U.S. Chamber of Commerce

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August 1, 2022

Comment Intake—Credit Card Late Fees
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Advance Notice of Proposed Rulemaking, Bureau of Consumer Financial Protection; Credit Card Late Fees and Late Payments; 87 Fed. Reg. 42662; Docket No. CFPB-2022-0039

To Whom It May Concern:

The Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau ("CFPB") regarding its Advance Notice of Proposed Rulemaking ("ANPR") on credit card late fees and late payments.[1]

Credit cards play an important and valuable role in American consumers' lives. They allow consumers to manage their budgets across the month, participate fully in the economy, and cover surprise expenses, including necessities. Credit cards also afford consumers an opportunity to build a credit history, which expands their access to other credit products, such as auto loans and mortgages, and non-credit opportunities, such as employment. For decades, credit cards have been a key component of the American consumer credit system.

Regular, periodic payments are a defining feature of consumer credit cards—and timely payment is the hallmark of a customer relationship that is built for long-term success. Late fees apply when a consumer does not submit a required payment on the agreed-upon timeline. These fees are disclosed at the time of account opening, and the consumer is aware of the obligation to repay the credit advanced. Such late fees play an important role in encouraging prudent consumer behavior by incentivizing borrowers to pay their bills on time. By doing so, late fees help consumers establish good repayment history, as well as avoid additional interest accruing on unpaid balances, future default on debt, and negative credit reporting. Conversely, the absence of late fees would remove financial incentives for responsible use of consumer credit cards and lead to negative impacts on consumers. Moreover, it would put credit card debt, already unsecured, in a competitive disadvantage vis-à-vis all other obligations ranging from other unsecured loans to cable subscriptions. While the absence of late fees might provide consumers with a short-term benefit, it would be vastly outweighed by

[1] *See* CFPB, Credit Card Late Fees and Late Payments, 87 Fed. Reg. 38,679 (June 29, 2022).

significant long-term negative consequences, including higher default and delinquency rates, higher cost of credit, and reduced credit availability.

Late fees are no boon to credit card issuers and, instead, are aimed at covering the collections and charge off costs associated with late payments. Issuers want borrowers to make timely payments because paying on time is the basis for a long-term relationship that benefits both the issuer and the consumer. Conversely, a pattern of late payments may well signal financial problems ahead for an individual consumer, show that the consumer may be financially overextending themselves, or indicate that other products may better fit their circumstances. More broadly, the safety and soundness may suffer is they experience a high volume of late payments.

Accordingly, credit card issuers work to help consumers pay their credit card bills on time. For example:

- Issuers provide robust disclosures that are even more extensive than required under law, including disclosures in multiple formats such as emails, text messages, and push notifications, as well as online and in-app banking capabilities that prominently display the consumer's next payment due date. Issuers use these methods to maximize a consumer's awareness of their payment due date and potential late fees.

- Issuers also have developed functions such as autopay, enabled consumers to choose their monthly payment date, and established financial education programs with the aim of helping consumers to pay on time. Autopay, for example, helps consumers to avoid forgetting to make monthly payments. Consumers can also choose the amount to autopay each month based on individual circumstances. Similarly, the option to choose a payment due date allows consumers to pick which payment due date fits best with their financial circumstances, increasing the likelihood that a consumer will be able to pay on time. This technology comes at a cost to the issuer, but has significant benefits to consumers.

- Many issuers have formal late fee forgiveness programs, including programs to waive first-time late fees or waive late fees at the borrower's request, based on their unique financial situation.

- Issuers often conduct outreach when a payment is late and work with borrowers to set up payment plans when the borrower cannot make payments on time. For example, during the COVID-19 pandemic, and other emergencies, issuers worked with borrowers suffering hardship to defer payments, lower monthly payment amounts, set up repayment plans, and waive late fees.

These efforts to promote on-time payments, and provide flexibility to consumers where possible, is more desirable to issuers than imposing late fees; timely payment is more important for both the consumer and the issuer.

When appropriate under governing contracts, issuers charge late fees that are highly regulated through strict disclosure requirements and substantive rules. The Credit Card Accountability Responsibility and Disclosure ("CARD") Act only permits a credit card issuer to charge a fee for violating the terms of the credit card agreement, including a late payment fee, that is reasonable and proportional to the violation.[2] What is reasonable and proportional is based upon a number of factors specifically enumerated by Congress, including the cost associated with late payments, deterring late payments, and the conduct of the consumer associated with the late payments. Moreover, Congress authorized the Federal Reserve Board (the "Board") to create a safe harbor under which a late fee is presumed to be reasonable and proportional—in other words, acceptable as a matter of law.[3] After careful examination and in consideration-of each of the factors set forth by Congress, the Board established a safe harbor for credit card penalty fees in 2010. This safe harbor provided that a penalty fee of $25.00 or under for a first violation (e.g., a late payment) and $35.00 or under for additional violations of the same type during the next six billing cycles is deemed to be reasonable and proportional to the violation.[4] The Board specifically concluded that those amounts took into account average cost, having a reasonable deterrent effect, and consumer behavior associated with multiple late payments. The Board established by rule that it would adjust the dollar amount of the rule annually to reflect changes in the Consumer Price Index ("CPI").[5] After the Dodd-Frank Act transferred implementation of Regulation Z to the CFPB, the Bureau adopted the safe harbor rule, as well as the rule requiring the Bureau to make periodic updates based on inflation, without substantive amendment in 2011.[6]

When announcing the ANPR, the CFPB seemed to ignore the practical benefits of the current approach to late fees, as well as the relevant regulatory and congressional history. In his remarks, Director Chopra stated that the CFPB will be "examining whether it is appropriate for credit card companies to receive immunity from enforcement if they hike the cost of credit card late fees each year by the rate of inflation."[7] This statement appears to discount the careful consideration that led to the current safe harbor,

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[2] *See* 15 U.S.C. § 1665d(a).

[3] *See id.* § 1665d(e).

[4] *See* Federal Reserve System, Truth in Lending, 75 Fed. Reg. 37,526, 37,572 (June 29, 2010) (codified at 12 C.F.R. § 226.52(b)(1)(ii)).

[5] *See id.*

[6] *See* CFPB, Truth in Lending (Regulation Z), 76 Fed. Reg. 79,268, 79,821 (Dec. 22, 2011) (codified at 12 C.F.R. § 1026.52(b)(1)(ii)).

[7] CFPB, Prepared Remarks of Director Chopra on Credit Card Late Fees ANPR Press Call (June 22, 2022).

including the CFPB's own role in determining any increases to the safe harbor to account for inflation.[8] By its own rule, the CFPB is required to annually adjust the safe harbor penalty fees under Regulation Z based on changes in the CPI.[9] The CFPB states in its commentary that it calculates these adjustments as follows: "When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in [the safe harbors] has risen by a whole dollar, those amounts will be increased by $1.00. Similarly, when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in [the safe harbors] has decreased by a whole dollar, those amounts will be decreased by $1.00."[10] This legally mandated mechanism for adjusting the penalty amounts is appropriate and necessary to reflect changes in inflation.

Given the established regulatory and congressional endorsement of a safe harbor for late fees, we do not agree with any suggestion that late fees are improper or that increasing the late fee safe harbor in line with inflation is somehow unreasonable. Congress was correct to recognize the complexity in setting penalty fees and was wise to authorize the creation of a penalty fee safe harbor, in consultation with the prudential regulators.[11] The Board likewise was right to establish a safe harbor and its approach continues to be justified today. The safe harbor approach provides legal certainty that should be maintained.

Accordingly, we write to make three points:

- Late fees are an appropriate method for managing risk.
- The existing approach to credit card late fee safe harbors is well-considered and provides much-needed legal certainty.
- Any changes to the existing approach on late fee regulation should only be made after careful study and based on accurate data.

Analysis

1. Late fees are an appropriate method for managing risk.

[8] *See, e.g.*, Truth in Lending (Regulation Z) Annual Threshold Adjustments (Credit Cards, HOEPA, and Qualified Mortgages), 86 Fed. Reg. 60,357 (Nov. 2, 2021).

[9] *See* 12 C.F.R. § 1026.52(b)(1)(ii)(D).

[10] *See* 12 C.F.R. § 1026.52(b)(1)(ii), cmt. 2.

[11] *See* 15 U.S.C. § 1665d(d). *See also* 12 U.S.C. § 5512(b)(2), requiring the CFPB to consult with the appropriate prudential regulators prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies and providing that the Bureau must address in its release any written objection to the proposed rule by a prudential regulator.

Late payment fees have important purposes, including offsetting an issuer's costs and helping consumers to avoid other negative consequences of late payments. Issuers incur processing costs related to late fees, but also incur fixed costs that are more difficult to quantify for purposes of calculating late fees.

Adjusting the safe harbor amount or structure could have negative impacts on consumers. Timely payment helps consumers establish good repayment history. Paying on time can help consumers avoid additional interest accruing on unpaid funds, future default, and negative credit reporting. Without late fees, consumers will not have as strong of an incentive to pay on time. The fact that a late fee is experienced soon after paying late, as well as the amount of the late fee, makes it a strong deterrent. Potential impacts to credit do not provide an equivalent, immediate incentive to consumers to pay on time. However, the long-term consequences of missing payments can be more impactful overall, significantly impacting a consumer's ability to secure credit in the future and increasing the cost of such credit. Thus, elimination of the safe harbor or a significant reduction to the amount of the safe harbor will increase the potential for consumer default and delinquency, while resulting in longer-term impacts and increased costs to the consumer overall.

Late fees also allow issuers to offset costs associated with late payments and to mitigate the risk associated with late payments, and thus continue to offer the products that customers want. Since the Board first promulgated the safe harbor amounts, the dollar amounts have only increased based on inflation. In effect, increasing the safe harbor amounts at the level of inflation keeps the real dollar value of the safe harbor amounts the same for issuers over time. If issuers cannot offset the risks and costs associated with late payment, issuers will need to manage these risks in other ways. These measures may include options that decrease consumer choice and access to credit to bring the risk of late payment to an acceptable level. Without effective encouragement to pay on time, issuers may no longer be able to offer as many products, may be forced to raise interest rates, and may no longer be able to offer existing products to as many consumers.

For an issuer to continue operating, and to comply with prudential regulations, an issuer must adhere to principles of safety and soundness. Late fees are a necessary component of ensuring safety and soundness. Not only do the fees help cover costs, they serve as a deterrent to late payments. If a high volume of payments are not made on time, there could be negative implications for safety and soundness. Issuers must be able to recover costs and manage risks. An issuer that is consistently not paid on time by a substantial number of consumers, and who is not able to recover the costs associated with late payments, may encounter an adverse financial impact. In addition, without the risk mitigation provided by late fees, issuers may need to take other measures to appropriately account for risks associated with late payment. The CFPB should carefully consider any changes to the late fee structure that could reduce the

deterrent value of late payments or could make it more difficult to offer features, such as mobile banking, that help consumers avoid late payments. In doing so, the CFPB should consult with prudential regulators, who would surely be concerned if a large number of consumers did not pay issuers back in a timely manner.

2. **The existing approach to credit card late fee safe harbors is well-considered and provides much-needed legal certainty.**

The CARD Act was passed to ensure "fair and transparent practices relating to the extension of credit under an open-end consumer credit plan."[12] As part of the CARD Act, Congress provided that an issuer can only charge a consumer a fee for violating the card agreement, expressly including a late payment fee, if that fee is reasonable and proportional to the violation. Congress expressly authorized the Board, and now the CFPB, to create and maintain a regulatory scheme that enabled late fees, and expressly directed them to consider the cost incurred by a creditor from a violation as well as the deterrence of a violation and the conduct of the cardholder when drafting a rule on the reasonable amount of late fees.[13] Congress recognized that penalty fees, including late fees, are appropriate, reasonable, and proportionate when based on the cost incurred by the creditor, deterrence, the conduct of the cardholder, and other factors the regulators deemed appropriate.[14]

The Board initially proposed a rule that would have required card issuers to develop and use a model to set penalty fees based on their estimated deterrent effect. The Board discarded this approach, however, and established the safe harbors that exist today. The Board made this decision with the input of consumer groups and industry, both of which commented that the Board's original modeling proposal was inconsistent with the purposes of the CARD Act.[15] Based on the above-mentioned considerations, the Board instead decided to implement a safe harbor for late penalty fees that incorporated each of the factors articulated by Congress and that would be adjusted periodically for inflation. The safe harbors established were initially $25 for a consumer's first late payment and $35 for subsequent late payments, for up to six billing cycles. The Board also issued a cost-based regulation, allowing issuers to instead set

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[12] Public Law 111-24, 111th Congress (May 22, 2009).

[13] *See* 15 U.S.C. § 1665d.

[14] 15 U.S.C. § 1665d(c) ("In issuing rules required by this section, the Bureau shall consider— ''(1) the cost incurred by the creditor from such omission or violation; (2) the deterrence of such omission or violation by the cardholder; (3) the conduct of the cardholder; and (4) such other factors as the Bureau may deem necessary or appropriate.").

[15] Consumer groups were concerned specifically that this standard would allow card issuers to use marginal changes in the frequency of violations to justify unreasonably high fee amounts. Some industry participants were concerned that this standard would require testing various fee amounts on consumers, and would also be impossible for smaller institutions to implement. *See* Federal Reserve System, Truth in Lending; Final Rule, 75 Fed. Reg. 37,526, 37,533 (June 29, 2010).

late fees based upon their costs associated with late payments. Issuers only need to rely on this regulation when an issuer wants to charge a late fee to recoup late payment costs that exceed the safe harbor. Removal of the safe harbor and moving to a strictly cost-based approach would leave the deterrence and consumer conduct factors unaccounted for in the regulation.

The Board's approach reflected consideration of these factors. In promulgating the final rule, the Board cited a study that a consumer who incurs a late payment fee is 40% less likely to incur a late payment fee during the next month, although this effect depreciates each subsequent month. Accordingly, the Board limited the imposition of the $35 late fee for repeat late payments to six billing cycles. The Board relevantly stated the following: "Because a card issuer is in the best position to determine the costs it incurs as a result of violations, the Board believes that, as a general matter, it is appropriate to make card issuers responsible for determining that their fees comply . . . As discussed below, to reduce the burden of making these determinations, [Regulation Z] contains safe harbors that are intended to generally reflect issuers' costs."[16] Notably, consumer groups disagreed with the provision of Regulation Z that allows issuers to base penalty fees on costs.[17] Those groups were concerned that this approach could allow card issuers with higher costs to collect higher fees, with the unintended consequence of rewarding issuers that are the least efficient in managing their costs.[18] Similar concerns could arise if the CFPB removed the safe harbor and only permitted issuers to base late fees on their costs.

The current safe harbor dollar amounts, as periodically adjusted by the CFPB for inflation, are appropriate considering the functions of late fees. The Board determined that the amount of the safe harbor, to be adjusted periodically for inflation, was reasonable, proportional to the violation, and sufficient to cover most issuers' costs and deter violations.[19] The CFPB adopted the safe harbor amount, as well as the rule requiring the CFPB to periodically adjust the safe harbor amount in accordance with the CPI. The CFPB determined that it would increase the safe harbor amounts by $1.00 when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in the safe harbors had risen by a whole dollar. Conversely, the rule requires the CFPB to lower the safe harbor amounts by $1.00 when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in the safe harbors

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[16] *See id* at 37,536.

[17] *See id.*

[18] *See id.* ("[C]onsumer group commenters expressed a general concern that—by allowing card issuers with higher costs to collect higher fees—the proposed rule could have the unintended consequence of rewarding the issuers that are least efficient in managing their costs.").

[19] *See* Federal Reserve System, Truth in Lending; Final Rule, 75 Fed. Reg. 37,526, 37,526-27, 37,533 (June 29, 2010).

has lowered by a whole dollar. Accordingly, the safe harbor amount increases have been limited to increases in accordance with inflation. These increases simply maintain the real dollar value of the safe harbor amounts; they do not represent a windfall to issuers. Indeed, the CFPB and other regulators routinely adjust other set dollar amounts in regulations based on changes in the CPI, such as adjustments to the amount of a reasonable fee that a consumer reporting agency may charge to make a disclosure under the Fair Credit Reporting Act.[20]

There is nothing inherently problematic with the current approach. As it stands, the CFPB can easily identify potential problems by examining the amount and frequency of an issuer's late fees. Consumers can be reasonably certain that their late fees will not exceed the safe harbor amount and amounts in excess of the safe harbor are likely to be subject to particular legal scrutiny.

In contrast, if the safe harbor is eliminated, consumers would be less likely to be able to determine whether an issuer's fee could be violating the law if it is based on an individual issuer's own cost considerations. This calculation also presumably would need to be re-evaluated and adjusted periodically, making these compliance efforts a long-term cost that an issuer would then need to recoup through a higher cost of credit. The CFPB would also need to individually analyze each issuer's late fee determination to verify compliance with the law. Indeed, elimination of the safe harbor would create a host of new challenges for regulators of banks not under the CFPB's jurisdiction, including federal and state prudential examiners. Requiring issuers to calculate and prove their costs would also place a disproportionately high burden on small issuers and community banks. Accordingly, the safe harbor approach remains the best available approach today.

The current safe harbor is a transparent, straightforward approach that establishes a bright line rule while being consistent with the statutory requirements of the CARD Act. The issuance of the ANPR seems to indicate that the CFPB is considering abandoning this clear standard in favor of a potentially complex rule that could lead to widely varying fees among issuers. Such an approach would contradict Director Chopra's statements, as recently as last month, that "[t]he CFPB is seeking to move away from highly complicated rules . . . and towards simpler and cleaner rules."[21] In his June 2022 blog post, Director Chopra highlighted the downsides of "overly complicated and tailored rules," stating that they impede consumer protection, increase compliance costs, and place new entrants and small firms at a disadvantage. In contrast, Director Chopra stated that "simple bright-lines allow all parties to better understand the law and policy priorities," and "[t]he CFPB aspires to more clearly communicate the

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[20] *See, e.g.*, CFPB, Fair Credit Reporting Act Disclosures, 86 Fed. Reg. 67,649, 67,649 (Nov. 29, 2021).

[21] *See* Rohit Chopra, Rethinking the approach to regulations, CFPB Blog (June 17, 2022).

agency's expectations in simple and straight-forward terms, which will produce more durable guidance and rules, in addition to numerous other benefits."

Here, the CFPB already has in place the very type of clear, bright-line rule that Director Chopra describes. Yet, the ANPR implies that the CFPB is considering replacing an already-existing bright-line rule with something highly complex and variable, all without evidence that the current approach should be revised. A rule based solely on an individual issuer's costs, for example, will result in a rule with the very downsides that Director Chopra pointed out – increased compliance costs to determine the overall costs resulting from late payments (placing a disproportionately high burden on smaller issuers, community banks, and new entrants) and potentially complicated formulas to determine costs and appropriate late fees. In contrast, the current approach balances all the appropriate considerations and results in reasonable and proportional fees for late payments.

3. **Any changes to the existing approach on late fee regulation should only be made after careful study and based on accurate data.**

The long-standing, well-considered approach to late fees and the regulatory safe harbor should not be discarded lightly. Rather, any changes should only be made after careful consideration and marshaling all relevant evidence. Any changes must be driven by research, data, and testing, which will take more time than the CFPB has allowed for stakeholder comment to the ANPR. Sources for such data should include the Board, which has extensive and holistic data about issuers that should be carefully considered in proposing any changes to the regulation, and the Consumer Credit Panel. Moreover, and as discussed above, the CFPB is statutorily required to consider factors other than just cost to the issuer, specifically, deterrence and consumer conduct.

The CFPB should not rely only on data collected in response to this ANPR. As an initial matter, even counting the recent extension, the Bureau has allowed a comment period of only 40 days to answer over 10 pages of questions requiring detailed and well-reasoned responses. Historically, the CFPB has allowed the public longer time to respond to ANPRs related to significant rule changes, including 108 days to respond to the Regulation F ANPR,[22] 90 days to respond to the ANPR on rules implementing section 1033,[23] and 60 days to respond to the Regulation E ANPR.[24] It was unrealistic for the CFPB to expect issuers to respond to such detailed questions within the timeframe

[22] *See* CFPB, Debt Collection (Regulation F), 79 Fed. Reg. 2,384, 2,384 (Jan. 14, 2014).

[23] *See* CFPB, Consumer Access to Financial Records, 85 Fed. Reg. 71,003, 71,003 (Nov. 6, 2020).

[24] *See* CFPB, Electronic Fund Transfers (Regulation E), 30,923, 30,923 (May 24, 2012).

provided. Because it did not give stakeholders adequate time to respond, the CFPB will not have sufficient information to proceed with a well-considered rulemaking.[25]

If the CFPB does propose changes to the current rule, the Bureau must give stakeholders a reasonable time to adequately respond. As this comment letter has detailed, any changes to the safe harbor rule could have serious implications for consumers and the consumer credit market. The CFPB should not rush into making changes to the safe harbor rule that neither it nor stakeholders have had time to analyze. Further, issuers are not subject only to Regulation Z and the jurisdiction of the CFPB—issuers must comply with safety and soundness standards as required by the prudential regulators. Accordingly, the CFPB should take the time to work with the prudential regulators (and indeed, is required to do so)[26] and all other stakeholders to decide whether to amend the late fee provisions under Regulation Z.

The CFPB should also carefully study the potential impacts of any proposed change to the current safe harbor amount or structure. As explained above, the Board carefully developed the initial safe harbor regulations after much research and in consultation with stakeholders. The CFPB must be able to demonstrate that the current rule is insufficient to accomplish the purposes of the CARD Act and any proposed changes would better accomplish those purposes. In the ANPR, the CFPB did not cite any research or studies on how any potential changes to the safe harbor may affect consumers, including how any changes may affect the cost and availability of credit to consumers who routinely pay on time. These are the type of outcomes that the CFPB should carefully consider and study before making any changes to the safe harbor. Further, because any proposed rule would likely have a significant economic impact on small issuers, the CFPB would need to undertake a Small Business Regulatory Enforcement Fairness Act review in connection with any proposed rule eliminating or significantly reducing the late fee safe harbor.

The CFPB's failure to take such a measured approach would risk creating a multitude of unintended consequences. Eliminating the safe harbor entirely, for example, could lead to increases to late fees for consumers, if an issuer's costs are particularly high. If the safe harbor is significantly reduced and issuers are unable to appropriately mitigate the risk of late payments through late fees, issuers may be required to mitigate that risk by eliminating certain products or features, increasing the credit underwriting standards for certain products, or increasing the cost of credit to account for risk. Such an increase in the cost of credit would be disproportionately higher for consumers that have relatively higher credit risk. Smaller creditors and

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[25] In addition to the timeframe being too short for stakeholders to provide sufficient data in response to the CFPB's requests, some of the information requested is sensitive or confidential. It may not be possible to share this information publicly, again limiting the value of the information that the CFPB will receive in response to this ANPR.

[26] *See* 15 U.S.C. § 1665d(d).

community banks, particularly those that extend credit to consumers who are trying to build or repair their credit, would have proportionately higher compliance costs and would face the most risk, limiting their ability to continue to offer credit products at the same terms. These actions will ultimately harm consumers because issuers may need to address risk and recoup costs in other ways, such as eliminating or reducing rewards or other product features. Moreover, ensuring legal compliance would be hard both for issuers and the CFPB. Requiring each issuer to develop a separate calculation for late fees is likely to result in confusion over whether particular late fee amounts are permissible and whether an issuer has correctly calculated a reasonable and proportionate late fee, frustrating the CFPB's goal of articulating clear regulatory requirements. As Director Chopra has stated, "bright lines" should be used whenever possible.[27] Here, the CFPB should retain the certainty of the safe harbor, which is currently set at an amount that is reasonable and proportional.

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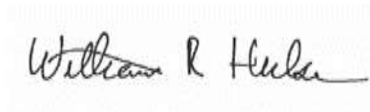
Thank you for considering these comments. We would be happy to discuss these issues further.

Sincerely,



Bill Hulse
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[27] CFPB, Prepared Statement of Director Rohit Chopra before the House Committee on Financial Services (Apr. 27, 2022).