U.S. Chamber of Commerce

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May 2, 2023

Comment Intake— 2023 NPRM Credit Card Late Fees
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Credit Card Penalty Fees (Regulation Z)

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" or the "Bureau") regarding its notice of Proposed Rulemaking to amend certain provisions of Regulation Z related to late fees charged on credit card accounts (the "Proposed Rule").[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. 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.

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 clearly 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. Accordingly, late fees serve an important purpose, as recognized by Congress in the Credit Card Accountability Responsibility and Disclosure ("CARD") Act and by the federal, state, and local governments that all charge late fees to encourage timely payment of amounts owed (e.g. parking tickets and taxes). In contrast to the CFPB's unfounded statements, late fees are not impermissible, so-called "junk fees" that fail to serve any purpose. Instead, they are heavily regulated by the CFPB, and the Federal Reserve before it.

[1] *See* CFPB, Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18,906 (Mar. 29, 2023).

The CFPB's proposal to reduce the credit card late fee safe harbor under Regulation Z to $8 per violation would significantly reduce financial incentives for the responsible use of consumer credit cards. By doing so, the Proposed Rule would hurt consumers. Any short-term benefit provided by the Proposed Rule to select consumers who did not pay on time would be vastly outweighed by significant long-term negative consequences, including potential higher default and delinquency rates, higher cost of credit, and reduced credit availability. The consumers who will suffer the most are those who manage to make their minimum payments each month, but occasionally struggle to do so. These consumers will be the most impacted by the resulting increases to interest rate and credit card fees, and the reduced availability of credit.

In addition to being bad policy, and hurting most consumers, the CFPB did not properly promulgate the Proposed Rule. For the reasons explained below, the Proposed Rule is unconstitutional and would violate the CARD Act, the Dodd-Frank Act, and the Administrative Procedure Act ("APA"). Moreover, issuers could not implement the Proposed Rule within the contemplated timeline were the CFPB to proceed as planned given the operational complexities.

Accordingly:

- The Proposed Rule would hurt consumers.
- The Proposed Rule is unlawful.
- The Proposed Rule cannot be implemented within the proposed timeline.

Analysis

1. The Proposed Rule would hurt consumers.

a. The existing regulatory approach more appropriately governs late fees.

Late fees are highly regulated and carefully and clearly disclosed. The fees are expressly authorized and recognized by Congress to serve important purposes in the credit market, including helping to offset costs of default and collection to issuers, deterring consumers from making late payments, and reducing the negative impacts of default to consumers (such as negative credit reporting and resulting reduced access to credit). Evidence shows consumers want to pay on time and know that their bank charges a late fee. This evidence shows that the existing regulatory and disclosure regime is working as intended. Indeed, a recent poll found that 99% of polled consumers believe it is important to pay their credit card bill on time, with 82% making all their payments on time.[2] Late fees are a far more effective deterrent to paying late than longer-term consequences, such as negative credit reporting or increased interest payments. The impact of a late fee is clearly disclosed in advance, immediate, and easy to understand. In contrast, consequences such as negative credit reporting may not occur until months after the late payment and consumers may not fully realize the connection between the late payment and a decrease in their credit score. The negative consequence of increased interest payments from carrying a balance may be less obvious to consumers than a flat late fee.

Congress agrees about the importance of avoiding late payments. It expressly authorized the Federal Reserve Board, and now the CFPB, to create and maintain a regulatory scheme that includes late fees. It also clearly directed the CFPB 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.[3] However, the CFPB failed to adequately consider this required element in the Proposed Rule.

Congress' emphasis on deterrence should come as no surprise. The U.S. government has consistently recognized the important purpose that deterrence serves in preventing late payments. For example, the Internal Revenue Service imposes a Failure to Pay Penalty of 0.5% of the unpaid taxes for each month or part of a month the tax remains unpaid.[4] In 1982, Congress passed the Prompt Payment Act to require Federal agencies to pay their bills on a timely basis, to pay interest penalties when payments are made late, and to take discounts.[5] Congress took a similar approach when it passed the CARD Act, recognizing the importance of deterrence in setting an appropriate penalty fee.[6] In addition to these federal government examples, state and local governments often penalize citizens for paying late (*e.g.*, parking tickets and taxes).

Of course, a consumer must be aware of applicable late fees for a deterrent to have its intended effect. To that end, regulated disclosures make sure that consumers understand applicable late fees and incorporate them into their financial decision making. The current regulatory scheme empowers consumers to make decisions based

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[2] North Star Opinion Research, Credit Card Fee Survey (Mar. 16, 2023), https://www.northstaropinion.com/credit-card-fee-survey. ("Credit Card Fee Survey")

[3] *See* 15 U.S.C. § 1665d ("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.").

[4] IRS, Failure to Pay Penalty, https://www.irs.gov/payments/failure-to-pay-penalty.

[5] Bureau of the Fiscal Service, Prompt Payment, https://www.fiscal.treasury.gov/prompt-payment/#:~:text=In%201982%2C%20Congress%20passed%20the,late%2C%20and%20to%20take%20discounts.

[6] 15 U.S.C. § 1665d.

on highly regulated disclosures that explain the true cost of credit and the cost of making late payments. As noted, credit card issuers provide robust disclosures, as required by law, regarding late fees. Consumers are aware and agree to these fees at the time of application, and are reminded of the late fee amount on every periodic statement. The consumer can also cancel the credit card at any time or elect not to use the credit card, providing maximum consumer choice. Polling shows that consumers understand if their credit card charges a late fee, and that issuers oftentimes provide communications that are beyond regulatory requirements.[7] Consumers factor in late fees as an appropriate and acceptable cost of credit they may incur if they are unable to make their minimum monthly payment both at the time of issuance as well as before each charge. Further, credit cards without late fees are available in the market..

The existing regulatory framework thus more appropriately weighs the required statutory factors, in an economically competitive market, with clearly disclosed late fees deterring delinquencies and helping issuers partially cover the costly consequences of late payments and defaults. Indeed, issuers often go well above and beyond the Regulation Z disclosure requirements in order to help consumers avoid late payment fees, as on time payments are both in the customer and issuers' best interest. These efforts may include offering, for example: autopay; notifications of upcoming payment due dates and incurred late fees via text, email, and apps; refunds of first-time late fees; and payment plans to prevent further delinquencies. Such offerings are further evidence that issuers want their customers to pay on time and dispel the CFPB's theory that late fees are merely a revenue source for financial institutions.

b. The Proposed Rule will disrupt the more balanced current approach, harming responsible consumers.

The CFPB's Proposed Rule would harm responsible consumers by undermining late fees' deterrent effect, leading to an increased cost of credit and reduced credit availability within the marketplace. These consequences will particularly harm consumers who pay their credit card bills on time by forcing them to cover the costs of those who do not, as the CFPB acknowledges: "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."[8]

The CFPB did not seek to measure how, and to what degree, reducing the late fee safe harbor and reducing the late fee an issuer can charge to 25% of the consumer's minimum payment amount could impact deterrence to consumers. Instead, it acknowledges that "a lower late fee amount for the first or subsequent late payments

[7] Credit Card Fee Survey.

[8] 88 Fed. Reg. 18,935.

might cause more consumers to pay late."[9] The CFPB further "recognizes 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."[10] CCMC has such evidence and the results are clear. By a 21-point margin, voters believe that a decrease in the penalty will result in more people making late payments. Fifty-three percent of voters believe "people will be more likely to make late payments on their credit cards if the late payment penalty is reduced from $30 to $8, because $8 isn't enough of a penalty to make people care about on-time payments."[11]

The CFPB acknowledges several studies showing that lower fees will have less of a deterrence effect and result in more frequent late payments. The CFPB failed to adequately justify why it has discounted and disregarded these studies.

The CFPB's reported method of analyzing deterrence in the FR Y-14 data is seriously flawed. That analysis seems to include only data from accountholders who have made at least one late payment, drawing general conclusions about deterrence based on whether a decrease in the late fee in month 7 changes the probability of paying late.[12] This analysis is flawed because (1) cardholders who have already made a late payment—i.e., for whom deterrence has already failed—are not fairly representative of how fees will deter all cardholders; and (2) it is likely that the difference in deterrence between $8 and $30 will be much greater than the difference in deterrence between $30 and $41.

Credit card issuers must adhere to the principles of safety and soundness and comply with prudential regulations. Late fees are a necessary component of ensuring safety and soundness. Not only do the fees help cover costs of late payments, they serve as a deterrent to late payments and expected revenue. If a high volume of payments are not made on time, there could be negative implications for safety and soundness. An issuer that is consistently not paid on time by a substantial number of consumers, and who is not able to compensate for the costs associated with late payments, may encounter an adverse financial impact.

Increases in late payments will result in less predictable cashflow for issuers, increasing the risk of extending unsecured consumer credit, especially to those consumers who may be borderline prime or subprime. In order to appropriately manage the increased credit risk, credit card issuers will need to restrict their credit offerings or raise rates or both. If a card issuer cannot adequately manage the risks of increased credit losses, the issuer must then reduce the credit losses—which means reducing the availability of affordable credit. Practically speaking, this will likely mean some

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[9] *Id.* at 18,919.

[10] *Id.*

[11] Credit Card Fee Survey.

[12] 88 Fed. Reg. 18,920.

combination of higher interest rates, increased fees, reductions to rewards programs, more stringent underwriting requirements, and the elimination of some products. Some cardholders in prime and subprime populations are likely to lose access to credit cards altogether, have access to much lower lines of credit, find it only at high-cost subprime specialist lenders, like payday lenders, or turn to secured credit cards, tying up capital that would otherwise be at the consumer's disposal. The CFPB, if genuinely acting in consumers' best interest, should want to avoid such an outcome. A consumer would be better off having a credit card with an avoidable $30 late fee than with no credit card at all.

These consequences will especially be felt by Americans who make the monthly minimum payment but carry a balance some months. Borrowers who pay the minimum payment on time will not receive any benefit from reduced late fees. They will, however, likely face increased interest rates, other increased charges (such as increased membership fees or reduction in available credit), and potential loss of rewards. In fact, the CFPB recognizes these are likely consequences of the Proposed Rule, stating, "[s]ophisticated 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."[13] While CCMC does not support grouping consumers under such terms, when asked, consumers themselves indicate they do not support this tradeoff. A recent survey asked consumers: "[i]f effectively limiting late fees to $8 causes credit card companies to eliminate or reduce benefits like cashback, discounts at restaurants, or airline miles, is that a good tradeoff?" 54% of consumers rejected this tradeoff.[14]

The CFPB should align itself with consumers and reject this trade-off too. The CFPB acknowledges that "[c]ardholders who carry a balance but rarely miss a payment are less likely to benefit on net."[15] It also concedes that an increase in interest rates will harm the very consumers who already struggle with access to credit, stating: "[I]nterest rates or other charges of subprime credit cards might increase more than for other cards, and some consumers might find these cards too expensive due to higher interest rate offers . . . . Cardholders 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—or if interest rates increase in response and these on-time cardholders carry a balance."[16] In sum, the CFPB's own analysis indicates that the Proposed Rule will harm many consumers and provide no benefit to many others. The only benefit the Proposed Rule purportedly would provide would be to consumers who frequently pay late, but they will also suffer the greatest long-term consequences from

[13] *Id.* at 18,935.

[14] Credit Card Fee Survey.

[15] 88 Fed. Reg. at 18,934.

[16] *Id.*

those late payments. The current regulatory regime, which more appropriately weighs costs to all consumers, should not be replaced by an approach that will, on balance, harm consumers in this manner. At best, this potentially significant disruption to a well-functioning market needs significant further study to better understand the tradeoffs the CFPB seeks to make in favor or consumers who fail to timely pay the minimum amount due against those that do pay on time.

The CFPB suggests that such an outcome nonetheless may be acceptable because of a purported increase in transparency. Thus, the CFPB acknowledges: "Card issuers also may undertake efforts to reduce collection costs or use interest rates or other charges to recover some of the costs of collecting late payments."[17] The CFPB argues that this consequence is acceptable because "[b]uilding those costs into upfront rates would provide consumers greater transparency regarding the cost of using their credit card accounts."[18] This reasoning is flawed. A late fee is provided upfront and is a clear, direct, and transparent consequence of violating the terms of a credit agreement. There would be no comparative transparency benefit from having a higher rate or membership fee, but lower late fee, so the CFPB's proposed approach cannot be justified on this basis. Further, the Proposed Rule converts an avoidable fee into a potentially unavoidable cost.

c. Further possible changes alluded to by the CFPB would compound the problems caused by the Proposed Rule.

i. The contemplated "courtesy period" would have unintended negative consequences.

The Proposed Rule mentions in passing several potential additional requirements being considered by the CFPB. These include a requirement that an issuer offer consumers a 15-day "courtesy period" in order to qualify for the safe harbor. Imposing a 15-day courtesy period would harm consumers, in addition to being outside the CFPB's authority.

A courtesy period would also have numerous unintended negative consequences for consumers:

- Such a courtesy period would likely confuse consumers who may not realize that, even though they may avoid a late fee if they pay within the courtesy period, they are accruing interest, and thus additional costs, on the unpaid outstanding balance any time after the due date.[19] Developing

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[17] *Id.* at 18,919.

[18] *Id.*

[19] The CFPB itself acknowledges that "[e]ven consumers who genuinely save some hassle, mental or pecuniary cost by delaying payment by less than 15 calendar days might suffer harm in the long run if

a disclosure that accurately conveys to consumers that they have a "courtesy period" as to a late fee, but not as to other consequences, such as interest accrual, would be difficult and even the best-crafted disclosure may be insufficient.

- Because of the courtesy period, the late fee may not appear on a consumer's next billing statement, but on the subsequent statement. In that event, the consumer would likely be confused about why a late fee was charged, particularly if it is unclear to which billing cycle the late fee applies and the consumer had paid the intervening bill on time.

- A courtesy period would also make underwriting more difficult as issuers would have to evaluate whether a borrower is likely to take advantage of such a courtesy period , thus increasing the costs to provide credit , without certainty as how to offset those costs. Issuers would likely take a more conservative approach to ensure that they are not exposed to undue financial risk , especially as additional uncertainties are introduced by the CFPB into the marketplace.

- A courtesy period would make it difficult for issuers to determine if a consumer is struggling financially, or just taking advantage of the extra time. This would make it harder for an issuer to assist the consumer with payment or other plan to avoid late fees and defaults.Further, the CARD Act does not authorize the CFPB to require issuers to create a courtesy period. The CARD Act authorizes the CFPB to regulate only the amount of penalty fees in connection with a violation of a cardholder agreement, not to determine when a violation of such agreement occurs. And the CFPB's assumptions with respect to this proposal continue to ignore the statute's instruction to consider the cardholder's conduct and the deterrence factor of late fees, not merely costs. Moreover, such a courtesy period would contradict the Truth in Lending Act ("TILA"). Under Section 163 of TILA, a creditor can "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."[20] Issuers would not be able to offer a courtesy period consistent with that requirement.

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this leads to confusion about effective due dates on their accounts or erodes habits of prudent money management." *See* 88 Fed. Reg. at 18,938.

[20] 15 U.S.C. § 1666b.

ii. The CFPB's current proposal is insufficient for the public to provide meaningful comment on certain topics.

The CFPB would be required to issue a new proposed rule before imposing any of the potential alternatives that were not formally proposed *(e.g.*, the 15-day courtesy period, autopay, amending requirements related to non-late fee penalty fees, or eliminating any safe harbors for any penalty fees). These ideas are only briefly referenced in the Proposed Rule: the CFPB does not detail or formally propose them with any specificity. The CFPB cannot move forward on these matters absent (1) more work on the Bureau's part to understand the benefits and burdens of this approach; and (2) far more opportunity for the public to understand the specifics of any proposed approach with an opportunity to meaningfully comment. Accordingly, a new proposed rule would be required if the CFPB sought to pursue these ideas.

2. The Proposed Rule is unlawful.

The Proposed Rule violates the CARD Act, the Dodd-Frank Act, and the APA. The Proposed Rule is unconstitutional, and the CFPB is not providing the public with a meaningful opportunity to comment. The CFPB does not adequately consider the costs and benefits of the Proposed Rule, nor does the CFPB give appropriate weight to each factor Congress required it to consider when promulgating rules related to penalty fees. Further, for numerous reasons described in more detail below, the Proposed Rule is arbitrary and capricious, in violation of the APA. In addition, the CFPB is unconstitutionally structured and if Section 1665d could be read as broadly as the CFPB purports in the Proposed Rule, it would be an unconstitutional delegation of legislative authority. Further, the Proposed Rule violates the major questions doctrine.

a. The Proposed Rule violates the CARD Act, the Dodd-Frank Act, and the APA.

Congress directed the CFPB to consider four factors when issuing rules related to penalty fees: (1) the cost incurred by the creditor from the consumer's omission or violation of the cardholder agreement; (2) the deterrence of such omission or violation; (3) the conduct of the cardholder; and (4) other factors the CFPB deems necessary or appropriate.[21] Throughout the Proposed Rule, the CFPB has ignored these statutory requirements. The Proposed Rule states: "In developing the proposed late fee safe harbor amount, the Bureau carefully considered several sources of data and other information to determine the amount that would cover a reasonable and proportional amount of card issuers' pre-charge-off collection costs."[22] But this approach does not consider all of the statutory factors Congress requires when issuing rules related to penalty fees and misstates the penalty fee an issuer is permitted to charge. The CARD

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[21] 15 USC 1665d(b).

[22] 88 Fed. Reg. at 18,916.

Act unambiguously states that the fee must be reasonable and proportional to the "omission or violation." Treating "such omission or violation" as equaling costs is inconsistent with the plain meaning of the statute. Moreover, the way the CFPB calculates costs is much narrower than actual costs borne by issuers and should instead consider *all* costs, not arbitrarily selected costs.

While an agency is entitled to deference in some instances for its interpretation of ambiguous statutes, it deserves no deference when it deviates from the plain language of the statute.[23] Here, Congress could have—but did not—use language that focuses on costs alone. Congress demonstrated in other provisions of the Dodd-Frank Act that when it wanted a fee to be based solely on costs, it would say so. Accordingly, the Proposed Rule rests on a misunderstanding of the requirements of the CARD Act.

The CFPB also appears to turn the safe-harbor analysis on its head. Instead of establishing an amount that is presumptively reasonable and proportional, the CFPB appears to be trying to set an upper limit for what is reasonable and proportional in every case. The Proposed Rule asserts that "The Bureau also has analyzed whether the current safe harbor threshold amounts for late fees are reasonable and proportional to a cardholder's omission or violation."[24] It further asserts, "As noted in part I, the Bureau is concerned that (1) the safe harbor dollar amounts for late fees currently set forth in § 1026.52(b)(1)(ii) are not reasonable and proportional to the omission or violation to which the fee relates; . . . and (3) additional restrictions on late fees may be needed to ensure that late fees are reasonable and proportional."[25] But the CARD Act expressly contemplates a more traditional safe-harbor analysis.

Moreover, the CFPB's proposed answer would be wrong even if it were answering the correct statutory question. Its analysis of costs to issuers, if addressed alone, is inadequate for at least eight reasons.

First, the CFPB did not adequately measure the significant costs to consumers. The Proposed Rule would hurt responsible consumers, ensuring that its costs outweigh any benefits it might provide. The CFPB does not adequately analyze those costs in the Proposed Rule. For example, although the CFPB acknowledges that issuers may increase consumers' minimum required periodic payments in response to the Proposed Rule, it does not adequately consider how this result may impact consumers.[26] Such increases would harm consumers who already may be struggling to make their minimum payments every month, and actually result in more consumers incurring late fees. Indeed, some consumers may no longer be able to afford certain credit card products if

[23] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

[24] 88 Fed. Reg. at 18,911.

[25] *Id.* at 18,913.

[26] *Id.* at 18,936.

the minimum payment amount is increased. Such consequences would contradict the CFPB's stated purposes for amending Regulation Z, yet the CFPB fails to sufficiently address them in the Proposed Rule.

Second, the data used by the CFPB to estimate costs to issuers and the safe harbor amount is insufficient to support the Proposed Rule. The cited data is based solely on confidential information collected from a small segment of the largest issuers. FR Y-14 data is currently collected only from bank holding companies, savings and loan holding companies, and intermediate holding companies with more than $100 billion in assets.[27] This data set is insufficient to support wide-ranging conclusions regarding costs to -issuers that do not report FR Y-14 data, including small businesses. It is also insufficient to allow meaningful comment on the proposal as the CFPB has not shared its analysis of this data for validation and/or comparison. Moreover, even the instructions to the FR Y-14 information collection call for a response that includes a smaller set of costs than the total costs incurred from a late payment. "Costs incurred to *collect* problem credits" may not, for example, include costs associated with developing and managing credit strategies to manage delinquent accounts, customer service calls about late payments, or infrastructure, informational technology, and personnel costs related to managing these late payments. And an account that pays late but not 30 days late is not considered a "problem credit," though the costs associated with such payments indisputably fall within the CARD Act's contemplation of costs. Additionally, despite these issues, the CFPB itself acknowledges the variability in cost data which makes the use of this data an inappropriate basis for the analysis. As a result, the CFPB's limited cost analysis rests on a flawed and inadequate foundation.

Third, the CFPB does not adequately analyze the effects of the Proposed Rule, particularly with respect to small entities. The CFPB states, "the Bureau does not have data with which to precisely estimate the effect of the Proposed Rule on late fee revenue,"[28] causing it to use a series of assumptions and estimates to support the Director's certification that neither an Initial Regulatory Flexibility Act Analysis nor a Small Business Review Panel is required. Despite lacking specific data regarding how the rule might impact small creditors,[29] the CFPB refused to convene a small business review panel, as required by the Regulatory Flexibility Act.[30] The CFPB could have obtained this information through a Small Business Regulatory Enforcement Fairness

[27] Prior to 2021, FR Y-14, the Federal Reserve Board collected FR Y-14 data from such companies with more than $50 billion in assets. See Federal Reserve Board, Supervision and Regulation Assessments of Fees for Bank Holding Companies and Savings and Loan Holding Companies With Total Consolidated Assets of $100 Billion or More, 85 Fed. Reg. 78,949, 78,949 (Dec. 8, 2020).

[28] 88 Fed. Reg. 18,940.

[29] *Id.* at 18,917 ("the Bureau does not have data equivalent to the Y–14 data for smaller issuers' pre-charge-off collection costs").

[30] 5 U.S.C. §§ 601-612.

Act ("SBREFA") panel but improperly chose not to do so, leaving it with an inadequate understanding of the foreseeable reduction in fee revenue.

The Proposed Rule indicates the CFPB made no effort to quantitatively analyze small bank and credit union impact, despite the availability of avenues to collect such data, such as through consultation with other financial regulators or use of the CFPB's authority under Dodd-Frank Act Section 1022(c)(4). The CFPB instead simply assumes that smaller issuers will be similarly situated to larger issuers, stating that it "has no reason to expect that smaller issuers exhibit substantially higher pre-charge-off collection costs than larger issuers."[31] The CFPB could have undertaken a SBREFA panel to determine whether its assumption was accurate before issuing the Proposed Rule. Had it done so, it almost certainly would have found that its assumption that small issuers will be similarly situated to larger issuers is untrue. In doing so, the CFPB would have had to grapple with ways in which the Proposed Rule is poised to make smaller issuers either less competitive or wholly exit the market, in favor of the largest institutions that may better be able to offset the late fee reduction through other product lines, economies of scale that can better absorb costs, and the ability to invest in technology and other resources that reduce cost over time. Having failed to do so, the CFPB instead improperly underestimates the costs that the Proposed Rule would impose on small banks and credit unions.

Fourth, the CFPB fails to adequately weigh post-charge-off collections costs. The CFPB asserts that post-charge-off collections costs are not within the scope of the costs an issuer may consider when setting a late fee, but offers no basis for this claim. Indeed, this statement is wholly unsupported in the CARD Act and the CFPB's previous regulations (which the CFPB improperly fails to even acknowledge). Issuers face significant post-charge-off collection costs as a direct result of a consumer's failure to comply with the terms of the credit card agreement and timely pay their credit card bills. These costs matter; they affect issuers' ability to continue offering credit card products at terms most beneficial to consumers. They are costs directly attributable to the consumer's nonpayment. The CFPB was wrong not to consider them in its cost analysis and it is inappropriate to either force issuers to impose these costs more broadly on other card holders who are not late or expect issuers to absorb them.

Fifth, the CFPB underestimates costs to issuers because it mistakenly overstates how some card issuers will choose to stop relying on the safe harbor. In the Proposed Rule, the CFPB states that if a card issuer's costs exceed the safe harbor, the card issuer can use the cost analysis provisions set forth in 12 C.F.R. § 1026.52(b)(1)(i) to set an appropriate late fee.[32] This argument fails to consider the compliance costs and regulatory uncertainty of setting a latefee using the cost analysis provisions. The CFPB

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[31] 88 Fed. Reg. at 18,908.

[32] *Id.*

acknowledges that its own analysis of credit card agreements found no evidence of issuers using the cost analysis provisions to charge an amount higher than the safe harbor.[33] In other words, the cost analysis provisions are largely untested. Any card issuer seeking to take advantage of that process would need to invest significant time, money, and resources to develop and reevaluate late fees every 12 months.

Even with the dramatic proposed reduction in late fees, the CFPB offers no compelling reason that issuers will abandon the safe harbor. Such a response is particularly unlikely, in fact, given the CFPB's aggressive and unreasonable attitude towards late fees. The CFPB cannot credibly call credit card late fees "junk fees"[34] and expect a meaningful number of card issuers to opt out of the safe harbor that protects against CFPB enforcement action. Absent sufficient evidence, the CFPB should not base its cost analysis on an assumption that any meaningful number of issuers will stop relying upon the reduced safe harbor. Further, the fact that issuers could use the cost analysis provisions to set a late fee does not negate the fact that in issuing a rule on late fees, the CFPB is required to considered deterrence and cardholder conduct in addition to costs to the issuer.

Sixth, to the extent issuers shift to using the cost analysis provisions, including with the CFPB's new interpretation of costs with respect to post-charge off costs, as the CFPB expects, the Bureau needs to reopen the existing regulation to address conflicts with the CARD Act. The existing regulation allows recovery of a fee that "represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of regulation,"[35] but those limitations are found nowhere in the statute. Rather, the statute contemplates and authorizes companies to charge a "penalty fee[]," which by definition would take into account the conduct of the cardholder and the need to deter such conduct, as well as the costs. The CFPB's error is particularly stark in the case of repeat late payments, where there may be a greater need for deterrence regardless of whether the costs caused by the second violation exceeded the costs caused by the first. And these errors are exacerbated by the commentary's decision to exclude several expenditures that are part of the costs incurred by issuers. In any regulatory effort with such financial stakes that would lead to a shift from a reasonable safe harbor toward the cost analysis provisions, the CFPB must consider the legal consistency of that method with the relevant statutes.

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[33] *Id.*

[34] CFPB, 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/.

[35] 12 C.F.R. § 1026.52(b)(1)(i).

Seventh, the CFPB fails to meet its statutory obligation under the CARD Act to properly weigh the costs and deterrent effect of the Proposed Rule. In doing so, the CFPB also fails to comply with the Dodd-Frank Act's requirement that it consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services."[36] As described above, the CFPB underweights the costs of compliance with a lower safe harbor regime and has refused to even attempt to quantify the various impacts that its $9 billion estimated reduction in fee revenue will have on the pricing and availability of credit cards. Indeed, the CFPB's profound failures to evaluate the costs associated with the Proposed Rule render it arbitrary and capricious in violation of the APA.

Eighth the CFPB fails to adequately weigh the increase in servicing costs that would result from the decreased deterrent effect of late fees under the Proposed Rule. As discussed above, credit card late fees play an important role in encouraging responsible borrowing practices and encourage timely repayment. Substantially reducing these fees will dramatically weaken their deterrent effect. Simply put, the proposed late fee safe harbor will, as the CFPB suggests[37] and research supports, make it more likely for consumers to pay late.[38] The resulting increase in delinquencies may cause credit card issuers to incur additional costs for even more proactive outreach to consumers to encourage consumers to pay timely, in addition to the extensive steps issuers already take. Collections costs to reach out to the increased number of consumers who make late payments will also increase. Overall, the Proposed Rule would lead to substantial increases in servicing and collections costs for issuers. The CFPB does not properly consider these increased costs, however, acknowledging instead that it lacks reliable, quantified evidence of how the Proposed Rule may impact costs to issuers, late payments, and delinquencies.[39] The failure to cite evidence makes the CFPB's uninformed and mistaken conclusion faulty at best.

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[36] 12 U.S.C. § 5512(b)(2)(A)(i).

[37] 88 Fed. Reg. at 18,933.

[38] Credit Card Fee Survey.

[39] *Id.*at 18,931 ("In particular, the Bureau is not aware of relevant, reliable, and quantified evidence that could be used to predict how changes to late fees would affect late payments and delinquencies or the expected substitution effects across credit cards and between credit cards and other forms of credit. Similarly, the Bureau believes there is little reliable quantitative evidence available on the cost and effectiveness of steps issuers might take to facilitate timely repayment, collect efficiently, reprice any of their services, remunerate their staff, suppliers, or sources of capital differently, or enter or exit any or all segments of the credit card market. The Bureau also believes there is little relevant evidence available on the impacts the proposed changes to the late fee provisions would have on charge cards or the effects of these potential changes on other penalty fees.").

b. The Proposed Rule is unconstitutional.

The Proposed Rule would violate constitutional requirements in at least three respects:

First, the CFPB lacks the authority to issue the Proposed Rule because it is unconstitutionally structured in violation of the Appropriations Clause. *See Community Financial Services Association of America, Limited v. CFPB*, 51 F.4th 616 (5th Cir. 2022).

Second, if Section 1665d could be read as capaciously as the CFPB has read it—that is, to give the CFPB authority to regulate late fees based on whatever criteria it chooses—then Section 1665d would effect an unconstitutional delegation of legislative authority. In other words, if the statute truly allowed the CFPB to disregard issuer costs, deterrence, and cardholder conduct to the extent it proposes to do, then the statute would provide no intelligible principle for the Bureau to follow, rendering it an unconstitutional abdication of congressional power. *See, e.g.*, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

Third, the Proposed Rule also would violate the separation of powers under the major questions doctrine. Under the CARD Act, Congress determined that credit card penalty fees should be addressed through a combination of limitations considering specific statutory factors and disclosure requirements. With the Proposed Rule, the CFPB is attempting to re-interpret the CARD Act and alter a long-standing regulation in a way that will have vast economic impacts on the consumer credit card market. The Supreme Court has explained that, under the major questions doctrine, a regulatory agency may not interpret governing statutes in such a manner without pointing to a clear congressional authorization for the power it seeks to assert. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). Having failed to do so here, separation of powers principles prohibit the CFPB's proposed action.

c. The CFPB is not giving the public a meaningful opportunity to comment.

The APA requires that regulatory agencies give the public notice and an opportunity to comment on the rules they propose.[40] The CFPB has failed to meet this basic requirement since it has already decided how to proceed, regardless of the comments it will receive. Making this clear, President Biden has already promised the public that safe harbor for credit card late fees will be reduced by the terms in the Proposed Rule. To this end, shortly after the Proposed Rule was published, the President committed in his State of the Union Address to "cutting credit card late fees by 75 percent, from $30 to $8."[41] The Biden-Harris administration and the CFPB have

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[40] 5 U.S.C. § 553.

[41] The White House, President Biden's State of the Union Address (Feb. 7, 2023), https://www.whitehouse.gov/state-of-the-union-2023/.

improperly concluded, without the opportunity for public comment, that credit card late fees are so-called "junk fees"[42]—despite the fact that late fees are entirely lawful, highly regulated, extensively disclosed to consumers, and provide an important deterrent to late payments. Practically speaking, this means that the CFPB will have no choice but to adopt the rule without giving fair consideration to the public's comments as required by the APA in order to fulfill the wishes of the President, who can fire the CFPB Director at any time and for any reason.

3. The Proposed Rule cannot be implemented within the proposed timeline.

Section 105(d) of TILA requires "any disclosure which differs from disclosures previously required by part A, part D, or Part E shall have an effective date of October 1 which follows by at least six months the date of promulgation," subject to certain exceptions.[43] Under the Proposed Rule, issuers would be required to develop, print, and mail new disclosures to consumers, triggering this statutory requirement. As a result, the CFPB must provide at least six months for implementation. The CFPB nonetheless argues that Section 105(d) does not apply because issuers will just be changing the amount of the late fee, but the amount is still a change and, in any event, that fails to address other proposed changes that may require additional explanation in card disclosures. The CFPB also argues that this is not a major adjustment, even though it would be changing a key aspect of the required disclosures specific to the fee regime. The CFPB's claims are unpersuasive: it should comply with TILA by providing institutions "an effective date of October 1 which follows by at least six months the date of promulgation."

Moving beyond its statutory responsibility to provide the timeline established by TILA, the CFPB would be best served by providing a reasonable implementation date to permit institutions to adjust their practices and disclosures to reflect the changes finalized through rulemaking. The sixty days for implementation currently considered would also not be sufficient to allow issuers who currently rely upon the safe harbor to complete any necessary operational changes to update their late fees and create new paper disclosures with any updated late fee figures. In addition, issuers will need time to evaluate whether the proposed safe harbor amount adequately covers their costs and if it does not, engage in the cost analysis under 12 C.F.R. § 1026.52(b)(1)(i) to set a late fee that does cover such costs. If CFPB believes that card issues will stop relying on the safe harbor, as it states in its proposal, the time required time to implement those changes are even more significant. The CFPB should provide significantly more time for

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[42] The White House, The President's Initiative on Junk Fees and Related Pricing Practices (Oct. 26, 2022), https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/.

[43] 15 U.S.C. § 1604(d).

compliance, and even more so for changes in the Proposed Rule that would require issuers to undertake systems changes.

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

William R Hulse

Bill Hulse
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Center for Capital Markets Competitiveness
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