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Comment Intake
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C., 20552

Re: Request for Information Regarding the Consumer Credit Card Market
Docket No. CFPB-20019-0002
84 Federal Register 647 (January 31, 2019)

Dear Sir or Madam:

The American Bankers Association (ABA)[1] is pleased to submit our comments to the request for information of the Bureau of Consumer Financial Protection Bureau (Bureau) regarding the consumer credit card market pursuant to the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act). Section 502(a) of that act requires the Bureau to conduct a review of the consumer credit card market every two years. The Bureau requests information about how the credit card market is functioning and asks for comment on seven specific topics of interest as well as any information the public believes relevant to the review of the credit card market.

Our comments focus on: changes in the cost and availability of consumer credit cards since the Bureau's last report in 2017; the need to improve the debt collection rules; credit card product innovation, including the use of artificial intelligence and regulations that inhibit advancement in customer and card issuer communications. Pursuant to the Bureau's request, we have used the topic headings in the request for comment.

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend nearly $10 trillion in loans.

### (d) The Cost and Availability of Consumer Credit Cards

The Bureau has asked about changes to credit card costs and availability since 2017. This section summarizes recent developments in the cost and availability of credit cards and describes the consequences to consumers of reduced credit card availability.

### Cost of Consumer Credit Cards

Over the last two years, credit card interest rates, typically variable interest rates since the CARD Act, have increased across risk tiers.[2] These changes were caused mostly by U.S. monetary policy; during this period, the Federal Reserve Board raised the interest rates a total of eight times, driving a 200-point increase in the bank prime loan rate.[3] As Table 1 shows, the average purchase APR for all accounts climbed 260 basis points from 2017 – 2018, reaching 19.0% at the end of Q4.

*Table 1: Credit Card Interest Rates by Risk Tier, 2008 – 2018*

| Risk Category | Average Purchase APR | | | Change (basis points) | | |
|---|---|---|---|---|---|---|
| | 2008.Q1 | 2016.Q4 | 2018.Q4 | 2008 – 2016 | 2016 – 2018 | 2008 – 2018 |
| **Super-prime** (Credit score > 759) | 13.5% | 15.3% | 17.9% | *+180* | *+260* | +440 |
| **Prime** (Credit score = 680 – 759) | 14.8% | 16.9% | 19.4% | *+210* | *+250* | +460 |
| **Subprime** (Credit score < 680) | 18.5% | 18.2% | 21.2% | *-30* | *+300* | +270 |
| **Overall** (All accounts) | **15.2%** | **16.4%** | **19.0%** | ***+120*** | ***+260*** | **+380** |

Source: Argus Information and Advisory Services

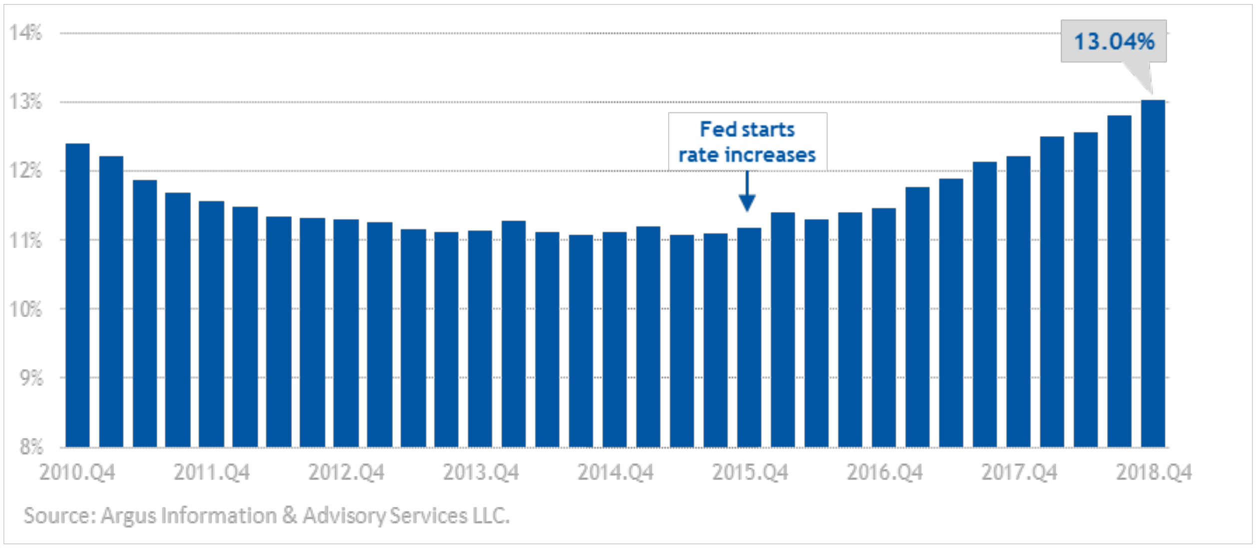
[2] The CARD Act restricts card issuers' ability to increase credit card interest rates, but allows rate increases on balances if the rate varies according to a publicly-available index that is not under the issuers' control. As such, most card issuers shifted their fixed-rate accounts to variable-rate accounts pegged to the U.S. bank prime loan rate after the CARD Act was implemented. According to Bankrate, the number of fixed-rate consumer credit cards available dropped from 33 to five between January 2008 and November 2013. By 2017, more than 90% of general purpose revolving balances were subject to variable rates, according to the Bureau's most recent *Consumer Credit Card Market Report.*

[3] As the Bureau found in its 2013 CARD ACT report (pp. 30–31), credit card interest rates increased after the CARD Act at a time when market interest rates declined. This change was in part due 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% of bank-issued credit cards had a minimum rate requirement (up from 1% of accounts seven months earlier), while 40% maintained floors on variable interest rate for cash advances (up from 10% 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. For example, from 2001 – 2007, the average interest rate margin was 720 basis points. However, between May 2008 (i.e., when the Federal Reserve promulgated the credit card pricing rules that were later codified in the CARD Act) through the end of 2010, interest rate margins averaged 960 basis points — a 240-point increase. Notably, consumer credit card interest rates rose even as the prime rate declined. After falling to 850 basis points in mid-2017, the average interest rate margin has climbed back up to 960 basis points as of February 2019.

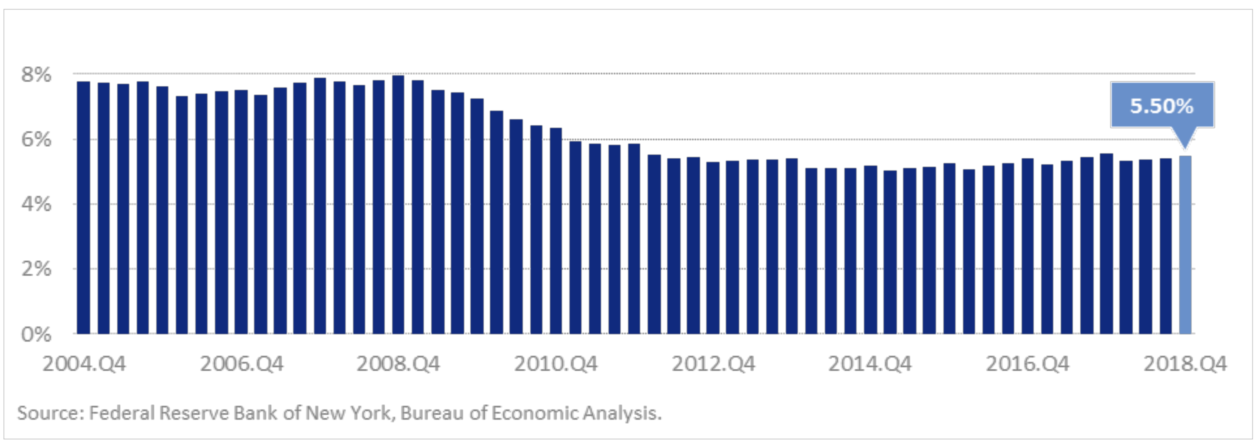
The rise in interest rates is also reflected in the effective finance charge yield, which is defined as the annualized interest income generated by a portfolio expressed as a percentage of a portfolio's assets.[4] As Figure 1 illustrates, since the end of 2016, the effective finance chart yield increased 186 basis points, from 11.18% to 13.04%.

***Figure 1: Credit Card Effective Finance Charge Yield***




Importantly, despite the rise in interest rates and the effective finance charge yield that has occurred over the last two years, credit card debt as a share of disposable income has been relatively flat and remains roughly 200 basis points below pre-recession levels (see Figure 2).

***Figure 2: Credit Card Credit Outstanding as a Share of Disposable Income***




## Availability of Consumer Credit Cards

Since the CARD Act, many subprime consumers have been pushed out of the credit card market.[5] As Table 2 illustrates, the share of subprime accounts has declined from 25% of open accounts to less

[4] In the credit card market, the effective finance charge yield measures total interest charged to all accounts, calculated as a share of total outstanding credit balances.

[5] Subprime borrowers were pushed out of the credit card market because card issuers are less able to ensure the price they charge is commensurate with the risk these cardholders pose to their portfolios. ABA's quarterly Credit Card Market Monitor illustrates

than 20% over the past ten years — equivalent to a loss of 14 million subprime cardholders — and the number of open subprime accounts is down 16% compared to early 2008. Among new accounts (i.e., those opened less than two years ago), subprime account openings are even more suppressed, more than 30% below 2008 levels.

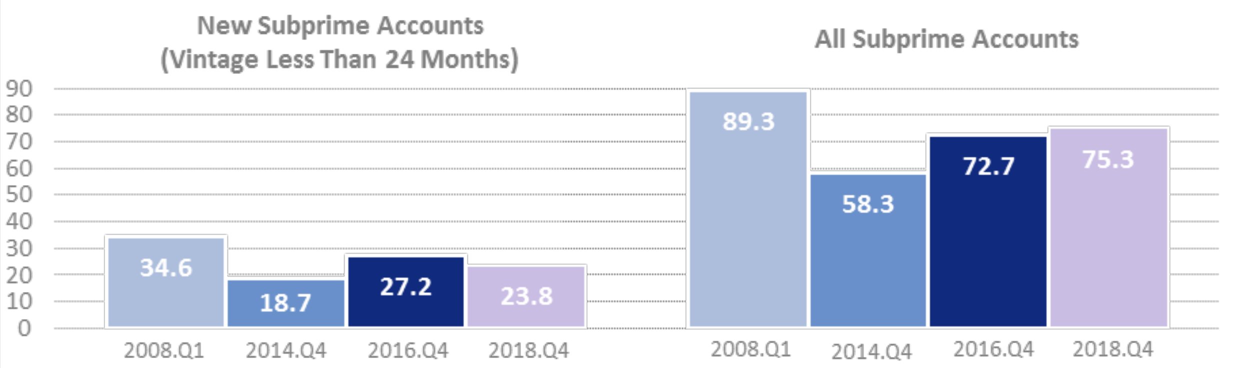
*Table 2: Account Volume and Distribution by Risk, 2008 – 2018*

| Risk Category | Dist. of Accounts | | Total Accounts (millions) | | | New Accounts (millions) | | |
|---|---|---|---|---|---|---|---|---|
| | 2008.Q1 | 2018.Q4 | 2008.Q1 | 2018.Q4 | % Change | 2008.Q1 | 2018.Q4 | % Change |
| **Subprime** (Credit score < 680) | 25.1% | 19.7% | 89.3 | 75.3 | -16% | 34.6 | 23.8 | -31% |

Source: Argus Information and Advisory Services

As shown in Figure 3, these negative effects are less pronounced since 2014 than they were in the immediate aftermath of the CARD Act's implementation. The total number of subprime accounts fell from 89 million to 58 million from 2008 — 2014 (a 35% decline) but has since bounced back to 75 million as of the end of 2018 — although this still represents a 16% reduction compared to 2008 levels. Most of the recovery in subprime accounts occurred in 2015 and 2016; over the last two years, total subprime account volume has grown only slightly, while new subprime account generation is below 2016 levels as of 2018 Q4. The return of some subprime borrowers likely reflects a stronger economy and labor market, which has allowed the card industry to prudently expand access to credit.

*Figure 3: Subprime Credit Card Accounts (Millions)*




Source: Argus Information and Advisory Services.

Credit lines for subprime accounts, which fell after implementation of the CARD Act, have recovered to some extent in the last few years. As shown in Table 3, since 2008, subprime credit lines have declined 17% among accounts opened in the previous 24 months and 15% overall. More recently, issuers have adopted a strategy of extending smaller initial credit lines which can rise over time as the borrower demonstrates good payment behavior. This practice, which has replaced the previous practice of repricing credit cards by raising interest rates if payment obligations were consistently unmet, has allowed issuers to expand access to credit while managing risk.

this effect: in early 2008, there were 35 million new subprime accounts, comprising nearly 40% of all new accounts. However, by late 2010, this figure had fallen to just 10 million new subprime accounts, making up less than one-quarter of new accounts

*Table 3: Average Credit Line for Subprime Credit Card Accounts*

| Risk Category | Total Accounts ($) | | | New Accounts ($) | | |
|---|---|---|---|---|---|---|
| | 2008.Q1 | 2018.Q4 | % Change | 2008.Q1 | 2018.Q4 | % Change |
| **Subprime** (Credit score < 680) | $4,531 | $3,830 | -15% | $3,259 | $2,701 | -17% |

Source: Argus Information and Advisory Services

### Consequences of Reduced Availability of Credit

Restricting the opportunity to build credit among borrowers with no, limited, or poor credit history inhibits their ability to become eligible for other types of loans (e.g., auto loans and mortgages). As former Director Richard Cordray noted in 2017, "People with limited or no credit history, or who lack a credit score, have fewer opportunities to borrow money in order to build a future, and any credit that is available usually costs more. That only deepens their economic vulnerability."[6]

Such challenges are particularly acute for younger consumers who have traditionally relied on credit cards to build the credit needed to make major life investments, such as purchasing a home or starting a business. For example:

- As of 2018, homeownership rates among older Americans had nearly recovered to pre-recession levels, whereas homeownership rates among Americans under the age of 35 remained 6 percentage points below the pre-recession peak.[7]
- Similarly, entrepreneurship among young Americans has stagnated, even as entrepreneurship is on the rise among Americans over the age of 35.[8] While other factors are at play, challenges building and accessing credit may be partially responsible for these trends.

Reduced credit availability also limits some consumers' ability to cover emergency expenses or pay bills when income is unstable. According to a recent survey conducted by the Federal Reserve, 41% of consumers cannot cover a $400 emergency expense without using credit card financing or some other form of loan.[9] Without access to a credit card, these consumers (particularly subprime borrowers) must turn to alternative short-term lending options, such as a payday loan, deposit advance, or bank overdraft. For example, a recent study shows that households with limited access to traditional credit

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6 Press Release, Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Directory Richard Cordray (Feb. 16, 2017), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-alternative-data-field-hearing/.

7 In 2018, homeownership rates among Americans age 65 and up reached 78.8%, nearing the 81.2% rate observed in 2006. In contrast, homeownership among Americans under age 35 remained at 37% in 2018, six percentage points lower than the 43% rate achieved in 2006. *See* U.S. Census Bureau, Current Population Survey/Housing Vacancy (2019).

8 According to the Kauffman Indicators of Entrepreneurship, the rate of new entrepreneurship among 20 to 34-year olds has stagnated, reaching 0.24% in both 2006 and 2017. Across all other age groups, however, new entrepreneurship rates have risen by four to five basis points over the same time period. *See* Kauffman Foundation, Kauffman Indicators of Entrepreneurship: Rate of New Entrepreneurs (Feb. 15, 2019), https://indicators.kauffman.org/indicator/rate-of-new-entrepreneurs/2016.

9 Bd. of Governors of the Fed. Reserve Sys., Report on the Economic Well-Being of U.S. Households in 2017 (2018), https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf.

channels are more likely to use payday loans than households that do not face credit constraints.[10] Payday lending and other short-term financing alternatives are typically more expensive than a credit card. As the Manhattan Institute notes, "If regulators cap interest rates in one area of the nonprime market, many borrowers will choose another area of the nonprime market… [T]his switch carries a cost, as consumer-finance loans are more expensive than high-interest credit cards."[11]

In response to this need for credit, card issuers have increasingly offered secured credit cards to consumers with limited or damaged credit history to help them both access credit and build (or rebuild) a positive credit record. As shown in Table 4, most secured card accounts are subprime accounts or "missing risk" accounts held by borrowers with little to no credit history (72% in 2011 and 79% in 2018). This is even more apparent for secured accounts opened in the previous 3 months; over half of these brand-new accounts are subprime, and another 40% are of unknown risk due to lack of a credit history. Over time, the distribution of the secured card portfolio shifts away from "missing risk" to subprime and prime accounts, but secured accounts can also be converted to a more traditional unsecured account based on payment behavior.[12]

***Table 4: Risk Distribution for Secured Credit Card Accounts***

| Risk Category | All Secured Accounts | | New Secured Accounts (<3 MOB) | | New Secured Accounts (<24 MOB) | |
|---|---|---|---|---|---|---|
| | 2011.Q4 | 2018.Q4 | 2011.Q4 | 2018.Q4 | 2011.Q4 | 2018.Q4 |
| **Super-prime** (Credit score > 759) | 5.3% | 3.9% | 0.9% | 1.5% | 3.2% | 1.9% |
| **Prime** (Credit score = 680 – 759) | 23.2% | 17.1% | 5.7% | 6.3% | 22.3% | 15.3% |
| **Subprime** (Credit score < 680) | 56.5% | 70.2% | 40.7% | 52.7% | 55.0% | 70.3% |
| **Missing Risk** (Limited or no credit history) | 15.1% | 8.8% | 52.7% | 39.5% | 19.5% | 12.5% |

Note: Values may not add to 100% due to rounding.
Source: Argus Information and Advisory Services

While it is clear that secured cards offer opportunities for consumers seeking to build or rebuild their credit histories, they are not a panacea. Secured cards can sometimes prove costly to the issuers that offer them, despite the fact that secured cards often feature higher APRs and frequently impose annual fees. In addition, issuers may lose profitable or potentially profitable customers whose scores have improved once these consumers gain access to a wider variety of accounts and become coveted by competitors, and regulatory uncertainty may also discourage issuers from offering secured credit cards.

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10 Specifically, in 2007 credit-constrained households were about twice as likely to use a payday loan as households without such constraints. However, as of 2010 and 2013, these credit-constrained consumers had become nearly three times more likely to use a payday loan. *See* Kyoung Tae Kim & Jonghee Lee, *The Increase in Payday Loans and Damaged Credit after the Great Recession*, 39 J. FAM. & ECON. ISSUES 360 (2018).

11 Nicole Gelinas, *Reforming Obama-Era Financial Regulation: Insights from Eight New Research Papers*, MANHATTAN INST., Apr. 2018, https://media4.manhattan-institute.org/sites/default/files/R-NG-0417.pdf.

12 These conclusions are consistent with findings from the Center for Financial Services Innovation: "As the consumer uses the card and makes on-time payments, their credit score typically improves, allowing them to graduate to a larger, unsecured credit line. The secured credit card permits a provider to offer a credit card to a population that otherwise is denied access and the user gains a revolving credit line and the potential to improve their score." *See* Rob Levy et al., *Secured Credit Cards: Innovating at the Intersection of Savings and Credit*, CTR. FOR FIN. SERVS. INNOVATION, 2016, at 4, http://www.workingcredit.org/wp-content/uploads/2016/09/2016-Secured-Credit-Cards-Full-Report.pdf.

### (e) The Safety and Soundness of Credit Card Issuers

The Bureau has asked whether there are any risks to safety and soundness present or growing in the credit card market. We have concerns about two emerging risks: the Fair Debt Collection Practices Act and the Office of the Comptroller's Debt Sales Guidance.

#### Fair Debt Collection Practices Act

The ability to collect outstanding credit card debt promotes the affordability and availability of consumer credit, as well as the safety and soundness of insured institutions. In its 2019 report on the Fair Debt Collection Practices Act (FDCPA), the Bureau expressed its intent to issue in the spring of 2019 a Notice of Proposed Rulemaking (NPR) to address how to apply the 42-year old FDCPA to modern debt collection practices, in particular to update communication-related provisions and to improve consumer disclosures. ABA supports this rulemaking, which should improve the functioning of the debt collection market as well as consumer understanding and protection.

It is important that the proposed rule address several aspects needed to improve the functioning of the debt collection market and improve consumer understanding and protection. First, current judicial interpretations of the 42-year-old FDCPA's restrictions on communication do not make sense for today's modern world. These interpretations have curtailed the ability to communicate with consumers via email and text message, channels that consumers prefer for their convenience and discretion. As we have noted previously,[13] borrowers in financial distress are best served if they are in contact with their creditor, who can work with borrowers to help them avoid late fees, minimize negative impacts to their credit report, avoid account closures, and take advantage of loss mitigation and other workout programs. We urge the Bureau to avoid imposing arbitrary limitations on contacting consumers via any channel, including email and text, as well as traditional postal mail and voice call channels. While Director Kraninger has announced plans to propose call limits on debt collectors,[14] we note that decades of judicial opinions have not established a bright line when such communication constitutes harassment, oppression, or abuse as prohibited by the statute.[15] Moreover, imposing arbitrary limitations on consumer contacts will negatively affect the ability of creditors to work with delinquent customers, raising the cost and availability of credit for *all* consumers, particularly the vast majority who honor their commitments in a timely manner.

As we have outlined in previous comment letters, there are many aspects of current collection practices that the Bureau should address in its upcoming rulemaking.[16] We hope that the new rule facilitates communication by creating a presumption against third-party disclosure for customer-provided contact information, including email addresses and mobile phone numbers, as well as standardizing disclosures to reduce the risk of frivolous litigation.

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13 Letter from Virginia O'Neil, Sr. Vice President, ABA, to J. Michael Mulvaney, Acting Director, Consumer Fin. Prot. Bureau (June 18, 2018), https://www.aba.com/Advocacy/commentletters/Documents/cl-RFI-AdoptedNewRegs20180618.pdf [hereinafter Virginia O'Neil June 18 Letter].

14 Press Release, Consumer Fin. Prot. Bureau, Speech at the Bipartisan Policy Center by Kathleen L. Kraninger, Director, Consumer Financial Protection Bureau (Apr. 17, 2019), https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/.

15 Thomas Pahl, *Collector Contact Caps and the Application of "Regulatory Humility,"* INSIDEARM, Jan. 30, 2017, https://www.insidearm.com/news/00042562-collector-contact-caps-and-application-re/.

16 Virginia O'Neil June 18 Letter, *supra* note 18.

### Office of the Comptroller of the Currency's Debt Sales Guidance

The Bureau's 2017 Consumer Credit Card Market Report (2017 Report) discussed the 2014 Office of the Comptroller of the Currency (OCC) Bulletin 2014-37, Risk Management Guidance on Consumer Debt Sales (Bulletin).[17] As the Bureau notes, the Bulletin purportedly outlines OCC supervisory "expectations" for structuring debt-sale arrangements that are "consistent with safety and soundness and promote fair treatment of customers."[18] However, the Bulletin, which the OCC issued without soliciting public feedback through the notice and comment process, imposes highly prescriptive standards regarding the types of debt that can be sold and the account information that should be made available to buyers. In addition, the Bulletin engendered a significant number of interpretive questions, which the OCC stated it would address through issuance of a Frequently Asked Questions (FAQ) document. In late 2014, ABA and member banks met with OCC staff to discuss the Bulletin and the banker's interpretive questions. In follow-up to that meeting, ABA wrote to the OCC and proposed several Questions and Answers.[19] To date, the OCC has not issued the FAQs.

The Bulletin has had a chilling effect on credit card debt sales. The 2017 Report notes that debt sold by credit card issuers declined from $68.2 billion in 2007 to $18.9 billion in 2013 and following issuance of the Bulletin half of all major credit card issuers ceased debt sales.[20] In addition, the Bureau explains that the OCC issued the Bulletin at the same time that the Bureau and FTC "were discussing consumer data in debt collection, with particular regard to the debt buying industry."[21]

ABA supports the goal of improving the integrity and flow of information about debts, but we do not believe that that these goals can be achieved only through regulatory standards mandating specific information and documentation that must be transferred upon the placement or sale of debt. Moreover, we oppose the use of supervisory "guidance" to impose documentation requirements that would only be applicable to OCC chartered banks.

We appreciate the need to structure debt sale arrangements in a manner that is consistent with safety and soundness and that promotes fair treatment of customers. The Bulletin does not meaningfully further those goals and accordingly should be rescinded. If necessary following issuance of the final FDCPA rule, the full FFIEC should reissue the Bulletin following an opportunity for public notice and comment to promote consistency in the credit card market.

### (g) Consumer Credit Card Product Innovation

The Bureau has asked about changes in innovation since the Bureau's last report in 2017, including new technological tools and evolving digital tools that have impacted the credit card market. Technological tools that collect, analyze, and mine the ever-increasing volume of data, such as artificial intelligence (AI),[22] offer significant potential to enhance the quality and efficiency of the credit card

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17 Office of the Comptroller of the Currency, OCC Bulletin 2014-37, Risk Management Guidance on Consumer Debt Sales (2014), https://www.occ.treas.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

18 Consumer Fin. Prot. Bureau, The Consumer Credit Card Market 307 (2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf [hereinafter 2017 CARD Act Report].

19 Letter from Virginia O'Neil, Sr. Counsel, ABA, to Jennifer Kelly, Sr. Deputy Comptroller for Bank Supervision & Chief Nat'l Bank Examiner, Office of the Comptroller of the Currency (Feb. 13, 2015) (on file with ABA and OCC).

20 2017 CARD Act Report, *supra* note 23, at 307.

21 *Id.*

22 AI and other related terms, such as "big data" and "alternative data," may overlap and are sometimes conflated.

decision process and to expand access to credit to those who may not qualify under traditional underwriting standards. It also has value and promise in product development, customer service and experience, and fraud prevention, as well as other aspects of the credit card market. While AI offers opportunities for innovation, some innovation that would allow card issuers to better engage and inform their customers by improving their digital experience is stymied by outdated regulations, specifically Regulation Z, which implements the Truth in Lending Act (TILA).

### Use of Artificial Intelligence

Artificial intelligence has tremendous promise for improving the credit card customer experience and potential to drive financial inclusion and lower the cost of credit. AI can help credit card companies extend credit to those with limited credit histories, enhance customer service, improve fraud detection, lower the cost of offering services, and more. Card issuers are proceeding carefully and intentionally as they explore which use cases represent the most appropriate deployment of this rapidly-evolving technology. Importantly, card issuers are taking a customer-first approach in their AI strategies, ensuring that practitioners inside these banks understand potential risks and prevent inappropriate bias from entering models.

AI generally refers to several technologies capable of analyzing data and identifying patterns. There are numerous aspects to this technology, but the key components are:

- **Machine Learning:** allows systems to learn and improve as new information is made available without specific programming instructions.

- **Robotics Process Automation**: allows organizations to automate tasks across applications and systems as if a human were performing them.

- **Natural Language Processing**: allows systems to understand the semantics of conversational language.

- **Speech/Object Recognition**: allows systems to identify objects or words within images and understand spoken language.

While card issuers are in the early days of evaluating AI's potential, several use cases have developed that promise to benefit customers including:

- **Lending.** AI allows credit card issuers to quickly make more accurate credit decisions. Already, card issuers use robotics process automation for collecting borrower information and making credit decisions. A faster credit card application process means funds are available to customers more quickly. A more efficient process lowers their cost.

  In addition, as discussed in our May 17, 2017 letter responding to the Bureau's request for comment about the current and potential use of "alternative data and modeling techniques" in the credit process, AI, coupled with mobile channels of access has the potential to expand financial services, including credit cards, and open the door to people with no or "thin" credit files and people who may not be eligible for credit using traditional underwriting standards.

- **Customer Interfaces.** AI also has the potential to improve how credit card customers engage with their accounts, making banking services more convenient and relevant for customers. They can use the data created through their credit card account interactions to understand their customers' needs.

AI tools make it easier for customers to interact digitally with card issuers. It can be used to provide faster, often instant, responses and resolutions to account questions and issues, for example, through chatbots. Chatbots and virtual assistants, which simulate human conversation, can be easier to use than websites and apps, especially for those who are unfamiliar with or uncomfortable with digital interactions. It can be much easier, for example, to "ask Alexa" than navigate an app. AI can also be used to offer credit card customers budgeting tools or identify complementary, customized services and products based on individual account use and preferences.

- **Fraud and Cybersecurity.** Card issuers first used AI for defensive purpose, for example, to prevent fraud and detect money laundering and other crimes and to comply with the Bank Secrecy Act and money laundering regulations. AI allows credit card issuers to compile and analyze great volumes of transactions and applications to detect identify theft, unauthorized transactions, and other fraud sooner, thereby minimizing harm and costs to both consumers and card issuers.

  Today, onboarding and verifying a customer's identity to both fulfill Customer Due Diligence requirements and reduce fraud is a manual, time-consuming task that relies on physical identification documents like a driver's license. AI can help automate this process, allowing banks to more quickly and accurately manage risks. For example, rather than requiring customers to mail in identification documents to verify their identity, customers can use software that allows them to upload images of the front and back of their identification. The images can then be automatically cross-referenced against global databases to confirm authenticity.

**Regulatory Impediments.** Notwithstanding AI's potential, card issuers have concerns that inhibit AI's use and constrain its promise. These include:

- **Fair Lending and Disparate Impact.** Card issuers support fair lending and strive to make cards available to all qualified borrowers. However, as card issuers look to expand access to credit using AI and alternative data, they face daunting challenges to satisfy examiner expectations with regard to disparate impact analysis and documentation.

- **Data Privacy.** Card issuers need assurances that the data are accurate and that data providers protect consumer privacy. Often third-party data providers are not subject to the same stringent regulation and oversight as banks.

- **Unfair, Deceptive, and Abusive Acts and Practices.** Card issuers agree that consumers should have clear and transparent information about credit card accounts. However, the vague and subjective prohibitions against unfair, deceptive, or abusive acts or practices (UDAAP) present a powerful deterrent to the use of AI. For example, a natural use for alternative data is to qualify for credit people who might not be eligible using traditional underwriting data. However, in recent years, UDAAP has been reflexively and widely invoked, often casually, subjectively, and with questionable legal analysis or basis. Products designed for those with no or low credit scores, who are often perceived as more vulnerable, invite particular regulatory scrutiny. Thus, the potential threat of a UDAAP claim inhibits the use of alternative data to expand credit cards to underserved groups.

- **Validation of Models**. Supervisory expectations for the validation of models also cause card issuers to pause. These inhibitors leave credit card issuers and banks at a competitive disadvantage compared to nonbanks that are not subject to the same rigorous regulatory structure or oversight.

Please see ABA's May 17, 2017 letter for more detail and our recommendations.

### Regulatory Constraints on Modernizing Communications between Card Issuers and Customers

Consumers are increasingly selecting electronic options as the means to manage their financial products and engage with their financial institutions. They are choosing to receive account disclosures, statements, and other documents electronically for a variety of reasons, including convenience, ease of accessibility, speed, security, and environmental concerns. Receiving these communications electronically can relieve people of the burden of filing and storing paper documents. When compared to documents delivered via mail, it can avoid longer delivery times, risk of mailbox theft, and delays associated with temporary and permanent address changes. Consumers are also engaging in new places and manner, including paying with wearable devices, managing accounts using voice activated technology, and interacting with customer support via mobile apps. The regulatory environment, however, has not kept pace with technological change or with consumers' clearly-demonstrated preference for digital-first options. A regulatory framework that recognizes and affirms the positive role of innovative technologies in the financial lives of bank consumers is crucial, especially as they are confronting an expanding selection of less-regulated non-bank options.

Unnecessary, cumbersome, and unclear requirements in some parts of Regulation Z are creating friction for banks seeking to innovate and better serve customers. These include Regulation Z's requirement that some — but not all — of that regulation's required disclosures comply with Electronic Signatures in Global and National Commerce Act (ESIGN).

Intended to promote — not impede — electronic delivery of disclosures, ESIGN was overwhelmingly passed into law by Congress and signed by President Clinton with the following commentary:

> Individuals are not just buying and selling online, they're gaining information that is empowering them as consumers and as citizens… [But] that potential is now being held back by old laws that were written ironically to protect the sanctity of contracts — laws that require pen and ink signatures on paper contracts for them to be enforceable. In order to unleash the full potential of the digital economy, Vice President Gore and I unveiled three years ago our framework for global electronic commerce. In that document, we set out the principles we believe should shape the rules governing electronic contracts. We said that the rules should be simple and non-regulatory — that they should not favor one technology over another — and they should give individuals and organizations maximum freedom to form electronic contracts as they see fit.[23]

[23] Press Release, The White House, Remarks by President Bill Clinton at Signing of Electronic Signature in Global and National Commerce Act (June 30, 2000), https://clintonwhitehouse6.archives.gov/2000/06/2000-06-30-remarks-by-the-president-at-signing-of-electronic-signatures.html.

ESIGN was a leap forward in enabling electronic contracts and catalyzing the development of early digital finance products in the marketplace. It codified that electronic disclosures satisfy any statutory or regulatory requirement that disclosures be provided in "writing," whether or not the statute or regulation specifically permits or prohibits electronic disclosures, if the consumer has consented to receive electronic disclosures in a manner that reasonably demonstrates that the consumer can access the subject information in the electronic form that will be used.[24]

Three important facts from the time of passage place the relative importance of this "reasonable demonstration" requirement into context. First, when ESIGN was drafted, email — which largely mimics the postal mail model — was the only widely available digital channel for distributing written materials. Second, internet and email usage among Americans at the time of enactment was significantly lower than today, with broadband internet in its infancy, and mobile digital banking not yet invented. Third, the legislative history shows that an alternative bill offered by the Democratic ranking member on the relevant U.S. House committee — which was considered the slower, more cautious approach to reform — *did not* contain a reasonable demonstration requirement.

In the intervening years, this first attempt at normalizing electronic signatures within routine commerce has proved flexible and adaptable, except as it relates to the reasonable demonstration requirement. As consumers became more sophisticated in their use of technology and firms moved away from the monochannel distribution model of email-only digital communications, the meaning and intent of this requirement has proven less relevant with each passing year. The passage of time has created the unintended consequence that a dated interpretation of the statute would, in fact, "favor one technology over another."

Ironically, but not surprisingly given the pace of change, a law which was created to remedy the inadequacies of old customs has itself spurred regulatory requirements that constrain innovation. When translated into rules like Regulation Z, the increasingly archaic requirement that companies verify customer computer skills (which are ubiquitous today) hinders customers' ability to receive disclosures electronically and impedes card issuers' ability to develop and offer useful and valuable new products and services.

As noted, consumer financial transactions are increasingly being conducted electronically. Electronic communications are both more convenient and more readily accessible and re-accessible than paper communications that consumers must file and store. Electronic disclosures offer cost savings that can be passed on to consumers in the form of more competitive pricing and better services.

Yet, current requirements for written disclosures impede the advancement of efficient and environmentally-friendly electronic disclosures. For example, application of the reasonable demonstration requirement, including for in-person transactions, is uncertain and problematic. How do consumers at a store or branch demonstrate access to the information if using the financial institution's hardware and software to give consent rather than their own device? If the disclosures are provided online, is it reasonable to assume that the customer has access to the internet because the customer provides an email address? Do customers have to demonstrate that they can navigate the internet to find online disclosures? Can the demonstration be done using the financial service providers' equipment? The ambiguity of what constitutes "reasonable demonstration of access" often leads credit card issuers and other financial providers to implement processes that are inconvenient or burdensome

[24] 15 U.S.C. § 7001(c)(1)(C)(ii) (2012).

to the consumer or impractical, with the result that people who want electronic disclosures, continue to receive paper.

To illustrate the practical impediments, consider customers in a bank branch opening an account using the institution's equipment who wish to receive disclosures electronically. Some may not have their device available or charged. They may lack access to the internet in the branch. If demonstrating access involves downloading an app on their device, some customers hesitate because of data or battery limitations or the inability to recall readily their passwords. Furthermore, requiring customers to use their own device in a self-service model disrupts and diminishes the interactive and seamless experience of using the provider's equipment. The reasonable demonstration is even *more* impractical and cumbersome when opening an account in a retail store, if it is even feasible.

Not only does the unnecessary reasonable demonstration requirement inhibit the use of electronic disclosures for existing products, it inhibits the development of new products people want — or will want once they learn about and use them. Products and services currently feasible as well as those not yet envisioned are hindered by unnecessary and unclear reasonable demonstration requirements. For example, the default presumption of written notice delivered through paper communications inhibits the development of digital only products and features that are best situated to meet and serve consumers in the channel of their choosing.

We agree it is important to ensure that people do not inadvertently or unintentionally agree to electronic disclosures that they cannot, in fact, access. We believe that both goals can be achieved through informed, meaningful consent, just as other important credit card and financial product terms are explained and agreed to in compliance with numerous consumer financial protection regulations. The Bureau and other federal regulators have a myriad of effective tools to address any problems that could arise, especially with regard to supervised institutions.

We believe that the Bureau can make significant progress towards modernizing credit card and other disclosure requirements under its existing authorities. It has the authority to allow consumers to consent to obtain written disclosures electronically without an obligation that the consumer demonstrate an ability to access the disclosures. Moreover, this change would be consistent with the objective of the ESIGN Act to normalize the use of electronic consent in the course of routine commerce.

First, the phrase "in writing" in TILA and other acts does not denote paper but rather letters and words that may be read through any medium. Thus, TILA's and other statutes' requirements that disclosures be "in writing" do not mandate paper disclosures as the exclusive method or preclude electronic disclosures. Second, TILA, like many of the consumer financial protection statutes, gives the Bureau discretion to make adjustments "necessary or proper to effectuate the purposes" of the statute" and to "facilitate compliance therewith."[25]

Indeed, the Bureau has already used its authority to provide specifically that ESIGN's requirements do not apply to certain written disclosures.[26] For example, under §1026.5(a)(1)(iii) of Regulation Z —

[25] The rule writing authority in the Truth in Lending Act provides that "The Bureau shall prescribe regulations to carry out the purposes of this subchapter…[S]uch regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. *Id.* § 1604(a)).

[26] *See also id.* § 1030.3(a) (Regulation DD (Truth in Savings Act)), § 1005.18(b)(1)(ii)(D) (Regulation E (Electronic Fund Transfer Act)), § 1002.4(d)(2) (Regulation B (Equal Credit Opportunity Act)) for additional examples of the Bureau's use of its discretionary authority to not apply the ESIGN consent requirements to certain disclosures.

> The disclosures required by sections 1025.60, [written disclosures required for credit card applications and solicitations] 1026.40 [written "early" disclosures required for home equity lines of credit], and 1026.16 [written advertisement requirements] may be provided to the consumer in electronic form *without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in those sections.* (emphasis added)

The Bureau should further modernize Regulation Z to facilitate disclosures more suited to modern technology. Consumer financial transactions, like other consumer communications, are increasingly being conducted electronically. Transactions are conducted online and disclosures displayed on a screen in a manner that often simply replicate paper disclosures, which deprives consumers of the benefits of optimized formatting. More recently, communication has moved to smaller screens on tablets or cell phones, without sacrificing the value of the information conveyed — when there is flexibility to optimize messages for the technology used. In addition, interactive technologies offer a means of delivering information that is more consumer-friendly than paper-based disclosures. By presenting key terms of information in summary form and including links to additional information, consumers can access information more quickly and efficiently in an interactive electronic format than they can with paper disclosures. This is particularly true where disclosures are lengthy or detailed.

Yet, current requirements for written disclosures, including the formatting and presentation requirements, were designed based on an assumed paper delivery. The potential for regulatory sanction or private litigation serves as a deterrent to delivering required disclosures in new formats, discouraging regulated traditional financial services providers from creating new means of delivering financial services that consumers value. Though the Bureau has made some efforts to accommodate electronic formats, such as the advertising rules in Regulation Z that allow certain required information to be accessible by link (one click away), significant impediments remain.

The Bureau could advance electronic alternatives that are more useful, valuable, and informative to consumers and more efficient for card issuers by adapting disclosure requirements to the rapidly evolving developments in communications. We recommend that the Bureau undertake a ground-up review of all disclosure requirements with an eye toward the current digital landscape and that it develop alternative standards that can be used for different modes of communications and emerging communications technologies, especially the conversational and responsive interfaces consumers are seeking.

These alternatives — which should be incorporated into the regulation and accorded safe harbor status — have the potential to streamline and improve the communication of critical information to consumers, including the potential to tailor the disclosure to an individual consumer.

While we appreciate and support the Bureau's efforts to facilitate innovation through initiatives such as its Office of Innovation, even important steps such as the "Policy to Encourage Trial Disclosure Programs," are not a substitute for rulemaking. Consistent with the Bureau's commitment to clear and publicized rules of the road, only reform through rulemaking can ensure that there is an open and equal playing field for all innovators. Moreover, developing and optimizing new products and services is time consuming and expensive. Without rulemaking that provides a clear understanding of what is and is not permissible, it is difficult to prioritize the investment necessary for innovation.

For the reasons stated above, as the Bureau reviews the credit card market, we strongly urge it to consider how the shortcomings of outdated regulations constrain card issuers' ability to engage and communicate electronically with consumers and customers, are a disservice to consumers, and inhibit valuable innovation. Such a review will also inform the Bureau on how it might address similar issues applicable to other regulations and financial products.

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Since the Bureau's last credit card market report in 2017, credit card interest rates have increased across all tiers as the Federal Reserve Board has raised interest rates. Subprime account openings have bounced back somewhat since the last report, but remain lower than pre-CARD Act levels. Outdated debt collection rules need to be revised to improve the functioning of the debt collection market and improve consumer understanding and protection. Credit card issuers are proceeding carefully in considering how to use AI's potential to improve credit card customer experience and drive financial inclusion. However, they remain constrained by regulatory impediments and uncertainties. Similarly, they seek to modernize required disclosures to reflect customer preferences in an electronic environment, but are hindered by outdated regulatory frameworks.

ABA appreciates the opportunity to provide comments on the consumer credit card market and is happy to provide any additional information.

Sincerely,

Nessa Eileen Feddis

Brian Murphy