May 3, 2023

Via Electronic Mail

Comment Intake - 2023 NPRM Credit Card Late Fees
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20052
2023-NPRM-CreditCardLateFees@cfpb.gov

Re: Docket No. CFPB-2023-0010 - Notice of Proposed Rulemaking on Credit Card Penalty Late Fees (Regulation Z)

To Whom it May Concern:

The Consumer Bankers Association (CBA)[1] appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau (the Bureau) in response to the notice of proposed rulemaking on credit card penalty late fees (the NPRM).[2] In addition to the comments shared in the letter CBA submitted jointly with several other trade associations,[3] CBA writes separately to express significant concerns with the Bureau's Dodd-Frank Act section 1022(b) analysis ("1022" or "1022 Analysis")[4] contained within the NPRM.[5]

This comment letter is narrowly focused on addressing the deficiencies in the Bureau's 1022 cost-benefit analysis for this rulemaking. In general, the Bureau did not conduct a thorough and rigorous analysis of the empirical economic literature on the effects of late fees nor conduct its own rigorous analysis with statistically significant findings in a transparent and consistent manner. The Bureau's flawed assumptions, overly narrow estimations, and deficient analyses have resulted in the Bureau reaching incorrect conclusions about the benefits and harms to consumers, as well as the costs issuers face in the marketplace. The Bureau's errors in

[1] CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.
[2] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18,906 (proposed Mar. 29, 2023).
[3] ABA et al., *Letter to the Consumer Financial Protection Bureau re: Docket No. CFPB-2023-0010, Notice of Proposed Rulemaking, Credit Card Late Fees and Late Payments (Truth in Lending Act/Regulation Z).*
[4] As used in this letter, "1022 analysis" refers to Section 1022(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which requires the Bureau to consider as part of any rulemaking "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to" the relevant market (here, credit cards), and "the impact of proposed rules" on smaller financial institutions. 12 U.S.C. § 5512(b). A "covered person" is any person that offers or provides consumer financial products or services, or an affiliate of that person that acts as a service provider. 12 U.S.C. § 5481(6).
[5] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,931-40.

conducting the required 1022 cost-benefit analysis have resulted in proposals that, contrary to the Bureau's stated intent, will harm consumers. These missteps are magnified by actions taken by the Bureau that suggest it is unwilling to alter course based on public feedback to help protect consumers.

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I. Deficiencies in the Bureau's 1022 Analysis

The Bureau has failed to properly quantify the costs to consumers, and is continuing with the rulemaking despite the fact that the majority of consumers are likely to receive little or no benefits from the proposals in the NPRM, [6]and may actually be worse off. The data the Bureau relied on for this rulemaking is not representative of the credit card market, and the Bureau did not seek out the data necessary to perform the proper cost-benefit analyses for the proposals. The Bureau has also performed an insufficient analysis of the nonrepresentative data in evaluating the costs faced by issuers associated with late payments. This is not the only data analysis misstep the Bureau has made in this NPRM, as the Bureau also inadequately and improperly analyzed the deterrent effect of late fees and ignores the many actions issuers currently undertake to ensure on-time payments by customers.

a. Inadequate Assessment of Costs and Benefits to Consumers

The Bureau is required by law to consider the costs and benefits to both consumers and covered persons (i.e. issuers and their affiliates in this case), including potential reduction in availability of credit. The Bureau has failed to properly quantify the benefits to consumers, and in fact, the proposals would only minimally benefit a small segment of the consumer population at the expense of all consumers. This determination seems premised on the Bureau's lack of awareness of issuers' obligations to manage credit risk, which would require issuers to take actions that may result in a reduction in access to credit, as well as a flawed assumption that the proposals would incentivize issuers to do more to encourage on-time payments.

i. Potential Negation of Any Consumer Benefit

Presumably, the Bureau would not propose, or consider finalizing, a rule that has no consumer benefits. However, it appears the Bureau acknowledges that the proposals may have no consumer benefit, but is carrying on with this rulemaking despite that fact. Issuer costs and consumer benefits are inextricably intertwined in the Bureau's proposals. The Bureau, by its own admission, states that if issuers raise the cost of credit in response to the Bureau's proposals any consumer benefit from the proposal would be completely eliminated:

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[6] As discussed in Part I.b.iv, this NPRM contains several formal and informal proposed changes to current Regulation Z: (i) lowering the late fee safe harbor amount to $8, (ii) eliminating the tiered fee structure, (iii) creating an analytical framework for calculating the "cost analysis" provision, and (iv) capping the late fee amount at 25% of the minimum payment amount. The Bureau is also requesting comment on providing consumers with a 15-day "courtesy period" for making a payment. For ease of reference, these will be referred to as "the proposals" throughout this comment letter.

> *"Since the proposal would reduce issuers' revenue from late fees, issuers may respond by adjusting interest rates or other card terms to offset the lost income. Issuer responses will affect both the sum of consumer gains and their distribution across market segments and populations. Total consumer gains will be the lowest if issuers make up for all lost revenue and any potential cost increase by raising revenue by changing other consumer prices. This full offset could manifest in higher maintenance fees, lower rewards, or higher interest on interest-paying accounts."*[7]

As discussed in Parts I.a.iii and I.a.iv of this letter, the most likely result of the Bureau's proposal to reduce the safe harbor amount to, effectively, the lesser of $8 or 25 percent of the minimum payment due, is that issuers will raise the cost of credit (through increasing APRs, reducing or restricting credit lines, or reducing new account approvals). Thus, it's likely that consumers will see no benefit from the Bureau's proposal.

ii. Increased Costs to All Consumers and Minimal Benefits to a Small Subset of Consumers

Under the proposals, consumers who pay on time or only occasionally pay late, may incur higher costs associated with access to credit. Put another way, consumers who meet their monthly obligations and responsibly pay on time will be cross-subsidizing consumers who do not pay on time through higher interest rates or lower benefits (*e.g.*, rewards). Further, those who are presumably attempting to manage their finances prudently and always make the minimum payment but may not have enough money to pay the full statement balance each month will be harmed for the benefit of those who do not:

> *"**Cardholders who never pay late** will not benefit from the reduction in late fees and **could pay more for their account** if maintenance fees in their market segment rise in response—or if interest rates increase in response and these on-time cardholders also carry a balance. **Frequent late payers are likely to benefit** monetarily from reduced late fees, even if higher interest rates or maintenance fees offset some of the benefits. Cardholders who do not regularly carry a balance but occasionally miss a payment would benefit from the proposed changes so long as any increase in the cost of finance charges (including the result of late payments that eliminate their grace period) is smaller than the drop in fees. **Cardholders who carry a balance but rarely miss a payment are less likely to benefit** on net."*[8]

Given that the cost of credit will increase for all consumers, it is illogical to argue that these costs are outweighed by the benefits to a likely small cohort of "frequent late payers." In the NPRM, the Bureau neither defines nor quantifies the size of this "frequent late payer" cohort, so industry cannot even meaningfully weigh the size of the population that would allegedly benefit from the Bureau's proposals.[9]

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[7] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,933.
[8] *Id*. at 18,934.
[9] For reference, between the first quarter of 2006 and the last quarter of 2020, the share of accounts that are 60 or more days delinquent were 2.5 percent or lower for general purpose cards and 1.4 percent or lower for private-label

The Bureau argues that consumer costs associated with the proposals would be limited to "increased penalty interest rates or lower credit scores" in the event that the lower fees lead to increased incidence of late payment.[10] This is an incomplete list. A more complete list of the possible costs to consumers would also include: potential curtailment of credit through credit limits, closure of accounts, and reduced approval of applications— all of which the Bureau acknowledges are more significant and pose longer-term costs to consumers than late fees.[11] These increased costs may result in consumers meeting their financial needs outside of the well-supervised banking system, including by turning to payday lenders or pawn shops, which are more costly and have the potential to result in more consumer harm.

iii. Issuers are Required to Manage Credit Risk Portfolios

The quantified consumer benefit of the proposal, as calculated by the Bureau,[12] is dependent on issuers taking little to no action, including raising annual percentage rates (APRs), lowering credit lines, or eliminating rewards, in response to a lower late fee safe harbor threshold. However, the Bureau does not fully account for the actions that issuers will likely be forced to take elsewhere in their credit portfolios to recover costs associated with late payment or non-payment in order to properly manage credit risk and other prudential regulatory requirements. For example, the Office of the Comptroller of the Currency (OCC) Handbook on Credit Card Lending[13] ("OCC Handbook") generally acknowledges that fees work to spread the financial risks of running an unsecured credit card portfolio across the consumer spectrum. In the Handbook, the OCC explains that it expects that banks will charge fees to ensure an unsecured portfolio is profitable and requires these banks to monitor how fee changes affect that portfolio.[14] Examiners are required to "[d]etermine whether the bank's process for evaluating the ramifications of changes in late-fee policies, including the dollar amounts and grace periods, is adequate before broad implementation of the changes"[15] and "assess whether the available reports provide the information necessary to evaluate the effect of late fees."[16] Fee income is also

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cards, according to the *Consumer Credit Card Market Figure Data* (2021), *available at* https://www.consumerfinance.gov/documents/10205/cfpb_consumer-credit-card-market-report-figure-data_2021.xlsx.

[10] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,933.

[11] *Id*. at 18,923 ("The Bureau also notes that card issuers have methods other than late fees to address credit risk. Specifically, card issuers may take steps to reduce a cardholder's credit line. Also, card issuers that charge an interest rate are permitted by § 1026.55(b)(3) to reprice new transactions on the account according to a penalty rate in certain circumstances. In addition, after 60 days, § 1026.55(b)(4) permits these issuers to take actions to reprice the entire outstanding balance on the account according to a penalty rate in certain circumstances.").

[12] The Bureau calculates the benefits to consumers of the proposed rule by estimating the average late fee currently paid by consumers, calculating what percentage of that would be lost if the late fee safe harbor dollar amount were lowered to $8, and applying that percentage to the fee income reported in the Y-14 data set. Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,932.

[13] Office of the Comptroller of the Currency, *Comptroller's Handbook, Safety and Soundness, Credit Card Lending* (April 2021), *available at*: https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/credit-card-lending/index-credit-card-lending.html.

[14] *Id*. at 93 ("Review the policies that govern imposing and waiving late, over-limit, extension, annual, and other fees. Determine whether the policies are reasonable and whether the effect on portfolio performance is adequately monitored, analyzed, and addressed.").

[15] *Id*. at 97.

[16] *Id*.

discussed in connection with management information systems, and the handbook notes the importance of accurately capturing fee income.[17]

Thus, banks are required, via their prudential lending standards, to run a safe and sound credit card portfolio. Late fees serve dual purposes of covering the cost of lending (both pre-charge-off and post-charge-off (discussed in Part I.c) and as a deterrent to consumers paying late (discussed in Part I.d). If issuers are not able to cover their pre-charge-off and post-charge-off costs, and more consumers are defaulting due to a lack of a deterrent against late payment, then issuers are facing a dual impact of increased costs. As a result, they will be forced to make changes, including raising APRs, lowering credit limits, and reducing approvals of new accounts in order to properly balance credit portfolios. There are other safety and soundness risk implications that stem from the proposals, which are discussed in more detail in Part I.c.i.

iv. Likely Reduction in Access to Credit

The Bureau does not appear to consider, in any meaningful or quantitative way, that a reduction in access to credit might result from the proposals. As discussed in Part I.a.iii, issuers will need to take certain actions in order to manage prudential regulatory requirements and properly manage credit risk, which may include raising APRs. Increasing APRs across the credit spectrum will put additional pressure on subprime borrowers, meaning they will incur greater interest expenses for every dollar borrowed, which could lead to increased defaults and follow-on credit expenses for issuers. At some point the cost of engaging with subprime customer accounts may reach an unsustainable level for issuers, and the subprime market segment will see credit access reduced or possibly eliminated. Regardless, the Bureau concludes "that any losses to credit access would be limited."[18] This assertion is not supported by any qualitative or quantitative data or analysis, and does not consider that consumers may need to go outside of the traditional banking system to meet their credit needs (to places such as payday lenders, vehicle title lenders, pawn brokers, etc.) where they will likely face a much higher cost of credit. The Bureau also acknowledges there is a chance that the proposal could "increase the frequency of late payments"[19] which will negatively impact late payors' credit scores. Lower credit scores for consumers who more frequently miss payments as a result of the Bureau's proposals would likely raise the cost and availability of credit for these customers.

The Bureau also fails to evaluate the reduction in access to credit due to the unintended effects the proposals would have on competition in the marketplace, specifically how the proposal would increase barriers to entry and result in distributional effects. The Bureau's official interpretation of the cost analysis approach says that, in determining whether a late fee is reasonable and proportional, a card issuer must take certain factors into consideration. The first factor listed is, "[t]he number of violations of a particular type [late fee incidences] experienced by the card issuer during a prior period of reasonable length (for example, a period of twelve months)."[20] or "reasonable estimates for an upcoming period."[21] But new issuers do not have

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[17] *Id*.
[18] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,934.
[19] *See id*. at 18,918, 18,921.
[20] 12 C.F.R. Part 1026, Supp. I, cmt. 52(b)(1)(i)-1.i.
[21] 12 C.F.R. Part 1026, Supp. I, cmt. 52(b)(1)(i)-1.iv.

prior history, so a new entrant may have to endure either the risks associated with "reasonable estimates for an upcoming period" or at least 12 months of the $8 safe harbor late fees before being able to cover their late fee costs. This imposes barriers to entry, which can harm competition among issuers. Additionally, the cost analysis approach could have a potentially adverse competitive effect for smaller issuers, as they must spread their fixed costs over a smaller number of accounts than larger issuers (resulting in a higher incremental cost on a per-account basis). Further, there may be similar barriers to current issuers entering market segments that have higher costs associated with late payment. With respect to distributional effects, the Bureau acknowledges that "[a]mong issuers there is a strong correlation between reliance on late fees and concentration of subprime accounts."[22] To the extent that subprime accounts are impacted, issuers may choose to exit or reduce their exposure to subprime accounts, such as extending less credit, reducing existing lines, and/or having stricter policies for account closure due to late payment.

v. Inaccurate Assertion that Proposals Will Incentivize Issuers to Better Encourage On-Time Payments

The Bureau also argues that the current late fee safe harbor dollar amounts do not incentivize issuers to encourage on-time payment, so "making late payments less profitable" by lowering the late fee safe harbor dollar amount will prompt issuers to do more to encourage on-time payment, which would ultimately benefit consumers.[23] It is unclear why the Bureau draws this conclusion, especially since the Bureau rejects the argument that multiple missed payments is a sign of increased credit risk. Moreover, the premise that the current late fee safe harbor dollar amount is so high that it does not incentivize issuers to encourage on-time payments is wholly unsupported, as issuers currently take numerous steps to actively encourage on-time payments. These actions can generally be divided into the following categories:

- ***Payment methods.*** Issuers typically offer several different avenues for consumers to make payments on their credit cards, with the goal of making on-time payment as convenient as possible. Customers typically can engage in online banking or use a mobile app on their phone to make digital payments, which often include the ability to set-up autopay so that the payment is always made by the due date. Often consumers can change their due dates to align the payment better with their individual financial situations, as well as customize frequency (meaning they could pay more often than monthly), and amount (minimum payment, statement balance, or other amount). Consumers can make a payment in an issuer branch or using an issuer ATM. Customers can also use the phone to either pay via the voice response unit or a live customer service agent. Finally, issuers may support consumers making payments by mail each month, as well as accept a mailed paper version of the autopay enrollment form. Issuers may waive fees in certain circumstances, such as in emergencies or exigent circumstances. Additionally, issuers often have policies that may mitigate the impact of payments that are not on time, including, but not limited to, engaging in fee tail clipping to ensure fees do not exceed the credit limit on the account in a 12-month period and instituting caps on the number of consecutive late fees in any single period of delinquency.

[22] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,908.
[23] *Id*. at 18,935.

- ***Communications.*** Issuers will often send multiple proactive payment reminders prior to the payment due date across multiple channels, including through email, push notifications in an app, and prompting users when they log into their online account. Email alerts may be sent each month a credit card statement is generated, which includes the statement balance, minimum payment amount, due date, and links to other resources to answer questions customers may have related to the credit card program. Customers can also often set their own alerts, which include, but are not limited to, payment due and credit card past due notices. These alerts have had a positive impact on consumer behavior. For example, one CBA member noted that in a five-month average following a new "Payment Not Received" alert to consumers on due dates, the member saw a 24 percent lower monthly late fee incidence rate and 20 percent less in monthly gross late fees assessed. While not directly related to making a payment, there are also alerts related to credit balances, which would allow the consumer to set a threshold for available balance and receive a notice when that threshold is breached. This may then serve to prompt the consumer to make an off-cycle payment to increase their credit availability, resulting in a payment in advance of the next due date. The alerts can be delivered by SMS, email, or push notification to the customer's smart phone. Issuers also often encourage customer enrollment in auto-pay through the use of regular marketing initiatives, including emails and prompts within the online account set-up process.

- ***Educational materials.*** Many issuers have developed financial education resources that are publicly available on their websites, ranging from tactical information, such as the many ways a credit card payment can be made, to broader financial literacy resources around the importance of credit scores and practical advice for improving a credit score.

These are notifications and services *currently provided and available* to consumers. The Bureau provides no data or evidence suggesting the effectiveness or ineffectiveness of these notifications and services, nor does it provide any evidence that additional notifications or services would reduce late payments or suggest alternative notifications or services that issuers should be employing.

b. Insufficient and Improper Data Analyses in NPRM

The Bureau's analyses of the data related to credit card late fees suffer from several fatal flaws. As a threshold matter, the Bureau failed to review the totality of data available, instead relying solely on a nonpublic data set that is not representative of the credit card market as a whole. Likewise, the data analyses the Bureau conducted using this nonrepresentative data were not adequately disclosed and were significantly flawed. These analytical deficiencies also extend to the Bureau's determination that a one-tier fee is preferable to a two-tier fee structure. Further, there are significant aspects of the NPRM where the Bureau has provided no data or analysis at all.

i. Failure to Obtain and Analyze the Totality of Data Available

The Bureau's primary data source in analyzing the costs and benefits of the proposed rule is the Y-14 (and Y-14+) data set collected monthly by the Board of Governors of the Federal Reserve System (Federal Reserve) "from bank holding companies with total consolidated assets exceeding $50 billion."[24] The Bureau supports its use of the Y-14 data by arguing that it "accounted for just under 70 percent of outstanding balances on U.S. consumer credit cards as of year-end 2020,"[25] but the data is not representative of consumer credit card accounts or of issuers. As the Bureau previously observed in its 2021 Consumer Credit Card Market Report, "the Y-14 data cover a large but ***not representative*** portion of the credit card market…. the remaining uncovered portion is still substantial, and ***the Y-14+ data should similarly not be considered representative*** of that uncovered portion."[26]

Using a nonrepresentative dataset as the basis for the proposals' cost-benefit analysis is a significant error and undermines the entire rationale for the rulemaking. The issuers not covered by the Y-14 data may have a considerably different customer base, cost structure, and operating environment than the larger issuers covered by the Y-14 data set. The Bureau admits as much when it states it "is not aware of relevant, reliable, and quantified evidence that could be used to predict how changes to late fees would affect late payments and delinquencies or the expected substitution effects across credit cards and between credit cards and other forms of credit"[27] and that "the data and research are not sufficient to fully quantify the potential effects of the proposal for consumers and issuers."[28] However, the Bureau may have been able to gather representative data sets if it had meaningfully consulted with the other banking agencies, as required by the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act).[29] Agencies such as the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve, and the OCC have considerable data and insight into card programs for smaller institutions that would have benefitted the Bureau's drafting of this NPRM.

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[24] *Id*. at 18,910. The Bureau does not explain why the NPRM states that the data is collected from institutions with consolidated assets exceeding $50 billion while the Federal Reserve's forms specify that the information is collected from institutions with consolidated assets exceeding $100 billion. *See* Federal Reserve, "Instructions for the Capital Assessments and Stress Testing information collection (Reporting Form FR Y-14M)," *available at* https://www.federalreserve.gov/apps/reportingforms/Report/Index/FR_Y-14M#:~:text=Description%3A%20The%20FR%20Y-14M%20report%20collects%20monthly%20detailed,portfolio-level%20collections%20and%20one%20detailed%20address%20matching%20collection. This change is likely due to the enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018) (EGRRCPA). EGRRCPA prompted the Federal Reserve to tailor its rules around stress testing, and sections 401(a) and (e) of EGRRCPA - which raised the thresholds for enhanced supervision and prudential standards for certain bank holding companies - are directly cited in Reporting Form FR Y-14M. EGRRCPA was enacted in 2018, therefore Y-14M data from between 2012 and 2018 relied on by the Bureau would be drawn from institutions with consolidated assets exceeding $50 billion, but post-2018 Y-14M data would only capture information from institutions with consolidated assets exceeding $100 billion, which is an even less representative sample size to review when engaging in a rulemaking that would impact the financial services industry as a whole.

[25] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,910.

[26] Consumer Financial Protection Bureau, *2021 Consumer Credit Card Market Report*, p.17 n.29 (Sept. 2021), *available at* https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

[27] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,931.

[28] *Id*. at 18,931-32.

[29] *See* 15 U.S.C. § 1665d(b), (e).

It is problematic that the proposals in the NPRM are fundamentally premised on non-public information and analyses that commenters do not have access to and are thus unable to review. The purpose of the notice-and-comment process is for interested parties to have the ability to meaningfully comment on a proposed rule. The ability to meaningfully review and analyze the underlying data is central to the notice and comment process outlined in the Administrative Procedures Act (APA). The Bureau has premised a significant rulemaking on non-standardized data collected by a different agency for an entirely different purpose and has not permitted commenters to review that data and analyses for themselves, which is not consonant with the principals of the rulemaking process. The Bureau has failed to show how it made its determinations in a manner that can be verified by industry. CBA, along with several trades, submitted a letter to the Bureau requesting that the Y-14 data be made public,[30] but as of the time of filing this letter CBA has received no response from the Bureau.

The Bureau asserts it did not receive specific data on losses and other associated costs[31] in response to its request in the Advanced Notice of Proposed Rulemaking (ANPR) on credit card late fees and late payments.[32] However, when industry requested an extension to the ANPR in order to collect and provide more robust data, the Bureau provided a mere 10-day extension near the end of the 30-day comment period,[33] which was not sufficient time to provide the data sought by the Bureau. Additionally, neither the ANPR nor the notice granting the 10-day extension provided any assurances that the data from individual issuers would remain confidential. Further, even if there was sufficient time for issuers to submit the requested data, the ANPR itself did not include a data dictionary or sufficient detail to ensure consistency amongst the data provided by issuers. As a result, the data provided could have been dismissed as inconsistent. Thus, the Bureau relied on incomplete and incongruous data for a major rulemaking, while not allowing industry and other stakeholders sufficient time to gather necessary data.

Instead of requesting data through a 30-day ANPR, the Bureau could have utilized its market monitoring authority under the Dodd-Frank Act section 1022[34] to compel institutions to provide data that the Bureau can then use for rulemakings or other quantitative analysis (an authority that the Bureau has used numerous times under Director Chopra).[35] The Bureau could have also engaged in requests for information (RFIs) specifically on this topic[36] or simply given an appropriate comment period to allow sufficient time for the type of responses sought. As discussed more fully in Part II.b, this expedited timeline is a further indication that the Bureau

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[30] ABA *et al.*, *Letter to Consumer Financial Protection Bureau re: NPR on Credit Card Penalty Fees (Regulation Z) (Docket No. CFPB-2023-0010; RIN 3170-AB15)* (Mar. 16, 2023) *available at* https://www.consumerbankers.com/sites/default/files/CFPB%20CC%20Late%20Fees%20NPR-%20Data%20Publication%20%283-16-23%29%20final%20for%20transmission.pdf.

[31] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,917.

[32] Credit Card Late Fees and Late Payments, 87 Fed. Reg. 38,679 (Jun. 29, 2022).

[33] Credit Card Late Fees and Late Payments, 87 Fed. Reg. 42,662 (Jul. 18, 2022).

[34] 12 U.S.C. § 5512(c)(1), (4).

[35] *See, e.g.*, Consumer Financial Protection Bureau, *CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans* (Oct. 21, 2021)*, available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/.

[36] Indeed, the Bureau has recently issued RFIs to understand the data broker market (Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information, 88 Fed. Reg. 16,951 (Mar. 21, 2023)) and the state of relationship banking (Request for Information Regarding Relationship Banking and Customer Service, 87 Fed. Reg. 36,828 (Jun. 21, 2022)).

has predetermined its course of action and is not truly seeking meaningful responses or data to support this rulemaking.

ii. Incomplete Analysis of the Y-14 Data

In addition to failing to consider data beyond the Y-14 data and Y-14+ data, the Bureau inappropriately limited the years of the Y-14 and Y-14+ data it used for its analyses, and then inadequately analyzed that limited subset of the data. The Y-14 data is available to approved users beginning with the 2012 data set.[37] Yet nearly all of the Bureau's analysis is limited to 2019, 2021, and 2022. For example, when attempting to estimate issuer pre-charge-off collection costs, the Bureau only looks at the time periods August 2021 up to "early 2022" and the time period from September 2021 through August 2022, rather than the entire data set.[38] The Bureau offers no explanation as to why their calculation, using collection costs as a percentage of total late fee income, would be representative as opposed to any other period available in the data, or the data set as a whole.

The Bureau was also not consistent in the time periods they chose to analyze when determining costs, benefits, and impacts. For example, the Bureau analyzed a different 12-month period – October 2021 through September 2022 – when evaluating the impact of its proposal to cap late fees at 25 percent of the total payment due.[39] Limiting analysis to only specific 12-month periods and changing the period under analysis depending on the question is arbitrary, and not adequately explained by the Bureau in the NPRM.

There is an additional issue with the Bureau choosing to analyze only data from 2021 and 2022: the effect that the COVID-19 pandemic and related government policies, such as the CARES Act, had on consumer financial behavior. It is well known, and posited by the Bureau in several other reports,[40] that due to government stimulus programs during the COVID-19 pandemic, consumer spending behavior was anomalous in the pandemic period (from March 2020 – 2022) compared to the pre-pandemic period (2019 and prior). In its March 2022 Consumer Credit Card Market Report, which was published 11 months prior to this NPRM, the Bureau highlights the issues with relying on data from the pandemic period and even states that there were unusual trends in late fees during this period: "As of this report writing, it remains too soon to determine the effects of the pandemic on consumer behavior. As such, after discussing *unusual trends in the overall late fee landscape* in this section, *this report primarily focuses on 2019 data*."[41]

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[37] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,910.
[38] *Id*. at 18,917.
[39] *Id*. at 18,929.
[40] *See, e.g.*, Consumer Financial Protection Bureau, *Consumer finances during the pandemic* (Dec. 2021), *available at* https://files.consumerfinance.gov/f/documents/cfbp_making-ends-meet-survey-insights_report_2021-12.pdf*;* Consumer Financial Protection Bureau, *Changes in consumer financial status during the early months of pandemic* (Apr. 2021), *available at* https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet-wave-2_report_2021-04.pdf; Consumer Financial Protection Bureau, *The Early Effects of the COVID-19 Pandemic on Consumer Credit* (Aug. 2020), *available at* https://files.consumerfinance.gov/f/documents/cfpb_early-effects-covid-19-consumer-credit_issue-brief.pdf; Consumer Financial protection Bureau, *The Early Effects of the COVID-19 Pandemic on Credit Applications* (Apr. 2020), *available at* https://files.consumerfinance.gov/f/documents/cfpb_issue-brief_early-effects-covid-19-credit-applications_2020-04.pdf.
[41] Consumer Financial Protection Bureau, *Credit card late fees*, p. 4 (emphasis added), *available at* https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf

Ironically, the Bureau also discounts studies from 2009-10 because of concern that behavior analyzed in those studies is affected by fallout from 2008-09 recession and economic dislocation.[42] The same logic should apply to analyses in 2021-22 because of economic disruptions from the COVID-19 pandemic. In fact, in their 2021 report on savings during the pandemic, The Federal Reserve Bank of Kansas City compared consumer savings behavior during the COVID-19 pandemic to the Great Recession, stating that "personal savings rates tend to increase when the economy is in a downturn, causing consumers to be more reluctant to spend… including [during] the Great Recession of 2007-09 and the current pandemic-induced recession."[43] The report finds that unlike the Great Recession period, during the COVID-19 pandemic,[44] household wealth increased overall, but this fact further highlights that the 2020 – 2022 period should be treated as anomalous, and not as a baseline.

iii. Improper Analysis of Tiered Fee Structure

The Bureau supports its conclusion that a one-tier fee, versus the current two-tier fee structure "better reflect[s] consideration of consumer conduct"[45] by relying on the wrong analysis. Specifically, the Bureau notes that "only 13.6 percent of accounts incurred a late fee and then no additional payments were made on the account."[46] A more apt question is whether those accounts that incur multiple late fees within the six-month window have a higher net charge off and credit cost within some short future period than those that do not. This is an analysis the Bureau could have performed with Y-14 data, but the Bureau did not present such an analysis. Further, the 13.6 percent figure would support keeping the two-tier structure. It is just as reasonable to conclude that the increased fee for the second late payment potentially incentivizes over 85 percent of consumers to make on-time payments going forward. Further, the Bureau has no basis to affirmatively conclude, and does not provide any data to affirmatively support, that the increased fee for the second late payment did *not* incentivize increased on-time payments.

Relatedly, the Bureau claims that multiple late payments within a six-month window is not a proxy for consumer credit risk.[47] To support this position it notes that industry credit bureau reporting utilizing the Metro2 credit reporting system does not consider a payment late if it is made within thirty days of the due date.[48] But this fact does not undermine the rationale that the two-tiered structure is a key component of credit risk management, since one of the purposes of a higher fee for second missed payment is to prevent multiple late payments within a short

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[42] *See, e.g.*, Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,920.

[43] Rick Babson, FEDERAL RESERVE BANK OF KANSAS CITY, *Study shows surge in savings during the pandemic* (Apr. 29, 2021), *available at* https://www.kansascityfed.org/ten/2021-spring-ten-magazine/study-shows-surge-in-savings-during-the-pandemic/.

[44] *See id.* ("One possible silver lining in the current downturn, is that its effects may be much different from recent downturns, particularly the most recent, the 2007-09 Great Recession. One of the major effects of the global financial crisis and the Great Recession was the loss of household wealth amid a crash in housing prices. 'This pandemic has been very different, as household wealth has actually increased,' [A. Lee] Smith said. 'That's one reason to be optimistic: that even if the stock of accumulated savings isn't drawn down, the savings rate will move back to pre-pandemic levels once this crisis ends.'") (quoting A. Lee Smith, a research and policy advisor in the Economic Research Department of the Federal Reserve Bank of Kansas City).

[45] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,923.

[46] *Id.*

[47] *Id.*

[48] *Id.*

window, which is a different risk characteristic than the question of any given payment being less than 30 days late. The Bureau also suggests that multiple missed payments do not increase credit risk, and it is unclear why the Bureau suggests this, as it is factually inaccurate. As discussed in Part I.a.iii, late fees are closely tied with credit risk. Assuming all other factors are equal, habitual late payers who have several consecutive late payments will have lower credit scores than on-time payers or non-habitual late payers, and credit scores are a key measure of credit risk.

iv. Missing Analysis for Major Aspects of the Proposal

The Bureau proposal encapsulates four main components: (i) lowering the late fee safe harbor dollar amount to $8, (ii) eliminating the tiered fee structure, (iii) creating an analytical framework for calculating the "cost analysis" provision, and (iv) capping the late fee amount at 25% of the minimum payment amount. The Bureau is also requesting comment on providing consumers with a 15-day "courtesy period" for making a payment. For two of these components, the 25% cap on the minimum payment amount and the institution of a 15-day "courtesy period," the Bureau offers little to no analysis, failing to quantify any benefits to consumers or calculate any costs to issuers.

While the Bureau does not appear to formally propose a 15-day "courtesy period" for consumers to make a late payment, the Bureau discusses it in the context of responses to their Advance Notice of Proposed Rulemaking. The Bureau states that it is "considering whether to require a courtesy period, which would prohibit late fees imposed within 15 calendar days after each payment due date and be applicable only to late fees assessed if the card issuer uses the safe harbor or alternatively, applicable to all late fees generally." The Bureau notes that consumer groups argue that mortgage loan contacts often provide for a 10-day or 15-day "courtesy period." However, the Bureau fails to explain why a 15-day grace period for mortgage payments, the largest form of *secured* lending, should be applied to credit cards, the most common form of *unsecured* lending. The Bureau provides no quantification of consumer benefits or harm for the suggested 15-day courtesy period or courtesy periods of any length. Additionally, as discussed in more detail in Part I.c.i, a 15-day "courtesy period" poses a substantial credit risk to issuers, a fact the Bureau does not appear to have considered. Further, this "courtesy period" has the potential to create consumer confusion. Consumers may not know when their payment is actually due and that interest may continue to accrue between the due date and the end of the "courtesy period."

The Bureau also provides minimal analysis of the cost, benefits, or likely effects of a cap of 25% of the minimum payment. The Bureau also provides nothing to demonstrate that the 25% minimum payment cap is reasonable and proportionate. The Bureau acknowledges that, in order to charge a late fee of more than $8, issuers will likely have to raise minimum payment amounts, but there is no discussion of the effect this will have on consumers and issuers.[49] In fact, it is likely that this change will negatively impact consumers, as some consumers may not be able to pay a larger minimum payment and, thus, more consumers will likely be delinquent, experience negative credit reporting, default, and not be able to meet ability to pay requirements. As

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[49] *See id*. at 18,936.

discussed in Part I.a.iv, an increase in defaulted consumers will also have credit risk implications for issuers and may restrict access to credit

c. Use of Insufficient and Inadequate Data in Assessing Costs to Issuers

Due to the analytical deficiencies outlined above, the Bureau has inaccurately assessed the costs issuers face with respect to late payments. The Bureau's evaluation of issuer costs is further undermined by faulty assumptions used in calculations, specifically the misguided exclusion of post-charge-off costs from determining an issuer's costs. The Bureau also neglects to consider increases in costs associated with increasing collection efforts and using technology to deter late payments.

i. *Inaccurate Calculation of Costs Associated with Managing Late Payment Risk*

The Bureau concludes that the NPRM "will generally lower compliance costs for card issuers and facilitate consumer understanding of the rule."[50] But it is not clear why the Bureau believes this, as all regulatory changes impose costs on industry. Whether or not an issuer chooses to utilize the new, significantly lower, $8 late fee safe harbor amount, or use the cost analysis approach, neither approach is costless and there will be significant costs associated with technology, executing a change in terms, updating existing agreements, and revising disclosures that are provided throughout the account lifecycle.

As discussed in Part I.b.i of this letter, the Y-14 data was not collected with the intention of appropriately quantifying industry-wide costs associated with late payments, thus it does not incorporate many of the costs issuers face in managing late payments. Actual costs to issuers (mentioned above and below) are not adequately captured in the Y-14 data, because the Y-14 data was not intended to be collected and used for the purpose of calculating costs to issuers of late credit card payments.

Managing late payment risk involves people-related expenses for strategic risk modeling, acquisitions credit policy, risk monitoring, and severity management. Issuers also incur vendor and technology costs associated with the platforms and data in support of credit assessment and severity management. Finally, there are numerous other material costs associated with delinquent payments that have been excluded, including credit losses and uncollected finance charges and fees.

The Bureau also ignores the multitude of costs to issuers associated with ensuring the safety and soundness of credit portfolios. A brief overview of some of the OCC's prudential regulatory standards was provided in Part I.a.iii of this letter, and the FDIC[51] and Federal Reserve[52] both have credit risk standards that, depending on their charter, issuers may be required to comply

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[50] *Id*. at 18,932.
[51] *See, e.g.*, Federal Deposit Insurance Corporation, *Risk Management Manual of Examination Policies* (Aug. 2022), *available at* https://www.fdic.gov/regulations/safety/manual/.
[52] *See, e.g.*, Federal Reserve Board, *Commercial Bank Examination Manual* (Nov. 2020), *available at* https://www.federalreserve.gov/publications/files/cbem.pdf.

with. One of the biggest safety and soundness risks not addressed in the Bureau's analysis is the risk associated with proposal to impose a mandatory 15-day "courtesy period" for charging late fees. This prohibition would effectively extend an approximately 30-day liability to an approximately 45-day liability for issuers, which can have drastic consequences and costs for an issuer's balance sheet, which raises significant safety and soundness risks.

Finally, the Bureau fails to factor no longer indexing the safe harbor to the Consumer Price Index (CPI) into its evaluation of issuer costs. The Bureau proposes to no longer index the safe harbor to the CPI and instead "monitor the market and adjust the safe harbor amount ad hoc to reflect changes to pre-charge-off collection costs and other statutory factors."[53] If the Bureau finalizes the rule as proposed in the NPRM, issuers would be faced with significant uncertainty and it may influence their decision whether to invest in a cost analysis approach to late fees.

ii. Inappropriate Limitation of Analysis to Pre-Charge-Off Collections Costs

When analyzing the potential costs to issuers of lowering the late-fee safe harbor dollar amount, the Bureau only considers "those (estimated) costs that card issuers are permitted to take into account for purposes of determining the amount of a late fee under the cost analysis provisions in § 1026.52(b)(1)(i)".[54] As a threshold matter, the CARD Act requires a much broader consideration of the costs to issuers that should be included (the "cost incurred by the creditor from such violation or omissions").[55] The Bureau proposes to narrow the calculation of issuer costs to just the costs of collection. However, when the additional "costs incurred by the creditor" are appropriately considered, the proposals' cost to issuers is significantly higher than the Bureau claims in the NPRM.

The Bureau relies on estimates of pre-charge-off collection costs per paid incident using the Y-14 data from September 2021 to August 2022 to determine whether and how late fee income is generated compared to the costs that are incurred by issuers.[56] The Bureau states that "the reported collection costs in the Y-14 data (1) include costs incurred to collect problem credits that includes the total collection cost of delinquent, recovery, and bankrupt accounts, and (2) do not include losses and associated costs."[57] The Bureau determined, without further reasoning, that but for the fact that the Y-14 data includes post charge off collection costs, the Y-14 data matches the costs included in the cost analysis approach.[58]

The Bureau concludes that late fee income is greater than five times estimated pre-charge-off costs, and that the appropriate late fee income to cover such costs is $8.[59] However, the Bureau, by its own admission, is only looking at pre-charge-off collection costs, not all "cost incurred by

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[53] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,936.
[54] *Id*. at 18,916.
[55] 15 U.S.C. § 1665d(c)(1).
[56] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,917.
[57] *Id*. at 18,916.
[58] *Id*. ("The Bureau concludes that the collection costs data in the Y–14 are consistent with the costs included for the cost analysis provisions in § 1026.52(b)(1)(i) except that the collection costs in the Y– 14 data include post-charge-off collection costs.").
[59] *Id*. at 18,917.

the creditor from such violation or omissions,”[60] which would include pre-charge-off costs other than collections costs as well as post-charge-off collections costs. There are many pre-charge-off costs beyond simply collections-related expenses that issuers face in connection with delinquent, recovery, and bankrupt accounts, including: costs associated with pre-charge-off customer service; commissions; grants; program development; and collections strategies. If the Bureau properly compared late fee income to “cost incurred by the creditor from such violation or omissions,” it would see that the current safe harbor amounts do not even currently cover issuer costs.[61]

Moreover, there are several months preceding August 2021 in the Bureau’s own data on the ratio of late fee income to future collection costs in which late fee income is not five times estimated pre-charge-off costs.[62] The Bureau fails to explain why its analysis appears to be limited to a period of less than 12 months,[63] while the Bureau considers 12 months an appropriate period for a cost analysis provisions.[64] Further, the calculations in Figure 1 of the NPRM are based on averages—a ratio of late fee income to future collection costs based on “estimated pre-charge-off collection costs for that month” averaged “across issuers and market segments, weighted by the number of accounts reported in the Y-14 data.”[65] Even among the 12 card issuer portfolios reviewed, the Bureau appears to estimate that at least three have pre-charge-off collection costs higher than one-fifth of their late fee income.[66] To the extent that issuers’ costs exceed the safe harbor, they may choose to potentially exit segments in which their late fee costs exceed the safe harbor amount. The Bureau has not provided information about the distribution of the ratio of late fee income to future collection costs, nor whether it used all of the issuers in the Y-14 data in its analysis presented in Figure 1 of the NPRM.

iii. Inappropriate Exclusion of Post-Charge Off Costs

The Bureau’s cost analysis approach should include the *true* costs of collections, including those incurred post-charge-off. Issuers consider many costs across the entire customer lifecycle as a part of encouraging customers to remain current and resume payments if they have fallen behind, regardless of delinquency or charge-off status. Charge-off is an accounting concept that has no impact on the collectability or obligation of the debt; in fact, the difference between pre-charge-off and post-charge-off delinquencies is the amount of time that the debt has been in delinquent

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[60] 12 C.F.R. § 1026.52(b)(1)(i).
[61] *See* ABA et al., *Letter to the Consumer Financial Protection Bureau re: Docket No. CFPB-2023-0010, Notice of Proposed Rulemaking, Credit Card Late Fees and Late Payments (Truth in Lending Act/Regulation Z)*.
[62] *See* Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,917 (Figure 1).
[63] While the CFPB has data from 2013 to early 2022, this analysis appears to only be focused on August 2021 through early 2022. *Id*. at 18,916-17.
[64] 12 C.F.R. § 1026.52(b)(1)(i) (“A card issuer may impose a fee for violating the terms or other requirements of an account if the card issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation. A card issuer must reevaluate this determination at least once every twelve months”).
[65] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,916-17.
[66] *Id*. at 18,917 (“The Bureau acknowledges that not all issuers in the Y-14 data face the average pre-charge-off collection costs. By using estimates of pre-charge-off collection costs per paid incident using the Y-14 data from September 2021 to August 2022, the Bureau estimates that fewer than four of the 12 card issuers in the Y-14 data have estimated pre-charge-off collection costs that are significantly higher than one-fifth of their late fee income”). Note, the Bureau does not define “significant.”

status. The Bureau argues that post-charge-off collection efforts are "related to mitigating a loss as opposed to the cost of a violation of the account terms." [67]

The Bureau's determination that issuer late payment costs do not include any collection costs incurred after an account is charged off pursuant to loan loss provisions[68] is misguided. The Bureau reasons that "the most significant post-charge-off collection costs are likely to be commissions paid to third-party debt collectors for charged-off accounts. The Bureau understands that such commission payments, made to third-party debt collection companies, would be made almost exclusively in connection with accounts that have been charged off, and represent a conservative estimate of post-charge-off collection costs, as there may be other costs associated with collections post-charge-off beyond such commission payments."[69] The Bureau's estimation of post-charge-off-costs is much too narrow and it does not address the reality that many issuers have large internal post-charge-off recovery teams. Issuer costs to recover post-charge-off accounts include: internal and supplier expenses; court costs and vendor commissions associated with the recovery of unpaid balances; technology expenses; people-related expenses for recoveries strategy development and execution; and customer communication costs throughout the recovery process. Additionally, the Bureau's calculation of post-charge-off costs ignores the fact that payments and commissions to third-party debt collectors are still costs borne by issuers associated with late/non-payment of credit card accounts, and would not have occurred if these customers made timely payments.

iv. Likely Increased Use of the Cost Analysis Approach

The Bureau also does not adequately consider that more issuers may use the cost analysis approach to set the late fee rather than relying on the safe harbor dollar amount. The Bureau concludes that "fewer than four of the twelve covered issuers may use the cost analysis provisions" rather than relying on the safe harbor[70] but this is based on collections cost data under the current regulatory regime, where the safe harbor dollar amount is $31 and consumer conduct is influenced by that amount (see discussion of the deterrent effect of late fees in Part I.d). To the extent that the lower amount leads to increased late payments and lower fee collection, issuers may have to respond by increasing collection efforts/collection costs, which could result in more issuers using the cost method in setting late fees.

v. Costs Associated with On-Time Payment Notifications

The Bureau discusses at length that technology used to deter late payments and incentivize or encourage on-time payments can mitigate pre-collection and post-collection charge-off costs for issuers.[71] However, the Bureau's cost-benefit analysis does not account for the costs associated with these technologies. Deterring late payments and incentivizing on-time payments involve costs associated with developing products and strategies designed to help customers maintain their current status on their loan, as well as tools and features designed to help people pay on

[67] *Id*. at 18,913.
[68] *Id*. at 18,907.
[69] *Id*. at 18,922.
[70] *Id*. at 18,933.
[71] *See id*. at 18,935-36.

time. Further, the Bureau appears to presume a baseline where issuers do not already have and employ these reminders and techniques, which is not the case. Issuers currently employ a broad range of reminders and nudges for consumers to pay on time, as discussed in Part I.a.v of this letter. The Bureau fails to provide evidence that there would not be diminishing marginal returns associated with additional reminders and nudges to consumers, or that more consumers would pay on-time if issuers employed more reminders. The Bureau also does not consider the cost of these interventions.

d. Inadequate Analysis of the Deterrent Effect on Late Fees

The Bureau's analysis of the deterrent effect of late fees is severely flawed. The Bureau's analysis generally lacks the necessary rigor of other published analyses that represent findings contrary to the Bureau's proposals. In particular, the Bureau's reliance on its Seven Month Analysis, which has several structural and analytical flaws and is not a good proxy for the proposals, is wholly inappropriate, as further discussed in Part I.d.ii.

i. Analytical Deficiencies in the Bureau's Evaluation of the Deterrent Effect of Late Fees

The Bureau argues that the deterrent effect of an $8 late fee is similar to the deterrent effect of the current rate structure,[72] but its analysis is profoundly lacking. The Bureau also argues that the $8 fee along with other potential costs, such as the loss of a grace period or negative credit reporting, will have a sufficient deterrent effect.[73] But those consequences already exist, and consumers still pay late even with a higher potential fee. In fact, the Bureau's proposal will essentially eliminate the most effective consumer consequence for paying late, therefore reducing the deterrent effect of the late fee.

The Bureau initially supports its conclusion, that the deterrent effect of an $8 late fee is similar to the deterrent effect of the current rate structure, by comparing the effective APR a consumer might incur in a series of hypothetical situations.[74] But high APRs may not adequately deter borrowers for ultra-short-term borrowing - such as the 10-30 days in the hypotheticals - where the absolute dollar amounts are relatively small. The Bureau offers no analysis as to whether those APRs would have the presumed deterrent effect, nor does it compare the potential deterrent effect of an $8 fee to the deterrent effect of the current fee structure. In fact, these APRs may not have a meaningful deterrent effect like late fees have because they are a more complicated, nebulous concept for consumers to understand.[75]

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[72] *See, e.g.*, *id*. at 18,918.
[73] *Id*. at 18,922.
[74] *Id*. at 18,920.
[75] *See generally,* Alycia Chin & Wändi Bruine de Bruin, *Helping consumers to evaluate annual percentage rates (APR) on credit cards*, Journal of Experimental Psychology: Applied (Mar. 2019) p. 3, *available at* https://psycnet.apa.org/fulltext/2018-58857-001.html ("However, disclosures may not be informative for consumers if they contain difficult-to-evaluate attributes, such as annual percentage rates (APRs)."). *See also* CBA, *New Poll: Majority of Americans Believe Credit Card Late Fees Are Legitimate* (Apr. 5, 2023), *available at* https://www.consumerbankers.com/cba-media-center/media-releases/new-poll-majority-americans-believe-credit-card-late-fees-are. Of the consequences that can follow late credit card payments, survey respondents answered the following

The Bureau then goes on to dismiss peer-reviewed published literature on the deterrent effect of late fees, which uses its own consumer credit panel data, in favor of a back-of-the-envelope calculation, further detailed in Part I.d.ii, that has none of the same rigor and no demonstration of statistical significance.

Moreover, the Bureau argues that even if the lower late fee safe harbor amount has a lesser deterrent effect and late payments increase, "the increased number of late payments are unlikely to be more costly, on average, to administer and collect than the current number of late payments."[76] The Bureau does not provide any data or analysis to support this assertion. By the plain text of their statement it is clear that this will increase costs to issuers as the absolute cost of a late payment to issuers is not decreasing. Issuers are likely to see more late payments due to a lesser deterrent effect of the $8 – thus, issuer costs will go up due to more late payers.[77]

ii. Structural and Analytical Flaws in the Bureau's Seven Month Analysis

The Bureau cites a 2022 paper by Grodzicki et al.[78] which contains an empirical analysis concluding that a decrease in the late fee amount stemming from the Board's 2010 Final Rule raised the likelihood of a cardholder paying late.[79] The Bureau then dismisses this published, peer-reviewed empirical assessment, in favor of its own calculation (the "Seven Month Analysis"). This dismissal is puzzling because the empirical work in the Grodzicki et al. analysis was performed using the Bureau's own Credit Card Database.[80] In addition to the deficiencies in this analysis that are described below, the Seven Month Analysis has none of the same rigor or weight of the Grodzicki et al. analysis and does not hold up to scrutiny. The specifics of the Seven Month Analysis are not provided in the NPRM, nor is the Seven Month Analysis peer reviewed. Most shockingly, the Bureau provides no indication that the results from the Seven Month Analysis are statistically significant.

The Bureau further dismisses the findings in the Grodzicki et al. paper by noting that market and economic factors could have had an effect: "[T]he 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"[81] and "the causal attribution of an increase in late payments to a reduction of the late fee amount is hard to prove due to the general economic

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ways: Only 1/3 (33%) selected "my interest rate goes up to a temporary penalty rate"; Less than 1/3 (31%) chose "my credit score can go down by as many as 100 points"; Only 26% accepted "I lose access to special offers, like introductory low or 0% interest rates"; Meanwhile 46% mistakenly believed "My credit score can go down a little, by 10 or fewer points."

[76] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,918.

[77] The current two-tiered late fee structure reflects the fact that habitual late payers result in greater costs for issuers than one-time late payers and occasional late payers.

[78] Daniel Grodzicki, et al., *Consumer Demand for Credit Card Services*, Journal of Financial Services Research (Apr. 25, 2022), https://link.springer.com/article/10.1007/s10693-022-00381-4.

[79] *Id*.

[80] *Id*. at p. 5-6.

[81] Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. at 18,920.

uncertainty around that time."[82] The Bureau simultaneously though uses another study that is based on the policy change of the 2010 Federal Reserve Board Final Rule regarding credit card late fees to dismiss potential concerns of adverse selection on APR.[83] Elsewhere the Bureau undertakes analyses that rely on data from 2021 and 2022[84] (discussed in Part I.b.ii), which immediately followed the COVID-19 global pandemic and was generally a time of great economic uncertainty much like the period following the Great Recession.

The Bureau admits that the Seven Month Analysis is not a good proxy for the proposed changes, but nevertheless concludes that it "suggests the prevalence of the late payments is not highly sensitive to the level of late fees at the current order of magnitude."[85] Ignoring the potential issues with the Seven Month Analysis, the data presented does not discuss "the prevalence of late payments" under the current fee regime. Rather, it discusses the deterrent effect that the two-tiered fee structure may, or may not, have on the specific population studied. There is no basis to conclude that the difference in deterrent effect that results from a $30 fee to a $41 fee for the second missed payment in the six-month window will be the same as the difference in deterrent effect that results from eliminating the two-tier structure altogether and/or going from a $30 fee to a fee that is effectively the lesser of $8 or 25 percent of the minimum payment due.

The Seven Month Analysis has several structural and analytical flaws. First, there is a selection bias problem with the population the Bureau is examining, as everyone in the sample, by definition, has made a late payment. Specifically, there is no control group of consumers who have not made a late payment that can be examined to determine how their behavior would change with a higher or lower late fee. Additionally, as discussed above, this analysis does not actually provide any comparison of either the order of magnitude change ($41 to $30 is an $11 drop, whereas $30 to $8 is a $22 drop and $41 to $8 is a $33 drop) or the absolute dollar amount change that the Bureau is proposing. The analysis also is flawed in that it looks at consumer behavior over inconsistent time periods. It is well known in the behavioral economic literature that there are significant temporal elements associated with consumer behavior. There are also well-known seasonal patterns of credit usage (*e.g.,* holiday spending). Thus, comparing a lesser fee charged six months out compared to a lesser fee charged on a monthly basis is not an apples-to-apples comparison.

The Bureau also relied on the Seven Month Analysis to support its proposal to eliminate the two-tier late fee structure. Specifically, the Bureau noted that individuals who incurred a higher fee for a second missed payment during the six-month window were not less likely to have a third missed payment within that window than were consumers who only paid the lower late fee because their second missed payment was outside of the six-month window.[86] But this comparison is inapt since it is comparing two separate types of consumers: (i) those who are not deterred by the higher fee amount, since they already incurred the higher late payment fee, and (ii) those who may have been deterred since they never incurred a second late fee within the six-month window. A better investigation may have been to determine what proportion of

[82] *Id*.
[83] *See id*. at 18,934, fn. 170.
[84] *See, e.g.*, *id*. at 18,916-17 (the Bureau's analysis of late fee income-to-cost ratios).
[85] *Id*. at 18,920.
[86] *Id*.

borrowers, after incurring an elevated late fee for missing a second payment in the six-month window, had additional instances in which they incurred the higher fee. Such an analysis could show that the higher fee structure does have a deterrent effect if a statistically significant portion of the population never again incurred the higher fee. However, the Bureau did not present such an investigation, and the Bureau's decision to only review a 12-month period precludes this type of analysis.

II. APA Notice-and-Comment Process Concerns

In addition to the concerns about the Bureau's Section 1022 analysis outlined in Part I above, CBA is deeply concerned about the potential APA violations that have occurred during this rulemaking process. The Bureau has failed to outline any reasonable or foreseeable alternatives to its proposals in the NPRM. Equally as worrying, the Bureau appears to have prejudged the outcome of this rulemaking based on statements made by the Bureau, its Director, and the President of the United States.

a. Failure to Consider Alternatives for the NPRM

The Bureau asserts that it "considered several alternatives in developing the proposal to lower the safe harbor amounts for late fees."[87] However, the only alternative discussed by the Bureau, and on which the Bureau seeks comment, is the elimination of the late fee safe harbor and/or the elimination of the safe harbor for all other credit card penalty fees altogether.[88] The Bureau does not provide further insight into the nature of the other alternatives it considered. To the extent such alternatives are under consideration, failure to include these alternatives in the NPRM deprives commenters of the ability to meaningfully comment.

There are reasonable and foreseeable alternatives to the Bureau's proposal that should have been included and discussed in the NPRM. For example, the Proposal did not consider whether: (i) the rule was necessary at all, (ii) a higher safe harbor late fee amount is appropriate (especially considering deterrent effects and differences between credit card products and portfolios), and (iii) it would be prudent to consider some of the proposals in isolation, rather than in conjunction with all of the other proposals discussed in Part I.b.iv. For example, the Bureau provided no analysis or insights into whether lowering the safe harbor amount and instituting a 15-day "courtesy period" jointly would be appropriate, or whether it would be better to institute one intervention *or* another.

b. Prejudgment of Issues in Rulemaking Process

The Bureau also appears to have prejudged the outcome of the rule making in general, and the amount of "consumer savings" in particular. This prejudgment could support a pre-enforcement challenge to the final rule. As noted in Part I.b.i, the Bureau's refusal to give industry sufficient time to provide data on credit card late fees and late payments in their response to the ANPR, as well as the Bureau's decision to not utilize its market monitoring authority or engage in RFIs on this topic, suggest that the Bureau is not truly seeking meaningful responses or data and has

[87] *Id*. at 18,924.
[88] *See id*. at 18,924-25.

predetermined its course of action. This is further evidenced by the fact the White House has already incorporated the presumed $9 billion in consumer savings into its communications strategy, and in his 2023 State of the Union Address delivered on February 7, 2023, President Biden stated definitively: "We're cutting credit card late fees by 75 percent, from $30 to $8."[89] Bureau decisionmakers must maintain an open mind in reviewing and considering comments submitted to the Bureau regarding the $8 late fee safe harbor dollar amount. The President's statement appears to constrain the Bureau's discretion in finalizing significant portions of the NPRM.

Additionally, the same day the rule was released, Director Chopra's and the CFPB's official Twitter accounts posted an infographic emphasizing that the Bureau's proposed late fee rule was expected to reduce late fee revenue by as much as $9 billion a year.[90] President Biden subsequently tweeted how "hidden junk fees can add up and cause real pain" and then cited to the Bureau's effort to reduce credit card late fees.[91] Subsequently, the White House and Bureau have hosted events on "junk fees" that contained similar rhetoric, pointing to the pre-judged finality of the proposal.

Given these very public statements and focus on the $9 billion number, it appears that the Bureau has prejudged the outcome of the rule[92] and thus will have a difficult time walking back from or changing anything about the rule that would change the $9 billion savings number**.** It is unclear how the Bureau can possibly reconcile its obligation to meaningfully weigh public comments on the NPRM with President Biden's proclamation that credit card late fees will be reduced to $8.[93]

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CBA appreciates the opportunity to comment on this NPRM, and hopes that the Bureau reevaluates its proposal in light of the aforementioned concerns.

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[89] President Joe Biden, State of the Union Address 2023 (Feb. 7, 2023), *available at* https://www.whitehouse.gov/state-of-the-union-2023/.

[90] Rohit Chopra (@chopraccfpb), TWITTER (Feb. 1, 2023, 7:52 AM), https://twitter.com/chopracfpb/status/1620767031065714689 ("Today, the @CFPB proposed a rule to curb excessive credit card penalty fees. We project that this could save Americans as much as $9 billion in credit card late fees each year. https://consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/"); Consumer Financial Protection Bureau (@CFPB), TWITTER (Feb. 1, 2023, 7:30 AM), https://twitter.com/CFPB/status/1620761391815598080?lang=en, ("Today, the CFPB proposed a rule to curb excessive credit card late fees that cost American families about $12 billion each year. Learn more about the proposed rule and how you can submit feedback. https://consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/").

[91] President Joe Biden (@POTUS), Twitter (Mar. 1, 2023, 5:15 PM), https://twitter.com/POTUS/status/1631055470831054852?lang=en ("Like Brenda shared, hidden junk fees can add up and cause real pain. We're cutting credit card late fees by 75%. The next step is for Congress to pass my Junk Fees Prevention Act.").

[92] *See, e.g.*, *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979), *cert. denied* 447 U.S. 921 (1980) ("An agency member may be disqualified from such a proceeding only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking").

[93] *See, e.g.*, *id*. at 1173 ("Moreover, as we stated earlier, an expression of opinion prior to the issuance of a proposed rulemaking does not, ***without more***, show that an agency member cannot maintain an open mind during the hearing stage of the proceeding") (emphasis added). The President of the United States announcing that an action will be taken is certainly beyond just the expression of an agency member's opinion.

Sincerely,

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