



December 18, 2023

The Honorable Rohit Chopra  
Director  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552

Dear Director Chopra,

The American Financial Services Association, the Bank Policy Institute, the Consumer Bankers Association and the U.S. Chamber of Commerce write to raise concerns and request clarification about certain aspects of the Consumer Financial Protection Bureau's (CFPB) recent Advisory Opinion (AO) released on October 11, 2023 "regarding section 1034(c) of the Consumer Financial Protection Act (CFPA), which requires large banks and credit unions to comply in a timely manner with consumer requests for information concerning their accounts for consumer financial products and services, subject to limited exceptions."<sup>1</sup> Enforcement of these new obligations, including setting forth an "unreasonable impediments" standard and pursuing monetary relief, would likely require the CFPB to first establish these new requirements via notice and comment rulemaking under the Administrative Procedure Act (APA).

We first wish to convey our concerns about the manner and method chosen by the CFPB to address the matters discussed in the AO. The AO goes well beyond merely providing the CFPB's interpretation or guidance of existing principles established by statute or regulation. While the language of section 1034(c) requires covered banks to comply in a timely manner with consumer requests for information, the AO articulates specific, additional requirements beyond the scope of the statute and establishes new legal penalties, and thereby breaks new regulatory ground more than a decade after Congress passed the statute.<sup>2</sup> The APA generally requires that the public be provided notice and opportunity to comment on proposed new

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<sup>1</sup> CFPB Issues Guidance to Halt Large Banks from Charging Illegal Junk Fees for Basic Customer Service. Consumer Financial Protection Bureau. (2023, October 11). <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-halt-large-banks-from-charging-illegal-junk-fees-for-basic-customer-service/>.

<sup>2</sup> In fact, Director Chopra described the CFPB's issuance of the Advisory Opinion as "issuing a *new policy* to ensure that the largest banks in the country" cannot "impos[e] excessive junk fees when people need basic answers to the questions." (emphasis added). Rohit Chopra, Prepared Remarks of CFPB Director Rohit Chopra on a Press Call on Junk Fees, Oct. 11, 2023, <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-a-press-call-on-junk-fees/>.

rules, as defined in that statute, before they are adopted.<sup>3</sup> As such, the CFPB should have adhered to the notice and comment requirements of the APA and proposed the obligations in the AO for comment and addressed any comments received in a final rule. For these reasons, we respectfully request that the CFPB rescind the AO or clarify in writing certain aspects of the AO, set forth below, preferably through notice and comment rulemaking.

Much of the AO appears to be a gloss on its assertion that section 1034(c) does not permit “unreasonable impediments to a request for information about a consumer’s account.” Specifically, the AO provides that “a large bank or credit union would not comply with section 1034(c) if it imposed conditions or requirements on consumers’ information requests that unreasonably impeded consumers’ ability to request and receive account information.” But the term “unreasonably impeded” is a new standard not found in Section 1034(c) or in any other section of the CFPA. In announcing this requirement, the AO goes beyond merely interpreting the statute. It effectively imposes new legal obligations, such as a new standard for evaluating when and whether particular fees are permissible and new requirements related to the manner in which banks respond to consumers’ requests for information, none of which is contemplated by the plain language of Section 1034(c). These new requirements on covered depository institutions constitute more than an “interpretation” of the law, as nowhere does the statute provide or even hint at the concept of “unreasonable impediments,” much less in a manner as detailed or as specific as those set forth in the AO. Moreover, the blanket prohibition on fees may be at odds with banks’ obligations to operate in a safe and sound manner<sup>4</sup> and does not take into consideration fees banks may have to pay third parties to respond to a consumer’s request, such as fees that depository institutions are charged when a balance inquiry is performed at ATMs owned or operated by others. These issues could have been identified and addressed by the CFPB had the agency issued the AO for comment.

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<sup>3</sup> See 5 U.S.C. 551(4). (A “rule” is defined as, “the whole or part of an *agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency* and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” emphasis added.).

<sup>4</sup> See, e.g., 12 CFR Part 30. Banks also have the authority to set fees for products and services consistent with safe and sound banking practices. See, e.g., 12 CFR § 7.4002(b), which provides that national banks may charge its customers non-interest charges and fees, the establishment of which are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if the bank employs a decision-making process through which it considers the following factors, among others: (i) The cost incurred by the bank in providing the service; (ii) The deterrence of misuse by customers of banking services; (iii) The enhancement of the competitive position of the bank in accordance with the bank’s business plan and marketing strategy; and (iv) The maintenance of the safety and soundness of the institution.

Similarly, the AO creates numerous compliance questions that could have been appropriately considered and answered had the CFPB issued the AO via notice and comment rulemaking. While the AO is labeled as “guidance,” the AO in fact fails to provide meaningful guidance on how to comply with the CFPB’s *new* requirements under Section 1034(c). The AO’s “interpretation” of the statute raises more questions than it answers and is inconsistent with the Bureau’s publicly stated desire of *having more clear, bright lines*” in the regulatory space.<sup>5</sup> APA notice and comment rulemaking would have provided an opportunity for the CFPB to engage with the public about its views of the statute and market practices and would have provided the public the appropriate avenue to pose questions for the CFPB to address through the rulemaking process, such as those questions set forth below. While the questions below seek to elicit clarity around the AO, the more appropriate procedure for promulgating the AO’s compliance obligations would be a formal rulemaking under the APA.

Furthermore, footnote 3 of the AO states that “the CFPB does not intend to seek monetary relief for violations of section 1034(c) that occur prior to February 1, 2024.” However, the CFPB should commit, in writing, to not seek monetary relief pursuant to this guidance. As we have noted above, enforcement of new obligations would only be permissible if those obligations have been established via notice and comment rulemaking. The AO appears to require financial institutions to significantly change their compliance systems (which serves as further evidence that the AO is in fact a legislative rule that should have been promulgated via APA rulemaking) that cannot reasonably be completed in the time provided by the CFPB, especially given the lack of clarity.

In addition, we are concerned about the CFPB’s criticism of technology that covered institutions have deployed in recent years to improve the consumer experience. The AO and accompanying press release seem to reach the conclusion that new technology and “relationship banking” are mutually exclusive when, in reality, the opposite is true. Financial institutions have deployed new technology, especially in the last decade, to make banking more accessible, including through improvements to online and mobile banking, artificial intelligence to assist with screening calls and fraud detection, and chatbots to respond to customers’ inquiries with increasingly sophisticated responses. Many of these technologies make it easier for consumers to monitor their account balances and other activity, at any time and from anywhere they like – a service the CFPB has previously encouraged financial institutions to offer. Rather than continuing to support the expansion of customer service capabilities and opportunities for consumers to connect with a covered person, the CFPB, through the AO guidance, appears critical of technology, which could create a chilling effect on innovation that typically helps to enhance financial services access.

Thank you for considering our concerns, and we hope that the CFPB provides further clarity by answering the enclosed questions. By January 1, 2024, please send us written acknowledgment of your receipt of this letter and therein also indicate: (1) whether the Bureau will provide substantive responses to our questions; and (2) if the agency intends to respond to the questions, then specify a specific timetable for providing the answers.

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<sup>5</sup> Public Citizen. Conversation with CFPB Director Rohit Chopra. (2022, September 16) <https://public-citizen.medium.com/conversation-with-rohit-chopra-f309e9af8627>.

Respectfully,

**American Financial Services Association**

Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

**Bank Policy Institute**

The Bank Policy Institute is a nonpartisan public policy, research, and advocacy group representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and major foreign banks doing business in the United States.

**Consumer Bankers Association**

CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

**U.S. Chamber of Commerce**

The U.S. Chamber of Commerce ("the Chamber") is the world's largest business federation, representing the interests of businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. For more than 100 years, the Chamber has advocated for pro-business policies that help businesses create jobs and grow our economy.

## QUESTIONS

1. **Although specific examples are given in the Advisory Opinion, what is the standard for determining whether a condition is an “unreasonable impediment”?** Examples given in the Advisory Opinion of “impediments” are primarily limited to fees, wait times, referring the customer to a third party or “chatbot”, and incomplete fulfillment. Assuming the AO’s examples are not exhaustive, what is the standard the CFPB will apply for determining whether an impediment is “unreasonable”? Further clarity on this question would allow covered entities to effectively evaluate the scope of the AO and effectuate compliance beyond the specific examples given in the Advisory Opinion.
2. **Are financial institutions permitted to assess fees for customer information requests through a particular channel when it makes the same information available for free via other and/or easier-to-access channels?**
  - a. For example, financial institutions assess ATM balance inquiry fees when the customer uses a third-party operators’ ATM. These operators traditionally assess fees to the financial institution for this service, which the financial institutions pass along to their customer. Are these permissible, especially when the customer has other, free, channels to access the same information?
  - b. As another example, if the institution is willing to respond to the consumer’s inquiry through its website, could it charge the consumer a fee to provide it in another form if desired by the consumer (e.g., via a specific email response or via the U.S. Postal Service)? Or if the institution was willing to respond by mail for free, could it charge a fee to send the response through overnight delivery?
  - c. Similarly, the AO states that “a consumer seeking information about past transactions on their account could request copies of past periodic statements or check images.” Many large banks and credit unions offer past periodic statements and check images online that are readily available to consumers at any point in time. And, in most cases, the consumer has already been provided with the information in question. How does the AO account for this service that already exists for consumers to access this information?
  - d. The AO provides that “it would generally not violate section 1034(c) for a large bank or credit union to impose a fee or charge in certain limited circumstances. For example, a large bank or credit union might charge a fee to a consumer who repeatedly requested and received the same information regarding their account (e.g., repeatedly asked for a copy of the same document). In that context, the large bank or credit union would have already met its obligation under section 1034(c) by complying with the consumer’s earlier requests.”
    - i. If a bank responds to a consumer’s request for information by referring the consumer to a periodic statement, website, or other

channel where the information is available, but the consumer specifically requests that the bank provide the information to the consumer in another format or through another channel, could a bank charge a fee to provide that information directly to the consumer when the requested information is otherwise available, as the request would be a repeat request of information already in the possession of the consumer?

- e. How would the guidance interact with potentially new requirements “Establishing basic standards for data access” contemplated under the Bureau’s proposed rule under Section 1033, especially if that data is made available without costs?

**3. Do institutions have to create specific reports in response to customer inquiries?**

- a. For example, if customers request information about the account in a format that the financial institution does not typically make available to them, such as an intra-month statement, does the financial institution have to provide that information in the format requested under section 1034(c)?
- b. Does a financial institution need to track requests for information including a request made by phone for which the customer service representative was able to immediately provide an answer?

**4. In what circumstances would a consumer be considered to have “submit[ted] the same request multiple times”? How many times constitutes “multiple”? Does the reference to “multiple” requests contemplate requests made only via the same channel or could “multiple” requests be considered to have been made when the consumer requests information through different channels?**

**5. Under what circumstances does an information request rise to a level of “complexity,” and when is information deemed “less accessible” that would justify a longer response time? Can the CFPB provide the standard it intends to use as well as specific examples? The AO states, “[w]here a request seeks basic information that is readily available to a large bank or credit union, to comply with section 1034(c) a bank or credit union would generally need to respond more quickly than if the request is more *complex* [emphasis added] or seeks information that is *less accessible* [emphasis added].”**

**6. What does the CFPB consider to be forcing or requiring a consumer to endure excessive wait times? If the financial institution provides both human options with longer wait times (which may only be available during certain reasonable business hours) and technology options (with shorter wait times that are generally accessible 24/7 for accessing the same information), is a financial institution considered to be “forcing consumers to endure excessively long wait times” even though a generally available technology option with a shorter wait time is made available?**

- a. For example, if the consumer wants certain information at 2 am on a Sunday morning that is available online at that time, but has to wait until 9 am on Monday to request the information from a human, is that, in the CFPB's view, an excessively long wait time?
7. **What does the CFPB consider to be forcing or requiring a consumer to use an automated service?** If financial institutions offer information for free through multiple automated channels, but charge a fee for accessing the same information in a channel that requires more time-consuming and expensive human interaction, is that considered to be "forcing use" of an automated service?
8. **What are the parameters and criteria the CFPB would consider in concluding that a chatbot "does not understand or adequately respond to consumers' requests"?** The AO notes, depending on the facts and circumstances, that "requiring consumers to interact with a chatbot that does not understand or adequately respond to consumers' requests" may constitute an unreasonable impediment. Guidance could include information about a standard for this determination such as whether a reasonable person would interpret the chatbot to have understood and adequately responded to a chatbot's output based on the information provided to a chatbot by the consumer.
9. **Are requests made on behalf of a consumer by an authorized third party considered "requests" for purposes of section 1034(c)? Does the CFPB apply the definition of "consumer" similarly to the way it proposes defining "consumer" as part of its section 1033 rulemaking?** If so, does the CFPB consider certain restrictions on who may be considered an authorized third party as "unreasonable impediments"? How should a financial institution determine who may be an authorized third party for the purposes of section 1034(c)?
10. **Is the AO intended to also apply to information requests when a loan or mortgage account is in default?** For example, when a loan account has been referred to a law firm due to default and/or other impending litigation, it is long-standing practice for some information requests covered by the AO to be referred to the law firm; however, the AO specifically suggests that directing consumers to a third party may be considered an unreasonable impediment.
11. **What is the standard for "reasonable conditions" for the purposes of identity verification, account verification, and data security requirements that may be imposed before responding to information requests?** Financial institutions regularly impose identity verification and other security requirements, consistent with the Gramm-Leach-Bliley Act (GLBA) and prudential regulatory expectations, before a customer can access their account information. It would be helpful to know whether and to what extent the CFPB gives deference to financial institutions' security measures consistent with prudential regulatory expectations, including those designed to comply with Customer Identification Program (CIP) requirements under the Bank Secrecy Act.

- 12. What is the standard for determining whether wait times are “excessively long” when a customer is making a request to customer service? Will the CFPB consider the facts and circumstances of the inquiry?** What constitutes an excessively long wait time is subjective and specific to certain circumstances, such as the channel through which the request is made. Moreover, there is variation in what a specific customer will consider to be “excessively long:” a two-minute wait time may be excessive for some customers, but not for others. Meanwhile, longer wait times may be more reasonable depending on day of week, hours, holidays, natural disasters, system outages, etc. Does the CFPB account for these factors, and if so, how?
- 13. In general, does the CFPB view the requirements of the AO as unlikely to impose requirements that differ from the same requirements contained in other applicable federal or state law?**
- a. For example, does the CFPB view the “timely manner requirement” as unlikely to impose timing requirements that differ from the specific timing requirements of other applicable *state law*?
    - i. The AO indicates the CFPB does not view section 1034(c)’s “timely manner” requirement as likely to impose timing requirements that differ from the specific timing requirements of other applicable Federal law or regulation. To what extent, if any, would meeting specific timing requirements set by state laws constitute meeting the “timely manner” requirement?
  - b. Does the CFPB view the “completeness requirement” as unlikely to impose requirements that differ from overlapping requirements of other applicable federal or state law?
    - i. The AO provides an example where a customer requests all transaction information with a particular merchant, which a large bank or credit union retains for seven years. If the large bank or credit union only routinely provides transaction information for one year, the AO states that the response would not be “complete” for purposes of section 1034(c). This potentially adds longer record retention requirements than may already exist under existing regulation, such as in Regulation E and Regulation Z and may further incentivize a shorter record retention period. The CFPB should clarify that section 1034(c) would not require banks to meet record retention requirements or other requirements related to completeness different from those established by other federal or state law.
- 14. Has the CFPB completed a cost-benefit analysis, and if so, what data has the CFPB used to inform this analysis?** The CFPB should consider that the AO requires covered depository institutions to create new compliance programs, or at a minimum, make significant updates and may also specifically prohibit recovering costs of providing certain services to consumers. In addition, customer service is



an evergreen priority of covered depository institutions, but the AO seems to minimize or disregard the significant investments that have already been made in robust customer service programs at banks.

15. **How did the CFPB determine the AO did not impose any new or revised recordkeeping, reporting, or disclosure requirements on covered entities?**
16. **How does the AO impact a national bank's obligation to operate in a safe and sound manner?** Specifically, is the AO inconsistent or does it inhibit a bank's ability to charge fees, as permitted under 12 C.F.R. 7.4002? Did the CFPB consult with the OCC prior to the issuance of the AO given the potential conflict with OCC regulations? If not, does the CFPB plan to consult with other prudential regulators, including the OCC about potential conflicts?
17. **Is a large bank or credit union required to ensure that a customer "received" the account information?** The AO states "Section 1034(c) thus grants consumers a right to request and *receive* account information. . . ." (emphasis added). How is a customer's receipt of account information determined if receiving the account information is a necessary component to a customer's right under section 1034(c)? For example:
  - a. If account information is provided through the mail, can receipt be considered to occur three business days after delivery or placement in the mail?
  - b. If provided electronically, can receipt be considered to have occurred when the electronic information is sent?
  - c. Can receipt be presumed if a customer signs an acknowledgement, or a time stamp is recorded if a customer opens an electronic communication?