

SHERROD BROWN, OHIO, CHAIRMAN
JACK REED, RHODE ISLAND
ROBERT MENENDEZ, NEW JERSEY
JON TESTER, MONTANA
MARK WARNER, VIRGINIA
ELIZABETH WARREN, MASSACHUSETTS
CHRIS VAN HOLLEN, MARYLAND
CATHERINE CORTEZ MASTO, NEVADA
TINA SMITH, MINNESOTA
KYRSTEN SINEMA, ARIZONA
JON OSSOFF, GEORGIA
RAPHAEL G. WARNOCK, GEORGIA
PATRICK J. TOOMEY, PENNSYLVANIA
RICHARD C. SHELBY, ALABAMA
MIKE CRAPO, IDAHO
TIM SCOTT, SOUTH CAROLINA
MIKE ROUNDS, SOUTH DAKOTA
THOM TILLIS, NORTH CAROLINA
JOHN KENNEDY, LOUISIANA
BILL HAGERTY, TENNESSEE
CYNTHIA M. LUMMIS, WYOMING
JERRY MORAN, KANSAS
KEVIN CRAMER, NORTH DAKOTA
STEVE DAINES, MONTANA
LAURA SWANSON, STAFF DIRECTOR
BRAD GRANTZ, REPUBLICAN STAFF DIRECTOR

United States Senate
COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS
WASHINGTON, DC 20510-6075

September 12, 2022

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

Dear Director Chopra:

We are deeply concerned that under your leadership, the Consumer Financial Protection Bureau (CFPB) has returned to its Obama-era roots as a lawless and unaccountable agency. Rather than operating as a tough, but fair and sensible regulator, the CFPB is again pursuing a radical and highly-politicized agenda unbounded by statutory limits. It has adopted an arrogant regulatory ethos: the CFPB can do whatever it wants. On at least one occasion, the CFPB has been criticized by a federal judge and former regulator for deploying inappropriate and legally dubious tactics that have unfairly damaged financial institutions' reputations and customer relationships. The CFPB's actions, which have been uncontrolled and unwarranted, will ultimately lead to costlier credit, or no credit at all, for millions of Americans.

For example, the CFPB has launched a relentless smear campaign against banks that offer optional overdraft services to their customers. With overdraft protection, consumers willingly agree to pay a fee for the product's flexibility and to have an alternative to short-term loans, and under current regulations, customers must affirmatively opt-in to the service after banks have provided them with a description of the product and fees.¹ In addition, prohibiting customers from agreeing to pay for a product means that, inevitably, it will either become unavailable or the bank will make up for lost fees and cover the costs of the product by charging higher prices for other products, such as checking accounts. Charging fees that customers chose to pay should not be disturbing or illegal, and yet, the CFPB appears to have developed a particular disdain for banks charging their customers for services, pejoratively calling overdraft protection "junk fees."

The CFPB has abused its authority by using name-and-shame tactics to pressure companies into eliminating this legal product. In February, the CFPB published a chart listing the top 20 banks by revenue from overdraft fees, and boasted that its campaign led some banks to change their overdraft policies.² The CFPB also signaled that publication of the chart was linked to its goal of

¹ Regulation E, 12 CFR § 205.17(b), (d) (opt-in requirement, content and format of notice).

² CFPB, *Overdraft/NSF metrics for Top 20 banks based on overdraft/NSF revenue reported* (Feb. 10, 2022), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-chart_2022-02.pdf; CFPB, *Comparing overdraft fees and policies across banks* (Feb. 10, 2022), <https://www.consumerfinance.gov/about-us/blog/comparing-overdraft->

changing banks' policies.³ Subsequently, in July, you stated you were “gratified to see where the market has been shifting” on overdraft fees and then publicly warned that the CFPB is “increasing our supervisory scrutiny of the institutions that are most dependent on [overdraft fees] as part of their deposit account fee revenue.”⁴ It is hard to view your statement as anything other than a threat that banks who do not bow to the CFPB’s pressure campaign could expect the agency to unfairly target them for increased supervision.

The CFPB has also changed its rules so the agency can publish previously confidential information about financial institutions in an apparent effort to make it easier to threaten firms with reputational harm. Under the Dodd-Frank Act, the CFPB was given authority, which it has never exercised, to supervise a nonbank if the agency determines that the nonbank was engaging in conduct that posed certain risks to consumers.⁵ This April, the CFPB amended its rules to give the CFPB Director discretion to publicly disclose his decision to supervise a nonbank, which the agency’s rules previously treated as confidential information. Notably, the CFPB’s rule change did not give a nonbank the same discretion in order to defend itself.⁶ Instead, the agency’s rules require a nonbank to keep confidential information relating to the CFPB’s decision, including facts that could call into question the CFPB Director’s decision or raise procedural concerns with it.⁷ The one-sided nature of the CFPB’s rule change gives the agency the ability to publicly tarnish an institution’s name without affording the firm the power to defend itself. Since the CFPB has never used this authority, the change in rules appears to serve as a threat to nonbanks. As your recent remarks about banks that charge overdraft fees demonstrate, nonbanks whose practices are legal but are not in line with your liberal policy views will now be at risk of heightened scrutiny and reputational harm from the CFPB.

Similarly, the CFPB recently changed its rules of adjudication to make it harder for companies to defend themselves against novel enforcement theories, and easier for the agency to engage in regulation by enforcement. This grossly unfair practice occurs when agencies fail to set clear rules of the road before bringing enforcement actions. Under these new rules, the CFPB Director

[fees-and-policies-across-banks/](#) (“As the CFPB has been focusing on this issue again, there has been a notable trend of banks announcing changes to their overdraft programs.”).

³ CFPB, *Comparing overdraft fees and policies across banks* (Feb. 10, 2022), <https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/> (Feb. 10, 2022) (“Collectively these changes represent an encouraging step by some banks in the right direction. We’ve prepared a table providing a snapshot of large banks’ overdraft and [non-sufficient funds] practices.”).

⁴ Kate Berry, *Q&A with CFPB Director Rohit Chopra*, *American Banker*, July 27, 2022, <https://www.americanbanker.com/news/q-a-with-cfpb-director-rohit-chopra>.

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203 § 1024(a)(1)(C) (2010) (codified at 12 U.S.C. 5514(a)(1)(C)).

⁶ Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders, 87 Fed. Reg. 25397, 25398 (Apr. 29, 2022) (codified at 12 C.F.R. § 1091.115(c)(2)). The preamble explicitly refuses to codify a standard for what information will be published. *See also* Procedural Rule To Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination, 78 Fed. Reg. 40351, 40380 (Jul. 3, 2015) (Obama administration rules stating that all documents relating to the process are confidential).

⁷ *See* 87 Fed. Reg. 25398; 12 C.F.R. §§ 1070.2(i), 1070.42(b).

can bypass an administrative law judge in enforcement cases and rule directly on substantive legal issues.⁸ As a result, you can now authorize CFPB staff to bring an enforcement case based on a novel legal theory and then you can personally rule that it is a valid theory. At the best of times, an agency's own adjudication of an enforcement action brought by the agency itself blurs the constitutional separation of executive and judicial powers. The CFPB's new rules of adjudication further disregard that separation in order to enable the CFPB Director to avoid even the most modest checks on his power to engage in regulation by enforcement. The rules send a clear signal to entities regulated by the CFPB that they need not bother mounting a defense to an enforcement action based on a novel legal theory, as the same CFPB Director who authorized the action can immediately rule his own theory valid.

The CFPB has also taken highly unusual and improper actions to harm the customer relationships of a bank that is involved in litigation with the agency. The CFPB sued Fifth Third Bank in 2020, alleging its employees had opened accounts for customers without their consent. In March 2022, the CFPB sent an unsolicited mass email to the bank's customers with a survey that referenced the lawsuit and asked prejudicial questions about whether the bank was acting against its customers' best interests.⁹ While the CFPB has a responsibility to investigate potential fraud, this mass email was not a legitimate investigative or litigation tool, but rather a means to damage the bank's customer relationships. Not surprisingly, the CFPB's actions have been widely criticized. A former career CFPB enforcement director criticized the agency's behavior¹⁰ while a federal judge called the CFPB's actions "a poor choice . . . that looks to the Court to be designed to create a wedge between Fifth Third and its customers."¹¹ The CFPB, however, arrogantly defended its actions by responding, as the judge put it, "we're the CFPB so, essentially, we can do whatever we want."¹²

These abuses of power and others by the CFPB are of serious concern. The CFPB is not all-powerful or unaccountable. It must stay within the boundaries of law. That is why we urge you to reverse course and stop using inappropriate tactics to harm financial institutions' reputations and customer relationships in order to advance your liberal policy preferences.

Sincerely,



Pat Toomey
U.S. Senator



Richard Shelby
U.S. Senator

⁸ Rules of Practice for Adjudication Proceedings, 87 Fed. Reg. 10028 (Feb. 22, 2022) (codified at 12 CFR 1081).

⁹ Kate Berry, *CFPB's tactics in Fifth Third lawsuit called 'pretty aggressive,'* American Banker, June 14, 2022, <https://www.americanbanker.com/news/cfpbs-tactics-in-fifth-third-lawsuit-called-pretty-aggressive>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*



Mike Crapo
U.S. Senator



Tim Scott
U.S. Senator



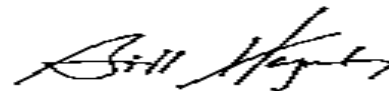
M. Michael Rounds
U.S. Senator



Thom Tillis
U.S. Senator



John Kennedy
U.S. Senator



Bill Hagerty
U.S. Senator



Cynthia Lummis
U.S. Senator



Jerry Moran
U.S. Senator



Kevin Cramer
U.S. Senator



Steve Daines
U.S. Senator

cc: The Honorable Sherrod Brown, Chairman, Senate Committee on Banking, Housing, and Urban Affairs