Via Electronic Submission

May 3, 2023

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Docket No. CFPB–2023–0010, Notice of Proposed Rulemaking, Credit Card Late Fees and Late Payments (Truth in Lending Act/Regulation Z)

Ladies and Gentlemen:

The American Bankers Association (ABA), the Consumer Bankers Association, and the National Association of Federally-Insured Credit Unions (collectively, the Associations) welcome the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) 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 has 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 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.

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.

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

Introduction

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.

These disclosures not only ensure consumer understanding of terms and obligations but also promote a competitive market as evidenced by the range of interest rates, fees, and other ancillary products and features that benefit consumers at all income levels and cater to the myriad of consumer tastes and preferences.[3] Commonly accepted measurements of industry concentration demonstrate that the U.S. credit card sector is not considered even moderately concentrated, especially when compared to other consumer-facing industries. Neither the "Credit Card Issuing" industry nor the "Financial Transactions Processing" industry (which includes credit card and financial transaction processing along with electronic financial payment and funds transfer services) meets the Department of Justice's threshold for a concentrated market according to the Herfindahl–Hirschman index. Indeed, several other industries that rely heavily on consumer credit card payments (e.g., passenger car rentals, wireless carriers, department stores or bookstores) are significantly more concentrated. The Bureau even recognized a competitive element regarding late fees, acknowledging a "growing trend" of credit cards with no or limited late fees.[4]

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

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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/.

[3] *See* Am. Bankers Ass'n, The Benefits of Credit Card Rewards: How Rewards Provide Value to Merchants and Consumers of All Incomes (June 23, 2021), https://www.aba.com/news-research/analysis-guides/the-benefits-of-credit-card-rewards.

[4] *See* Consumer Fin. Prot. Bureau, Credit Card Late Fees, at 15 (Mar. 29, 2022), https://files.consumerfinance.gov/f/documents/cfpb credit-card-late-fees report 2022-03.pdf.

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 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. 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.

Summary of Comments

1. Consumer cardholders will be harmed by the Proposal, whether the cardholder pays timely, pays late, or carries a balance. Credit cards will cost more and be more difficult to obtain.
2. The CFPB'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 are resulting in the development of flawed policy. Specifically:
    a) The CFPB failed to adequately consider the consequences of reducing the safe harbor to $8 or less.
    b) The CFPB failed to adequately consider the consequences of capping late payment fees to 25 percent of the required minimum payment.
    c) The CFPB failed to adequately consider the costs borne by the issuer for repeated violations.
    d) The CFPB failed to adequately consider the statutory factors in Section 149 of TILA.
3. The CFPB violated various process and procedural requirements, which must be remedied. Specifically:
    a) The CFPB's additional requests on various regulatory changes are underdeveloped and are not a logical outgrowth of this Proposal and may not be finalized without notice and comment.
    b) The Director improperly certified that the Proposal would not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE).
    c) The CFPB is engaging in a rushed rulemaking with a preordained timeline and outcome, in violation of the Administrative Procedure Act (APA).

d) The Proposal signals an intent to evade Section 105(d) of TILA, which sets forth the effective dates of regulations containing new or changed TILA disclosure requirements.

e) The CFPB's rulemaking process should be halted until the U.S. Supreme Court renders an opinion in *CFPB v. CFSA*.

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Detailed Comments

1. Consumer cardholders will be harmed by the Proposal, whether the cardholder pays timely, pays late, or carries a balance. Credit cards will cost more and be more difficult to obtain.

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

Consumers who pay their bills on time will be harmed by the Proposal.

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, 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] Moreover, as discussed in section 2 below, because issuers are restricted from raising

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[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…").

[6] 88 Fed. Reg. at 18,934.

[7] *Id.*

interest rates on existing balances, issuers principally would need to adjust APRs for new transactions and newly opened accounts.[8]

In short, 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.

Late-paying cardholders will be harmed by the NPRM.

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, as discussed further in section 2 below 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."[9]

The long-term impacts of late payment are not easily understood by consumers.[10] 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.[11] 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.[12] 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.,

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[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] 88 Fed. Reg. at 18,935.
[10] 88 Fed. Reg. at 18,935 (noting that "consumers may not fully consider late fees when shopping for a credit card.").
[11] *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/.
[12] 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/.

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.[13]

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 for credit generally or will be cut off from access to responsible credit.[14] 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.

Both prospective applicants and current customers will be harmed by the NPRM.

The Proposal will harm not only current customers, but also prospective credit card applicants, including those who may use their personal credit card for small business purposes.[15] As issuers are forced to adopt new business and pricing models to adjust to an environment where the late fee safe harbor does not adequately encourage on-time payments or allow for the recovery of the true cost of late payments and management of the associated risks, issuers will be compelled to be more selective in granting credit. For the same reasons, those eligible to retain or obtain credit will have lower credit limits. To recover costs associated with the higher losses and risks, issuers may increase APRs and increase or add annual fees to cards. Consumers will have fewer choices, because, as discussed in more detail in section 2 below, there may be fewer credit card competitors if the NPRM is finalized as proposed. Consumers with limited or no credit history and lower credit scores will be most impacted.

The CFPB 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.[16] 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.[17] Additionally, following the enactment of debit card interchange fee

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[13] 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.

[14] 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.").

[15] According to a recent survey, more than 3 in 4 small business owners say they have used a personal credit card for business expenses. Wallet Hub, Financial Products for Small Businesses Survey (Apr. 27, 2023), https://wallethub.com/best-business-credit-cards#survey.

[16] 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/.

[17] *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

caps, independent academic research determined that banks fully offset losses through other account fees to support the cost of providing bank accounts and that consumers were ultimately not helped by the regulation.[18] 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 harmed most by this Proposal.

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2. The CFPB'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.

A significant reduction in the amount of late fees that can be charged will result in flawed policy and consumer harm. The NPRM characterizes late fees as harmful to consumers without considering that, 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."[19]

A 2022 paper found that consumers internalize late fees and factor them into decisions surrounding card payments, indicating that "the frequency of late payments rises when the late fee falls."[20] In its NPRM, the Bureau dismisses the findings of this paper because the paper examined changes in late fees following the Federal Reserve Board's 2010 Late Fee Final Rule, which the Bureau argues could have been confounded by the Great Recession. The NPRM also suggests that the late fee rule affected all consumers, so there was no suitable control group over the same period. While there may be limitations to the research, they are not sufficient to dismiss this published, peer-reviewed paper's findings. Many policy changes affect entire populations and are subject to other confounding economic developments: observational economic research does not usually happen in a vacuum or as the result of randomized control trials. Further, this paper imposes several robustness checks to account for the Great Recession. In fact, an earlier

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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.

[18] *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/.

[19] 75 Fed. Reg. 12,334, 12,342 (Mar. 15, 2010).

[20] Grodzicki *et al.*, "Consumer Demand for Credit Card Services," Journal of Financial Services Research (2022), https://link.springer.com/article/10.1007/s10693-022-00381-4.

version of this paper was released through the Bureau's own working paper series.[21] The Bureau should consider seriously that lower late fees increase late payments, as this research finds.

> *Issuers already utilize the innovative tools that the Bureau claims will be sufficient to encourage consumers pay on-time absent a late payment fee sufficient to encourage on-time payment, but these existing tools will not substitute for the deterrence value of sufficient late fees and other incentives the Bureau suggests will be more harmful to consumers.*

As discussed in our Advance Notice of Proposed Rulemaking (ANPR) comment, card issuers make significant investments to promote good payment behavior.[22] Issuers want consumers to pay on time and promote on-time payments through multiple payment reminders sent via mail, e-mail, text message, and mobile app alerts. Issuers offer and encourage features like autopay to help consumers pay on time. According to one smaller issuer that provided data to ABA, about 14 percent of their cardholders were enrolled in an autopay option. The bank stated that many cardholders choose not to use the program because they want to avoid drawing on an account with insufficient funds and because they want the flexibility to decide at the time of payment whether to pay the minimum payment, full balance, or another amount. While autopay is not appropriate for, or desired by, all consumers, it is a useful tool for cardholders to prevent inadvertent late payments. Many issuers also allow consumers to choose the payment due date, which allows them to balance their payment obligations against other bills and paydays. In addition, issuers allow consumers to pay by phone or digitally, often applying immediate credit to their account.

While acknowledging that issuers *already* offer tools to help consumers manage their credit card accounts and pay bills on-time, the Bureau minimizes the potential consumer harm that would result from lower late fees and resultant increases in late payments by mistakenly suggesting that issuers will find "other approaches" to make the consequences of late payments salient to consumers, including warnings or reminders.[23] However, those warnings and reminders are not, and will not be, effective for all cardholders. Many cardholders respond better to incentives like consequential late fees. Indeed, as Figure 1 below indicates, many pay on time to avoid a late fee.

The Bureau suggests that there are other actions issuers may take to encourage on-time payments. For example, the agency suggests that card issuers can decrease the credit line, increase the interest rate, or limit rewards or redemptions.[24] Card issuers could also close the account. However, the issuer's ability to modify credit card rewards programs may also be limited by state law.[25] This may require issuers to focus on lowering credit limits and suspending

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[21] Grodzicki *et al.*, "Consumer Demand for Credit Card Services," Consumer Fin. Prot. Bureau, Office of Research Working Paper No. 2018-03 (Mar. 6, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135421.
[22] ABA *et al*. Comment Letter in response to Advance Notice of Proposed Rulemaking on Credit Card Late Fees and Late Payments (Aug. 1, 2022), https://www.regulations.gov/comment/CFPB-2022-0039-0043 (hereinafter Credit Card Late Fees ANPR Comment Letter).
[23] 88 Fed. Reg. at 18,935.
[24] 88 Fed. Reg. at 18,922.
[25] *See, e.g.*, N.Y. Gen. Bus. Law § 520-E.

or closing accounts. The steps the Bureau recommends card issuers take would be more harmful to cardholders than late fees at today's levels.

To be clear, as the Bureau is well aware, issuers *already* utilize innovative mechanisms to help consumers pay on-time. Further, it is incorrect to suggest that these (already in use) innovations will somehow substitute for an appropriately set late fee as in incentive to pay on time and cover the costs associated with increased late payments resulting from an ineffective late fee amount.

Moreover, in addition to the above-described mechanisms, issuers are able to work with late-paying customers to make accommodations (e.g., waiving one late payment fee per year) and otherwise accommodate hardships when customers make contact to discuss the circumstances of their overdue payments. If the NPRM is finalized as proposed, issuers will have less opportunity and flexibility to waive late payment fees.

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.[26] 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.

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.[27] Penalty fees deter bad behavior and are avoidable. Indeed, a majority, 57 percent, of consumers recently surveyed think it is reasonable for banks to charge late fees and even more, 78 percent, believe that paying on time is a personal responsibility. [28] Consumers who comply with their contractual obligations by making timely payments do not incur late fees.

Moreover, consumers are repeatedly advised of the amount of late fees and the payment due date. Late fees are prominently disclosed in applications and solicitations,[29] account opening disclosures,[30] and monthly periodic statements,[31] and additional disclosures are made through electronic payment reminders. Banks and credit unions try to meet their customers in their desired communication channels; thus, in addition to paper statements and disclosures, digitally

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[26] 15 U.S.C. § 1665d(c)(2).
[27] *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.
[28] *Id.*
[29] 12 C.F.R. § 1026.7(b)(11).
[30] 12 C.F.R. § 1026.6(b)(2)(ix).
[31] 12 C.F.R. § 1026.60(b)(9).

engaged customers also see the due date and late payment information when logging on to their depository institution's mobile or online banking environment.

Models of consumer behavior are an appropriate tool for measuring the impact of late fees in encouraging on-time payments.

Consumer behavior studies provide helpful insight into what may influence consumer decision-making and how consumers may respond to, and interact with, different product features. In its 2010 Late Fee Final Rule, the Federal Reserve Board discussed the limitations of consumer behavior survey data. Specifically, the Federal Reserve Board considered, but chose not to rely on, an online survey of what fee amounts would or would not deter late payment.[32]

At the time, the Federal Reserve Board was not aware of "this type of survey being used to measure the deterrent effect of fees" and decided not to give "significant weight to the results of this survey."[33] However, the Federal Reserve Board did consider this feedback, and noted as a general matter that increases in the amount of penalty fees can affect the frequency of violation.[34] Because of the Federal Reserve Board's decision to not *solely* rely upon specific consumer behavior data, the Bureau has apparently determined to reject *any* consumer behavior data submitted by commenters, unless such behavioral data supports the Bureau's conclusions.[35] Yet, elsewhere, to support its Proposal, the Bureau relies upon naïveté-based discrimination research suggesting that consumers who incur late fee charges are "naïve" because they do not expect high fees to be important.[36] The Bureau further suggests that the solution for naïve customers is to lower the cost of the late payment. However, this analysis fails to consider that lowering the cost of the late payment will lead to increased instances of late payments. Additionally, the Bureau ignores the Congressional mandate to consider deterrence in setting the late fee safe harbor. Following this analysis, lowering the cost of late payments would remove the deterrence value of late payment fees.

In the 12 years since its inception, the Bureau has conducted and relied on surveys of consumer behavior to inform policymaking. For example, in developing the prepaid card rule, the CFPB engaged in significant qualitative testing of prepaid account prototype disclosures.[37] Additionally, in the CFPB's 2015 Arbitration study, the Bureau conducted consumer testing to learn about consumer understanding related to dispute resolution systems.[38] In this survey of consumer behavior, the Bureau surveyed features that factored into respondents' decision to acquire personal credit cards. When questioned in a closed-end format, respondents ranked fees as the third most important factor impacting their decision to acquire a credit card. Similarly,

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[32] 75 Fed. Reg. 37,526, 37,541 (June 29, 2010), hereinafter Federal Reserve Board's "2010 Late Fee Final Rule."
[33] *Id* at n. 43.
[34] 75 Fed. Reg. at 37,541 ("Nevertheless, the Board does accept that —as a generally illustrated by these models — increases in the amount of penalty fees can affect the frequency of violations.").
[35] 88 Fed. Reg. at 18,921.
[36] 88 Fed. Reg. at 18,935.
[37] 81 Fed. Reg. 83,934, 83,954 (Nov. 22, 2016). (This consumer testing included research on consumer behavior, including how consumers interacted with prototype forms developed by the Bureau. Findings from this research influenced the Bureau's choice to create pre- and post-acquisition disclosures for prepaid cards.).
[38] Consumer Fin. Prot. Bureau, Arbitration Study Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), Sec. 3, p. 14 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

when questioned in an open-ended format, respondents most frequently ranked fees as the third most important factor in their decision to acquire a credit card. The Bureau's attempt to have it both ways—by utilizing consumer behavioral data when it suits its policy goals and dismissing consumer behavioral data when it does not—is not a principled approach to rulemaking.

In addition, the Bureau's analysis of deterrence in the NPRM is fundamentally flawed. The Bureau compared late payment behavior in months 6 and 7 to determine whether a $41 charge in month 6 has a significant deterrence impact over a $30 charge in month 7, finding that "the prevalence of late payments is not highly sensitive to the level of late fees at the current order of magnitude." [39] This analysis is flawed in several obvious ways.

First, the analysis is limited only to those cardholders who have already paid a late fee. ABA analysis demonstrates that cardholders who have made late payments require a higher threshold to be encouraged to pay on time.[40] These cardholders have already demonstrated a propensity to pay late, whether out of forgetfulness or financial distress. A more appropriate deterrence analysis would examine all cardholders, not just those who have already paid late. Many people pay on time *to avoid having to pay a late fee*.

Second, as the NPRM acknowledges, the order of magnitude matters. There may be a substantial decrease in the deterrence effect when moving from a $30 fee to an $8 fee (a 73 percent reduction) which does not appear when moving from a $41 fee to a $30 fee (a 27 percent reduction). The Bureau's consideration of deterrence, as required by statute, is insufficient and will result in consumer harm.

ABA surveys show late fees encourage on-time payments.

The ABA conducted its own survey of issuer costs and consumer behavior.[41] Among other things, this survey found that late fees are more effective in motivating consumers to pay bills on time than negative credit score impacts. As shown in Figure 1, almost half of consumers (46 percent) said that avoiding late fees was the most important reason to pay credit card bills on time. Only 15 percent said that concerns about credit ratings was the most important reason to pay on time.

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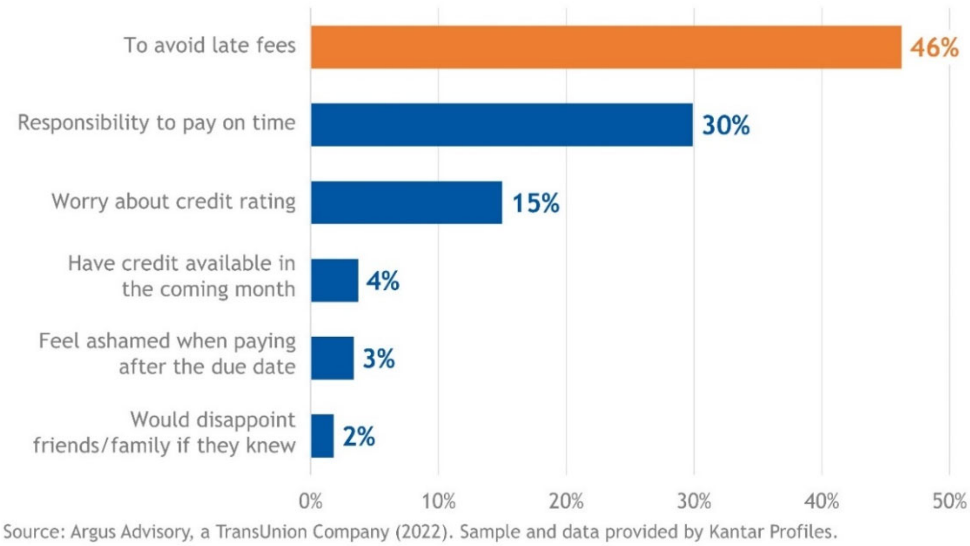
[39] 88 Fed. Reg. at 18,919.

[40] Per Argus Advisory, a TransUnion company ("Argus"), a lower share of cardholders who have paid late in the past year said that they would be incentivized to pay on time at most late fee levels. Sample and data provided by Kantar Profiles.

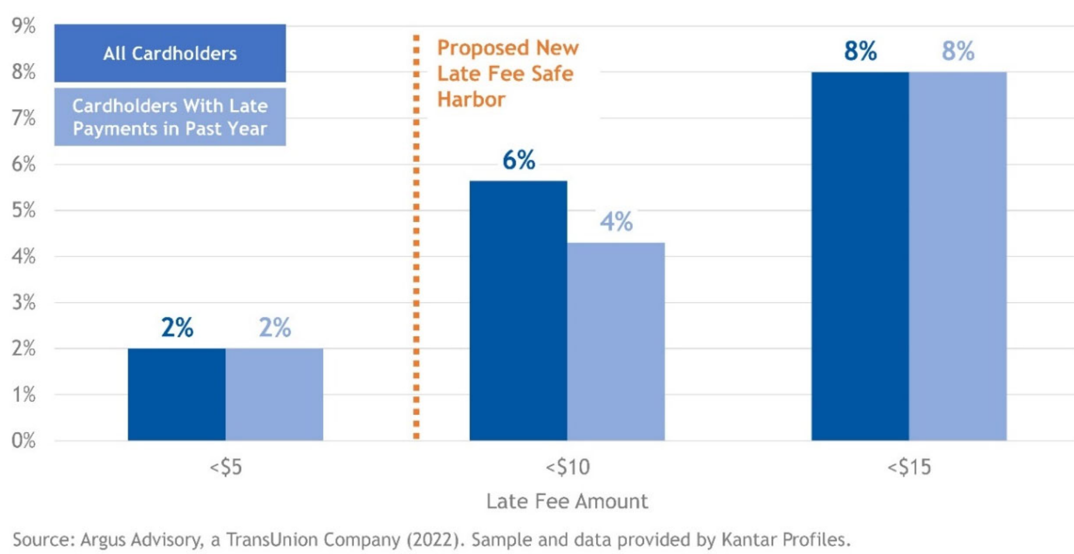
[41] See Appendix A for a detailed methodological description of the survey.

Figure 1: Consumers' Primary Reasons for Paying on Time



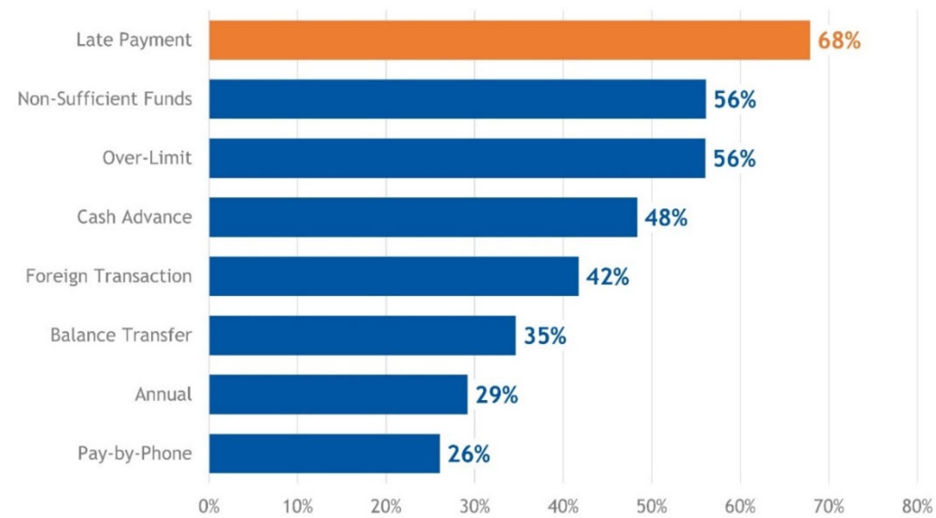
Hardly surprising, the Bureau's proposed $8 safe harbor, subject to the 25 percent of the minimum payment late fee limitation, discussed further in section 2 below, would not motivate many consumers to pay their credit card bills on time. In the survey, more than 4 in 5 consumers (83 percent) said that a $10 late fee would be insufficient to deter them from paying a credit card bill late. As shown in Figure 2, only 6 percent of respondents said that a fee of $10 would have a deterrent effect. For those who have paid a late fee in the past year, the deterrence effect of a $10 fee is even lower: only 4.3 percent said that such a fee would deter them from paying late.

Figure 2: Share of Cardholders Reporting They Would Be Deterred from Paying Late



In this same survey, consumers were clear that they consider late fees to be appropriate: 68 percent of consumers surveyed felt that it is reasonable for banks and credit unions to charge late fees, a greater share than any other fees considered, including annual fees, as shown in Figure 3.

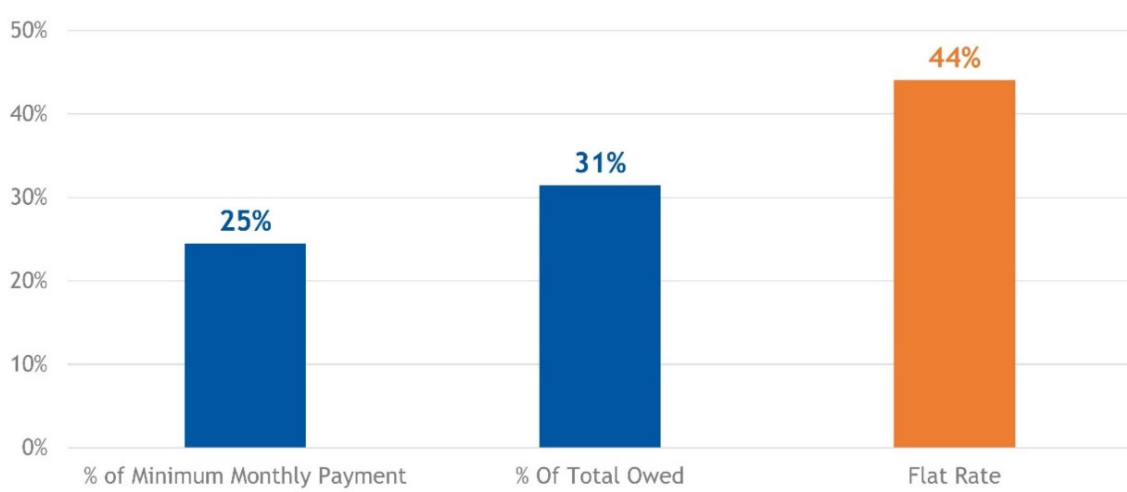
Figure 3: Share of Consumers Who Feel it is Reasonable for Issuers to Charge Various Fees



Source: Argus Advisory, a TransUnion Company (2022). Sample and data provided by Kantar Profiles.

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 4).

Figure 4: Consumer Opinions on Fairest Fee Structure



Source: Argus Advisory, a TransUnion Company (2022). Sample and data provided by Kantar Profiles.

In addition, the potential for imposition of late fees encourages consumers to contact their card issuer about their overdue account and to become current. ABA surveyed membership to understand qualitative evidence of the impact of late fees on consumer behavior. When consumers miss payments, ABA members report that consumers often proactively reach out to explain why they missed a payment and ask how they can become current. In contrast, ABA members report very low contact rates when they try to call consumers who are delinquent on their accounts.

In circumstances concerning consumers with infrequent missed payments, late fees are high enough to encourage consumer action. Such a late fee often prompts consumers to contact the issuer and get back on track. These consumers will immediately reach out directly to their issuer to explain, make a payment, or request a fee waiver. Issuers can, and do, grant fee waivers in circumstances such as these where missed payments are infrequent or inadvertent. Issuers can also connect consumers with available hardship programs. This proactive communication reinforces responsible credit usage. It also provides issuers with valuable information (i.e., the extent to which their customers may be in financial distress) as issuers monitor and assess the credit risk of their customer base. A late fee of $8, subject to a limitation of 25 percent of the minimum payment, as proposed, is not high enough for consumers to feel the need to contact the issuer, making it more difficult for issuers to distinguish between consumers who simply forgot to pay and those in serious financial distress.

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

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.[42] 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."[43] 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."[44] 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."[45]

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 may report as "costs incurred to collect problem credits…[including] total collection cost of

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[42] *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.

[43] *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).

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

[45] 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.

delinquent, recovery, and bankrupt accounts."[46] 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.

Additionally, as discussed further below and as the Bureau concedes, these data are not representative of all impacts of the NPRM, such as the impact on small issuer costs. Moreover, the Bureau does not consider interpretive differences in Y-14 instructions and how these differences may impact the data quality, which may have distorting effects on the data, particularly when used for unintended purposes.[47] This lack of research and data regarding potential secondary impacts of the proposed rule is antithetical to the Bureau's statutory mission to ensure that "all consumers have access to markets for consumer financial products."[48]

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, identified in Appendix A, that the Bureau excluded from its analysis.[49] 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.

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[46] *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.
[47] ABA members note that the data instructions are not clear. These ambiguities skew what costs are included in reportable data. For example, members report that they do not uniformly consider shared or allocated collection costs (e.g., rent, overhead, IT) in the figure that the Bureau uses for collections in Total Collection costs.
[48] 12 U.S.C. § 5511(a).
[49] *See* Appendix A.

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 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."[50] 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.

As discussed further in section 3 below, the CARD Act requires consultation with other banking regulators in the course of a penalty fee rulemaking;[51] however, the Bureau failed to offer evidence of any discussion with the banking regulators about the prudential risks raised by the Proposal to remove any deterrent to late payment. Similarly, under the Dodd-Frank Act, when prescribing a rule under Federal consumer financial laws, the CFPB, among other things, is required to consult with the "appropriate prudential regulators and other agencies prior to proposing a rule . . . regarding consistency with *prudential, market, or systemic objectives* administered by such agencies."[52]

Given the safety and soundness implications discussed above, the NPRM has a conspicuous absence of any fulsome discussion of the impact of the Proposal on credit risk management from the prudential perspective. The interagency consultation described in the NPRM is inadequate in light of the prudential considerations that may result from issuers adjusting their credit risk management tools. Relatedly, as discussed further in section 3 below,

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[50] *See* Off. of the 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.

[51] *See* 88 Fed. Reg. at 18,910. The Bureau consulted with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, and the National Credit Union Administration Board, but failed to include in the record any additional data concerning small banks and credit unions.

[52] *See* 12 U.S.C. 5512(b)(2)(B) (emphasis added).

the Bureau failed to use that consultation process to obtain relevant cost and deterrence data for community banks and credit unions.

a) <u>The CFPB failed to adequately consider the consequences of reducing the safe harbor to $8 or less.</u>

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."[53] 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.[54] 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.[55] The NPRM fails to analyze whether this "flexibility" would be contrary to the constitutional right to be free of uncompensated takings of private property.

This so-called flexibility will actually diminish the importance and seriousness of on-time payment. More consumers will miss payments because the short-term consequences are less severe. ABA members report that cardholders often are confused or unsure about when late payments impact credit score. Many understand that it is not immediate but are unclear of how late they can be before being reported. However, they know that credit score impact is less immediate than a late fee. Other consumers who pay late may not be aware of the long-term consequences of late payment because these consequences are attenuated from the behavior. The short-term consequences are nominal where the fee is $8, and especially when it is even lower at 25 percent of the required minimum payment. Small banks and credit unions that offer credit cards designed to help consumers build or rebuild their credit history typically have low credit limits, so the required minimum payments are low. One bank reported that 40 percent of its required minimum payments for consumer credit card accounts are under $32. In these instances, such a low late fee will mean these cardholders will be more likely to pay late, thwarting efforts to reinforce good financial habits that ultimately improve credit scores.

Overall, missed payments promote poor payment habits, which can ultimately result in even poorer payment habits and create a cascading effect on a consumer's finances to the point where their balance becomes unmanageable. Additionally, consumers may not appreciate other consequences of late payments, including loss of interest-free periods and additional interest charges. Issuers offer an interest-free period if the consumer pays the entire balance on or before

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[53] *See* 88 Fed. Reg. at 18,919.
[54] *See id*. at 18,933.
[55] *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.").

the due date. However, if the payment is late, consumers are not eligible for the interest-free period and are typically charged interest on any unpaid balance until it is paid in full.

Small depository institutions will be most impacted: Some may exit the market and others will not enter the market, resulting in reduced competition and consumer choice.

Issuers of all sizes rely on the late fee safe harbor, but, of particular note, the Bureau failed to consider that the burden of a reduced safe harbor will fall most squarely on small issuers. The Bureau expressly acknowledges that the cost data considered by the Bureau may not be representative of smaller issuers, who do not report to the Y-14 collection.[56] Instead, the CFPB *guesses* that smaller issuers do not exhibit substantially higher pre-charge-off collection costs than larger issuers, and that the proposed $8 or 25 percent of the minimum payment fee would have a proportionately smaller impact on smaller issuers' late fee income, due to smaller issuers having lower late fee amounts.[57] For an agency that represents itself as "data-driven," it is surprising that the Bureau did not use its research resources to study the impact of the Proposal on smaller issuers. This must be remedied before any rule moves forward.

The Bureau's own research, however, contradicts that assumption. In its 2022 report on late fees, the Bureau analyzed the maximum late fees charged by credit card issuers, dividing the sample of issuers into the top 20 issuing banks, banks excluding the top 20 issuers, and credit unions. The Bureau found that just 6.9 percent of smaller banks and 6.8 percent of credit unions charge late fees of $10 or less. Indeed, the Bureau data show the median maximum late fee charged by a small bank is between $26 and $30, while the median credit union charges a late fee between $21 and $25, three times higher than the proposed late fee safe harbor of $8.

ABA's detailed review of credit card agreements also found that a significant number of small issuers would be adversely affected by the late fee regulatory changes proposed by the Bureau.[58] This analysis found that both small banks and small credit unions (defined as institutions with assets of less than $850 million) charge a median maximum late fee of $25. No small bank in the analysis and less than 1 percent of credit unions charged a maximum late fee of $8 or less. Maximum small bank late fees ranged from $10 to $41, and maximum small credit union late fees ranged from $5 to $40, with $25 being the most common late fee for both groups. Therefore, the proposed reduction in the late fee safe harbor would significantly reduce fee revenue collected by these small issuers.

ABA's review includes data from small institutions that issue cards directly, as well as data from those small banks and credit unions that contract with larger credit card issuers, sponsor banks, or agent banks to issue cards. These programs allow smaller banks and credit unions to take advantage of the agent banks' knowledge and expertise on credit card underwriting, fraud, disputes, and risk management, while also utilizing the agent banks' investments in electronic payment technology. By participating in an agent bank credit card

[56] 88 Fed. Reg. at 18,917.
[57] *Id*.
[58] ABA's sample of banks was slightly different from the Bureau's sample. The Bureau's sample pulls from its credit card agreement database, which requires data from issuers with more than 10,000 credit card accounts. These data include large credit unions and banks outside of the top twenty largest card-issuing banks. The sample used in the ABA analysis, by contrast, includes only banks and credit unions with less than $850 million in assets.

program, small institutions can offer prospective and existing customers a credit card to establish and strengthen customer relationships without taking on all of the costs and risks associated with credit card programs. In some cases, the small institutions directly control product offerings and terms and receive fee and finance charge income; in other cases, they may not set or collect late fees directly.[59] Some agent banks charge a monthly, per-account fee and provide a pre-established share of revenue, which includes finance charges and fees.[60]

Data from a subset of banks participating in one such agent bank program illustrate the potential effects of the proposed regulation. These banks range in size from less than $50 million to more than $9 billion in assets, with an average asset size of $743 million. The size of these banks' credit card programs varies as well: average estimated annual card revenue was $24,064, with a median of about $5,200 and a maximum of about $413,000. Some community banks clearly rely on income from credit card programs. For others, the provision of card services enables an expansion of relationships with customers and allows them to better compete with larger issuers.

This revenue, while important, is not the primary reason 451 banks with assets of less than $850 million[61] choose to include a credit card in their suite of retail products. Our small institution members that offer credit cards uniformly noted that being able to offer card services facilitates connections with customers and helps them compete with larger banks. The Proposal, however, completely ignores the value of the product for acquiring and retaining customers and helping smaller banks compete in the consumer financial marketplace. Although it may not be possible to quantify the value of being able to offer a credit card for relationship building, that does not excuse the Bureau from considering its qualitative value as well as the adverse impact of the loss of the product on the ability of small banks and credit unions to remain competitive. Despite Director Chopra's frequent expressions of support for "relationship banks" and competition, the impact of the Proposal would have the opposite effect.

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 community banks and credit unions. These changes would negatively impact both the revenue

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[59] *See* TIB, National Association, Credit Card Programs, https://www.tib.bank/credit-cards (illustrating the variety of credit card programs.).

[60] *See* ServisFirst, Agent Bank Card Program, https://www.servisfirstbank.com/Agent-Bank-Credit-Card-Program, Corserv, In the Cards: Innovative Credit Card Issuing for Community Banks, 2021, https://www.aba.com/-/media/documents/industry-insights/corserv-white-paper-in-the-cards.pdf?rev=76a1caf651a646cb818bc265f2fb71c1.

[61] Credit Card Penalty Fees Rulemaking and Obligations under the Small Business Regulatory Enforcement Fairness Act of 1996, ABA *et al*. Comment Letter (Jan. 20, 2023), https://www.aba.com/-/media/documents/letters-to-congress-and-regulators/sbrefaltr2023jan.pdf?rev=eba1e64f1b9440ad8dd794ebc0558b0c (as noted in the letter, there are approximately 805 credit card-issuing banks and more than half (451) have assets of less than $850 million.).

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 CFPB notes.[62] The Bureau's Proposal would also limit small issuers' ability to compete with larger issuers on the basis of fees.

Conducting and defending an annual analysis of whether their fees are "reasonable and proportional" also poses similar challenges to smaller issuers, given small banks' and credit unions' limited resources. And even if issuers conduct such an analysis, the Proposal limits late fees to 25 percent of the required minimum payment. As noted, for small banks offering credit cards with low credit limits, a substantial percentage of their required minimum payments are less than $32, so any analysis based on cost will have limited application and relief. This is another reason why the 25 percent of the minimum payment limitation is problematic and should not be finalized as proposed.

Due to these burdens and risks, small issuers have informed ABA that they may be compelled to withdraw from the credit card market or curtail offerings if the safe harbor is reduced. Others who might have entered the market will not. Their withdrawal from the credit card marketplace will reduce competition and innovation. As a result, consumers will have fewer choices with less competitive terms and services. In particular, the Proposal will negatively impact those consumers that elect to open a credit card issued by a community bank with which they have a relationship. Reducing competition and consumer choice is contrary to the Bureau's charge to reduce unwarranted regulatory burden and facilitate competition in the consumer financial services market.[63]

b) <u>The CFPB failed to adequately consider the consequences of capping late payment fees to 25 percent of the required minimum payment.</u>

In addition to the lack of deterrence raised in the section above, we have significant concerns about the impact on consumers if the 25 percent of minimum payment cap is finalized as proposed. Under current minimum payment calculations, the costs incurred by credit card issuers when a consumer is late on a payment likely exceed the amounts that they would be allowed to charge customers under the new safe harbor and the 25 percent payment cap. One small issuer that provided data to ABA estimated that 53 percent of accounts and 29.1 percent of balances have minimum payments under $32.

Under current ability to pay (ATP) requirements in Regulation Z, an issuer may not open a credit card account for a consumer or increase any credit limit unless the issuer considers the consumer's ability to make the required minimum payment due based on the consumer's income

[62] 88 Fed. Reg. at 18,935.
[63] 12 U.S.C. §§ 5511(b)(3) and (5).

or assets and current obligations.[64] If the Proposal is finalized as proposed, issuers will have to increase consumers' monthly minimum payments to be able to charge the $8 late fee which will allow issuers to cover more of the costs of the late payments. However, increasing the minimum monthly payment will make it more difficult for some consumers to qualify for a credit card under Regulation Z's ATP requirements. [65] In addition, consumers will be required to pay more on their credit card accounts on a monthly basis. The NPRM does not discuss or contemplate these impacts.

Increasing minimum monthly payments will make it more difficult for low-income consumers to qualify for and meet the terms of lower limit credit cards that can help them with credit needs and to build a credit history. The impact of this flawed policy will fall most squarely on those who need credit the most, as consumers with lower credit card limits are often consumers with limited income and low or nonexistent credit scores. In addition, the higher minimum payment creates hardships for consumers with uneven income streams who rely on a low minimum payment in months where their income is low.

The CFPB already concedes that interest rates or other charges for subprime credit cards might increase more than for other cards and may price subprime consumers out of these products.[66] Capping late fees at 25 percent of the minimum payment compounds the challenges in some consumers' ability to obtain credit cards, thus forcing that population into higher-cost, less-regulated credit like payday loans. The Proposal to limit late payment fees to 25 percent of the minimum payment due is an arbitrary restriction unsupported by substantial evidence in the NPRM. Inclusion of other fees in the 25 percent cap, on which the Bureau has requested information, would compound the above-described issues.

Finally, the Bureau failed to adequately consider the burden of imposing a 25 percent fee cap. This type of account limitation will require extensive systems changes to amend the calculation, which will fall most squarely on small issuers. For the reasons set forth above, issuers may be compelled to increase minimum payment to recover late payment costs. Changing the minimum payment requirement would be considered a significant change in account terms.[67] Thus, all applications, solicitations, and initial disclosures would need to be amended and change in terms notices would need to be issued to reflect the new minimum payment calculation.[68] The Proposal does not consider these incremental regulatory burdens, thus significantly underestimating the cost and implementation time needed for compliance.

The Bureau does not have authority under Section 149 of TILA to cap late fees at 25 percent of the required minimum payment.

More fundamentally, the Bureau's Proposal exceeds its authority to set standards for penalty fees by arbitrarily capping issuers' ability to recover costs at 25 percent of the required

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[64] 12 C.F.R. § 1026.51(a)(1)(i).
[65] 12 C.F.R. § 1026.51(a)(1).
[66] 88 Fed. Reg. at 18,940.
[67] *See* 12 C.F.R. § 1026.9(c)(2)(ii), (defining significant changes in account terms to include, among other things, "an increase in the required minimum periodic payment,"), 12 C.F.R.§ 1026.6(b)(2)(viii) (late payment fee is required in account opening disclosures, and this disclosure requirement is cross referenced in § 1026.9(c)(2)(ii).)
[68] *See* 12 C.F.R. §§ 1026.60(b), 1026.6(b).

minimum payment. As discussed further below, Section 149(b) of TILA directs the Bureau to set standards for assessing whether any penalty fee or charge is reasonable and proportional to the omission or violation, and specifically requires that the Bureau consider: cost, deterrence, cardholder conduct, and other such factors as determined to be necessary or appropriate by the Bureau.[69]

In the 2010 Late Fee Final Rule, the Federal Reserve Board determined that limiting the late payment fee to the required minimum payment was reasonable and proportional to the conduct of the cardholder.[70] In doing so, the Federal Reserve Board stated its belief that Congress did not intend issuers to charge a fee greater than the value of the violation.[71] Additionally, the Federal Reserve Board adopted this limitation to specifically address violations involving "relatively small dollar amounts."[72] In developing this interpretation, the Federal Reserve Board considered imposing a more stringent limitation, but declined to do so, because the existing statutory limit of "reasonable and proportional" prevented issuers from imposing unreasonable and disproportionate fees.[73]

The Bureau arbitrarily and capriciously deviates from this principle.[74] Under the APA, the Bureau is required to take the 2010 Late Fee Final Rule as its baseline and affirmatively justify why the judgements made in that rule are longer sound, and why the Bureau's Proposal is better.[75] The Bureau failed to do so. The Bureau justifies the 25 percent cap on late fees by claiming that late fees are similar to contingency fee structures paid to third-party agencies for pre-charge-off collections.[76] This is wholly inconsistent with the statutory considerations and does not take into account the true costs of collection, while completely ignoring the other statutory factors. Contingency fee structures are not representative of the cost to issuers when a consumer pays late. Additionally, even if they were, the Bureau is required to consider other factors besides cost when setting standards. Here, the Bureau again ignores the other statutory considerations. Contingency fee structures have no relationship to the deterrence effect of fees or cardholder conduct. Accordingly, they are not an appropriate metric for measuring deterrence or cardholder conduct. Furthermore, the fees paid to third parties are a percentage of the amount collected and have no relation to a "reasonable and proportional" late fee.

c) <u>The CFPB failed to adequately consider the costs borne by the issuer for repeated violations.</u>

The NPRM, if finalized as proposed, would remove the safe harbor that allows card issuers to charge an increased fee for additional violations during the six billing cycles following

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[69] *See* 15 U.S.C. § 1665d(b) (added by CARD Act § 102(b)), 12 C.F.R. §§ 1026.60(b), 1026.6(b).
[70] 75 Fed. Reg. at 37,544.
[71] *Id.*
[72] 75 Fed. Reg. at 37,545.
[73] 75 Fed. Reg. at 37,544-45.
[74] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (holding that there must be a rational connection between the facts found and choices made to pass muster under the arbitrary and capricious standard.).
[75] *Id.* at 42 ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016).
[76] 88 Fed. Reg. at 18,928.

the initial violation. For the reasons discussed below, the CFPB should not remove this tiered safe harbor. Issuers incur additional costs for delinquent payments and need to be able to apportion those costs to delinquent customers who create the costs.

Removing the tiered safe harbor will exacerbate the constraints discussed above in the 25 percent cap minimum payment discussion. The cost to issuers for repeated late payments is greater than that of a single late payment. If minimum payments are limited to charging consumers $8 or less, issuers will not be able to recover the cost for repeated late payments. If consumers repeatedly violate the terms of their credit agreements, card issuers will not be able to price for risks associated with such consumers. As a result, issuers will likely need to reduce credit to or close more accounts when there are late payments in order to meet their risk management obligations.

In 2010, the Federal Reserve Board found that an increased fee of $35 (since adjusted to $41 based on inflation), was "generally… sufficient to cover any increase in the costs incurred by the card issuer and will have a reasonable deterrent effect on additional violations."[77] Additionally, in consideration of data from a large credit card issuer, the Federal Reserve Board recognized that the chance of default was higher for chronic late payers. "Data submitted on behalf of a large credit card issuer indicates that consumers who pay late multiple times over six months generally are significantly more likely to charge-off than consumers who only pay late once during the same period."[78] A higher fee, thus, is needed to deter these consumers from continued delinquency.

The Bureau does not refute the Federal Reserve Board's findings, but rather suggests the Federal Reserve Board did not have specific cost data to justify $35—and importantly—ignores the fact that TILA required the Federal Reserve Board to consider, and the Board complied, not only costs but the role of late fees for repeated late payments on deterrence and consumer behavior. The Bureau has no data to support its conclusion that $8 is reasonable and proportional to cover the cost of additional violations (i.e., subsequent late payments) and act as any deterrent.

ABA data suggest that for those accounts that become delinquent, costs are significantly higher for late payments. The average delinquent incident costs issuers $46.30, including $33.00 in direct expenses, $9.00 in attributable expenses, and $4.30 in funding costs.[79] When setting late fees, issuers must consider the cost per delinquent incident as well as the cost per late payment incident. When a cardholder misses a payment, issuers have no way of knowing whether that cardholder will pay a few days late or become delinquent—a significant risk and expense for the issuer. Similarly, issuers consider post-charge-off costs as part of the costs of late payments because issuers have no way of knowing at the time of late payment whether that cardholder will eventually charge-off.

The Bureau suggests that issuers can avoid these costs by taking other actions to encourage payment. In the NPRM, the Bureau suggests, without evidence or explanation, that issuers "take other steps to discourage additional violations" such as "further limiting…above-

[77] 75 Fed. Reg. at 37,542.
[78] *Id*. at 37,543.
[79] Cardholder is delinquent by at least sixty days.

the-limit transactions."[80] In addition, as noted previously, the Proposal suggests that "[a]t any point as an account becomes more delinquent, an issuer may take steps to reduce a cardholder's credit line or suspend use of the card, limit their earning or redemption of rewards, or increase outreach to collect the outstanding debt."[81] The Proposal also notes, "A card issuer also may take actions to reprice new transaction on the account according to a penalty rate [if permitted]."[82] Card issuers could also close the account or increase the APR on new transactions. However, as noted, these and the actions the Bureau is suggesting issuers take will often impose more significant hardship on cardholders than a late fee at today's levels. These steps will also impose costs on issuers, which the Bureau fails to consider in its NPRM.

Moreover, as discussed above, as it relates to innovative payment mechanisms, issuers utilize extensive innovative techniques to help consumers monitor their credit usage and pay their bills on time. The Bureau's suggestion that issuers essentially "try harder" to remind consumers to pay fails to acknowledge the steps that issuers already take and is not a sufficient remedy to the deterrence gap the agency would create by removing the tiered violation fee safe harbor. The CARD Act requires that the Bureau consider deterrence as a factor when setting standards for penalty fees.[83] The Federal Reserve Board appropriately did so in 2010 when creating the safe harbor for additional violations.

d) <u>The CFPB failed to adequately consider the statutory factors in Section 149 of TILA.</u>

The CFPB misinterprets TILA as requiring that the late payment fee needs only be reasonable and proportional to the costs incurred by issuers. For example, the press release associated with the NPRM states that the proposed changes would "ensure that late fees meet the [CARD] Act's requirement to be 'reasonable and proportional to the costs' incurred by issuers to handle late payments."[84] Instead, TILA requires that the fee be "reasonable and proportional *to such omission or violation.*"[85] To read "such omission or violation" as equaling costs alone is inconsistent with the plain language of the statute: Congress would have used different language if it wanted cost to be the sole factor, it has in other statutes. The Bureau may be entitled to deference in some instances for ambiguous statutes, but no such deference occurs when the statute is not ambiguous. Congress was not ambiguous in this requirement. As such, the Proposal is inconsistent with the Bureau's statutory authority under TILA, by limiting the interpretation of reasonable and proportional only to the cost of the violation.

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[80] 88 Fed. Reg. at 18,939.
[81] *Id*. at 18,909.
[82] *Id*.
[83] 12 U.S.C. § 1665d(c)(2).
[84] Press Release, Consumer Fin. Prot. Bureau, CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees (Feb. 1, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/.
[85] 15 U.S.C. § 1665d(a) (emphasis added).

The Bureau fails to fulfill its statutory obligations to adequately consider the statutory factors enumerated by Section 149 of TILA.

Section 149(b) of TILA delegates rulemaking authority to the Bureau and provides that the Bureau shall issue rules "to establish standards for assessing whether the amount of any penalty fee or charge…is reasonable and proportional to the omission or violation to which the fee or charge relates."[86] In delegating this authority, Congress requires the Bureau to consider: (1) costs incurred by the creditor from such omission or violation; (2) deterrence of such omission or violation; (3) conduct of the cardholder; and (4) such other factors as it deems necessary or appropriate.[87]

Following enactment of the Dodd-Frank Act and the transfer of rule-writing authority to the Bureau, the CFPB committed to giving due consideration to the guidance, interpretations, and policy statements issued prior to July 21, 2011, by a transferor agency, including the Federal Reserve Board's analysis of the penalty fee safe harbor.[88] In consideration of this commitment, the Bureau has relied upon and adjusted this threshold regime for 12 years. The Bureau failed to meet this commitment in the NPRM, and the Bureau also failed to fulfill its statutory obligations to adequately consider the statutory factors enumerated by Section 149, including deterrence and cardholder conduct.

As it relates to deterrence, the CFPB disregarded the Federal Reserve Board's findings on deterrence in lieu of an APR analysis of the relative differences between a hypothetical $100 loan for the current safe harbor and the proposed safe harbor. Based on this comparative APR analysis, the Bureau reaches the counter-intuitive conclusion that a significantly lower safe harbor would still act as a deterrent.[89] The Bureau's use of APR as a behavioral input in consumer decision-making is particularly curious given other Bureau rulemakings where the Bureau suggests that consumers do not understand APR.[90]

The Bureau did not meaningfully consider the deterrent effect of the late fee. Indeed, the agency admits that "it does not have direct evidence on what consumers would do in response to a fee reduction similar to those contained in the proposal."[91] Rather the Bureau appropriated the effectiveness of the current late fee to a lowered fee without reasonable basis. The agency simply declared that consumers will benefit from the $8 or less fee because some cardholders, according to the CFPB, will have a greater ability to repay, and card issuers have other methods to deter late payments.[92] This interpretation violates the express language of Section 149.

With respect to the conduct of the cardholder, the Federal Reserve Board considered consumer conduct in adopting the higher safe harbor fee for subsequent violations, identifying that "multiple violations during a relatively short period can be associated with increased costs

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[86] *Id*. § 1665d(b).
[87] *Id*. § 1665d(c).
[88] *See* 76 Fed. Reg. 43,569, 43,570 (July 21, 2011).
[89] 88 Fed. Reg. at 18,920.
[90] *See generally* Kleimann Communication Group, Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures, Presented to the Consumer Fin. Prot. Bureau, July 9, 2012, 303, https://www.regulations.gov/document/CFPB-2012-0028-0002.
[91] 88 Fed. Reg. at 18,920.
[92] 88 Fed. Reg. at 18,921.

and credit risk and reflect a more serious form of consumer conduct than a single violation."[93] The Bureau incorrectly disregards these findings by suggesting the Federal Reserve Board did not sufficiently explain how the assessment of additional fees reduced credit risk, when as discussed above, the Board did do so.

Additionally, the Bureau imposes an additional requirement that considering the conduct of the cardholder also includes the cardholder's ability to pay increased penalty fees.[94] In determining that the proposed $8 safe harbor would better reflect consideration of consumer conduct, the Bureau claims through the absence of data that multiple violations do not increase credit risk or risk of a more serious consumer violation.[95] This determination is arbitrary. The Bureau notes that some consumers who may pay late chronically but otherwise make payments within 30 days of the due date are not at significant risk of defaulting on credit because they pay after their next payday. Without additional explanation or justification, the Bureau improperly applies this to all consumers.

The Federal Reserve Board considered these factors in developing the current, well-accepted late fee safe harbor amount.[96] The Federal Reserve Board understood the cost and difficulty with annually developing fee amounts and created a safe harbor for penalty fees. In developing the safe harbor, the Federal Reserve Board considered feedback from a variety of commenters, as well as existing state and international law.[97] In the Proposal, the Bureau notes that issuer "costs do appear to be trending up,"[98] but fails to consider an alternative cost index to replace the existing Consumer Price Index (CPI) adjustment. The Bureau employs faulty logic by determining that while the Bureau may be skeptical of CPI as an index for adjusting the safe harbor amount, no cost index is suitable.

The Bureau does not have authority under Section 149 of TILA to limit what costs issuers may consider as they determine what is reasonable and proportional.

Section 149(b) of TILA requires the Bureau to issue rules "to establish standards for assessing whether the amount of any penalty fee or charge . . . is reasonable and proportional to the omission or violation to which the fee or charge relates." Further, Congress specified the considerations the Bureau must factor into these standards, including, among other factors, "the cost incurred by the creditor from such omission or violation."[99]

While the Federal Reserve Board's process and research were superior to those of the CFPB, there were flaws with the Board's cost calculation. The Federal Reserve Board in the 2010 Late Fee Final Rule, as the Bureau does now, improperly limited what costs may be

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[93] 75 Fed. Reg. at 37,538.
[94] 88 Fed. Reg. at 18,915.
[95] 88 Fed. Reg. at 18,923.
[96] 75 Fed. Reg. at 37,532. The Federal Reserve Board discussed arguments from commenters who claimed Section 149 required the Federal Reserve Board to choose between basing penalty fees on costs or deterrence. The Federal Reserve Board found that the use of "and" when listing factors indicated that Congress intended for the Federal Reserve Board to use its discretion in appropriately considering listed factors and resolve any conflict.
[97] *See* 75 Fed. Reg. at 37,543 (weighing and balancing the statutory factors, the Federal Reserve Board determined that changes in the Consumer Price Index were "sufficiently similar to changes in issuers costs….").
[98] 88 Fed. Reg. at 18,926.
[99] 15 U.S.C. §1665d(c).

considered by creditors. The Federal Reserve Board found that it was appropriate to exclude losses because issuers do not incur losses as a result of the overwhelming majority of violations.[100] Additionally, the Federal Reserve Board justified this limitation by indicating that Congress only required consideration of cost, not that cost itself be a standard.

The existing regulation permits issuers to impose a late fee that represents a reasonable proportion of "total costs incurred by the card issuer."[101] The Official Staff Commentary provides a single, non-exclusive example of permitted costs for late payments.[102] The existing regulation also sets forth specific cost exclusions.[103] Therefore, anything that is not excluded, that is a "cost" *could* be a factor in determining a reasonable and proportional late fee, with the express permission for an issuer to include "costs associated with the collection of late payments." Note that if the *only* permitted cost were those "associated with the collection of late payments," neither the regulation nor the Official Staff Commentary would need to exclude any other cost or potential cost.

Yet, the Bureau then attempts to *further* limit the costs that can be considered when evaluating whether a late fee is "reasonable and proportional." First, the Bureau mischaracterizes this change as a "clarification" that permitted collection costs "do not include any collection costs that are incurred after an account is charged off."[104] This is not a clarification: the Bureau is impermissibly limiting what may be considered as a cost. There is no authority in TILA or the Consumer Financial Protection Act that allows the Bureau to simply declare that an obvious cost associated with the collection of an account must be excluded when it is otherwise expressly permitted by the law.

But the Bureau goes one step further. Not only must post-charge-off costs be excluded from any cost analysis under the Proposal, but the Bureau then specifies that pre-charge-off collection costs are the only "costs that card issuers are permitted to take into account for purposes of determining the amount of a late fee under the cost analysis provisions" of the regulation.[105] There is no support for this interpretation in statute or regulation. If the statute or regulation were intended to limit the cost-based calculation only to pre-charge-off collection costs, they would have done so expressly. They do not.

It is inconsistent with the statute and the Bureau's own proposed language to try to circumscribe, through a single sentence in the Supplementary Information to the Proposal, how an issuer may calculate a reasonable and proportional fee. It should go without saying that the Supplementary Information cannot supersede the plain text of the statute and regulation. The Bureau must respect principles of administrative procedural law in its rulemaking releases. Moreover, the Bureau's discussion in the NPRM ignores other instances where Congress

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[100] 75 Fed. Reg. at 37,538.
[101] 12 C.F.R. § 1026.52(b)(1)(i).
[102] 12 C.F.R. pt. 1026, Supp. I, cmt. 52(b)(1)(i)-6.
[103] Such cost exclusions are contrary to the plain language of the statute and, therefore, impermissible.
[104] 88 Fed. Reg. at 18,913.
[105] 88 Fed. Reg. at 18,916.

explicitly defined the costs to be considered and not considered in a reasonable and proportional calculation.[106]

The Federal Reserve Board and the Bureau attempt to have it both ways: on the one hand using ambiguity in the statute to interpret that costs are only required to be a consideration, while then reading into the same ambiguity that it is permissible to exclude certain costs. If Congress intended to permit the Bureau to exclude certain costs, it would have done so expressly in statute, but it did not. Any finalized rule must adhere to the statutory standards prescribed by Section 149.

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3. The CFPB violated various process and procedural requirements, which must be remedied.

a) <u>The CFPB's additional requests on various regulatory changes are underdeveloped and are not a logical outgrowth of this Proposal and may not be finalized without notice and comment.</u>

The Bureau has requested comment on whether to require a courtesy period, which would prohibit a late fee from being imposed within 15 calendar days after each payment due date and be applicable only to late fees assessed if the card issuer uses the safe harbor or alternatively, applicable to all late fees.[107] This prohibition is arbitrary and capricious and exceeds the CFPB's statutory authority under TILA. Additionally, it is a significant shift from current market practice, and risks significant consumer confusion and harm.

As an initial matter, the NPRM seeks comment on a 15-day "courtesy period" for late payment fees, but provides no legal authority for doing so beyond the statement, "[t]he Bureau has preliminary [*sic*] determined that it may be appropriate that the late fee amount essentially be $0 during the courtesy period because. . . card issuers may not incur significant costs to collect late payments immediately after a late payment violation."[108] In fact, a 15-day courtesy period exceeds and directly conflicts with the Bureau's statutory authority under TILA.[109] Under Section 163 of TILA,[110] a creditor may "treat a payment on a credit card account under an open end consumer credit plan as late for any purpose" so long as "the creditor has adopted reasonable procedures designed to ensure that each periodic statement including the [statement disclosures required pursuant to 15 U.S.C. § 1637(b)] is mailed or delivered to the consumer not later than 21 days before the payment due date."

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[106] *See generally* 15 U.S.C. §1693o–2(4)(B) (specifically requiring the Federal Reserve Board to "distinguish between—(i) the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction, which cost shall be considered under paragraph (2); and (ii) other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered under paragraph (2)").
[107] 88 Fed. Reg. at 18,927.
[108] *Id.*
[109] 15 U.S.C. § 1666b.
[110] *Id.*

Congress does not provide the Bureau with any additional authority to supplant this 21-day notification requirement with a 15-day courtesy period. An ambiguous 15-day courtesy period, without additional details or explanation, would arbitrarily redefine when a payment is late under the pretense that there are no costs associated with a late payment. This is inconsistent with Congressional intent, as Congress explicitly required periodic statements be provided 21 days before the payment due date, after which the payment is late and issuers are permitted to act accordingly.

Additionally, this concept is in direct conflict with the plain and well understood meaning of "late."[111] In this instance, the statutorily appointed time is 21 days, after which the payment is late and issuers are permitted to treat it as late. Moreover, implicit in Congress' direction that late fees be reasonable and proportional, is that they are not zero. Congress recognized that omissions or violations cost issuers and that late fees serve to encourage on-time payments. Imposing a mandatory grace period inappropriately interferes with the contractual relationship between the issuer and the consumer, in which the consumer agreed to pay no later than the due date.

Importantly, a 15-day courtesy period will significantly confuse and ultimately harm consumers because the courtesy period only limits the imposition of a fee but would not pause the accrual of interest on the balance. Consumers will be confused about when payments are actually considered late, which will vary depending on whether it relates to a loss of a grace period. Consumers will also be confused about when interest is charged on the account, and when their lack of payment would be reported to credit bureaus. The courtesy period also would encourage cardholders to pay late, which, as discussed above, would reinforce poor financial habits and mask certain costs of late payment to consumers (e.g., negative reporting). In addition to this concerning consumer harm, the courtesy period also creates reputational, customer service and legal exposure. Issuers will be forced to bear the brunt of this regulatorily-induced Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) risk.

The Bureau seeks comment on other safe harbor amounts for all other credit card penalty fees.[112] The Bureau should not adjust any other fees at this time. Current safe harbors are well understood and utilized by industry for their compliance certainty. The justification put forth by the Federal Reserve Board in setting these fees is still sound. Additionally, because the Bureau has not provided any reasoned justification for adjusting any other penalty fees, changes to other fees related to a credit card account would not be a logical outgrowth of the NPRM, and they cannot be finalized with notice and comment.

b) The Director improperly certified that the Proposal would not have a SISNOSE.

As a "covered agency" designated by the Dodd-Frank Act,[113] the Bureau must comply with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[114] 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

[111] Black's Law Dictionary (11th ed. 2019) ("coming after an appointed or expected time").
[112] 88 Fed. Reg. at 18,924.
[113] *See* 5 U.S.C. § 609(d), as amended by Dodd-Frank Act § 1100G.
[114] *See* 5 U.S.C. § 603.

number of small entities.[115] As stated in our prior communications to the CFPB,[116] 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.[117]

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.[118] SBREFA also expressly requires the Bureau to consider any projected increase in the cost of small business credit.[119] 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. As previously communicated, 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.[120] 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. As discussed above, the impact on small depository institutions would be greater.

The CFPB declined to convene a Panel under SBREFA and, inexplicably, at the same time laments its lack of data on small issuers. Insight into small entities' business is precisely the purpose of RFA and SBREFA. These laws provide for—and, indeed, require—the very process that the CFPB needs and must use to collect advice and recommendations from SERs to understand the economic impact of the Proposal and ways to minimize any increase in the cost of small business credit. Accordingly, the CFPB must convene a SBREFA Panel.

The Bureau's Regulatory Flexibility Act analysis is incomplete and inadequate.

The Bureau is proposing to lower the late fee safe harbor without adequate consideration of the economic impacts on small entities. The Bureau improperly determined that the NPRM, if finalized, would not have a SISNOSE. The Bureau does not have the data to support this

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[115] 5 U.S.C. § 609(b).
[116] Credit Card Penalty Fees Rulemaking and Obligations under the Small Business Regulatory Enforcement Fairness Act of 1996, ABA *et al*. Comment Letter (Jan. 20, 2023), https://www.aba.com/-/media/documents/letters-to-congress-and-regulators/sbrefaltr2023jan.pdf?rev=eba1e64f1b9440ad8dd794ebc0558b0c.
[117] 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.").
[118] 5 U.S.C. §§ 609(b)(4), 603(c).
[119] 5 U.S.C. § 603(d).
[120] 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.

conclusion.[121] In lieu of obtaining data, the Bureau impermissibly attempts to shift its statutory obligation to the public and treat the absence of data as proof that there is no SISNOSE. The NPRM makes no effort to quantitatively analyze small bank and credit union impact and relies exclusively on Y-14 data collected from large banks, despite the availability of avenues to collect small bank data.[122] Consultation with other financial regulators prior to this NPRM's development is required by the CARD Act, yet the Bureau failed to use that consultation process to obtain relevant cost and deterrence data for community banks and credit unions.[123]

Furthermore, in the NPRM, the Bureau attempts to shift the burden onto issuers to affirmatively provide data to affirmatively prove that the SBREFA process is necessary. When commenters provided data in response to the ANPR, within a notably shorter time frame than the Bureau had, the Bureau decided the data were insufficient.[124] The obligation to gather data and determine whether there is a SISNOSE is on the Bureau, not the public. This attempt to shift the burden of informed policymaking from the Bureau to the public, when the policies the Bureau is attempting to modify have stood for 12 years, through multiple administrations, will result in an arbitrary and capricious rulemaking if finalized.

The Section 1022 analysis is incomplete and inadequate, and violates the Bureau's statutory obligation to "ensure all consumers have access to markets for consumer financial products."

The Section 1022 analysis in the NPRM is incomplete and inadequate and violates the Bureau's statutory obligation to ensure "all consumers have access to markets for consumer financial products."[125] The Associations and other trade groups provided data in response to the Bureau's ANPR.[126] That comment letter provided data on the costs associated with late payments, but the Bureau improperly ignored these cost data. Moreover, the Bureau has conceded that the Y-14 data are not representative of small issuers, yet, the agency failed to

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[121] *See, e.g.,* SBA Letter (stating that the CFPB does not "know the actual impact of the rulemaking on small issuers because it does not have data" and that "[t]he CFPB's certification lacks specific data on the impact of reduced fees, reductions in card issuances, costs of changes to risk analysis and other internal processes and impacts on the cost of credit.").
[122] *See* 88 Fed. Reg. at 18,917 ("The Bureau recognizes that the analysis above is based on data from the largest issuers, and *may not be representative of smaller issuers*, who do not report to the Y-14 collection. As discussed above, the Bureau did not receive specific cost data in response to its request in the ANPR for data on card issuers' pre-charge-off collection costs, including data on pre-charge-off collection costs incurred by smaller issuers. Although the Bureau does not have data equivalent to the Y-14 data for smaller issuers' pre-charge-off collection costs, it has no reason to expect that smaller issuers exhibit substantially higher pre-charge-off collection costs than larger issuers.") (emphasis added).
[123] *See* 88 Fed. Reg. at 18,910. The Bureau consulted with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, and the National Credit Union Administration Board but failed to include in the record any additional data concerning small banks and credit unions.
[124] 88 Fed. Reg. at 18,941.
[125] 12 U.S.C. § 5512(b) (requiring the Bureau to consider the potential benefits and costs to consumers and covered persons in prescribing a rule under the federal consumer financial laws).
[126] Credit Card Late Fees ANPR, ABA *et al*. Comment Letter in response to Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services (Apr. 11, 2022), https://www.regulations.gov/comment/CFPB-2022-0003-2512.

complete adequate and required administrative process through SBREFA to collect such data on small issuers.

The fact that the NPRM's reliance on Y-14 data that has not been adequately summarized for the record and cannot be made public raises serious conflict with bedrock principles of transparency under administrative law.[127] It is a well-established principle under the APA that administrative agencies are required to make public the data upon which they rely.[128] The Bureau could have utilized alternative means for gathering appropriate data, including but not limited to, interagency consultation, purchase through a third-party provider,[129] Dodd-Frank Section 1022(c)(4),[130] or through specific solicitation as part of the Bureau's CARD Act study.[131]

c) <u>The CFPB is engaging in a rushed rulemaking with a preordained timeline and outcome, in violation of the APA.</u>

As discussed above, the CFPB skipped the SBREFA process and published an ill-conceived NPRM, seemingly to meet an artificial deadline for a White House press event and the State of the Union address. Public statements by the White House continue to advertise that the outcome of the rulemaking—lowering the safe harbor to $8—is completed.[132] Such statements show the Director, serving at the will of the President, is not able to meaningfully consider feedback from the notice and comment process.

Public statements by the Director before issuance of a final rule show that the agency has, in violation of the APA, prejudged the issue and has a predetermined course of action prior to receiving comments.[133] Under existing regulations, the CFPB is required to annually adjust late fees based on cumulative changes to the CPI.[134] Without explanation, the Bureau failed to adjust late fee thresholds in 2022. This failure to act illustrates the Bureau's commitment to do away with the current model without following notice and comment.

Concurrent with the release of the NPRM, Director Chopra also revealed the lack of an open mind when he described the well-accepted existing safe harbor as a "regulatory loophole

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[127] *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.").
[128] *Id*.
[129] *See, e.g.,* Fiscal Year 2020, Service Contract Inventory, CFPB purchase of data from Experian to construct nationally representative panel of credit information on consumers for use in a wide range of policy research projects.
[130] 12 U.S.C. § 5512(c)(4).
[131] 15 U.S.C. § 1616(a).
[132] *See, e.g.,* President Joseph Biden (@POTUS), Instagram, "We are cutting credit card late fees by 75%", March 3, 2023, White House (@whitehouse), Instagram, "The Biden-Harris Administration is taking action to get lots of these fees under control." (the picture shows "Credit Card Late Fee $31.00 in a list of other "junk fees"), March 3, 2023.)
[133] *Air Transport Ass'n of America Inc. v. National Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (stating that "[d]ecisionmakers violate the Due Process Clause and must be disqualified when they act with an "unalterably closed mind" and are "unwilling or unable to rationally consider arguments.").
[134] 12 C.F.R. § 1026.52(b)(1)(ii)(D).

that has allowed [companies] to escape scrutiny for charging an otherwise illegal junk fee."[135] This is a fundamental mischaracterization of law, which, coincidentally the CFPB administers and is under a statute that was passed on a bipartisan basis and signed into law under former President Obama. As discussed earlier, this unhelpful rhetoric continues to perpetuate a false narrative that issuers want consumers to be late on their payments. The Bureau's ability to weigh the public's comments on its late fee NPRM and revise the proposed $8 safe harbor upwards has been fundamentally compromised. The Bureau cannot decide to revise this NPRM to reflect the public's input without also deciding to revise a promise of cutting late fees by 75 percent that the President of the United States made to the American people in his State of the Union Address and continues to repeat.

As discussed further below, beyond a rushed rulemaking, the Bureau is also solving for a predetermined timeline. Congress imposed a mechanism to ensure that those who are subject to the Bureau's regulations have sufficient time to implement them. Industry must be provided sufficient time to comply, including requisite time to develop late fee costs. Given that the proposed effective date of a final rule is only 60 days after publication in the Federal Register, many issuers will not have sufficient time to conduct a detailed cost analysis, particularly given the proposed changes to how costs are calculated. The speed at which the Bureau is pushing this rulemaking is an attempt to force issuers to adopt the $8 safe harbor and the cap on 25 percent of the minimum payment.

d) <u>The Proposal signals an intent to evade Section 105(d) of TILA, which sets forth the effective dates of regulations containing new or changed TILA disclosure requirements.</u>

The NPRM's proposed effective date of 60 days after final rule promulgation[136] would be inconsistent with requirements under Section 105(d) of TILA. Section 105(d) of TILA provides that "[a]ny regulation of the Bureau…requiring any disclosure which differs from the disclosures previously required by…any regulation of the Bureau…shall have an effective date of that October 1 which follows by at least six months the date of promulgation…."[137] When Congress added Section 105(d) to TILA through the Truth in Lending Simplification and Reform Act, it indicated that the purpose of the bill was to make creditor compliance easier.[138] This was done in response to Congressional findings that creditors were having difficulty in "keeping current with a steady stream of administrative interpretations and amendments" to TILA, in response to concerns that despite sincere attempts to comply with TILA, creditors found themselves in violation of TILA and subject to litigation.[139] Congress intended for the October 1 schedule to cover "changes in disclosure forms" so that "creditors would therefore need to alter their forms only once per year…."[140] Given that the Proposal requires issuers to change the late fee

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[135] Press Release, Consumer Fin. Prot. Bureau, CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees (Feb. 1, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/.
[136] 88 Fed. Reg. at 18,931.
[137] 15 U.S.C. § 1604(d).
[138] S. Rep. No. 96-73, at 2 (1979).
[139] *Id.*
[140] *Id.* at 7.

disclosures, pursuant to the statutory language and Congressional intent, changes must be made effective on the October 1 which follows by at least six months the date of promulgation.

The Proposal would require changes to multiple mandatory credit card disclosures. These include credit card Application Disclosures, Account Opening Disclosures, and periodic statements, all of which require the disclosure of the amount of the late fee. The Proposal will require issuers to change the amount of the late fee and may require a change in terms notice. Accordingly, the Proposal is subject to the effective date requirements of Section 105(d) because, if finalized, it will require disclosures that differs from the disclosures previously required by Regulation Z. The Proposal illustrates precisely why Congress built in a mandatory period to allow creditors time to make changes to disclosures.

The Bureau incorrectly asserts that Section 105(d) does not apply on two grounds. First, the NPRM claims the changes, if finalized, "would not differ from the current requirement to disclose late fee amounts; instead, it would solely result in a change to the amount of the late fees disclosed for issuers using the safe harbor." This argument is disingenuous and mischaracterizes the proposed changes. The Bureau's argument suggesting that changing the amount of a required disclosure is not changing a disclosure, conflicts with the essence of what it means to disclose.

Next, the NPRM's claims that "this change in amount applies to the safe harbor, which is an amount that card issuers may elect but are not required to use." The CFPB's argument fails to acknowledge that card issuers will be required to change their disclosures regardless of the way card issuers elect to demonstrate compliance with the CARD Act requirement that late fees be "reasonable and proportional."

The effective date proposed in the NPRM is arbitrary and unsupported by substantial evidence.

Section 105(d) of TILA only permits the CFPB to shorten the length of time required to allow issuers to come into compliance "when it makes a specific finding that such action is necessary to comply with the findings of a court or to prevent unfair or deceptive disclosure practices." The Bureau did not do so. No finding was made because: (1) no such court findings exist; and (2) it would be unreasonable and legally suspect for the CFPB to suddenly reclassify existing late fee disclosures, for figures which the CFPB set and updated annually, as "unfair or deceptive" when they must be disclosed multiple times in formats that were designed to be noticeable and clear to consumers and that are fully consistent with TILA (and its implementing Regulation Z) and have been for more than 12 years. Accordingly, the effective date of any final rule may only be the October 1 that is six months after the promulgation of the Final Rule; therefore, a final rule could not take effect until October 1, 2024. This effective date more accurately reflects the amount of time that would be required for card issuers to implement any final rule.

e) The CFPB's rulemaking process should be halted until the U.S. Supreme Court renders an opinion in *CFPB v. CFSA*.

On February 27, 2023, the U.S. Supreme Court granted certiorari to review the Fifth Circuit determination that the funding structure that allows the CFPB to, among other things, exercise rule-writing authority is unconstitutional.[141] To avoid significant disruption for consumers and the credit card market more broadly, we respectfully submit that it is incumbent on the CFPB to halt the late payment fee rulemaking until the Supreme Court has rendered its opinion. As discussed in detail above, failure to do so would needlessly result in a significant loss of consumer access to credit and costly and potentially unnecessary issuer investments in modifying the terms of their credit card products, which would particularly burden small issuers.

It is inappropriate and irresponsible to finalize significant changes to a long-standing rule that has endured through CFPB leadership appointed by both political parties when there is an open Constitutional question under consideration by the Supreme Court. By the Bureau's own admission, this case "calls into question virtually every action the CFPB has taken in the 12 years since it was created."[142] The structure, power, and responsibilities of the Bureau may change as a result of this litigation, and it would be inappropriate for the Bureau to finalize a rule during such uncertainty that is completely discretionary and a marked deviation from well-established principles.

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 CFPB has violated various process and procedural requirements, which must be remedied before proceeding.

* * *

We appreciate this opportunity to comment on the Bureau's Proposal and would be happy to discuss any of these topics at your convenience.

Sincerely,

AMERICAN BANKERS ASSOCIATION

CONSUMER BANKERS ASSOCIATION

NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS

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[141] *See Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2022).
[142] Petition for a Writ of Certiorari at 10, Consumer Fin. Prot. Bureau v. Comm. Fin. Servs. Assoc. of Am., No. 22-448 (Nov. 14, 2022 U.S.).

Appendix A

Overview of Large Issuer Cost Study Methodology

ABA worked with Argus Advisory, a TransUnion Company to estimate the average costs of late and delinquent payments to credit card issuers. This analysis was based in part on the analysis performed in 2010 in response to the proposed rule from the Federal Reserve Board.[1]

Argus surveyed 12 large credit card issuers using a data request template. The template requested detailed cost data on direct collections expenses, additional attributable expenses, and funding costs, as described in the table below.

#	Expense Component	Description	Rationale
1	Direct collections expense	Collections expense that can be directly and specifically associated with late payment and collections activities. Includes post charge-off recovery and commission expenses.	A conservative estimation of costs.
2	Attributable expense	All indirect operating expense that can be reasonable attributed to late payment and collections activities, including reasonable proportions of corporate allocations, systems expense, risk department expense, sales costs, etc.	Indirect costs are a real and reasonable allocation of expenses associated with late/collections activities.
3	Funding costs	The costs associated with funding delinquent accounts.	Late payments require issuers to fund balances for six months longer than expected and are eventually non-recoverable and not covered by APR changes.

Argus worked with participating issuers to validate the template. When the information was submitted, Argus anonymized and aggregated the results to ensure individual issuer anonymity. In addition to the requested data, Argus also leveraged its consortia dataset to calculate additional costs incurred as a result of late behavior (e.g., charge-offs, unpaid minimum payments).

[1] *See* Morrison & Foerster LLP, Comment Letter on Notice of Proposed Rulemaking pursuant to the CARD Act, FRB Docket No. R-1384, (Apr. 14, 2010), https://www.federalreserve.gov/SECRS/2010/April/20100429/R-1384/R-1384_042310_50285_474240311824_1.pdf.

Overview of Late Fee Revenue Modeling Exercise Methodology

ABA also worked with Argus to analyze the financial impact that a reduction in late fees would have on the credit card industry, including how it would affect the profitability of various customer cohorts. Argus leveraged its proprietary cross-issuer credit card transactional data to answer these questions.

Argus utilized data from 477 million general purpose and private label balance-active accounts from 2019 (to eliminate any effects from the COVID-19 pandemic) and excluded debit cards, secured cards, charge cards, small business cards, gift cards, prepaid cards, cash, checks, and ACH transfers.

Argus segmented accounts based on whether the account incurred a late fee at least once in 2019, finding that 31 percent of balance active accounts incurred a late fee. These accounts presented relatively higher credit risks and were less profitable compared to accounts that did not incur a late fee. They also segmented accounts by age.

Argus calculated the following metrics for various cardholder segments:

- Total Revenue ($): Interest + Interchange & Contra Revenue + Net Late Fee + Other Fees & Other Revenue
- Risk-Adjusted Revenue ($): Total Revenue – Cost of Funds – Gross Credit Losses
- Total Net Late Fees ($): Gross Late Fees – Late Fee Waiver
- Late Fee Share of Revenue (%): Net Late Fees/Total Revenue
- Avg. Revenue per Active Account ($): Total Revenue/Active Accounts
- Total Non-Late Fee Revenue ($): Interest + Interchange & Contra Revenue + Other Fees & Other Revenue

Argus then calculated the estimated impact on risk-adjusted revenue of various limits on late fees, including the full elimination of late fees and caps of $15, $25, and $30. Finally, they modeled several potential issuer responses to reduced profitability, including increased interest rates and reduced rewards on various cardholder populations.

Overview of Consumer Deterrence Study Methodology

ABA worked with Argus to survey consumers on the deterrent effects of credit card late fees. This analysis was also based in part on the analysis performed in 2010 in response to the proposed rule from the Federal Reserve Board.[2]

Argus leveraged a third-party vendor, Kantar Profiles, with a pre-existing credit card panel to survey a sample of 2,000 consumers. Demographic characteristics were gathered and used to

[2] *Id.*

balance the online sample to the national population based on Census Bureau data. The survey was in the field December 1 to 31, 2022.

Respondents were asked a series of questions about their perceptions of credit card late fees. The Van Westendorp methodology was used to identify the fee point at which consumers would likely be deterred from paying their credit card bills late.

Overview of Small Issuer Average Fees Methodology

This analysis examined 3,616 banks and 4,737 credit unions with assets of less than $850 million. Maximum late fees were pulled from credit card agreements from a random sample of each issuer type (697 banks and 435 credit unions). Some credit card agreements were available via the Bureau's Credit Card Agreement Database,[3] but most were found via individual websites. Many of the sampled banks and credit unions do not issue credit cards directly, but agreements were located for 59 of the 697 banks and 141 of the 435 credit unions in the sample.

As shown in Table 1, the maximum late fee charged by small banks ranged from $10 to $41, with a median of $25 and a mean of $26.

Table 1: Summary Statistics, Small Bank Late Fees

Total Banks Checked	697
Total Agreements Found	59
Mean	$26
Minimum	$10
1st Quartile	$25
Median	$25
3rd Quartile	$26
Maximum	$41
Mode	$25

The maximum late fees charged by credit unions ranged from $5 to $40, with a median of $25 and a mean of $23.

[3] Consumer Fin. Prot. Bureau, Credit Card Agreement Database (2023), https://www.consumerfinance.gov/credit-cards/agreements/.

Table 2: Summary Statistics, Small Credit Union Late Fees

Total Credit Unions Checked	435
Total Agreements Found	141
Mean	$23
Minimum	$5
1st Quartile	$20
Median	$25
3rd Quartile	$25
Maximum	$40
Mode	$25

As a quality check to determine whether the sample was similar to the broader population of small issuers, the issuers included in the sample were randomly sorted into four groups, and summary statistics were collected for each group. This process was then repeated five times, to ensure the medians remained consistent across each group. For credit unions, the measured median late fee was equivalent to the sample median late fee across all four groups and five attempts. Similarly, for banks, the measured median was equivalent to the sample median across all four groups in all five attempts. This test demonstrates that the sample is statistically similar to the full population of issuers with a relatively high level of confidence.

Overview of Small Issuer Credit Card Revenue Data

Small issuer card revenue is based on Q4 2022 data from a sample of banks participating in one agent bank program. The Q4 revenue was estimated to be approximately 27 percent of total 2022 revenue based on data showing that Q4 2022 credit card and other revolving loan volume was approximately 27 percent of total 2022 revenue.[4] Late fee revenue was estimated at approximately 7 percent of total card revenue based on Q2 2022 data from a smaller sample of banks participating in the same agent bank program.

[4] Board of Governors of the Federal Reserve System, Consumer Loans: Credit Cards and Other Revolving Plans, All Commercial Banks [CCLACBW027NBOG], retrieved from FRED, Federal Reserve Bank of St. Louis, Apr. 27, 2023, https://fred.stlouisfed.org/series/CCLACBW027NBOG.