Statement for the Record

On Behalf of the

American Bankers Association

before the

Subcommittee on Financial Institutions and Consumer Protection

of the

Senate Banking, Housing, and Urban Affairs Committee

July 26, 2023

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The American Bankers Association (ABA) appreciates the opportunity to submit this Statement for the Record for the hearing of the Subcommittee on Financial Institutions and Consumer Protection entitled, "Taking Account of Fees and Tactics Impacting Americans' Wallets."

Banks believe that fees should be clearly disclosed and comply with the law. Transparency should form the basis of the relationships between companies and consumers. Bank fees are fully disclosed in advance and are subject to significant government regulation. Moreover, the fees charged by regulated financial institutions serve legitimate economic purposes are not "junk fees." Properly disclosed fees recover costs, encourage sustainable financial behavior, support the affordable pricing of financial services, and are consistent with prudent risk management.

Despite these realities, the Consumer Financial Protection Bureau ("Bureau") is pursuing a campaign against legal, disclosed, and fairly-assessed fees. The Bureau's untested and unvalidated assumptions about credit card late fees are wrong, particularly with regard to the deterrence effect of late fees, and these flawed inputs will result in a flawed policy.

One of the major prongs of the campaign is the Bureau's Notice of Proposed Rulemaking (NPRM or Proposal) regarding credit card late fees and late payments.[1] Specifically, the Bureau is proposing to amend Section 1026.52(b) of Regulation Z (Truth in Lending Act), which implements Section 149 of the Truth in Lending Act (TILA) and requires that credit card penalty fees, including late payment fees (late fees), be "reasonable and proportional to [the] omission or violation."

In the NPRM, the Bureau proposed to: (1) lower the safe harbor dollar amount for late fees to $8 and eliminate a higher safe harbor dollar amount for late fees for subsequent violations of the same type; (2) eliminate the annual adjustment for the late fee safe harbor; (3) prohibit

[1] 88 Fed. Reg. 18,906 (Mar. 29, 2023).

issuers from including any collection costs that are incurred after an account is charged off from the costs that can be used for purposes of the Section 1026.52(b)(1)(i) cost calculation; and (4) cap late fee amounts at 25 percent of the required minimum payment. The NPRM also requests information on a wide range of far-reaching restrictions on credit card account terms.

This statement consolidates some of the key points made in several comment letters from organizations representing community financial institutions. A joint letter signed by ABA that examines these issues in greater depth can be found here.

Currently, as an alternative to the cost-based fee calculation set forth in Section 1026.52(b)(1)(i), Regulation Z offers a safe harbor amount that issuers may charge in the event of late payment. The safe harbor amount, which the Bureau has adjusted annually for inflation from 2011 to 2021, currently allows issuers to charge $30 for the first late payment and $41 for a second late payment in the six billing cycles following the initial violation.

According to the Bureau, 175 million Americans have credit cards, making them one of the most common financial products in the United States.[2] Credit card issuers go to great lengths to provide quality products and a good consumer experience. Credit card issuers compete aggressively on terms, services, and products that ultimately benefit consumers at all income levels. There are good reasons for credit cards' popularity and ubiquity. Credit cards provide valuable consumer benefits, including income and consumption smoothing, unparalleled convenience that allows consumers to make purchases and obtain credit at the time and place they need it, safety and security, fraud protection, merchant dispute rights, credit-building opportunities, and cardholder benefits and rewards.

In addition, credit card terms and conditions are well known to, and understood by consumers. Consumers receive repeated disclosures about the key terms, including any late payment fee, in easy-to-read, consumer-tested formats before they open an account and again after account approval but before they are obligated on the account. Periodic statements highlight late payment fees and indicate fees incurred for the period and year to date.

In consideration for extending credit, consumers contractually agree to pay their bills on time. Credit card issuers rely on this promise to manage their risks and sustain their business of providing credit. To be clear, credit card issuers want consumers to pay on time. On-time payments help consumers and card issuers to manage their respective finances. Card issuers have made significant investments to provide tools to promote on-time payments and good financial management. They want consumers to have a good experience with their product. However, tools such as due date alerts and voluntary automatic payments alone are insufficient to encourage on-time payments.

As with many obligations, late fees provide an important incentive to pay on time and help cover the costs and risk of people failing to pay. Late fees are designed to recover at least part of the issuer's costs associated with late payment, encourage on-time payments, minimize

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[2] *See* Consumer Fin. Prot. Bureau, Blog Post, As Outstanding Credit Card Debt Hits New High, the CFPB is Focusing on Ways to Increase Competition and Reduce Costs (Apr. 17, 2023), https://www.consumerfinance.gov/about-us/blog/credit-card-debt-hits-new-high-cfpb-is-focusing-on-ways-to-increase-competition-and-reduce-costs/.

defaults and delinquencies, and promote good credit management. As discussed further herein, consumers understand and support this construct.

Unrecognized by the Bureau, assessing fees for failure to pay on time (or other violations of contractual obligations) is a universal market practice and is a proven deterrent. Deterrence is an appropriate purpose of late fees, as Congress recognized. Fees assessed for violation of a contractual obligation are common and exist across federal, state, and local governments and the economy. Indeed, the CARD Act specifically requires the Bureau to consider deterrence in determining the standards for "reasonable and proportional" late payment fees for credit cards.[3] The statutory considerations are in furtherance of the CARD Act's mandate that the fee be reasonable and proportional to the omission or violation, rather than the Bureau's misinterpretation that penalty fees be reasonable and proportional to the cost of the violation.

State and federal governments routinely impose penalties for failure to pay taxes and other obligations on time. Condominium associations commonly levy late fees to ensure income to manage budgets. Most loans, such as mortgage and auto loans, have late payment fees. The late fees are imposed because they work to deter late payment. Indeed, most cardholders pay on time—many so as to avoid a late fee. In 2010, when the Federal Reserve Board implemented CARD Act amendments to create the safe harbor, the Board acknowledged that "as a general matter, the imposition of a fee for particular behavior (such as paying late) can reduce the frequency of that behavior."[4]

The vast majority of consumer cardholders will be harmed by the Proposal.

Limiting the ability of issuers to allocate the cost and risk of late payments to the late paying population will force issuers to spread these costs across all consumer cardholders. Moreover, without an effective incentive to pay on time, late payments and associated costs will increase. As a result, the cost of credit will increase, credit availability will drop, and rewards and other credit card features will decline, and some may disappear. The Bureau expressly acknowledges these consequences with no rebuttal. In fact, the Bureau failed to study the true cost of the Proposal to consumers, neglecting fundamental cost-benefit analysis requirements.

By the Bureau's own admission, "[c]ardholders who never pay late will not benefit from the reduction in late fees and could pay more for their account if maintenance fees in their market segment rise in response" to the Proposal.[5] Cardholders who pay at least their minimum payment in a timely manner will **pay more** for existing and new credit because issuers will have to adjust rates and fees to manage new risks and recover costs (including potential losses) related to late payments. The cost of credit for these timely payers, who account for the vast majority of the consumer cardholder population, will increase with no corresponding benefit. In other words,

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[3] 15 U.S.C. § 1665d(c)(2).
[4] 75 Fed. Reg. 12,334, 12,342 (Mar. 15, 2010).
[5] 88 Fed. Reg. at 18,934-35 ("Sophisticated consumers, inasmuch they would have been cross-subsidized by naïve customers' costly mistakes, may pay higher maintenance fees or interest or collect fewer rewards if the issuer offsets the revenue lost to naïve consumers. The Bureau considers that to the extent there are offsetting changes to card terms, some of these changes are likely but has not quantified their magnitude…").

the NPRM gives short-term preferential treatment to a small minority of frequently late paying consumers at the expense of the vast majority of consumers who pay their bills on time.

Cardholders who pay on time but carry a balance from month-to-month will be particularly harmed. Indeed, the Bureau acknowledges that annual percentage rates (APRs) could rise 2 percentage points for most cards, and that "[c]ardholders who carry a balance but rarely miss a payment are less likely to benefit on net."[6] The NPRM also admits that "if interest rates increase in response [to the NPRM] and these on-time cardholders also carry a balance," they will not benefit from the NPRM, and indeed would be harmed if the cost of credit increases as a result.[7] Because issuers are restricted from raising interest rates on existing balances, issuers principally would need to adjust APRs for new transactions and newly opened accounts.[8]

The Bureau and the White House have claimed that "the proposal could reduce late fees by as much as $9 billion per year," but this is a misleading and irresponsible mischaracterization of the true impacts and costs of the Proposal.[9] Similar price regulation has led to increased costs for other banking products and forced consumers to seek credit from less regulated non-bank providers. As the Bureau found after enactment of the CARD Act, which limited certain fees and risk-based pricing adjustments, credit card APRs increased as issuers adjusted pricing to manage portfolio risks and losses.[10] Additionally, following the enactment of debit card interchange fee caps, independent academic research determined that financial institutions fully offset losses through other account fees to support the cost of providing accounts and that consumers were ultimately not helped by the regulation.[11] We expect that the only cardholders who would not see an increase in the cost of their credit card accounts are those cardholders that do not pay late and do not carry a balance—and even those consumers may be adversely impacted by reduced card account features, lost rewards, or increased credit card annual fees. Regrettably, it will be the very consumers who need access to credit the most, who will be harmed most by this Proposal.

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[6] 88 Fed. Reg. at 18,934.
[7] *Id*.
[8] Under existing late fee regulation, issuers rarely utilize penalty APRs for late payers; however, if the late fee safe harbor is reduced to $8, more issuers may exercise this option.
[9] Press Release, Consumer Fin. Prot. Bureau, CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees (Feb. 1, 2023), www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/.
[10] *See* Consumer Fin. Prot. Bureau, The Consumer Credit Card Market Report, 30-31 (Oct. 2013), https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf. This report found that credit card interest rates increased after the CARD Act at a time when market interest rates declined. This change was due in part to the inability of credit card issuers to adjust prices based on cardholders' changing risk profiles, as well as on the Act's prohibition on interest rate floors. Prior to the CARD Act, some issuers used floors to hedge against the risk that a variable rate card pegged to the prime rate would fall below the level required to maintain profitability. As of July 2009, approximately 9 percent of bank-issued credit cards had a minimum rate requirement (up from 1 percent of accounts seven months earlier), while 40 percent maintained floors on variable interest rate for cash advances (up from 10 percent at the end of 2008). After the CARD Act's implementation, issuers that relied on floors predictably raised rates in response to this new restriction. The changes brought about by the CARD Act resulted in higher interest rate margins (i.e., the difference between the average consumer credit card interest rate and the prime rate) as issuers sought alternative ways to manage portfolio-wide risk.
[11] *See* Mukharlyamov, Vladimir and Sarin, Natasha, The Impact of the Durbin Amendment on Banks, Merchants, and Consumers (2019), Faculty Scholarship at Penn Carey Law. 2046, https://scholarship.law.upenn.edu/faculty_scholarship/2046/.

Under the guise of transparency and a forced front-end fee structure, the Bureau's proposed late fee cap is a heavy-handed attempt to eliminate fees based on individual cardholder payment behavior and to shift the costs and risks associated with individual payment behavior to the entire cardholder base. In effect, this market manipulation forces consumers who manage their credit card well, and pay on time, to subsidize those who do not.

More consumers will pay late if the Proposal is finalized.

Timely payment helps cardholders better manage their finances and avoid becoming overleveraged and overwhelmed as their balance and minimum payment requirements increase due to missed payments. By lowering the current late payment fee below any meaningful deterrence threshold, and expressly acknowledged by the Bureau, more consumers will pay late. Specifically, the Bureau noted that it "acknowledges the possibility that consumers who were more likely to pay attention to late fees than to other consequences of paying late, like interest charges, penalty rates, credit reporting, and the loss of a grace period, might be harmed in the short run if a reduction in late fees makes it more likely that they mistakenly miss payments."[12]

The long-term impacts of late payment are not easily understood by consumers.[13] More late payments could harm creditworthiness and put consumers at a greater risk of default, higher interest rates, and lower credit scores. Altogether, these consequences will lead to reduced consumer credit opportunities and higher costs for credit.

Payment history is the most heavily weighted factor for both FICO and Vantage credit scores.[14] For example, a payment that is more than 30 days late will typically cause a credit score to decline. The lower score may increase the cost of credit not only for credit card credit but other loans such as mortgage and auto loans.[15] The increased cost of credit for many will be greater than any cost savings achieved from lowering a late payment fee from $30 to the lower of $8 or 25 percent of the minimum payment. For example, a consumer with Prime credit, taking out a $30,000 new vehicle loan at 4.9 percent interest for 48 months will pay $3,096.99 in interest on a car loan for a new vehicle. If that same consumer's credit falls to Near Prime (e.g., because of late payments on a credit card account), the interest rate will increase to 7.25 percent and they will pay $1,552.87 more in just interest over the life of the same $30,000 loan.[16]

In the long term, the Bureau's goal to provide consumers with more money to pay their credit card bill by lowering the late payment fee will be frustrated because many will pay more

[12] 88 Fed. Reg. at 18,935.
[13] 88 Fed. Reg. at 18,935 (noting that "consumers may not fully consider late fees when shopping for a credit card.").
[14] *See, e.g.,* FICO, What's In My FICO Scores?, https://www.myfico.com/credit-education/whats-in-your-credit-score, VantageScore, The Complete Guide to Your VantageScore, https://vantagescore.com/press_releases/the-complete-guide-to-your-vantagescore/.
[15] For example, credit scores are utilized by landlords when evaluating a potential renter application. *See* Experian, Can My Credit Score Affect Renting? (Sept. 9, 2021), https://www.experian.com/blogs/ask-experian/can-my-credit-score-affect-renting/.
[16] For the purposes of this exercise, Prime was defined as a credit score of 661 to 780, and Near Prime as a credit score of 601-660. Average new vehicle loan interest rates from Experian State of the Automotive Finance Market Q3 2022.

for credit generally or will be cut off from access to responsible credit.[17] Thus, the Bureau's position distorts the true cost of consumer credit. Further, credit card credit might become unavailable for some late paying consumers, and to meet their credit needs, they will be forced to higher-cost, less-regulated credit alternatives such as payday loans.

The CFPB failed to comply with SBREFA.

As a "covered agency" designated by the Dodd-Frank Act,[18] the Bureau must comply with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[19] Under SBREFA, the Bureau must convene and chair a Small Business Review Panel (Panel) if it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities.[20] Any reduction in the late fee safe harbor would have a significant adverse impact on a substantial number of community banks and credit unions, with assets below $850 million. In declining to convene a Panel, the Bureau is failing to account for foreseeable harm to small businesses and consumers, as generally required by the Regulatory Flexibility Act (RFA) and SBREFA.[21]

SBREFA requires the Bureau to collect the advice and recommendations of Small Entity Representatives (SERs) concerning whether the proposals under consideration might increase the cost of credit for small businesses and whether alternatives exist that might accomplish the stated objectives of applicable statutes and that minimize any such increase.[22] SBREFA also expressly requires the Bureau to consider any projected increase in the cost of small business credit.[23] Reducing the amount issuers may charge for late payments could increase the cost of and reduce access to credit by small businesses, many of which use personal credit cards for business purchases. Of the approximately 805 credit card-issuing banks, more than half (451) have assets of less than $850 million, and of the 3,127 credit card-issuing credit unions, 85 percent (2,670) have assets of less than $850 million.[24] Reducing the amount issuers may charge for late payments will have a significant adverse impact on all issuers and cause them to alter their business models. The impact on small depository institutions would be greater.

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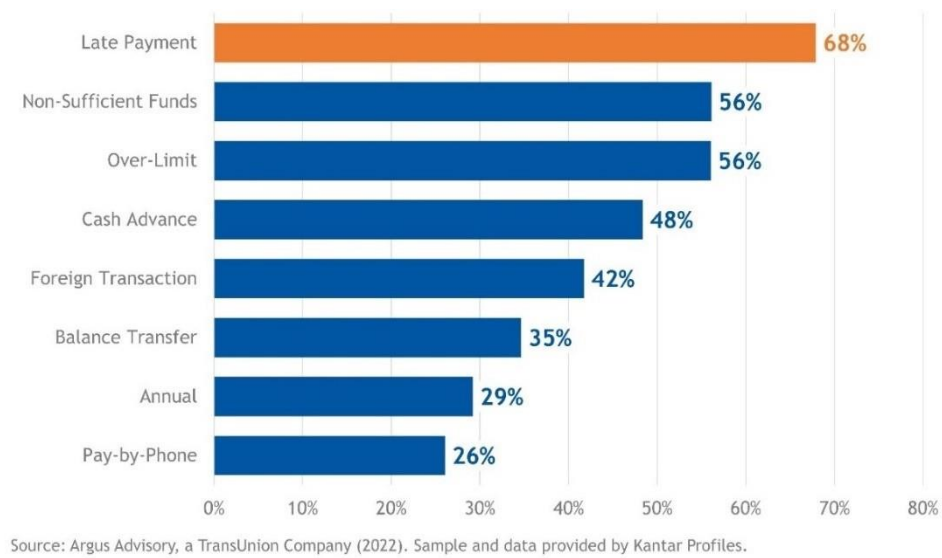
[17] 88 Fed. Reg. at 18,919 (". . . the Bureau has preliminarily determined that some cardholders may benefit from the proposed $8 safe harbor threshold amount in terms of a greater ability to pay revolving debt.").
[18] *See* 5 U.S.C. § 609(d), as amended by Dodd-Frank Act § 1100G.
[19] *See* 5 U.S.C. § 603.
[20] 5 U.S.C. § 609(b).
[21] Notably, the Small Business Administration Office of Advocacy, a member of a required Panel, has expressed serious concern that the CFPB does not have necessary data to certify that the Proposal will not have a SISNOSE. U.S. Small Bus. Admin. Off. of Advoc., Comment Letter on Notice of Proposed Rulemaking on Credit Card Late Fees and Late Payments (May 2, 2023), https://www.regulations.gov/comment/CFPB-2023-0010-0170 (hereinafter the SBA Letter) (stating that "[i]t is unclear why CFPB lacks the data necessary to evaluate the cost of this rule for the small financial entities that it regulates" and that "[w]ithout a factual basis, the agency may not certify under Section 605(b) and must publish an Initial Regulatory Flexibility Analysis under Section 603 of the RFA.").
[22] 5 U.S.C. §§ 609(b)(4), 603(c).
[23] 5 U.S.C. § 603(d).
[24] The number of card-issuing depository institutions is based on an analysis of bank, credit union, and thrift balance sheets. Those with non-zero credit card loan balances were included as card issuers.

ABA surveys show late fees encourage on-time payments.

When set appropriately, late fees encourage consumers to pay on time and develop good financial and credit management habits that lead to financial well-being. Indeed, several governmental bodies have recognized the positive impact late fees have on payment behavior. In 2010, the Federal Reserve Board acknowledged that "as a general matter, the imposition of a fee for particular behavior (such as paying late) can reduce the frequency of that behavior."[25]

Late fees are judged to be fair by the public. The Bureau's repeated mischaracterization of late payment fees as so-called "junk fees" ignores the well-understood and accepted value of late fees as a deterrent and undermines the significance of the role of these late fees in the credit market.[26] Penalty fees deter bad behavior and are avoidable. Indeed, a majority, 57 percent, of consumers recently surveyed think it is reasonable for financial institutions to charge late fees and even more, 78 percent, believe that paying on time is a personal responsibility.[27] Consumers who comply with their contractual obligations by making timely payments do not incur late fees.

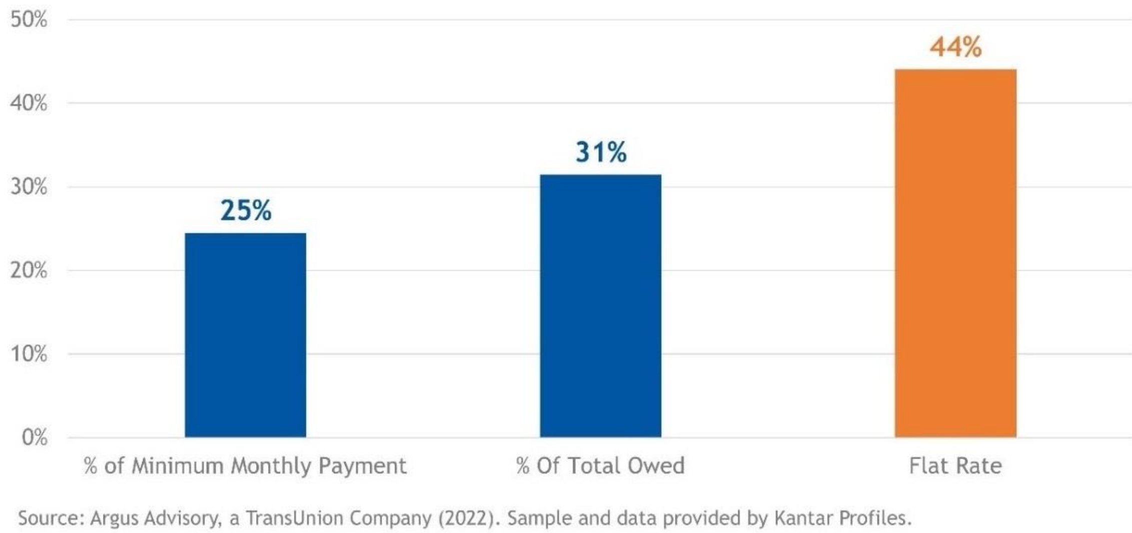
Figure 1: Share of Consumers Who Feel it is Reasonable for Issuers to Charge Various Fees



A plurality said that a flat fee is the fairest fee structure, compared to the percent of total balance and the percent of minimum monthly payment, indicating little consumer support for the limit of 25 percent of the minimum payment (see Figure 2).

[25] 75 Fed. Reg. 12,334, 12,342 (Mar. 15, 2010).
[26] *See* Media Release, Consumer Bankers Association, New Poll: Majority of Americans Believe Credit Card Fees are Legitimate (Apr. 5, 2023), https://www.consumerbankers.com/cba-media-center/media-releases/new-poll-majority-americans-believe-credit-card-late-fees-are.
[27] *Id.*

Figure 2: Consumer Opinions on Fairest Fee Structure



<u>The Bureau improperly relied upon non-public data that are ill-suited for this rulemaking.</u>

The Bureau utilizes Y-14 data as the principal basis for the cost estimates in the Proposal. As a preliminary matter, these data are confidential, and the Bureau's reliance on data and analysis that it has not disclosed, and has no authority to disclose for public input, violates bedrock principles of administrative law.[28] As the D.C. Circuit has explained, it "is the agency's *duty* to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules."[29] In addition "[a]n agency commits serious procedural error when," as the Proposal does here, "it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."[30] What we do know about these confidential data is that they are not fit for the purpose of evaluating the efficacy of late fee safe harbors. According to the Federal Reserve Board, Y-14 data are used to "assess the capital adequacy of large firms" and "to support supervisory stress test models and continuous monitoring efforts," as well as to "inform the [Federal Reserve Board's] operational decision making to implement the Dodd-Frank Act."[31]

Utilizing Y-14 data as the sole and principal basis for the proposed safe harbor is concerning because the data were collected for an entirely different purpose and are not reconciled. Moreover, the Bureau does not have insight into the specific inputs that are factored into the total costs. What is clear, however, is that the Y-14 data are limited to what an issuer

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[28] *See, e.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, to a critical degree, is known only to the agency."); *see also* Letter from BPI *et al.*, re: NPR on Credit Card Penalty Fees (Regulation Z) to CFPB, March 16, 2023, https://bpi.com/wp-content/uploads/2023/03/CFPB-CC-Late-Fees-NPR-Data-Publication-3-16-23-final-for-transmission.pdf.

[29] *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.,* 494 F.3d 188, 199 (D.C. Cir. 2007) (emphasis added) (citation omitted).

[30] *Id.* (citations omitted).

[31] Fed. Rsrv. Sys., FR Y-14 Information Collection Q&As (Capital Assessments and Stress Testing information collection), https://www.federalreserve.gov/publications/fr-y-14-qas/y-14-qas.htm.

may report as "costs incurred to collect problem credits…[including] total collection cost of delinquent, recovery, and bankrupt accounts."[32] As discussed elsewhere, even if a card issuer's late fee could be based solely on "costs" as defined above, there are *additional* costs associated with a late payment that exceed those solely related to collections. Furthermore, the Y-14 data are limited to "problem credits" (*i.e.*, accounts 30 days or more past due), and there are a large number of costs associated with late payments on accounts that are not yet problem credits. The Y-14 data are, therefore grossly underinclusive. Accordingly, the Bureau cannot conclude that this metric is representative of costs permitted to be considered under the rule and, as discussed further in section 3 below, reliance on it represents a limitation on the statutory cost consideration not expressly contemplated by Congress.

The Bureau's methodology in calculating costs for late payments is incomplete.

When considering the amount of late fees that should be charged, the Bureau only considers certain costs related to the violation or omission. There is no basis in the CARD Act to exclude certain costs that the Bureau excluded from its analysis.[33] The Bureau's proposed amendments to amounts excluded from cost analysis exclude actual costs associated with late payments beyond collection costs, such as direct post charge-off costs. These post-charge-off costs include recovery of the charged-off balance and commission paid to collections agents.

In addition, the Bureau's analysis excludes attributable expenses and overhead and funding costs related to consumer credit card accounts. Attributable expenses include indirect operating expenses related to accounts that are delinquent, including systems expenses and risk department expenses. These indirect costs represent real and reasonable expenses associated with late and delinquent accounts. Funding costs are related to the cost of funding delinquent accounts. While these resources are needed when an account becomes delinquent, issuers do not know which accounts will become delinquent (or when). However, issuers need these functions to maintain the orderly management of the entire credit card programs, so it is appropriate for these costs to be a part of the late fee calculation.

Late fees allow issuers to manage safety and soundness risk.

Lower late fees will affect issuers' ability to manage safety and soundness risk. Effective late fees allow issuers to extend credit knowing that consumers have an incentive to make timely payment. If consumers decide that a "penalty" is less troublesome than making a payment, issuers cannot accurately assess when a consumer pays late whether the consumer is in early stages of financial distress or whether the late fee was simply insufficient to serve as a deterrent to late payment. The aggregate impact of large swaths of consumers missing their payments, anticipated by the Bureau, will have a cascading adverse impact on the integrity of issuer portfolios. This lack of information inhibits issuers from effectively monitoring their credit

[32] *See* Consumer Fin. Prot. Bureau, Credit Card Late Fees: Revenue and Collection Costs at Large Bank Holding Companies, at 2 (Feb. 23, 2023), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees-revenue-collection-costs-large-bank_2023-01.pdf.

[33] *See* ABA et al. Comment Letter on Notice of Proposed Rulemaking on Credit Card Late Fees and Late Payments, Docket No. CFPB–2023–0010 (May 3, 2023).

portfolios. Additionally, the lack of information will also impair the efficacy of issuers' predictive models on credit risk.

Depository institutions must ensure adequate liquidity and capital to cover expected and unexpected losses for performing and non-performing credit card portfolios. The Office of the Comptroller of the Currency highlights that "[c]redit risk poses the most significant risk to banks involved in credit card lending" because "repayment depends primarily on a borrower's *willingness* and capacity to repay."[34] As the Bureau expressly acknowledges, there will be a direct correlation between a significantly reduced late fee and a cardholder's willingness to pay late. In safety and soundness examinations, regulators test liquidity and capital adequacy and review expected cash flow from credit card assets to ensure there is sufficient cash flow to cover the liabilities. The capital adequacy can shift and decline when loans are paid late.

The Bureau failed to adequately consider the consequences of reducing the safe harbor to $8 or less. As discussed above, the proposed safe harbor no longer provides a meaningful incentive to pay on time. As the Bureau acknowledges in the NPRM, "a lower late fee amount for the first or subsequent late payments might cause more consumers to pay late."[35] As discussed above, ABA data show that 83 percent of consumers said that a $10 fee (let alone an $8 fee) would not be high enough to deter them from paying a credit card bill late, and only 15 percent said that worrying about their credit rating was the most important reason to pay on time.

Inexplicably, for an agency charged with promoting responsible use of financial products and services, the Bureau refers to a violation of the terms of a cardholder agreement as "flexibility" about what bills to pay on time.[36] Setting clear contractual obligations and expectations was the very hallmark of the CARD Act and is a foundational element of American jurisprudence and the economy. Any rulemaking that is designed to allow any party to avoid a contractually agreed-upon deadline that is legally permissible, may constitute a taking.[37] The NPRM fails to analyze whether this "flexibility" would be contrary to the constitutional right to be free of uncompensated takings of private property.

Small issuers that collect fee revenue through agent bank relationships will be adversely impacted in the same way as those that directly issue cards. Moreover, those banks and credit unions that do not collect fee income would be indirectly affected by a reduction in late fees. Partner issuers and agent banks, like all credit card issuers, may be forced to increase APRs or decrease credit access to make up for the costs and increased risk associated with late payments. Agent issuers could also be forced to reduce the share of revenue provided to participating

[34] Comptroller of the Currency, Comptroller's Handbook: Credit Card Lending, V. 2.0, at 8 (2021), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/credit-card-lending/pub-ch-credit-card.pdf (emphasis added). Similarly the National Credit Union Administration highlights "situations where a credit union distributes funds before it has them" as a primary risk of credit card lending. *See* Nat'l Credit Union Admin, Examiner's Guide: Electronic Payment Systems (Sept. 2017), https://publishedguides.ncua.gov/examiner/Content/ExaminersGuide/ElectronicPaymentSystems/EPS_PrimaryRisks.htm.

[35] *See* 88 Fed. Reg. at 18,919.

[36] *See id*. at 18,933.

[37] *See, e.g.*, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken … provided that just compensation is paid.").

community banks. These changes would negatively impact both the revenue provided by these products to small institutions and the customer relationships that these credit cards helped establish.

In its dismissal of impacts to small depository institutions, the Bureau also ignores the fact that lower late fees will compel issuers to absorb the costs of those late payments in other ways, including by increasing interest rates reducing credit card availability. Smaller entities, in particular, have less flexibility and fewer resources to make those adjustments. Moreover, while raising APRs may be an option for large issuers, some smaller card issuers may not be able to raise rates due to state usury laws, as the Bureau notes.[38] The Bureau's Proposal would also limit small issuers' ability to compete with larger issuers on the basis of fees.

Conclusion

Credit cards are widely popular financial products that provide valuable consumer benefits. Unlike the Bureau's mischaracterization of late fees, consumers understand late fees and recognize the importance of late fees in promoting responsible consumer behavior and more efficiently allocating costs. As discussed above, the Bureau's Proposal is based on flawed assumptions, which would create similarly flawed policy. If finalized as proposed, the Proposal will harm the vast majority of consumers by raising the cost of credit and limiting access to new and existing credit. In addition, as discussed above, the Bureau has violated various process and procedural requirements, which must be remedied before proceeding.

* * *

We urge Congress to conduct robust oversight of the Bureau's Proposal and its "junk fees" campaign to ensure that it is following the law and not pursuing policies which will harm consumers. Thank you for the opportunity to share our views.

[38] 88 Fed. Reg. at 18,935.