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May 3, 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); Docket No. CFPB-2023-0010

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their more than 135 million members. On behalf of our members, we are writing in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed rule with request for public comment on credit card late fees and late payments.[1]

Background

The CFPB has proposed to amend Regulation Z, which implements the Truth in Lending Act (TILA), to uniformly reduce the level of permissible late fees charged for all consumer credit card accounts. Currently, credit card late payment fees must be "reasonable and proportional" to the late payment as required under TILA.

The Bureau's proposal would considerably decrease the safe harbor dollar amount for late fees from $30 to $8 and eliminate the higher safe harbor dollar amount for fees incurred by subsequent late payments. In addition, the proposal seeks to eliminate the annual inflation adjustment for the safe harbor dollar amounts and fix its reduced safe harbor threshold in perpetuity. The proposal would also mandate late fee amounts not exceed 25 percent of the account's required minimum payment.

General Comment

Credit unions are not-for-profit financial cooperatives with a statutory mission to promote thrift and provide access to credit for provident purposes. Unlike for-profit financial institutions, credit unions do not issue stock or pay dividends to outside stockholders. Instead, credit union earnings – including any fee income – are returned to members in the form of lower interest rates on loans,

[1] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18906 (Mar. 29, 2023).

higher returns on deposits, and lower fees. Credit unions exist only to serve their members, and the relationship between credit unions and their members is fundamentally stronger than the relationship for-profit financial services companies have with their customers.

Because of this unique relationship, credit unions' interest in their members' financial well-being and advancing the communities they serve takes on a paramount importance. We often find that even well-intentioned policies can have the unintended consequence of making credit union services less available and more expensive to those who need them the most. In that regard, reducing or eliminating the well-established late fee safe harbor threshold for determining whether a late fee is "reasonable and proportional" would do just that.[2] CUNA strongly objects to the Bureau's proposed rule, as we believe it will negatively impact the ability of credit unions to offer viable credit card programs, manage the risks associated with those programs, and increase the cost of credit cards for all cardholding members – not just those that incur late payment fees.

We believe the proposal represents a gross deviation from the Bureau's standards of practice for issuing policies grounded in sound and relevant data. In light our serious concerns, we are supplementing our comment letter with an attached independent economic analysis of the proposed rule prepared on our behalf by Edgeworth Economics, LLC.

Clearly disclosed, heavily regulated fees incurred due to consumers' late payments are not so-called "junk fees."

The CFPB and the Administration have repeatedly classified a broad range of ordinary fees in the consumer financial services market as so-called "junk fees" obscuring the true cost of financial services.[3] In the press release for this proposal, Director Chopra went so far as to say "[o]ver a decade ago, Congress banned excessive credit card late fees, but companies have exploited a regulatory loophole that has allowed them to escape scrutiny for charging an otherwise illegal junk fee."[4] We would argue that a legally established safe harbor is not a "regulatory loophole" and this government-wide effort to characterize all fees as "junk fees" appears to be little more than a convenient public relations tactic intended to divert the public's attention away from the ever-increasing cost of everyday goods and services arising out of an environment of high inflation and other economic pressures. We strongly object to the government's inflammatory messaging as it is intentionally misleading and clearly wrong-headed.

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[2] 12 C.F.R. § 1026.52(b)(1)(ii).

[3] *See* Consumer Financial Protection Bureau, Junk Fees Landing Page, *available at* https://www.consumerfinance.gov/rules-policy/junk-fees/. *See also* Consumer Financial Protection Bureau, Blog Post, The hidden cost of junk fees (Feb. 2, 2022), *available at* https://www.consumerfinance.gov/about-us/blog/hidden-cost-junk-fees/. *See also* Consumer Financial Protection 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), *available at* https://www.experian.com/blogs/ask-experian/can-my-credit-score-affect-renting/. *See* 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" Mar. 3, 2023.)

[4] Press Release, Consumer Financial Protection Bureau, CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees (Feb. 1, 2023), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/.

In multiple press releases, the CFPB has attempted to lump together fees levied in truly opaque markets outside of the Bureau's jurisdiction with the clearly disclosed, heavily regulated financial institution fees that are incurred in direct response to specific actions (*i.e.*, a late payment). For example, in launching its junk fee initiative the Bureau highlighted that "hotels and concert venues advertise rates, only to add 'resort fees' and 'service fees' after the fact."[5] While that may be a true assessment of fees in the entertainment and leisure industries, the Bureau would do itself a service by focusing on the state of the consumer financial services market, where fees are clearly governed by robust disclosure requirements that prevent "surprise" fees after the fact.

It's especially perplexing that the Bureau would choose to characterize nearly all fees as "hidden" when most of the rules governing bank and credit union fees are either promulgated or administered by the CFPB itself. In particular, Regulation Z – the subject of this proposed rule – specifically requires disclosures, at application or solicitation, outlining the amount of and circumstances resulting in late payment fees for a credit card account. Similarly, Regulation E requires disclosures, before account opening, of all fees associated with a prepaid account. These regulations are actively administered by the Bureau, including the precise scope and timing of the disclosures. These two examples, while not nearly comprehensive, are examples of the extensive network of legal protections created precisely to prevent these fees from being "hidden" from consumers, as the Bureau alleges.

Regarding fee amounts, in its proposal the Bureau has assumed that credit card issuers are charging an excessive fee when charging $30 for a first late payment and $41 for a subsequent late payment. However, provisions of Regulation Z implementing the Credit Card Accountability Responsibility and Disclosure Act (CARD Act) require late payment fees to be "reasonable and proportional" and, in turn, federal regulators establish a safe harbor that *expressly permits* the imposition of a fee of up to $30 for a first late payment and up to $41 for a subsequent late payment. The Federal Reserve-established late fee safe harbor is the current standard for defining a permissible fee. In short, the Bureau is severely critical of credit card issuers for charging fees at levels that are reasonable and proportional *as a matter of law*. This logic makes no sense, and we can only surmise the entire "junk fee initiative" is purposefully intended to be provocative merely to score political points rather than begin a legitimate discussion of the purpose of fees and the efficacy of disclosures.

Credit unions are the original consumer protectors, often adopting generous fee waiver policies and dedicating significant resources to financial education and outreach aimed at assisting financially struggling members.

America's credit unions stand as the epitome of consumer protection in practice. As part of our member-owned structure, credit union members can rely on fair and equitable treatment by their credit union because they have a voice and a vote in its operation. This fairness extends to the level of fees charged in exchange for services or as a penalty.

[5] Press Release, Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees (Jan. 26, 2022), *available at* https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/.

We strongly caution the Bureau against painting a broad picture of fees in the financial services market. Many credit unions have specifically designed their fee schedules with members in mind and as a result there is substantial diversity across the industry. There are many examples of credit unions exploring and adopting changes to their fee schedules in response to consumer preferences. While it's impossible to fully account for the diverse range of options offered, it is not uncommon to find credit unions that have established generous late payment grace periods, reduced fees across-the-board, reduced fees on small card balances, automated the fee waiver process, or limited the frequency certain fees can be charged over a specified period. All these changes, and many others, reveal the innovative nature of credit unions and the proactive work that credit unions are doing to secure financial well-being for all.

Irrespective of recent innovations, credit unions have a track record of establishing policies and procedures aimed at assisting members that frequently incur certain fees. For example, when a credit union becomes aware of a member's tendency to pay late, they often attempt to contact the member to address the member's financial situation and offer financial education support or alternative products. In these communications, credit unions inform members about other options that may be available, including financial and budgetary counseling and/or traditional loan products. These efforts support the best interest of the member and exemplify the pro-consumer nature of the credit union-member relationship.

Credit unions have also established generous fee waiver or forgiveness programs intended to help members who reach out for assistance. CUNA always encourages financially distressed credit union members to contact their credit union to discuss relief options or learn about alternative products and services. Credit unions regularly work with their members to improve their financial well-being. We strongly believe credit unions should be allowed to continue this work rather than the Bureau adopting a policy that drastically deviates from the long-held standard for reasonable late fees.

The consequences for consumers could be significant should the Bureau act hastily to restrict the ability of card issuers to set reasonable late fees.

Credit unions provide the safest and most affordable financial products for consumers in need of financial services, especially in the credit card market. The Bureau should further evaluate the impact its rulemaking will have on consumers' cost of credit and available options for financial services. Well-disclosed fees serve not only to recoup costs but also to encourage positive behavior. For example, late fees are levied only after a payment is not rendered by a specified date. This late payment is intended to recoup the cost of losses due to non-payment but also to encourage the payment of debts in a timely manner. If credit unions were unable to assess reasonable late fees for non-payment, then credit unions would not only face safety and soundness concerns but it's likely the costs of non-payments would be borne by the entire membership in the form of higher interest rates or the tightening of credit standards – even for those consumers that pay their debts in a timely fashion.

The Bureau has directly criticized financial institutions for a purported "dependency" on fee income. However, despite this provocative messaging, there is likely little that can be learned from

merely looking at the total amount of fees collected or the percentage of fees relative to overall revenue. To the contrary, looking at these data points alone without context could obscure the extent to which an institution's fee revenue is driven by the scale of its service to moderate- and low-income consumers. Comparisons based on fees as a percent of non-interest income often reveal more about the diversity of revenue than fairness in practices. If anything, this is an area in need of further study rather than blanket assumptions not grounded in data. Treading too hastily in this area could ultimately result in an outsized impact on financial institutions that are trying to fill banking vacuums and serve more lower-income consumers – an undertaking the Bureau has repeatedly encouraged.

It is important the CFPB strikes an appropriate balance between its consumer protection goals and the continued availability of necessary products and services. Late fees are an important part of that ecosystem, especially for financial cooperatives that reinvest earnings in their members and communities.

The proposal's indefensibly short comment period provided insufficient opportunity for impacted stakeholders to respond to the proposal with necessary levels of data and research.

Evaluating and determining the full impact of the Bureau's proposal – particularly to quantify the impact on consumer cardholders and smaller issuers – requires significant time. Throughout the proposed rule, the Bureau calls on stakeholders to provide data and cites the failure of industry to provide data to inform the rulemaking proceeding in response to the late fee Advance Notice of Proposed Rulemaking (ANPR).[6] CUNA and other associations joined together to request an extension to the ANPR comment deadline in order to be responsive to that request for material data.[7] In response, the Bureau provided only a paltry 10 days additional days to respond. This comment deadline extension was inadequate and did not reflect a good faith effort to hear feedback from stakeholders.

The rush to finalize significant changes to a decades-long rule that endured through several CFPB leaders without providing sufficient time for commenters to provide data and other information on consumer and market impacts only adds to the perception this rule is politically motivated. The lack of transparent data, the absence of rigorous scholarship on the potential consequences of the proposed changes, and the lack of interest in soliciting meaningful stakeholder feedback only serves to invite substantial scrutiny to the Bureau's rulemaking effort. This "lightening round" approach to a significant rulemaking ultimately invites more scrutiny to the Bureau's intentions and increases the likelihood of either litigation or future revision of the ultimate final rule. A see-saw approach to regulating bread-and-butter financial products and services does not benefit consumers, small issuers, or the market.

[6] *See, e.g.,* 88 Fed. Reg. at 18,918-9.

[7] *See* Joint Trade Request for Extension of ANPR on Credit Card Late Fees and Late Payments (June 24, 2022), *available at* https://www.regulations.gov/comment/CFPB-2022-0039-0002.

The proposal's impact on smaller financial institutions was not given proper consideration through the SBREFA process and the proposal contains merely cursory, inaccurate analysis of their unique needs.

We believe that any reduction in, or elimination of, the late fee safe harbor will have a significant adverse impact on a substantial number of credit unions with assets below $850 million. The Bureau itself acknowledges this proposal is intended to have a significant impact on the total amount of fees recovered by card issuers in response to consumers late payments. As a result, if the Bureau intended to conduct this rulemaking using proper procedures, then it should have complied with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), as a "covered agency" designated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[8] Considering this clear statutory obligation, we were extremely disappointed to see the Bureau rush to issue a proposed rule without conducting a necessary Small Business Review Panel. While the Bureau's breakneck speed may serve its political goals, the administrative procedure process required a more careful consideration of the potential impacts on small entities.

The SBREFA process provides an essential mechanism for the Bureau to obtain input from small entities early in the rulemaking process, before policymakers' prior assumptions are calcified. Small Entity Representative (SERs) provide the Panel with important perspective on the potential economic impacts of complying with the regulations under consideration and the alternatives intended to minimize these impacts. In addition, SBREFA requires the CFPB to collect the advice and recommendations of 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.8

As the Bureau is aware, there are over 3,000 credit card-issuing credit unions and 85 percent have assets less than $850 million.[9] As highlighted throughout our letter, reducing the amount issuers may charge for late payments would potentially have a significant adverse impact on all issuers and force them to review the viability of their credit card products. The impact on smaller issuers would be even greater as some have indicated they may have to consider exiting the market altogether. In addition, 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. Indeed, any regulatory change to late fees would ultimately impact the entire credit card market and bring with it the potential to change the competitive position of small issuers in ways that must be explored through the SBREFA process. Prior to proposing this rule, the Bureau failed to convene a Small Business Review Panel. It must go back and follow the proper procedure.

[8] *See* 5 U.S.C. § 609(d), as amended by Pub. L. No. 111–203, § 1100G(a), 124 Stat. 1376, 2112 (2010).

[9] The number of card-issuing credit unions is based on an analysis of credit union balance sheets. Those with non-zero credit card loan balances are considered card issuers.

The rulemaking should be postponed until after the U.S. Supreme Court resolves the dispute over the constitutionality of the Bureau's funding structure.

The U.S. Supreme Court granted certiorari to review the determination made by the Fifth Circuit Court of Appeals that the CFPB's funding structure is unconstitutional.[10] The case directly implicates the exercise of the Bureau's authority and may ultimately put into question the legality of any rulemakings established prior to the Court's decision. The Bureau itself has argued that the case "calls into question virtually every action the CFPB has taken in the 12 years since it was created."[11] Given the broad implications of the case, we believe the Bureau should proactively postpone further development of this rulemaking until the legal questions before the Court are resolved.

As the Bureau acknowledges in its proposal, credit cards are a widespread product used by millions of consumers in their everyday financial lives. Exposing such a popular financial tool to uncertainty and potential disruption merely to rush through changes to a decade-long standard of practice is both irresponsible and unnecessary. The more reasonable course of action would be to adhere to principles of fairness and wait until resolution of the Bureau's legal status before considering this proposal further.

The CFPB's research and data underlying the proposal is weak and does not support its proposed reduction of the late fee safe harbor threshold.

The CFPB prides itself on being a data-driven organization. However, in this instance, the Bureau conducted little research on the issue at hand prior to proposing this rule. The research and data outlined in the proposed rule simply does not support a dramatic reduction in the safe harbor dollar threshold or the elimination of the threshold's annual inflation adjustment.

In justifying its rule, the Bureau used the Federal Reserve's Y-14 and Y-14+ data. These sources contain data on credit cards and focus on the largest banks. However, there are several key differences between banks and credit unions to keep in mind:

- Credit unions are community-based, not-for-profit financial cooperatives. As a result, credit union "profits" (*i.e.*, income) are reinvested into the communities they serve, their members through low-cost financial products, dividends and higher savings rates, or better service for their members.
- Credit unions have more integrated product offerings. The loss of the risk signal that credit card late fees provide will make other product offerings provided to that individual member riskier.
- Credit unions generally have lower fees than for-profit banks.

The lack of credit unions in the Y-14 data means that the Bureau has essentially conducted **no** analysis of the effects the proposed rule will have on our unique segment of the market. Given the

[10] See Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616 (5th Cir. 2022).
[11] Petition for a Writ of Certiorari at 11, Consumer Fin. Prot. Bureau v. Comm. Fin. Servs. Assoc. of Am., No. 22-448 (Nov. 14, 2022 U.S.).

stark differences between credit unions and banks, any data analysis based on the Y-14 data cannot be extrapolated to credit unions offering credit cards.

The proposal lacks a sufficient cost-benefit analysis nor does the proposal contain a comprehensive outline of potential effects.

The Bureau did not conduct a traditional cost benefit analysis, instead citing simple back-of-the-envelope calculations from the Federal Reserve's Y-14+ data set of mass market bank data. This data applies to large banks with over $100B in assets and have zero coverage of credit unions. There is also no systematic economic analysis of a "but-for world" in which the rule is implemented, and effects are forecasted or quantified.

<u>Cited Benefits</u>

- The Bureau assumes that future collected late fees will drop over 70 percent by calculating total fees if fees had been $8 rather than the fees actually collected. Consumers are considered passive and that there would be no behavioral response to the lower fee.
    - Firms in the Y-14 data will have fee revenue go from $12 billion to $9 billion.

<u>Cited Costs</u>

- The Bureau assumes consumers will be deterred from more late fees through assumption.
- The Bureau expects loss revenues to be absorbed by firms and not entirely passed through to consumers. This is justified by an assumption that the industry is imperfectly competitive with a resulting excess industry profit.
- The possibility of a reduction in the supply of credit is never considered as the market is assumed to be oligopolistic.
- The cost of losing late fees as a tool of risk management is never addressed.

The Bureau rejects, without explanation, academic studies used by the Federal Reserve during the promulgation of the current safe harbor in 2010.

The Bureau relies on academic studies to justify its assertion that little will occur in the but-for world where the credit card late fee proposal will be implemented. However, the Bureau rejects studies that were used by the Federal Reserve Board (Federal Reserve) in their 2010 rulemaking. But sometimes the Bureau accepts a study rejected earlier if it supports a point they want to make. Often the cited works have not been peer reviewed. The Bureau rejects work that uses older data as no longer relevant but then uses even older data if the conclusion supports their position. Additionally, the Bureau makes use of new scholarship in behavioral economics while missing key works in financial economics. It appears the Bureau is selecting research in a manner consistent with confirmation of their pre-existing beliefs and not an impartial analysis to determine the most likely costs and benefits associated with implementation of their rule.

The Bureau has failed to appropriately consider the role of risk in determining the appropriate level of late fees.

Any analysis is going to depend on the economic model the analysts are using. The Bureau shows a fundamental misunderstanding of how credit markets work. The Bureau's analysis of the benefits and costs that will occur if their rule is implemented is premised on unsecured lending, via credit cards, having economic rents. In its analysis the Bureau states "[a]s the recent profitability of consumer credit card businesses suggests that these markets are imperfectly competitive, the Bureau expects less than full offset, with consumers gaining in total from reduced late fees." However, the assumption of "imperfect competition" is contradicted by the following facts:

1. Over 600,000 unique card offers between 1999-2007 which are issued by big banks, small banks, credit unions, etc.[12]
2. Credit cards exist in a competitive environment which includes payday lenders, unsecured loans, buy now pay later credit, etc.

The Bureau did not conduct any market analysis to justify its assertion that the market structure is imperfectly competitive which implicitly assumes an oligopoly free from competitive pressures. Normal economic modelling would assume zero economic profits and work out the implications. Failing such an assumption, some empirical work would have to justify the oligopoly assumption. This analysis fails best practices.

Credit markets are not like other markets as their central function is in the management of risk. The Bureau's analysis is devoid of the concept of risk management which must be considered by any financial economist. Fees in general, and late fees specifically, are an important feature of a financial contract as they provide valuable signals about a consumer's risk profile. If one accepts that late fees are an expensive signal and correlate with eventual default, then the loss or weakening of permissible late fees make the management of risk more difficult. This is not even considered by the Bureau's economists.

The Bureau fails to account for the role of risk in finance, instead relying on theories of behavioral biases which assume consumer decision making is flawed resulting in sub-optimal or irrational choices. The Bureau cites studies showing that a significant percentage of consumers do not consider fees or are incapable of managing their finances. Behavioral economics is a promising field of economics that has made great strides in the past 10-20 years, but these studies should be cautiously used in any market level studies. Simply put, there is no general theory of behavioral economics. There are micro studies to show behavioral biases are consistent with some data but there is no study that shows which consumers will have which biases. Nor are there studies that quantify the severity of a behavioral bias or show how consumers adapt. For example, suppose we assume a large percentage of the population does not know late fees exist, but the behavior theory cannot tell us anything about how and whether the people who pay the late fees know they exist. Yet we see late fee payers repeatedly pay late fees. The assumption that individuals are always ignorant is inaccurate and late fees should be treated as another credit decision in a series of decisions. The Bureau uses behavioral economics despite fundamental limitation outside of specific individual contexts – but it is not generalizable.

[12] 88 Fed. Reg. 18908.

The Bureau has failed to conduct a thorough analysis of deterrence, which is relevant to late fee levels.

No analysis of deterrence levels has been done as part of this proposal. The Bureau does not recognize a tradeoff between the level of late fees and lateness. Despite the Federal Reserve Board relying on Agarwal et al (2013) study that is premised on the incentives that fees provide.[13] The CFPB dismisses evidence of this trade off using an argument based on the time period of the data that the Bureau does not consistently apply in other cases. The Bureau does note that the average late fee in the Y-14 data for 2019 was $31. This is well below the $8 threshold and a change of this magnitude will have large effects on deterrence. But these effects have not been studied by the CFPB prior to issuing this proposal.

Deterrence in credit card fees is simplified since the probability of being caught is 100 percent and not being caught is 0 percent. Thus, a consumer is deterred from being late if the cost of the late payment, the late fee, is greater than the alternative use of the funds. If late payments persist it can escalate to a credit report line in 30 days, after 60 days the repricing of credit or a reduction in credit line and after 180 days a charge off due to delinquency. The cost of not paying is escalating over time where the late fee is the first punitive act.

The alternative is where the model becomes more complex. The Bureau acknowledges that not making a credit card payment is implicitly a form of credit. A simple scenario could be where $100 is owed but money is needed for an alternative use like paying for gas so a consumer can get to work. Without the ability to pay late the consumer in this example would need an alternative source of credit. Some consumers can dig into savings, borrow from a friend or relative or use an alternative lender. There is a continuum of alternative costs as there are many types of people in unique situations. A late fee, as an implicit cost of borrowing, may be a rational economic fee to pay for many consumers but not for others. Given the different type of consumers, the late fee will implicitly determine which consumers will pay on time and which will not.

This model is a great paradigm for thinking about consumers who treat late fees as an economic decision. For consumers who are more accurately described by behavioral economics this model does not apply as well. If late fees were set to draconian levels some people may still not pay on time, while the rational economic actors would. However, if fees were set to zero then there would be an implicit free credit until the non-fee punishments became applicable 60 or more days later. In that world many more people would not pay on time as they could find short-term alternative uses for their money.

This gets to the central failing of the CFPB's analysis of deterrence. It fails to account for the fact that deterrence is a continuum. The Bureau's analysis just states if deterrence is likely to occur but never models the trade-off between late fee and late payment. The Bureau claims deterrence would be sufficient based on the Agarwal (2013) article. However, this article has its shortcomings as a

[13] Sumit Agarwal *et al.*, Regulating Consumer Financial Products: Evidence from Credit Cards, 130 Quarterly J. of Econ., at 111-164 (February 2015), *available at* https://doi.org/10.1093/qje/qju037.

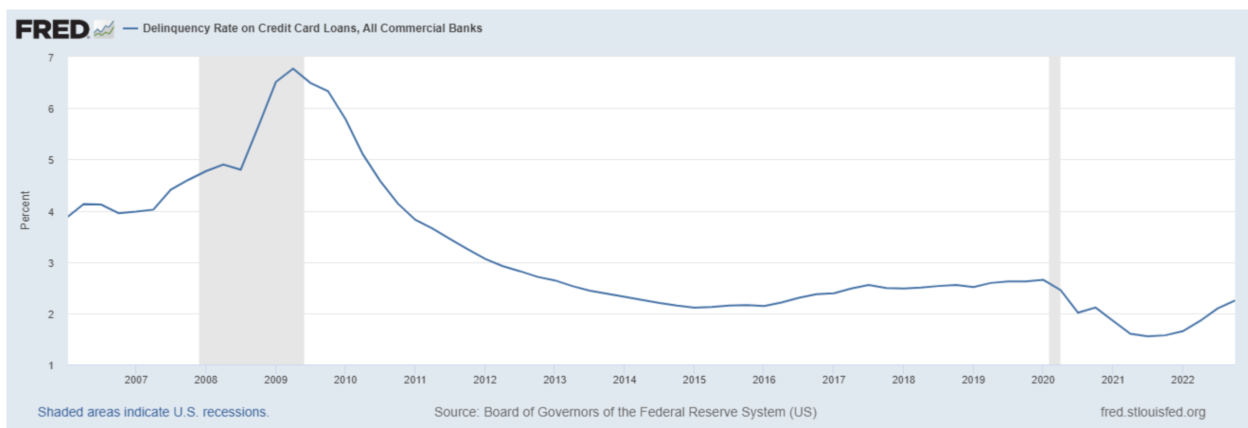
predictive tool.[14] But Agarwal finds that fees cause a reduction in the probability of a late fee in the next month. The learning dynamic in the paper is premised, like most learning, in learning of the fees and being deterred to taking them on.

Grodzicki (2020) predicts that late fees would be more likely when these fees are less costly.[15] The Bureau acknowledges the work of Grodzicki to support some arguments but in this case when he points out that late fees would occur more frequently as a result of low deterrence the Bureau states: "While the Bureau recognizes that this paper suggests that consumers may engage in more late payments when they are less costly to consumers, for the reasons discussed below, the Bureau does not consider this robust evidence that the proposed $8 safe harbor late fee amount would not have a deterrent effect."[16] The main rationale is that "In particular, the late fee provisions in the Board's 2010 Final Rule were implemented in August 2010, as the U.S. economy was still dealing with the aftermath of the Great Recession, and thus it was difficult to attribute consumer finance statistical trends to particular events." Older data is discounted in the Bureau's deterrence analysis but not in when used by other authors in defense of their position.

The Bureau fails to understand the role of late fees in risk management and its proposal would significantly hamper late payments as a useful metric of risk.

A key benefit of late fees is its use as a risk management device. As can be seen by figure 1 which shows the delinquency rate[17] on credit cards at commercial banks, the rate of delinquency is rarely over 3 percent.

Figure 1



The group of delinquent accounts, many which become current again, is a small, self-selected group of customers. It is commonly held that delinquencies are more likely to default. The Bureau

[14] This academic work, like many academic works, is an interesting contribution of local effects but not sufficient for predicting large structural changes.
[15] Grodzicki et al., "Consumer Demand for Credit Card Services," Journal of Financial Services Research (2022), *available at* https://link.springer.com/article/10.1007/s10693-022-00381-4.
[16] 88 Fed. Reg. 18915.
[17] Delinquency is usually defined as 90+ days past due. However, credit unions are subject to stricter reporting requirements with loans 60+ days past due being delinquent compared to banks' 90+ days past due.

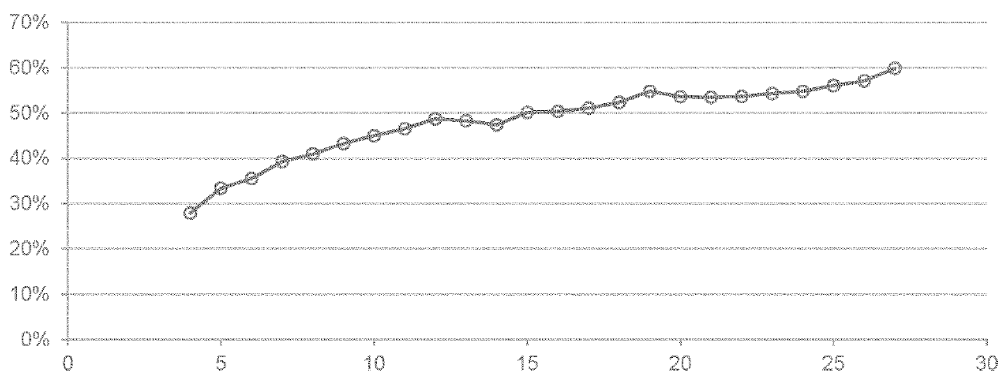
acknowledges this when the Federal Reserve's analysis is reviewed and state "[t]he Board acknowledged that this data [used by the Board] also indicates that consumers who pay late two or more times over longer periods (such as 12 or 24 months) are significantly riskier than consumers who pay late a single time."[18]

The biggest exposure to credit card issuers is the Exposure at Default (EAD) and the Loss Given Default (LGD). In unsecured lending, such as credit cards, the EAD is usually defined as the credit limit. The Bureau mentions that this is often mitigated when after 60 days the credit issuer begins to lessen the credit available. However, the LGD is what is expected in default. At any given time, the LGD is the outstanding balance on the credit card. The CFPB states that late fees are a profit center. But rather, given the LGD, late fees are a method of recuperating income to mitigate the potential LGD.

A key factor in risk management is to identify the borrowers who are bad risks. A borrower must miss multiple payments to become delinquent. Many borrowers who become defaulters will be late payers various times before they become defaulters. The late payment is the first step in a default process that is costly to any credit card issuer. An important tool in managing the risk that defaulters present is a signal that identifies defaulters early in the process.

The CFPB claims that late fees are not needed to manage risk based on calculations from the Y-14 data (which, again, do not include credit unions), that show 60 percent of late payers pay within 30 days. This is replicated in the proposal's Figure 4.

Figure 4: Share of Late Accounts Current at End of Months by How Many Days Passed



Another way to view this data, as produced by the Bureau itself, is that being late has a 40 percent probability of being two months late. Which is two-thirds of the way to delinquency (i.e., late for 90 days). Given that Figure 1, data from the Federal Reserve Board, has credit card delinquency occurring in less than 3 percent of accounts, it is obvious being late, even in the first month, is a strong predictor of default risk. Additionally, except for fraudsters, few borrowers borrow and go straight to default. Being late, and then catching up, is a sign that a consumer is struggling. A key

[18] 88 Fed. Reg. 18915.

problem of any signal is that to be credible it must be expensive and difficult to replicate. A minimal late fee, such as $8, would increase the number of late payers as being late has little consequence. Thus, the value of the signal is in deterrence. A lower late fee weakens the value as a signal and as a tool of risk management.

The Bureau notes that there is a lack of competition in late fees. This emphasizes the flawed understanding the CFPB has in its economic analysis. If one understands late fees as a risk management device, then there should **not** be competition on late fees. To compete in late fees would be to compete for high-risk borrowers who understand they struggle to pay their bills. In a competitive market environment, such as credit card origination, there may be niche lenders who will want to operate in a high-risk lending pool and lower fees. However, the Bureau by eliminating fees well below where they currently are would reduce options to consumers who know they will be diligent in paying their bills.

The Bureau makes the argument that lower fees are needed to incentivize lenders to encourage timely payments with “nudges,” or behavioral tricks. This can include text messages, email notifications, automatic payment schedules etc. This again shows a lack of understanding by the Bureau of the purpose of late fees. If late fees are a risk management device, and not solely a profit center, lenders will want to encourage timely payments. If a consumer is reminded and encouraged to pay and still doesn’t, then the signal value of a late fee of a possible default event is even stronger. In this analysis, the CFPB has shown a fundamental lack of understanding of the role late fees play as risk management devices. Thus, the cost benefit analysis of the CFPB is at best incomplete but misleading.

Credit unions are active participants in the credit card market and credit union credit cards are often less expensive than those offered by banks.

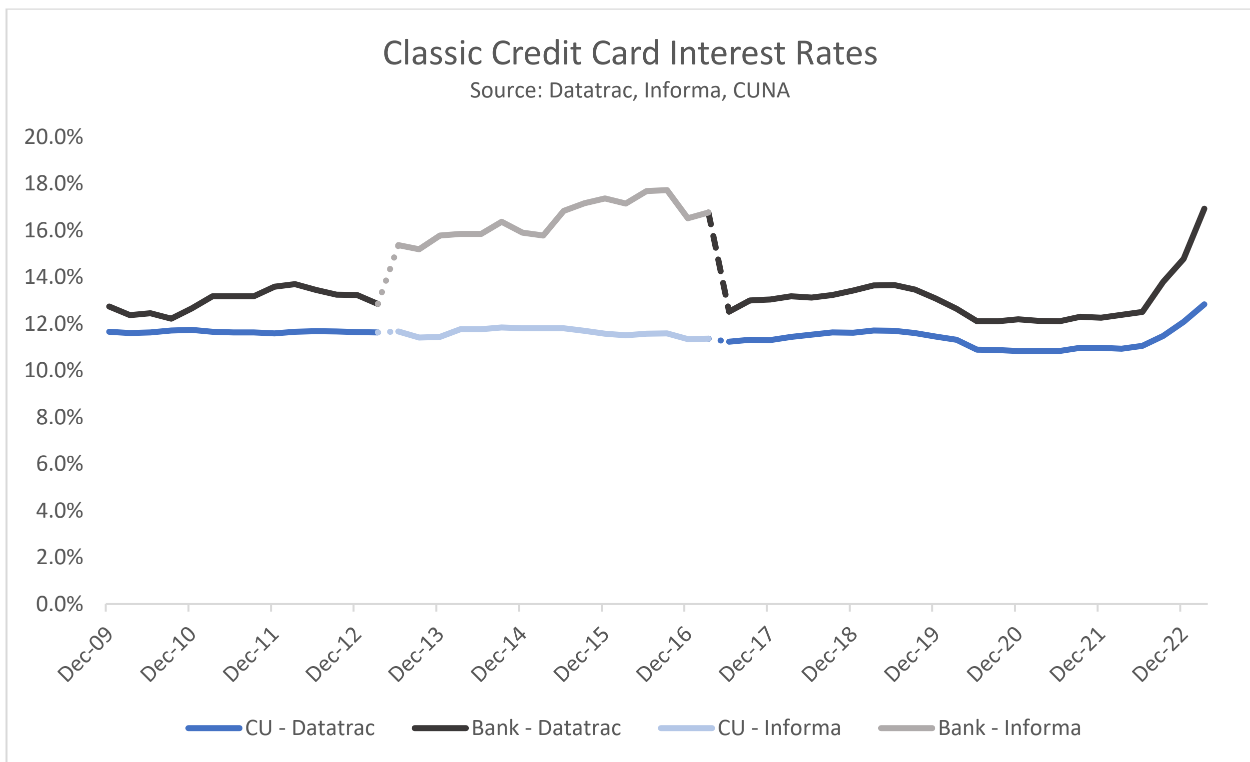
As the CFPB considers its proposal, we urge it to be cognizant that restrictive regulatory policies have the potential to divert credit unions’ resources and attention from meeting their members’ needs. The credit unions that offer credit card programs do so as a service to their members. Credit unions operate for the purpose of promoting thrift, providing credit, and providing other financial services at competitive interest rates, which are often lower than those offered by banks. The data clearly demonstrates that credit unions are fulfilling this mission even though they face regulatory and business hurdles in the competitive credit card market.

Credit cards as a service offering, measured by bank or credit union reporting of outstanding credit card loans, are more common at credit unions than banks. 64.5 percent of credit unions serving 93.5 percent of all credit union members offer consumer credit cards, but only 17 percent of Federal Deposit Insurance Corporation (FDIC) banks had outstanding credit card loans despite banks holding most of the market for revolving credit.

As member-owned financial cooperatives, credit unions have a vested interest in minimizing fees related to their products and services, including credit cards. Nevertheless, the services offered by credit unions do have associated costs. It is reasonable for credit unions to assess appropriate fees and charge fair interest rates for such services, particularly because the costs are often borne by

the credit unions membership. Credit unions also face regulatory pressures to maintain net worth that often exceeds the well-capitalized level and, unlike publicly traded banks, credit unions have limited sources from which they can build capital. Therefore, credit card fees or interest charges are necessary for credit unions to maintain these programs for their members.

As illustrated below, credit unions offering credit cards do so at lower interest rates than banks. Clearly, consumers benefit from having diverse credit card options. As of December 2022, credit unions' average interest rate for classic credit cards stood at 12.83 percent compared to banks' average interest rate of 16.93 percent. This trend holds true for most credit cards, including niche credit cards associated with special rewards programs. In addition, the average credit card late fee is about $10 cheaper at a credit union than at a bank, according to CUNA's latest Membership Benefits report.[19] This cost difference serves as further evidence that credit unions are the best financial option for America's consumers but the Bureau's pursuit of a substantially decreased permissible late fee may ultimately hurt the viability and availability of credit unions' credit card programs, which in turn hurts consumers.



[19] CUNA National Credit Union Member Benefits Report *available at* https://www.cuna.org/advocacy/credit-union---economic-data/Benefits-of-Credit-Union-Membership.html.

The Bureau should withdraw this proposal or, at a minimum, postpone progress until it can conduct a proper analysis of the entire credit card market and the potential outcomes of changing late fee levels.

The proposed rule's lack of data analysis coupled with statements by the CFPB made over the past several months show a clear lack of understanding of how the rule will impact the credit card market. Notably, some of the assumptions made in the proposal are unmistakably not supported by substantial data and research of credit union lending in this market. We respectfully suggest that if the CFPB does not intend to curtail or disrupt consumers' access to unsecured credit, then it should engage in a more complete analysis of the market before going down the path of proposing a rule. As we have seen with this rulemaking, once a proposal is introduced in the Federal Register it begins to have immediate market implications. Further, we were very concerned that certain parts of the rule were proposed without a complete analysis of the impact on credit unions. Such a solicitation of feedback would arguably be more appropriate if included in an Advance Notice of Proposed Rulemaking (ANPR) or a SBREFA outline, rather than through a formal Notice of Proposed Rulemaking.

The insufficient research on which the CFPB has relied to include credit unions products in this proposed rule, the lack of understanding of credit unions that the CFPB has demonstrated throughout the rulemaking process, and the many other impact concerns we have raised in this letter suggest the best course of action would be for the Bureau to simply withdraw the proposal altogether.

Federal credit unions, subject to a statutory usury cap, would be competitively disadvantaged relative to other credit card issuers in their response to a dramatically decreased safe harbor.

It is widely agreed if the Bureau's late fee rule goes into effect as proposed, credit card issuers are likely to recover the costs of collecting late payments through increasing interest rates, reducing rewards, tightening access to credit, adding or increasing annual fees, and/or changing pricing models. The Bureau seems to accept this across-the-board increase in costs as providing "greater transparency" or "consumers gaining in total from reduced late fees." But what the Bureau has no consideration of is the likely impact on competition and the ability of small card issuers to survive in an environment with dramatically changing card economics.

On that point, credit unions face significant limitations which do not impact other credit card issuers. Unique among credit unions is the statutory interest rate cap that federally chartered credit unions are subjected to by law. The Federal Credit Union Act caps credit union interest rates at 15 percent but provides the National Credit Union Administration (NCUA) Board limited ability to increase the cap in certain instances.[20] During its January 2023 meeting, the NCUA Board approved a continuation of an 18 percent maximum loan interest rate for federal credit unions

[20] 12 U.S.C §1757(5)(A)(vi)(I).

through September 10, 2024.[21] Federal credit unions are unable to provide interest rates on credit cards and most other loan products higher than this threshold.

Although the average credit union credit card interest rate is currently below the statutory limit, the cap could affect credit unions' ability to recoup the costs of late payments in the same manner as other card issuers. The hurdles associated with supporting a credit card program at a credit union is especially heightened in a rapidly increasing interest rate environment. While this cap is directly implicated by the Bureau's proposed policy change, there is zero discussion of this issue in the rule nor does there appear to be any analysis of the potential challenges for federally chartered credit unions that issue credit cards. It is clear the Bureau's proposal was created with the largest card issuers in mind and the Bureau has essentially ignored all other participants in the market.

If the Bureau moves forward with this rulemaking against the urging of credit unions, then it should provide card issuers with an extended multi-year window to make necessary changes to consumer disclosures and to reprogram systems.

The proposed late fee final rule, if adopted, would take effect 60 days after publication in the Federal Register and solicits comment on whether the Bureau should provide a mandatory compliance date that is after that effective date. Credit card issuers, especially smaller issuers reliant on vendors, will need an extended compliance window to accurately implement the necessary changes to systems and consumer disclosures.

Based on feedback from credit unions and vendors, only a multi-year timeframe would be sufficient for card issuers to revise their systems and processes in coordination with vendors and to make additional changes necessary to meet the requirements of a reduced late fee safe harbor threshold. The Bureau would also be warranted in adopting a staggered implementation period with the largest issuers being subject to the rule before community-based providers. A staggered implementation strategy has been deployed for complex rules like the Financial Accounting Standards Board's current expected credit loss accounting standard in recognition of certain rules' high one-time costs and the advantages larger financial institutions have in negotiating with vendors.

Conclusion

We hope our comments provide clarity to the CFPB about the detrimental impact this proposal is likely to have on consumers' access to affordable credit card options from credit unions, and credit unions' ability to innovate in the market. This dramatic proposal has already started to affect future credit union participation in the market, as some credit unions are evaluating whether they should remain in it. To be clear, the Bureau has promulgated a rule intended to be a solution to a nonexistent problem in the credit card market. Accordingly, we urge the CFPB to provide

[21] *See* National Credit Union Administration, Board Action Bulletin (Jan. 26, 2023), *available at* https://ncua.gov/newsroom/press-release/2023/board-extends-loan-interest-rate-ceiling-approves-annual-performance-plan.

immediate clarification on the data underlying its proposed rule and halt further rulemaking in this area to ensure no harm is done to consumers or their access to credit.

As the Bureau considers stakeholder feedback, including those provided herein, we call on the Bureau to engage in additional research on consumer impacts and abide by the required SBREFA process. The Bureau cannot finalize this rulemaking without sufficiently studying the impact this rule could have on small credit unions and their members. Alternatively, we suggest re-proposing this rule as an ANPR because the Bureau is essentially seeking feedback on ideas for which the Bureau has not completed comprehensive research. In short, before finalizing this rule, we strongly urge the Bureau to go back and show its work because the solution proposed does not make sense for credit union members.

On behalf of America's credit unions and their 135 million members, thank you for your consideration. If you have questions or require additional information related to our comments, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,

Alexander Monterrubio
Deputy Chief Advocacy Officer & Managing Counsel

Attachments

1. Economic Analysis of the CFPB's Proposed Rule prepared by Steve Bronars, Ph.D. of Edgeworth Economics LLC on behalf of the Credit Union National Association. May 3, 2023.

Economic Analysis of the Consumer Financial Protection Bureau's Proposed Rule

"Credit Card Penalty Fees (Regulation Z)"

by Stephen G. Bronars

Qualifications and Assignment

1. I am a Partner with Edgeworth Economics LLC., a consulting firm specializing in economic and statistical analysis. I worked previously at Welch Consulting (now part of Charles River Associates) for more than eight years and prior to that I was the Leroy Denman Jr. Regents Professor of Economics at the University of Texas at Austin. I have submitted expert reports and testified on economic damages and liability, and on statistical analyses and statistical sampling for litigation. I earned a PhD in Economics from the University of Chicago. I have published many peer-reviewed papers on labor economics, applied microeconomics, econometrics, and applied statistics in academic journals. Edgeworth Economics is being compensated for this report.

2. I was hired by the Credit Union National Association (CUNA) to provide my opinion concerning the economic analyses and empirical evidence cited in the Consumer Financial Protection Bureau's (CFPB) Proposed Rule: "Credit Card Penalty Fees (Regulation Z)."[1] I was also asked by CUNA to provide my opinion concerning the possible economic impact of the proposed rule on credit card issuers, especially credit unions that issue credit cards, as well as credit card customers.

Summary of Conclusions

3. My review of the CFPB's proposed rule and economic analyses indicate that the CFPB did not provide a valid and reliable analysis of the economic impact of the proposed rule on either credit card issuers or credit card customers. The CFPB did not conduct an analysis of the costs and benefits of the changes required by the proposed rule. The CFPB did not provide a valid economic analysis of the impact of the proposed rule on:

[1] Federal Register, Vol. 88, No. 60, March 29, 2023, Proposed Rules, pp. 18906-18951, which will be referred to as the "proposed rule" throughout this declaration.

- The increased frequency of late payments caused by lower late fees.
- Changes in annual percentage rates (APRs), credit limits, minimum payments and other credit card terms caused by lower late fees.
- The increased risk of charge-offs and losses faced by credit card issuers resulting from the increase frequency of late and skipped payments caused by lower late fees.
- The much greater difficulty in adapting to lower late fees faced by credit unions that cannot charge APRs of more than 18 percent.
- Which customers will benefit, and which will be harmed by the mandated decrease in late fees and the resulting changes in other credit card terms.
- The decrease in access to credit, and reduction in credit limits for customers with lower credit scores caused by lower late fees.

4. The CFPB did not conduct a proper Initial Regulatory Flexibility Act analysis and failed to study the economic impact of the proposed rule on small businesses, especially small credit unions. The CFPB also did not study how freezing credit card late fees at $8, which is substantially less than the typical current late fee, would impact credit card issuers and customers in an economy with a higher inflation rate and market interest rates than at any time since safe harbor penalty late fees were first regulated in 2010.

Final Rule in 2010

5. In June 2010 the Federal Reserve Board submitted a Final Rule, which amended Regulation Z, which implemented the Truth in Lending Act, to enact provisions of the Credit Card Accountability Responsibility and Disclosure Act (the CARD Act) of 2009. This 2010 Final Rule set the safe harbor penalty late fee for credit cards at $25 with the provision that (i) the safe harbor penalty late fee is $35 for each subsequent late payment in the next six billing cycles, (ii) the safe harbor fee amounts would be

indexed to inflation, and (iii) credit card issuers could charge a higher penalty fees if they could demonstrate that pre-charge-off collection costs were higher than these amounts.[2]

Introduction

6. The CFPB's proposed rule substantially impacts the credit card market because it: (i) drastically reduces the safe harbor credit card late fee to $8, (ii) eliminates higher safe harbor late fees for subsequent late payments within a six-month period, (iii) eliminates annual inflation adjustments for safe harbor late fees, (iv) requires that a late fee not exceed 25 percent of the required minimum payment, and (v) establishes a 15-day grace period before late fees can be assessed. Because of inflation adjustments, the current safe harbor late fee for credit card late fees based on the Federal Reserve Board's 2010 rule is $30 with a $41 safe harbor for repeated late payments that occur within six billing cycles.

7. The proposed rule mandates a more than 70 percent decline in the safe harbor credit card late fee and a more than 80 percent decline in the safe harbor fee for subsequent late payment violations within a six-month period. The proposed rule will mandate an unprecedented decline in late fees, and the CFPB is unable to reliably predict how this massive policy change will impact credit card issuers or credit card customers. The CFPB's economic analysis of the proposed rule is overly simplistic and narrow in its focus. The CFPB does not estimate the magnitude of the increase in late payments or skipped payments that will result from drastically smaller penalties for late payments. The CFPB presents no analyses or empirical evidence to predict the number of customers who currently make payments on time and avoid late fees but will be incentivized to make late payments because of the substantial decline in penalty fees.

8. The proposed rule will almost certainly impact the terms, other than late fees, of millions of credit card accounts but the CFPB cannot reliably predict these changes. The proposed rule will have a substantial adverse impact on credit unions that issue credit cards because of the legal limitations on the (APRs charged by credit unions but the CFPB does not address this issue. The data used by the CFPB for

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[2] The CARD Act went into effect on August 22, 2010. The 2010 Final Rule is available at https://www.govinfo.gov/content/pkg/FR-2010-06-29/pdf/2010-14717.pdf

its empirical analyses do not include credit unions.[3] The CFPB does not attempt to explain how credit card issuers will respond to much lower late fees if increases in APRs are limited by regulations, as they are for credit unions. The rule will also disproportionately impact consumers with low credit scores and will likely reduce their access to credit, but the CFPB does not estimate the loss in economic welfare from lower access to credit for this group of customers.

9. The CFPB understands that the proposed rule will have a substantial impact on the credit card market. Throughout the proposed rule the CFPB discusses the many possible ways in which the credit card market may react to the much lower safe harbor late fee.[4] However, the CFPB's discussion of the possible changes in credit card terms and policies falls well short of an economic analysis that would explain and estimate the expected costs and benefits of the changes caused by the proposed rule. By setting dramatically lower safe harbor late fees, the CFPB is initiating a process that will lead to different sets of terms for millions of credit card accounts.

10. The CFPB has started this process without presenting a valid and reliable analysis of the costs and benefits of the expected new credit card terms for either credit card issuers or customers. The new regulations will impact various segments of the credit card market quite differently, so a valid analysis by the CFPB would need to account for the differential impact of the proposed rule on different groups of credit card issuers and customers. The CFPB does not attempt to measure how the proposed rule will adversely impact either credit unions or the millions of credit card customers with lower credit scores who make timely credit card payments and largely avoid late fees. The CFPB repeatedly makes excuses for why it has not presented a proper cost-benefit analysis for the economic impact of the proposed rule. The CFPB's most common reason for failing to analyze and estimate the costs and benefits of the proposed rule for customers and credit card issuers is the lack of appropriate and reliable data.[5]

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[3] The CFPB relies on the Federal Reserves Y-14 data which includes information for larger banks.

[4] Proposed Rule, pp. 18914, 18923, 18933-18936, and 18939-18940.

[5] I counted 29 times in the Proposed Rule when the CFPB indicated that it was unable to estimate or quantify an important measure because it lacked the appropriate data.

The CFPB Does Not Analyze the Impact of the Proposed Rule on the Frequency of Late Payments

11. A fundamental concept in economics is that individuals respond to incentives. If penalty late fees are lowered by more than 70%, as the CFPB intends from the proposed rule, more late payments on credit cards will occur. If higher penalty fees for multiple late payments within a six-month period are eliminated, as the CFPB would prefer, customers skip payments or make multiple late payments within a six-month period at a higher frequency than before. If a 15-day grace period is allowed before a penalty fee is assessed, more credit card customers will take advantage of this grace period and delay their payment. If late fees are frozen at $8 while the cost of other goods and services are increasing due to inflation, the frequency of late payments will increase over time as the real value of the late fee declines. While the CFPB recognizes that each of these responses will happen as the result of its proposed rule, it provides no valid or reliable estimates of the magnitude of any of these responses.

12. The CFPB cites the study by Sumit Agarwal et al., "Regulating Consumer Financial Products: Evidence from Credit Cards" that examined the consequences of the changes in late fees that followed the passage of the Card Act in 2009. The CFPB states that this study "tentatively suggests" that the expected 70% decline in revenue from the large decline in late fees will be less than fully offset by increases in other fees or APRs.[6]

13. The CFPB's suggestion about the impact of the proposed rule is flawed is flawed because late fee revenue depends on both the fee per late payment and the number of late payments that are made. The CFPB has no reliable evidence on the elasticity of the response of customers because, as noted by the CFPB, the Agarwal et. al. study, and another study by Grodzicki, et. al., relied on data from changes that "were implemented in August 2010, as the U.S. economy was still dealing with the aftermath of the Great Recession."[7] The CFPB does not consider these studies to be robust evidence of the causal impact of a reduction in late fees because they rely on before and after comparisons of behavior during a period in

[6] Proposed Rule, p. 18934.
[7] Proposed Rule, p. 18920

which the U.S. was recovering from the Great Recession.[8] In other words, the CFPB cannot reliably predict how lower late fees will impact the frequency of late credit card payments because the data from independent studies coincides with the recovery from the Great Recession.

14. The CFPB said that in developing the proposed rule it studied the impact of the decline in late fees after a customer is outside the six-month period of higher late fees due to repeated late payments. The study attempted to determine whether the lower late fee in "month seven" leads to a distinct rise in late payments. The CFPB states "In a random subsample from account-level data available in 2019 from the Y–14 data, this statistical analysis did not support that the lower late fees in "month seven" have an effect on the late payment rate, at conventional confidence levels."[9] A study based on a random subsample of credit card accounts during the transition in month seven from a possible elevated late fee to the standard late fee is inadequate for estimating the elasticity of the response of all credit card customers to the substantially lower late fees mandated in the proposed rule. The CFPB has not reported the magnitude of the effect it found or the sample size in its own unreliable study. The CFPB's "month seven" study is based on a relatively small and unrepresentative sample of credit card accounts and focused only on the subsequent payments of accounts that recently incurred a late fee.

15. The CFPB repeatedly claims that even with a more than 70% decrease in penalty late fees the cost to credit card issuers per late payment is unlikely to increase. The CFPB seems to believe that its inability to obtain a reliable estimate of the impact of the proposed rule on the frequency of late payments is unimportant because the proposed $8 safe harbor late fee currently covers the costs associated with each late payment regardless of the number of late payments. The CFPB also presumes, without providing an economic analysis or empirical study, that providing incentives for more late payments will not spill over into higher costs to credit card issuers through more delinquencies and more charge-offs.

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[8] The CFPB states that the Grodzicki et. al. study "suggests that consumers may engage in more late payments when they are less costly to consumers" but "does not consider this robust evidence that the proposed $8 safe harbor late fee amount would not have a deterrent effect." Because the changes implemented in August 2010 occurred while still dealing with the aftermath of the Great Recession it would be "difficult to attribute consumer finance statistical trends to particular events." Proposed Rule, p.18920.

[9] Proposed Rule, p. 18920

16. Even if the CFPB is correct and the decline in late fee revenue will be less than fully offset by an increase in other fees or APRs, some current credit card customers would not receive a credit card account if the late fee was $8 for every late payment. Any customer who would be denied a credit card because of the mandated reduction in penalty late fees is clearly made worse off by the CFPB's proposed rule. The CFPB has not attempted to estimate how many customers would lose their credit card because of the proposed rule.

The CFPB Provides No Economic Analysis to Determine the Overall Impact of the Proposed Rule

17. The CFPB states that the Federal Reserve Board noted in its 2010 Final Rule that "it would be inconsistent with the purpose of the [CARD Act] to permit card issuers to begin recovering losses and associated costs through penalty fees rather than through upfront rates.''[10] Despite this statement the 2010 Final Rule set a $25 safe harbor fee, allowed for a higher late fee ($35) for repeated late payments within a six-month period, and indexed safe harbor late fees to inflation.

18. The CFPB claims that the "recent profitability of consumer credit card businesses suggests that these markets are imperfectly competitive" which indicates to the CFPB that other fees and APRs may not increase to completely offset the decline in late fee revenue.[11] The "recent profitability" that suggests to the CFPB that there may be a lack of competition among credit card issuers, is during a period when the Federal Reserve kept interest rates historically low, and the Federal Government provided trillions of dollars in economic consumer assistance to mitigate the economic consequences of COVID-19 policies. These government policies reduced credit card delinquencies and charge-offs and contributed to the financial health of credit card issuers.[12] As market interest rates and inflation increase, and if the economy heads into a recession, the profitability of credit card issuers will change and the CFPB's suggestion that the credit card market is imperfectly competitive may look much different.

[10] Proposed Rule, p.18913.
[11] Proposed Rule, p. 18933.
[12] https://fred.stlouisfed.org/series/CORCCACBS and https://fred.stlouisfed.org/series/DRCCLACBS

19. Although the CFPB suggests that the credit card market might be imperfectly competitive, the CFPB March 2022 Credit Card Late Fee Report found that many credit card issuers charged late fees that were lower than the safe harbor late fee. The Report also explained that some credit card issuers offer credit card accounts with no late fees. Competition among credit card issuers involves different combinations of fees, awards, and APRs. Because credit card accounts are differentiated products, with a variety of different features, an appropriate study of the impact of the proposed rule should consider the effect of mandated lower late fees on all features and terms of credit card accounts.

20. The CFPB also suggests, with no economic justification, that credit card late fees contribute to excessive profits if they exceed pre-charge-off collection costs and contribute to covering the costs associated with future losses and charge-offs. By mandating substantially lower late fees the CFPB expects customers to face higher “upfront rates” to cover losses from charge-offs. However, the CFPB does not study the costs and benefits of these changes or identify which credit card customers would be made better off, and which would be harmed, by the mandate for lower fees and higher APRs, annual fees, or other “upfront rates.” The CFPB also does not address what the impact of the proposed rule will be for credit unions that are prohibited from raising APRs above 18 percent for credit card accounts.

21. Late fees are one component of the terms of the unsecured loan that customers receive when they obtain a credit card. The card’s annual fee, APR, credit limit, and the minimum payment conditional on the credit card balance are other important factors that determine the credit card’s value to the customer. The supposed gain to a customer from 70% lower late fees may be more than offset by a lower credit limit, higher APR, higher annual fee, or higher minimum payment conditional on the credit card balance.

22. Other than suggesting that the decline in late fees would not be fully offset, based on unreliable empirical studies, the CFPB has not attempted to estimate how much the proposed rule would increase annual fees and APRs. The CFPB does attempt a back-of-the envelope calculation that is meant to “illustrate an upper bound of the offsetting potential effect” on APRs of a mandated late fee of $8. Based on the Y-14 data the CFPB uses, late fee payments would decline by 72.3 percent, which represents 5.8 percent of interest payments to credit card issuers, so APRs would increase by no more than 5.8 percent

or about 2 percentage points on an APR of 34.7 percent.[13] By the logic of the CFPB, if the $8 late fee is 72.7% less than the current late fee for the typical credit card issuer, as long as the number of late payments increase by 257% after the proposed rule is implemented, dollars of late fee payments will remain constant and the typical credit card issuer will not change APRs or other credit card terms.[14] The CFPB's arithmetic is simplistic and completely ignores the possibility that a massive decline in late fees, followed by a massive increase in late payments, would substantially increase the risks faced by credit card issuers and warrant higher APRs even if late fee dollar payments remained stable.

23. The CFPB also does not study how much the proposed rule would lower credit limits or increase minimum required payments. Faced with the possibility of a substantial increase in late payments, and the increased risk of losses and charge-offs, credit card issuers may reduce credit limits, deny credit card accounts to some customers, or raise minimum payment requirements. Without studying and understanding the impact of mandated lower late fees on credit card terms it is impossible for the CFPB to assess which credit card customers will be made better off and which customers will be made worse off by the proposed rule.

24. For customers who rarely pay late fees the proposed rule is very likely to have an adverse effect. Whether credit card issuers raise annual fees or APRs, or whether they reduce credit limits or increase minimum payments to counteract the effect of much lower late fees, each of these changes are less favorable for customers. In addition, unlike late payments, these changes in credit card terms apply to all customers, not only to the customers who make late payments on their credit card accounts.

25. It is also possible that some current credit card customers would not receive a credit card account if the late fee was $8, with no higher fee for multiple late payments within a six-month period. The CFPB has not attempted to estimate how many customers would no longer have a credit card because of the

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[13] Proposed Rule, p.18934.

[14] If the number of late payments increases by 257%, the dollars paid from an $8 late fee will equal the dollars paid from a $29.30 late fee. $8 is 72.7% less than $29.30.

proposed rule. Any customer who would be denied a credit card because of the mandated substantially lower penalty late fees is clearly made worse off by the CFPB's proposed rule.

26. Rather than attempting to estimate the number of credit card customers who will see a decline in their credit limit, an increase in their minimum payment, or who are denied a credit card, the CFPB instead speculates about differences between naïve and sophisticated customers.[15] This speculation, based on theories in psychology and behavioral economics, is misguided. The CFPB's March 2022 Credit Card Late Fee Report shows that over 85 percent of accounts had zero or one late payment in 2019.[16] The 85 percent of customers who consistently make payments on time may be unfamiliar with the details of the structure of late fees, because high late fees do not impact their marginal decisions. With much lower late fees, however, many more customers may become better informed about late fees and consider skipping multiple payments each year. The CFPB has not attempted to estimate how its proposed rule will impact access to credit for consumers with lower incomes and less favorable credit scores and instead tries to suggest, based on no reliable evidence, that its mandate for lower late fees may improve the information flow from credit card issuers to customers.[17]

27. The CFPB does consider the possibility that customers will turn down credit card offers because the terms are unfavorable due to the rule, but incredibly does not consider this a potential loss in consumer welfare. The CFPB states that "Lost credit to consumers consciously declining offers because of the card's actual price becoming more salient would constitute no harm to them."[18] This conjecture is completely false for many customers with lower credit scores who do not make chronic late payments and

[15] Proposed Rule, p. 18935.
[16] These calculations are based on Figures 3 and 4 in the CFPB's March 2022 Credit Card Late Fees Report.
[17] The CFPB states 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. The Bureau has not quantified this effect but notes that reducing late fees may increase issuer incentives to find other approaches to make the consequences of late payment salient to consumers, including reminders or warnings." Proposed Rule, p. 18935.
[18] Proposed Rule, p. 18934.

would prefer a lower APR and a much higher late fee that is rarely incurred, but would balk at a credit card with a lower late fee and higher APR.

The CFPB Does Not Study the Impact of the Proposed Rule on Credit Unions

28. The economic analysis in the proposed rule is fundamentally flawed and inadequate because it does not study the impact of the proposed rule on credit unions that issue credit cards. Credit unions are required to comply with the proposed rule but, due to Federal government regulations, can charge a maximum APR of 18 percent. Credit unions will respond differently than commercial banks to the very large reduction in late fees mandated by the proposed rule but the CFPB has not studied the impact of the rule on credit unions.

29. The CFPB explained in their March 2022 study of Credit Card Late Fees that in the fourth quarter of 2020 the most common late fee was $25, below the safe harbor late fee. The CFPB stated that lower average late fees were "driven by the practices of smaller banks and credit unions."[19] Because of the requirement that APRs for credit unions can be no more than 18 percent, the proposed rule will have the most harmful impact on credit unions even though, as a group, the CFPB has recognized that credit unions charge some of the lowest late fees in the market. The CFPB provides no economic rationale for mandating lower late fees for credit unions, knowing that credit unions are the credit card issuers least able to offset the reduction in late fees and still cover losses from delinquent and charged-off accounts through higher APRs.

A Regulatory Flexibility Act Analysis is Required but Was Not Conducted

30. The CFPB is required to conduct an Initial Regulatory Flexibility Act analysis and a final Regulatory Flexibility Act analysis unless it can certify that the rule will not have a significant economic impact on a substantial number of small entities. The CFPB estimates that there are approximately 2,785 small credit unions that report credit card assets and would be affected by the proposed rule. The CFPB also acknowledges that it does not have a reliable measure of credit card income or revenue for small

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[19] Credit Card Late Fees, CFPB, March 2022, p. 14.

credit unions because credit unions are not required to report credit card income separately in NCUA call reports.[20] The CFPB states: "to assess whether the proposed rule would have a significant economic effect on small entities, the Bureau considers the significance of credit card late fee revenue as a share of the total revenue of affected small entities."[21] The CFPB "considers total late fee revenue to be an upper bound on potential impacts of the proposal on small entities."[22] Despite lacking data on credit card income and late fee revenue for small credit unions the CFPB still concludes that credit card income is a small enough component of total revenue at small credit unions for the proposed rule to not have a significant economic effect on these businesses.

31. The CFPB's economic reasoning in determining whether its proposed rule would have a significant economic impact on 2,785 small credit unions is simply incorrect. The CFPB is effectively arguing that it would not be "significant" if thousands of small credit unions were no longer able to issue credit cards because credit card assets of credit unions look comparatively small to the CFPB. It is completely inconsistent with the Regulatory Flexibility Act for the CFPB to consider a regulation to have an insignificant effect on small businesses even though the regulation will severely hamper the ability of small credit unions to effectively compete with larger banks in the credit card market.

32. The CFPB does not deny the possibility that many small credit unions that currently issue credit cards will no longer be able to compete with larger banks that can adjust to lower late fees with higher APRs. The CFPB also does not deny the possibility that small credit unions will be less able to compete effectively with banks for credit card customers with lower credit scores because of their inability to offer a higher APR to adjust to lower late fees. The CFPB has not studied the impact of the proposed rule on credit unions and is satisfied to conclude that the credit card offerings of credit unions are economically insignificant and unworthy of a Regulatory Flexibility Act analysis.

[20] Proposed Rule, p. 18940.
[21] Proposed Rule, p. 18940.
[22] Proposed Rule, p. 18940.

The CFPB Provides No Economic Analysis to Determine Efficient or Optimal Late Fees

33. Late fees are one of the tools that credit card issuers use to discourage late payments. The proposed rule discusses other ways that credit card issuers can discourage late payments and remind customers to make timely payments.[23] Credit card issuers already send reminders to customers of upcoming due dates and notify and work with customers to make a payment after a payment is late or has been missed. The CFPB has not presented evidence that credit card issuers have made insufficient efforts to discourage customers from making late payments. The CFPB has not indicated whether (and by what amount) the frequency of late payments would decline if more messages were sent, or more phone calls were made, to customers in the days leading up to their accounts' due dates.

34. Competing credit card issuers rely on interest rates, penalty late fees, and proactive efforts to remind customers to make on-time payments. Penalty late fees discourage customers from falling behind on their credit card payments after other efforts have failed. Late fees are also a way for credit card issuers to differentiate between customers with different risks of default. Penalty late fees would be used in a competitive market in a way that efficiently manages risk and discourages late payments and would not be constrained by pre-charge-off collection costs of credit card issuers.

35. The CFPB does not present an economic analysis of the optimal penalty late fee consistent with competitive (normal) profits but instead presumes that "reasonable and proportional" late fees must be no larger than the pre-charge-off collection costs incurred by credit card issuers.[24] However, the CFPB has not presented a rational economic argument for why an optimal late fee in a competitive market should equal pre-charge-off collection costs. There is no logical reason why the safe harbor late fee should be low simply because efficient spending on pre-charge-off collections is low. This argument ignores the effect of late fees on discouraging late payments and is equivalent to arguing that the optimal fine for littering should be no higher than the cost of hiring workers to pick up the litter.

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[23] Proposed Rule, pp. 18919, 18922, 18923, and 18935.

[24] The CFPB estimates that approximately 75% of collection costs in the Y-14 financial data they examine are incurred prior to an account being charged off. Proposed Rule, p. 18911.

The CFPB Did Not Study Whether the Proposed Rule Will Reduce Credit for Subprime Customers

36. The March 2022 CFPB Credit Card Late Fee study found that in 2019 subprime and deep subprime credit card accounts represent 12% of accounts and 42% of late payment fee volume.[25] The study also found that the average deep subprime credit card account was charged 12 times more in late fees than the average "superprime" account in 2019.[26] Subprime and deep subprime customers made more late payments and more repeated late payments within the same six-month period, compared to prime and "superprime" customers.[27]

37. Not all subprime and deep subprime credit card customers incur late fees; 47 percent of subprime accounts paid no late fees in 2019 and an additional 15 percent had only one late payment all year. In addition, according to the CFPB, about 48 percent of deep subprime accounts had three or more late payments in 2019.[28]

38. Subprime and deep subprime customers, as a group, are much more likely to be impacted by the CFPB's proposed rule. Credit card issuers may respond to drastically lower late fees by providing much less credit and higher APRs (except for credit unions) to customers with lower credit scores. The unintended consequence of the CFPB's proposed rule may be less credit offered to customers with lower credit scores even though many of these customers nearly always pay their credit card bills on time and occur one or fewer late fees per account per year. While the CFPB recognizes that this may occur, it has not estimated the loss in welfare to customers with lower credit scores if they are denied a credit card or are issued a credit card with a higher APR and lower credit line.

39. Credit card issuers use late fees to help manage risk. Late fees, in addition to payment histories and other information, are used to identify which customers pose a higher risk for continued chronic late payments, delinquent accounts, and possible account charge-offs. An account that has incurred multiple

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[25] These calculations are based on Figures 3 and 4 in the CFPB's March 2022 Credit Card Late Fees Report.
[26] Credit Card Late Fees, CFPB, March 2022, p. 14.
[27] The CFPB also reported that the average deep subprime customer has, on average, at least two credit cards.
[28] These calculations are based on Figures 3 and 4 in the CFPB's March 2022 Credit Card Late Fees Report.

late fees per year, at a cost of $30 or more per late payment, is unlikely to receive a credit limit increase. However, if the late fee is reduced from $30 to $8 a customer who previously missed one or fewer payments per year may now find it in their best financial interest to skip three payments per year and incur $24 in late fees. The new much lower safe harbor late fee weakens the strength of the information to the credit card issuer when an account has multiple late payments in the same year. The weaker signal due to a much lower penalty late fee may make it more difficult for customers to obtain higher credit limits, which results in a decline in consumer welfare.

40. The CFPB has not attempted to study how the information value in late fees is diminished by the proposed rule or how the rule impacts the ability of credit card issuers to manage risk, especially among customers with weaker credit histories and lower credit scores. If the proposed rule is enacted, it will be more difficult for credit card issuers to distinguish between higher and lower risk accounts.

The CFPB Does Not Study the Options Facing Credit Card Customers

41. The CFPB does not attempt to explain why customers with approximately the same credit score can have very different late payment experiences. The fact that accounts with late fee payments have higher outstanding balances offers a possible simple explanation – perhaps the minority of credit card customers who repeatedly make late payments have made more expenditures than they can afford given their economic situation. The CFPB reported that in 2019 the median minimum due for all credit card holders was $39, while the median minimum payment was $100 for credit card holders with a late payment.[29] Accounts that incur late fees have a median minimum payment that is 156% higher than the median minimum payment for all accounts even though subprime and deep subprime accounts, which likely have lower credit limits, are over-represented among accounts that paid late fees.[30]

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[29]This is for the period between September 2021 and October 2022 in the Y-14 data. Proposed Rule, pp. 18919-18920.

[30] Because the CFPB has not made their data available, it is unclear what the average credit card balances are for accounts that make payments relative to all accounts. According to publicly available Federal Reserve data from earlier this year, the average account appears to have a balance of about $1,700. https://www.newyorkfed.org/microeconomics/hhdc/background.html

42. If late fees are lowered and annual fees or APRs are increased, the millions of subprime and deep subprime credit card customers who pay their bills on time and typically avoid late payments will be partially subsidizing customers who make late payments. The CFPB does not study the cross-subsidization of credit card customers within groups defined by credit score categories, but its proposed rule will penalize subprime customers who pay their credit card bills on time relative to customers who chronically make late payments.

43. The CFPB provides an example of the consequences of late payment fees using information for the median credit card account that incurred a late payment fee in recent Y-14 data.[31] In the example the CFPB states that "the costs of paying late fees are quite steep both under current late payment fee amounts and under the proposed safe harbor amount." The CFPB states that the median customer who delays the $100 payment for the entire month, and then pays an $8 late fee, has implicitly paid $8 to borrow $100 for one month "incurring an effective APR of 96 percent."[32] While an effective APR of 96% framed in this way may seem "quite steep" to the CFPB, a late credit card fee of $8 may be an attractive choice compared to the other available options.

44. Before considering other options available to credit card customers facing difficult financial tradeoffs, note that the proposed rule also fixes the safe harbor penalty late fee at $8 even for repeated late payments within a six-month period. The hypothetical median customer in the CFPB example can therefore consistently make the minimum payment every other month for an annual cost of $48. For the hypothetical median account considered by the CFPB, the annual cost of making a minimum payment every two months rather than every month is a small percentage of the outstanding credit card balance. In addition, with the proposed 15-day grace period rational customers facing difficult economic tradeoffs would delay their payments 15 days past the due date, even in months when they make a minimum payment. Because of the proposed rule, the option to make six rather than 12 payments per year may

[31] Proposed Rule, p. 18919-18920. The CFPB has not studied whether the typical minimum payment for accounts paid late will remain about the same after the large decline in the safe harbor penalty late fee.
[32] Proposed Rule, p. 18920.

seem attractive to customers who are struggling financially, but it will cause these customers to accumulate even more credit card debt and expose the credit card issuer to greater risk of losses.

45. The CFPB does not examine the tradeoffs facing individuals choosing to repeatedly pay late fees on their credit card accounts. A financially struggling but rational customer may well prefer paying an $8 credit card late fee instead of bank overdraft fees, auto loan late fees, obtaining a payday loan, cash advance, or pawn shop loan, or falling behind on rent, utility, or phone payments. The proposed rule may make skipping a credit card payment and paying an $8 late fee the most attractive option for individuals facing a range of unfavorable choices during periods of financial distress.

46. The CFPB has not studied how many credit card customers would choose to skip a credit card payment and pay an $8 penalty late fee when faced with difficult economic tradeoffs. The magnitude of this effect depends on the amount of financial distress faced by customers and the range of fees, penalties, and interest that would be incurred if other payments were skipped. Skipping a credit card payment for a late fee of $8 is an even more attractive option to credit card customers with the highest outstanding balances and minimum payments.

47. The CFPB has not studied whether an increase in late payments that would result from a drastic reduction in penalty late fees might cause more accounts to become delinquent and eventually result in more charge-offs and greater risk to credit card issuers. If credit card late fees are substantially reduced customers are incentivized to put a higher priority on making rent, auto loan, utility, and phone payments rather than making the minimum payment to their credit card accounts. Because the $8 fee may consistently be preferable to other fees and service interruptions, an unintended consequence of the proposed rule may be to encourage customers to fall further behind on their credit card accounts than they would have otherwise, accumulate more credit card debt, and increase the risk of charge-offs and losses.

48. The CFPB presents no economic analysis to support its view that the losses and collection costs of accounts that are charged off should only be covered by interest rate payments and other “up front” fees. There is no economic rationale for the bright line that the CFPB has drawn to separate late fees from the costs and losses from charge-offs. The CFPB has not presented evidence concerning the subsequent

behavior of the minority of credit card accounts with multiple late payments in a year. The CFPB does not report what fraction of credit card accounts with multiple late payments in the same year will become delinquent accounts or what fraction will eventually be charged off and sold to a third-party debt collector. Summary statistics presented in the proposed rule provide some empirical support for the connection between accounts that incur late fees and delinquent accounts. The CFPB states that 14% of late fees are assessed to accounts that never make another payment.[33]

49. The CFPB has not studied how substantially lower late fees will reduce incentives for credit card customers to make timely payments and whether this will increase the share of credit card accounts that are delinquent. The CFPB has also not studied whether a higher frequency of late payments, caused by the proposed rule, may also contribute to more accounts being charged off.

50. The CFPB report on late fees showed that the distribution of late fee payments is quite skewed. Calculations based on figures in the March 2022 report show that in 2019 about 74 percent of all credit card accounts had no late fee payments and just over 10 percent of accounts had three or more late fee payments.[34] If the reduction in safe harbor late fees causes credit card issuers to respond by raising annual fees and APRs, most credit card customers who make no late payments will be required to pay more in annual fees or interest to subsidize the late payments made by a minority of customers.

The CFPB Did Not Make Data Available to Interested Parties

51. The CFPB conducted analyses in its March 2022 study and in the proposed rule and did not make these data available to commenters and interested parties. In addition, the data used by the CFPB, the Federal Reserve's Y-14 data, does not include data representative of many credit card issuers who will be required to comply with the new rule. Credit unions are not represented at all in the Y-14 data.

52. It is problematic that the CFPB relied only on Y-14 data that provides information from the largest banks and no information about the credit unions that will be impacted by the regulation. This

[33] Proposed Rule, p. 18394. This correlation is not evidence of a causal effect between missing one late payment and the chance of default, but the CFPB did not study whether encouraging more late payments might cause more delinquencies and charge-offs.
[34] These calculations are based on Figures 3 and 4 in the CFPB's March 2022 Credit Card Late Fees Report.

omission is even more glaring because credit unions face an 18% limit on the APR for their credit cards and the larger banks do not. As explained above, credit unions face more limited options for reacting to the mandated large decline in late fees. The CFPB should have relied on data that would have allowed it to study the unique situation faced by credit unions, but it did not.

The CFPB Did Not Study the Impact of Freezing Safe Harbor Late Fees

53. The CFPB has not studied how freezing the $8 safe harbor late fee will impact the credit card market as a fixed $8 fee becomes worth even less in real terms due to inflation. The CFPB has decided to eliminate the automatic inflation adjustment for penalty late fees while inflation is higher than it has been since the passage of the CARD Act in 2009.[35] Because inflation is higher than it has been in decades, a fixed $8 safe harbor late fee is declining in real value at a much faster rate than it would have previously. The failure of the proposed rule to index safe harbor late fees to the CPI could have unanticipated and unintended consequences in inflation continues at the rates we have seen in the past two years.

54. An important benefit of an inflation-adjusted safe harbor penalty late fee, which maintains the value of the late fee in real dollars, is that it provides regulatory certainty to credit card markets. If the CFPB is concerned that nominal fees might change too quickly, the proposed rule could have allowed for indexing of the safe harbor late fee every other year, or once every three years. The CFPB suggests that the safe harbor late fee will be increased in future years, but it is uncertain when, and by how much, the safe harbor fee would be adjusted.[36] This regulatory uncertainty benefits neither credit card issuers nor credit card customers.

The CFPB Did Not Study How the Proposed Rule Would be Impacted by Higher Market Interest Rates

55. The CFPB did not study how the proposed rule would impact the credit card market in the presence of nominal interest rates that are much higher than they have been since the passage of the

[35] In the 12 years between 2009 and 2020 the Consumer Price Index (CPI) increased at an annual rate of only 1.84% per year. According to the latest data from March 2023, the CPI increased by about 5.0% over the past 12 months and by 14.0% over the past two years. https://www.bls.gov/cpi/data.htm

[36] Proposed Rule, p. 18937.

CARD Act in 2009. In the 12 years between 2009 and 2020 the average one-year Treasury Bill rate was about 0.68 percent. During April 2023 the average one-year Treasury Bill rate was 4.71 percent.[37]

56. The opportunity cost of loanable funds is much higher now than it has been in years. This is especially important for a credit union that cannot charge an APR of more than 18 percent to its credit card customers. The differential between the APR on a credit card from a credit union and a one-year Treasury Bill is much lower than it was been for most of the months since 2009. If the safe harbor late fee is reduced to $8 it will be even more difficult for credit unions to adjust to the increased risk of losses and charge-offs given the relatively high opportunity cost of loanable funds.

57. Higher inflation and interest rates can also have an important impact on customer incentives to repay credit card balances in a timely fashion. As interest rates have risen, it may be more attractive for customers to delay credit card payments as it becomes more difficult to make other loan payments such as for auto loans.[38]

58. Consumers facing transitory difficult financial circumstances are in a different situation today, with higher car loan payments and other expenses, than they were prior to the increase in inflation and interest rates over the past two years. The CFPB has not studied how higher interest rates on other personal loans would impact the frequency of late payments among credit card holders. The CFPB has also not studied the unique situation of credit unions, that may only charge an APR of 18 percent, in an environment in which market interest rates are substantially higher than at any time since the passage of the CARD Act.

The Safe Harbor Late Fee is the De Facto Late Fee

59. If the proposed rule is adopted the CFPB expects that a relatively small minority of credit card issuers will use the cost analysis provisions to charge late fee amounts above the $8 safe harbor late fee.[39]

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[37] https://fred.stlouisfed.org/series/DTB1YR

[38] The average interest rate on a 48-month new automobile loan at commercial banks was 5.07% over the 12-year period from 2009 to 2020. In the most recent Federal Reserve data the average interest rate on a 48-month auto loan was 7.46%. https://fred.stlouisfed.org/series/TERMCBAUTO48NS

[39] Proposed Rule, pp. 18917 and 18933.

This is likely correct because the CFPB has taken the position that a higher penalty fee cannot be justified by showing that it deters late payments, is helpful for risk management, or helps offset losses due to charge-offs. If the proposed rule is adopted the only apparent justification for a late fee above the safe harbor level of $8 that the CFPB would consider is pre-charge-off collection fees that are more than $8 per late payment.

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