December 20, 2023

Andrea Joy Campbell, Attorney General
Massachusetts Office of the Attorney General
Attn: Policy & Government Affairs Division
One Ashburton Place, 20th Floor
Boston, MA 02108
Junkfees@mass.gov

Re: Proposed Regulations 940 C.M.R. 38.00: Unfair and Deceptive Fees

Dear Attorney General Campbell:

On behalf of the American Financial Services Association (AFSA),[1] thank you for the opportunity to provide comments on the Office of the Attorney General's (OAG) proposed regulations related to Unfair and Deceptive Fees (940 C.M.R. 38.00). We have significant concerns with the proposed regulations due to the broad scope and vague language that leaves the potential impact on financial services unclear.

Unreasonable Comment Period

The proposed regulations would broadly affect "any item available for or as part of a Sale, including but not limited to goods, services, and programs," but the period for public comments is limited to less than three weeks, ending during the holiday season. Such a short comment period for proposed regulations as broad and potentially impactful as these does not allow for adequate consideration of the proposal or opportunity for more robust comments. A longer comment period would allow additional participants more opportunity to digest the bill and formulate thoughtful comments supported by data which could help educate OAG on potential unintended consequences of the regulations and would allow for more members of the public to have their voices heard. A short comment period is also out of step with OAG's previous practices. For example, in 2011 and 2016 when OAG studied debt collection practices and adopted regulations (940 CMR 7.00), comments were accepted over multiple months. Accordingly, to allow for more robust public consideration and comments, we request that OAG open the proposal up to an additional, lengthier comment period in 2024. Alternatively, OAG could hold additional public listening sessions in early 2024 which would allow market participants and the public to provide more feedback for the OAG's consideration before the rule is potentially finalized.

[1] Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

The Broad and Unclear Scope of the Proposed Regulations

As drafted, the intended scope of the proposed regulation is unclear. For instance, the restrictions apply to certain practices related to "any product," which is broadly defined to include "any item available for or as part of a Sale, including but not limited to goods, services, and programs."; however, "goods, services, and programs" are generic terms with broad meanings that are undefined in the proposed regulations, leaving questions about what is actually intended to be covered by the regulations. For example, are the proposed regulations intended to apply to the financed sale of a motor vehicle – a process that is already governed by rigorous federal and state disclosure regimes? Further the Scope includes advertising or marketing, solicitation that "*results* in a sale in MA." This regulation would bring into scope marketing not targeted to Massachusetts consumers and not otherwise regulated by Massachusetts and already regulated by another state.

Additionally, although we do not believe it was OAG's intent to cover commercial transactions (i.e. business-to-business transactions), the proposed regulations could be further clarified to ensure the requirements are limited to consumer transactions, consistent with this intent. Accordingly, we request that OAG make clear that commercial transactions are not covered by limiting the definition of "Sale" to "sales to a consumer for personal, family, or household use." Also, it is not clear whether the definition of "Sale" would include or exclude loan or leasing transactions, whether they be consumer or commercial loan or leasing transactions. We respectfully request that OAG more clearly define the scope of the regulations.

Disclosures Inconsistent with Federal Law

For over 50 years, the federal Truth in Lending Act (TILA) has provided a standard of how to calculate, and more importantly, disclose the costs of covered financial products. TILA ensures that disclosures are consistent and require little interpretation, which allows consumers to have a clear understanding of the terms and cost of credit and to compare costs of similar loan products. Requiring creditors to provide Massachusetts-specific disclosures in addition to the TILA disclosures, could confuse consumers (and market participants) if the state disclosures are inconsistent with or different from the TILA disclosures to which they've become accustomed for decades. This would not present the consumer with a clear understanding of the contract and cost of credit, undermining the central purpose of TILA and the intent of the proposed regulations.

For example, Regulation Z provides, for closed end credit, the requirements for advertisement of specific credit terms in advertising at 12 CFR §1026.24. This section provides that if an advertisement states a rate of finance charge, it shall state the rate as an annual percentage rate. This section also requires a creditor to provide additional disclosures if it uses "triggering terms." In the proposed regulations, a business must "Clearly and Conspicuously" provide the "Total Price" and, at the time of initial presentation of the price of any Product, or any subsequent presentation thereafter" the nature and purpose of any fees, interest, charges, or other expenses with any advertising or marketing, solicitation or offer, which must be "Clearly and Conspicuously." This would require the disclosure of interest, Annual Percentage Rate, and arguably all other charges that are part of the loan or lease transaction or any other possible servicing charges that could occur during the servicing of the transaction. In Regulation Z, Annual Percentage Rate is a triggering term and does not under Regulation Z require the disclosure of the total price. In a closed end loan transaction, the "total price" varies depending on not

only the interest rate or finance charge that is charged for the transaction, but also the size of the loan and the term of the loan. Given this variation, it's not feasible to disclose the total amount in advertising.

Regulation Z, for open end credit, also provides requirements for advertising in 12 CFR §1026.16. We believe OAG must explain, for open-end credit—whether for real estate-secured or non-real estate-secured credit—how a creditor can disclose "Total Price" in advertising. We believe this is not possible for open-end credit, where total price would again vary upon the size of the loan, the number of advances, and how long advances are permissible under the credit agreement.

Financial institutions are already highly regulated under competing federal and state laws and regulations. They contend with extensive industry-specific regulatory regimes in all 50 states, including Massachusetts, and on the federal side they comply with several rules and statutes prohibiting misrepresenting the nature and purpose of any amount a consumer may pay, including: the Business Opportunity Rule, the Mortgage Acts and Practices Advertising Rule (Regulation N), the Mortgage Assistance Relief Services Rule (Regulation O), the proposed amendments to the Negative Option Rule, the Telemarketing Sales Rule, the TILA and the TISA. Financial institutions operate in a heavily regulated market sector where additional disclosure requirements risk contradicting the existing regulatory requirements. We therefore encourage you to amend the proposed regulations to expressly exempt any state or federally regulated financial entities, such as banks, non-bank financial institutions, and credit unions, from the regulations to the extent they are advertising a financial transaction that is already subject to state or federal disclosure laws. In order to limit conflicting disclosure requirements and to facilitate borrower understanding consistent with the intent of the statutes and the proposed regulations, we respectfully request that OAG amend the proposed regulations to exempt financial services products from their requirements, or to at least clarify that disclosures provided under TILA or other similar federal financial disclosure laws would satisfy the requirements of the proposed regulations.

Conditional Fees

Financial services products should be exempted from the proposed regulations through their compliance with TILA and other federal and state laws. However, if the proposed regulations were to apply to financial services products, it is not clear whether conditional fees (convenience fees, payment processing fees, late fees, NSF fees, etc.), which a customer can avoid at their election, would be included in the definition of the "Total Price" such that they must be disclosed pursuant to the regulations. "Total Price" is broadly defined as "[t]he entire price to be paid by the consumer, inclusive of all fees, interest, charges, or other expenses necessary or required to complete the transaction. Total Price may exclude taxes, Shipping Charges, or any fees required by federal, state, or local law." Conditional fees, like whether the customer elects to incur a payment processing fee by using a particular payment method, may fall under this definition but necessarily cannot be known at origination of the contract because they are dependent on consumer behavior. Would conditional fees need to be separately disclosed as "optional" fees and would failing to do so be a "misrepresentation" or omission under the proposed regulation? Further, state laws already provide specific disclosure requirements for some conditional fees; for example, late fees are authorized by state law which mandate disclosure of the amount of the fees as well as the specific circumstances in which they may be charged. Would such fees require additional disclosure under the proposed regulations? And what would be the public need for such additional disclosure of conditional fees? Massachusetts regulators already conduct regular,

comprehensive examinations of regulated financial services providers to ensure that the amount of fees being charged is correct, the circumstances in which the fees are being charged are permissible and the fees are adequately disclosed.

As outlined above, financial services products should be exempted from the requirements of these proposed regulations due to the already existing federal and state regulatory regime which governs the consumer disclosures surrounding these products. However, to the extent that financial services products are subject to the proposed regulations, we request that the definition of "Total Price" be amended to clarify that it does not include any fees dependent on consumer behavior.

For these and other reasons, which time has not allowed us to pursue in depth, we respectfully reiterate our requests for an extended comment period to allow additional input by industry and interested or affected parties and amendments expressly exempting any state or federally regulated financial entities. Thank you in advance for your consideration of our comments.

If you have any questions, or would like to discuss our concerns further, please do not hesitate to contact me by phone at 952-922-6500 or e-mail at dfagre@afsamail.org. Thank you again for your time and consideration.

Sincerely,

Danielle Fagre Arlowe
Senior Vice President
American Financial Services Association