Tech companies will exploit their payments platforms," for instance to "interfere[] with fair, transparent, and competitive markets" and to "use their scale to extract rents from market participants."[11]

In a later speech, the Director assailed the "outsize influence Apple and Google exert over popular contactless payment options," specifically through operating system rules about accessing near-field communications (NFC) technology to enable contactless and "tap-to-pay" technology.[12] The Director expressed concern that these rules "erect even more gates and toll booths that will prevent small firms from emerging and succeeding, even when they offer superior products" and noted that the European Commission had charged Apple with abusing its market power.[13]

I note all of these statements because they are a clear indication of the nature of the Director's interest in technology companies engaged in payments services. To be fair, he raises some interesting public policy questions. However, these are antitrust questions that are best addressed by the application of antitrust laws by agencies with statutory authority to do so, such as the Federal Trade Commission (FTC) or the Department of Justice. The Dodd-Frank Congress made exacting and deliberate choices about which FTC authorities would remain with the FTC and which would transfer to the CFPB.[14] In particular, Congress gave the CFPB certain of the FTC's consumer financial protection functions, but not its antitrust functions, unfair methods of competition, or other competition-related authorities.[15] Accordingly, the Director's stated concerns about "Big Tech" firms are largely irrelevant to the execution of the CFPB's statutory functions, which Congress defined in relevant part to mean "supervising covered persons for compliance with *Federal consumer financial law*, and taking appropriate enforcement actions to address violations of Federal consumer financial law."[16]

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[10] Id.
[11] Id.
[12] *Prepared Remarks of CFPB Director Rohit Chopra at the Federal Reserve Bank of Philadelphia's Annual Fintech Conference* (Sept. 7, 2023), available at https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-federal-reserve-bank-of-philadelphias-annual-fintech-conference/.
[13] Id.
[14] See, e.g., 12 U.S.C. 5581(b)(5).
[15] Id.
[16] 12 U.S.C. 5511(c)(4) (emphasis added).

With this context in mind, I reviewed the written justification the CFPB provided for its Proposed Rule. The CFPB states that it is proposing to establish supervisory authority over larger participants of the market for general-use digital consumer payment applications "because this market has large and increasing significance to the everyday financial lives of consumers."[17] This justification does not identify any new or growing risk to consumers from the offering or provision of consumer financial products or services. Therefore, it is unclear what purpose would be served by the CFPB's supervision of institutions covered by the rule for compliance with Federal consumer financial law.

A recent CFPB supervisory policy change should also be noted for additional context. The CFPB's examination manual describes the examination process, and in relevant part describes two types of communication that examiners may use to convey supervisory expectations in examination reports and Supervisory Letters.[18] The first type of communication, a Matter Requiring Attention or "MRA," communicates specific goals to be accomplished in order to correct violations of "Federal consumer financial law."[19] The second type of communication, a Supervisory Recommendation or "SR," communicates voluntary actions for an institution to consider taking based on observed weaknesses in compliance management systems that do not constitute violations of law.[20] The purpose of separating these two types of communications is to ensure that the CFPB does not exceed its statutory authority and uses the confidential supervisory process as intended to address violations of Federal consumer financial law, but not to otherwise dictate the internal operations of supervised institutions.

However, in March 2021, the CFPB released a Supervisory Bulletin that eliminated the SR category of supervisory communication and declared that CFPB examiners "may issue MRAs *with or without* a related supervisory finding that a supervisory entity has violated a Federal consumer financial law."[21] This policy change plainly telegraphed that the CFPB would

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[17] 88 Fed. Reg. 80200.
[18] See https://files.consumerfinance.gov/f/documents/cfpb_examination-process-section.pdf.
[19] Id. The term "Federal consumer financial law" is defined in the Dodd-Frank Act to mean the provisions of Title X, a discrete list of enumerated laws, specifically transferred authorities, and rules or orders prescribed thereunder. See 12 U.S.C. 5481(14).
[20] Id.
[21] CFPB Bulletin 2021-01, *Changes to Types of Supervisory Communications*, available at https://files.consumerfinance.gov/f/documents/cfpb_bulletin_2021-01_changes-to-types-of-supervisory-communications_2021-03.pdf (emphasis added).

be using MRAs for purposes other than addressing violations of Federal consumer financial law. All supervisory agencies know that institutions subject to examination are very hesitant to challenge MRAs or other supervisory determinations for fear of retaliation by their examiners. Accordingly, MRAs are rarely challenged, and there is always some risk that this confidential process may be used to dictate how institutions conduct their business, beyond complying with applicable legal requirements. That risk is elevated by the CFPB's supervisory policy change, and it is further elevated by the Proposed Rule and the Director's associated statements, which strongly imply the Bureau's intention to supervise large technology firms for reasons other than detecting violations of Federal consumer financial law.

Legal Authority

Regarding the legal authority to promulgate its Proposed Rule, the CFPB relies on Sections 1024(a)(1)(B) and (a)(2) of the Dodd-Frank Act, which enables the CFPB to conduct examinations of a nonbank covered person that is a "larger participant of a market for … consumer financial products or services, as defined by rule."[22] Accordingly, to define covered persons subject to examination, the CFPB must define a specific "market" for consumer financial products or services, and also define "larger participants" of that market. However, the Dodd-Frank Act does not define these terms, nor does it provide factors to be considered by the CFPB in defining markets or larger participants within a rulemaking. The CFPB has complete discretion to decide which markets to target and how to identify the larger participants within those markets. This is especially significant because the CFPB has a self-interest in using this authority to expand its own supervisory jurisdiction. All else being equal, more institutions subject to supervision mean more exams, more exams mean more examiners, and more examiners mean greater agency claims to financial resources. In point of fact, the Dodd-Frank Act provides the CFPB with no intelligible principle to guide or limit its self-expansionary efforts. Without such an intelligible principle, the CFPB's larger participant rulemakings constitute legislative acts rather than the mere execution of Congress's commands, which violates the non-delegation doctrine.[23] It should be Congress, not the CFPB itself, that draws the

[22] See 12 U.S.C. 5514(a)(1)(B) and (a)(2).
[23] See, e.g., *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

boundaries of the CFPB's jurisdiction and decides which institutions are subject to CFPB supervision.

Leveling the Playing Field

One of the CFPB's statutory objectives is to ensure that "outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens."[24] Another objective is to ensure that Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution."[25] Read together, these objectives obligate the Bureau to try to reduce unwarranted regulatory burdens in order to achieve regulatory parity between depository institutions and nonbanks. The CFPB argues that the Proposed Rule would "help level the playing field between nonbanks and depository institutions."[26] But there are two ways to level a playing field. The CFPB proposes only to *increase* regulatory burdens on certain nonbanks; the Proposed Rule does not consider in the alternative any proposal to *reduce* regulatory burdens for depository institutions. The CFPB's failure to consider burden-reducing alternatives to its Proposed Rule is an oversight that appears at odds with its objectives.

Market Definition

The CFPB defines the market covered by the Proposed Rule as "providing a general-use digital consumer payment application."[27] This term would be further defined to mean providing a "covered payment functionality" through a "digital application" for consumers' "general use" in making "consumer payment transaction(s)."[28] The term "consumer payment transactions" would mean the "transfer of funds by or on behalf of a consumer physically located in a State to another person primarily for personal, family, or household purposes."[29] The term "covered payment functionality" includes a "funds transfer functionality" and a "wallet functionality."[30] The term "digital application" would mean a software program a consumer may access through a personal

[24] 12 U.S.C. 5511(b)(3).
[25] 12 U.S.C. 5511(b)(4).
[26] 88 Fed. Reg. 80201.
[27] 88 Fed. Reg. 80215.
[28] Id.
[29] Id.
[30] Id. at 80215-16.

computing device.[31] The term "general use" would mean the absence of significant limitations on the purpose of consumer payment transactions facilitated by the covered payment functionality provided through the digital consumer payment application.[32]

The market definition proposed by the Bureau is, in a word, incoherent. There is no reasonable way to discern, based on these definitions, exactly what products or providers would be covered by the Proposed Rule. Notably, the Bureau did not have this problem in its prior larger participant rulemakings, where it was able to succinctly define the markets for consumer reporting, consumer debt collection, student loan servicing, international money transfers, and automobile financing.[33] Of course, such definitions are easy to provide when they describe a coherent market. The Proposed Rule's market definition, on the contrary, describes not an existing market but is rather a tortured aggregation of terms designed to cover disparate products and services. This approach is inadequate because a market definition should describe products that are "reasonably interchangeable by consumers for the same purposes."[34] Consequently, the CFPB's proposed market definition is overbroad.

Digital Asset Jurisdiction

The Proposed Rule would define the term "consumer payment transactions" to mean "the transfer of funds by or on behalf of a consumer physically located in a State to another person primarily for personal, family, or household purposes."[35] However, the Proposed Rule does not define the term "funds," as used in this definition. And, in fact, Congress did not define the term "funds" in Title X of the Dodd-Frank Act, either. But this did not stop the Bureau from supplying a novel definition in the section-by-section analysis of the Proposed Rule. Here, the CFPB states:

> "Without fully addressing the scope of that term, the CFPB believes that, consistent with its plain meaning, the term "funds" in the CFPA is not limited to fiat currency or legal tender, and includes digital assets that have monetary value

[31] Id. at 80216.
[32] Id.
[33] See 12 C.F.R. 1090.104; 1090.105; 1090.106; 1090.107; and 1090.108.
[34] *United States v. E.I. du Pont de Nemours & Co*., 351 U.S. 377, 395 (1956).
[35] 88 Fed. Reg. 80215.

and are readily useable for financial purposes, including as a medium of exchange."[36]

With this assertion, the CFPB is claiming regulatory authority over digital assets, including crypto-assets (virtual currencies). This is, to my knowledge, the first time that the CFPB has made this claim. Digital assets were in their infancy during Congress's deliberations over the Dodd-Frank Act, so it is not surprising that the Act makes no mention of them, much less clearly defines them, or assigns one or more agencies regulatory authority over them. In fact, to this day, this Committee continues its important legislative work on a comprehensive regulatory framework for digital assets. For the CFPB to now claim authority over digital assets, and to communicate its claim in the mere preamble to a rulemaking proposal, is improper. Less than two years ago, the Supreme Court clarified that a "merely plausible textual basis for the agency action" is not sufficient when an agency seeks to resolve a major question of economic and political significance; instead, the agency "must point to 'clear congressional authorization' for the power it claims."[37] The nature of the government's regulatory authority over emerging crypto technologies and digital assets would seem to be the exact kind of major question that Congress must decide. Congress has not provided the CFPB clear congressional authorization to regulate digital assets and the CFPB cannot lawfully arrogate that power to itself now.

Cost-Benefit Analysis

Turning to the Proposed Rule's cost-benefit analysis, the CFPB sets forth a methodology for estimating the expected cost to larger participants of its supervisory activities. First, the CFPB estimates that an examined institution will require two weeks to prepare for the exams, and that the subsequent on-site examination period will then last eight weeks.[38] The CFPB then assumes that the institution will only devote one compliance officer to assist with an exam during these ten weeks, along with one-tenth of an attorney's time.[39] Then the CFPB uses BLS data to estimate the national mean average hourly wages for the compliance officer and attorney

[36] 88 Fed. Reg. 80202.
[37] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting *Utility Air Reg. Grp. V. EPA*, 573 U.S. 302, 324 (2014).
[38] 88 Fed. Reg. 80213.
[39] Id.

and calculates that the total employer cost of labor to comply with an exam is approximately $25,001.[40]

This figure is a woeful underestimate. The Bureau first adopted this cost estimate methodology back in 2012, when it finalized its larger participant rule for the consumer debt collection market.[41] These were the early days of federal nonbank supervision, just over a year after the CFPB opened its doors, so the Bureau could perhaps be forgiven for errors in its preliminary cost estimates due to its lack of supervisory experience. But the CFPB has now conducted thousands of exams over the ensuing eleven years and should rely upon this seasoned experience to revise its prior methodology and develop more accurate cost estimates.

For most institutions, a CFPB exam is an all-hands-on-deck exercise involving executives, managers from multiple business lines, compliance staff at all levels, and often outside counsel and consultants engaged for a period of months. Staff must prepare a large volume of material for CFPB examiners, research and respond to voluminous follow-up requests, extract system data, and participate in on-site and off-site reviews and meetings. In my estimation, the dollar value of the time incurred by any "larger participant" within any market to assist with a CFPB exam is at least an order of magnitude greater than the CFPB's meager $25,001 estimate and can sometimes run into the millions of dollars. The CFPB has ready means available to survey supervised institutions to develop accurate estimates of exam resource requirements. The CFPB's failure to develop accurate exam cost estimates in its Proposed Rule is a significant weakness in the CFPB's 1022 analysis.

Comment Period

I also wish to note a procedural irregularity with the Proposed Rule. In every prior larger participant rulemaking (all issued by Director Corday), the CFPB established a comment submission deadline of 60 days from the date of publication of the proposal in the Federal Register.[42] For example, three most recent larger participant rulemaking proposals released by the CFPB (on automobile financing, international money transfers, and student loan servicing) established comment periods measured from the date of initial announcement to comment

[40] Id.
[41] See 77 Fed. Reg. 65792.
[42] See, 77 Fed. Reg. 9592; 78 Fed. Reg. 18902; 79 Fed. Reg. 5302; 79 Fed. Reg. 60762.

deadline of 82 days, 68 days, and 75 days, respectively. Compare these to the comment period established by the Proposed Rule. Had the Bureau followed prior practice, the comment deadline for the Proposed Rule would have been January 16, 2024 (the date that was 60 days after the November 17, 2023, Federal Register publication date). But instead, the CFPB established a hard due date of January 8, 2024, leaving commenters with only 62 days to submit comments, or eight fewer days than anticipated. Also, the comment period fell over the Thanksgiving, Christmas, and New Year holidays, so in practical effect the comment period was shorter still.[43] The CFPB's decision to artificially restrict the comment period was unnecessary, and thus contrary to the spirit of the Administrative Procedure Act, which seeks to guarantee the public a meaningful opportunity to participate in the rulemaking process.

The Broader Context of Recent CFPB Actions

Supervision

Now I would like to turn to broader concerns regarding the CFPB's approach to supervision. The consequences of CFPB supervision for any financial institution are of course not just financial. For one thing, CFPB supervision compels institutions to waive their legal rights in a manner that puts consumers at risk. The CFPB has asserted that it has authority to compel the production of attorney-client privileged material from financial institutions during an examination.[44] However, the CFPB's claim of legal authority is unfounded. The U.S. Supreme Court has long held that a statute abrogates common law privileges only if "the language declaring the legislative will [is] so clear as to prevent doubt as to its intent and limit."[45] The CFPB cannot act without statutory authority, and nothing in the Dodd-Frank Act or any other law abrogates attorney-client privilege for purposes of CFPB supervision. The U.S. Supreme Court has recognized that attorney-client privilege is "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from

[43] It also fell during a concurrent comment submission period established for the CFPB's 1033 rulemaking, which commenced on October 19, 2023, and closed on December 29, 2023.
[44] See CFPB Bull. No. 2012-01, *The Bureau's Supervision Authority and Treatment of Confidential Supervisory Information* (Jan. 4, 2012), available at https://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf.
[45] See, e.g., *Bassett v. United States*, 137 U.S. 496, 505-06 (1890).

the consequences or the apprehension of disclosure."[46] Knowing that CFPB examiners may demand production of confidential communications between a financial institution and its attorneys may deter some institutions from engaging in free and unfettered investigation and remediation of potential regulatory compliance risks. The CFPB's policy and practice of demanding attorney-client privileged material during exams therefore creates an unwarranted chilling effect on attorney communications that increases the potential scope and scale of consumer harm.

For another thing, in the Dodd-Frank Act, Congress required the CFPB to adopt a risk-based supervision program.[47] The CFPB describes certain aspects of its annual exam prioritization framework and process in its Examination Manual.[48] However, the CFPB does not publicly announce its annual exam priorities. This practice stands in contrast to the common practice of sister agencies like the OCC and SEC, which both publish look-ahead exam priority reports each fiscal year.[49] Such reports give supervised financial institutions fair notice of the product lines or practices their regulators consider to be higher risk, which affords these institutions the opportunity to proactively address these risks, including through enhancements to the design and operation of internal compliance controls, which ultimately reduces the risk of harm to consumers and makes subsequent examinations more efficient and effective.[50] Conversely, the CFPB's decision not to announce its annual exam priorities comparatively increases compliance risk and reduces exam efficiency and effectiveness.

Rulemaking

I will now address concerns regarding the CFPB's recent approach to rulemaking. This Committee's former Chairman presciently warned over a decade ago that the CFPB Director has the "power to decide what financial products and services will – and will not – be available to American consumers and how much they will have to pay for them."[51] The exercise of such

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[46] See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).
[47] See, e.g., 12 U.S.C. 5514(b)(2).
[48] See https://files.consumerfinance.gov/f/documents/201703_cfpb_Supervision-Examination-Overview.pdf.
[49] See https://www.sec.gov/files/2024-exam-priorities.pdf and https://www.occ.gov/news-issuances/news-releases/2023/nr-occ-2023-109a.pdf.
[50] Such reports would also afford the public the opportunity to assess whether CFPB exam priorities align with actual risks or are being pursued for other reasons.
[51] See, e.g., https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=330857.

dictatorial power is a clear red line that presents a severe danger to free markets and consumer autonomy. However, this danger was discounted or dismissed by many , perhaps because prior Directors rarely exercised it. That is unfortunately no longer the case. The redline has now been crossed. The common element that connects the CFPB's recent rulemakings is that each outlaws certain features of mainstream financial products in favor of the Director's *government-controlled product design*. Consider the following examples:

- On March 5, 2024, the CFPB finalized a Credit Card Late Fees rule that would, according to the CFPB, reduce the typical credit card late fee from $32 to $8.[52]
- On January 24, 2024, the CFPB proposed a rule prohibiting the imposition of nonsufficient funds (NSF) fees for certain types of declined transactions, whether or not disclosed and agreed to in account agreements.[53]
- On January 17, 2024, the CFPB proposed an Overdraft Lending rule that would establish a "benchmark" amount that can be charged by certain institutions for providing overdraft protection services, with institutions charging fees in excess of the benchmark amount subject to new requirements.[54]

In short, the CFPB is now imposing price controls and banning products or features that it disfavors, notwithstanding the fact that such products or features are fully disclosed to consumers and voluntarily agreed to within competitive markets.[55] The CFPB and the White House have marketed these rules as part of the Administration's broader "junk fees" initiative, with the operative definition of "junk fee" being any fee that in the Administration's subjective determination is not justified.[56]

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[52] https://www.consumerfinance.gov/about-us/newsroom/cfpb-bans-excessive-credit-card-late-fees-lowers-typical-fee-from-32-to-8/.
[53] 89 Fed. Reg. 6031.
[54] 89 Fed. Reg. 13852.
[55] The CFPB may also soon propose an FCRA rulemaking that would determine whether information concerning certain debts may be furnished to consumer reporting agencies or included within consumer reports, which would which could influence creditor decisions regarding the allocation of credit to consumers.
[56] https://www.consumerfinance.gov/rules-policy/junk-fees/; https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/; https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/03/05/remarks-by-president-biden-and-members-of-the-competition-council-announcing-new-actions-to-lower-costs-for-hardworking-families-by-fighting-corporate-rip-offs/#:~:text=Today%2C%20we%27re%20taking%20action,estimated%20%2410%20billion%20each%20year.

This regulatory approach stands in stark contrast to the generally accepted means of regulating consumer financial products and services, which focuses principally on disclosing information to consumers[57] and policing market conduct by financial services providers.[58] It also departs from accepted rulemaking practice, which logically starts by identifying a problem – that is, a market failure that in some way prevents the efficient operation of a market – and then seeks a solution, namely a minimally-disruptive regulation to remedy that problem. Implicit in this approach is the maxim that in a free society, no government intervention into private market conduct is justified absent market failure. Notably, *none* of the CFPB's junk fees rulemakings listed above (each of which are discretionary) contain a single instance of the phrase "market failure," much less identify and analyze a market failure to be addressed.[59] Contrast this practice with that of the CFPB's rulemaking practice under the leadership of Director Cordray: each of the Ability to Repay/Qualified Mortgage, Mortgage Servicing, Payday, and Arbitration rulemakings included a discussion of market failure.[60]

Government-controlled product design, i.e., the mandatory inclusion or exclusion of product or service features or interference with the price of such features, is a species of central planning wherein government decides how resources are to be used by private market participants. The tragic lessons of the 20th Century amply demonstrate that central planning of commercial activity is the road to serfdom – and that road is ultimately paved with the graves of millions.[61] Price signals embed the collective knowledge of millions of market participants engaged in trillions of voluntary exchanges and are used to efficiently direct economic activity and allocate limited resources. With disastrous effect, central planners indulge their impulse to replace price signals with administrative fiat.

Much like Wile E. Coyote over the Grand Canyon, allowing bureaucrats to dictate prices and acceptable risk levels, as opposed to allowing markets to discover and price them, only works for so long; at some point you have to look down, and it makes the pain of the fall that

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[57] See, e.g., the Truth in Lending Act.
[58] See, e.g., the Equal Credit Opportunity Act and the Fair Debt Collection Practices Act.
[59] The term "market failure" also does not appear in the Proposed Rule.
[60] 78 Fed. Reg. 6408; 78 Fed. Reg. 10696; 82 Fed. Reg. 54472; and 82 Fed. Reg. 33210. This is not to suggest that these market failure determinations were necessarily valid, but credit is due for at least grappling with the question.
[61] See https://victimsofcommunism.org/. See also Brian Johnson, *Toward a 21st Century Approach to Consumer Protection*, Remarks to Consumer Action (Nov. 18, 2018), available at https://www.consumerfinance.gov/about-us/newsroom/toward-21st-century-approach-consumer-protection/.

much worse. A basic understanding of economics also demonstrates that imposing controls on prices or other features of consumer final products services creates deleterious unintended effects, reduces aggregate consumer welfare, and transfers costs and benefits between different groups of consumers. Obscuring price signals will result in market dysfunction, and resulting transfer costs will affect the overall cost, quality, and availability of the products for consumers, especially for those who have lower incomes or are credit constrained.

I lament that the CFPB appears to be pursuing short-term political gain at the long-term expense of consumer welfare and the resilience and vitality of our financial markets. Paternalistic central planning is not consumer protection, it is *consumer immiseration*. The CFPB has now crossed the fateful red line that many have long warned about. For the sake of consumers and economic prosperity, I urge Congress to assert budget control over the CFPB and forever prevent it from engaging in government-controlled product design.

A Path Forward

Even absent Congressional action, precautions can be taken internally to address and perhaps prevent Bureau overreach. The CFPB, like other federal agencies, has adopted an Enterprise Risk Management ("ERM") Program for the purpose of mitigating enterprise risks such as legal risk and reputational risk to within defined risk appetites and risk tolerances. But unlike other agencies, the CFPB has not made its risk appetite statement and risk tolerances public.[62] The CFPB's propensity to exceed its statutory authorities[63] suggests that the CFPB's ERM Program is failing internally to address and mitigate the inherent legal and reputational risks of the CFPB's actions. This failing requires immediate remedial action, to include: (1) conducting a comprehensive assessment of the design adequacy and operating effectiveness of the internal controls governing the execution of the CFPB's functions; (2) retaining a qualified independent audit firm to conduct a robust annual audit of its operations and budget, as required by Congress;[64] and (3) adopting and publishing comprehensive rules of agency organization,

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[62] See, e.g., https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-risk-appetite-statement.pdf.

[63] See, e.g., https://docs.house.gov/meetings/BA/BA20/20230309/115384/HHRG-118-BA20-Wstate-JohnsonB-20230309.pdf

[64] See 12 U.S.C. 5496a(a). The CFPB's most recent independent audit report, a mere nine pages long and containing no findings or recommendations, is inadequate. See https://files.consumerfinance.gov/f/documents/cfpb_independent-audit-of-selected-operations-and-budget_2023-12.pdf.

procedure or practice to govern the conduct of its principal functions, such as rulemaking, supervision, enforcement, guidance, research, and financial education.[65] Such action could help mitigate the risk of continued Bureau overreach.

Thank you, and I welcome the opportunity to answer any questions that you may have.

[65] The White House Office of Management and Budget and the Administrative Conference of the United States have provided ample guidance to assist the CFPB in developing these rules.