May 1, 2019

Via Regulations.gov

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Attn: Comment Intake

Re: Request for Information Regarding Consumer Credit Card Market (Docket No. CFPB-2019-0002)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the request for information[2] issued by the Consumer Financial Protection Bureau seeking input regarding the consumer credit card market.

Credit cards play a vital and growing role in consumers' personal and household finances, most recently demonstrated by the Federal Reserve Board's G.19 Report showing that outstanding consumer credit related to credit card plans has increased to an amount over $15.2 billion.[3] The continuing and increasing use of credit cards demonstrate their value to consumers to address day-to-day expenses, emergencies and general household needs. To this end, the Credit Card Accountability Responsibility and Disclosure Act of 2009, through requiring consumer disclosures, allows consumers to better understand available products and make informed decisions about using those products that best suit their financial needs.

At the same time, however, certain aspects of the CARD Act, as currently implemented, continue to have an adverse impact on consumer choice in and access to the marketplace, which manifests in several ways.

- First, aspects of the CARD Act have spurred homogeneity in the credit card market, with product availability being narrowed over time. In particular, as a result of those aspects, credit card products now tend to reflect similar terms and conditions, constraining consumer choice by

---

1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

2 Request for Information Regarding Consumer Credit Card Market, 84 Fed. Reg. 647 (Jan. 31, 2019).

3 FRB, Consumer Credit – G.19 (Apr. 5, 2019).

reducing the pool of available and different products, including those that might best suit consumers' financial needs. While standardization may facilitate a comparison of product benefits for consumers, it also at times drives a significant segment of borrowers, particularly those that are non-prime and higher-risk, away from the traditional credit card market into less safe and sound credit market alternatives.

- Second, the applicable interest rate restrictions have limited repricing discretion, thus constraining the ability of banks to accommodate borrowers falling outside of the prime category. More specifically, banks are not as easily able to adjust interest rates—including *decreasing* rates where otherwise warranted—and are further limited from providing price adjustments to borrowers falling outside of the prime range.[4]

- Third, credit card offerings continue to cluster around prime and super-prime borrowers in part due to the income and asset determination required under the ability-to-repay provisions of the CARD Act, which impose a linear analysis of a borrower's repayment capability that limits banks' ability to account for other factors that presumably could allow that borrower to receive a credit card product. Although lending to higher-risk borrowers has occurred more recently, some banks remain constrained from further expanding availability of credit card products to those borrowers that fall outside of the prime range.

To address these issues, this letter sets forth and discusses the following three key areas that we believe warrant further focus and consideration by the CFPB as it continues to examine and oversee the consumer credit card market. First, although banks continue to seek methods by which to improve and increase availability of credit card products to a larger set of consumers, the ability-to-repay provisions of the CARD Act, as implemented, place limitations on banks' ability to comprehensively increase access to credit for non-prime and higher-risk borrowers who may well be able to demonstrate sufficient creditworthiness through alternative means. Second, innovations in the online servicing of credit card products continue to benefit borrowers by providing increased transparency and greater control over the use of credit card products, but to maximize these efficiencies modifications to Regulation Z are needed to align with consumer use of these products. Third, given that consumers increasingly interact with financial institutions through digital channels, the CARD Act's disclosure framework, as implemented by Regulation Z, correspondingly should be modernized to provide a flexible approach for delivering mandated disclosures in a format and manner that reflects the evolution of technology and the ubiquity of digital channels.

---

4 *See e.g.*, Joshua Ronen & Tiago da Silva Pinheiro, *Unintended Consequences of the Credit Card Act* (Aug. 2014) (evaluating the impact on consumer welfare of the constraints on increasing interest rates present in the CARD Act, which may lead to lower up-front fees, but higher credit card interest rates for low credit-quality consumers); Yiwei Dou, Geng Li & Joshua Ronen, *Does Price Regulation Affect Competition? Evidence from Credit Card Solicitations*, Finance and Economics Discussion Series 2019-018, Board of Governors of the Federal Reserve System (2019).

I. Banks continue to seek to expand the availability of responsible, safe and sound credit card products to consumers, but aspects of the CARD Act constrain banks' ability to offer products to non-prime and higher-risk borrowers.

A. Considerations related to the income and asset determination required under the ability-to-repay provisions pursuant to the CARD Act, and as implemented by Regulation Z, continue to limit the availability of and access to credit card products for non-prime and higher-risk borrowers who may well be able to demonstrate sufficient creditworthiness through alternative means.

The CARD Act's income and asset determination requirements related to its ability-to-repay requirements continue to impair consumer access and availability to credit card products. While we believe that engaging in the income and asset analysis facilitates consumers' understanding of the cost of credit and their ability to make minimum payments, rigidly considering a borrower's debt-to-income or debt-to-asset ratios can result in declining a borrower that falls outside of the prime range.

Card issuers continually balance expanding the availability of consumer credit card products with ensuring that a consumer will continue to have remaining income after repayment of his or her debt. In engaging in this analysis, considerations related to a borrower's debt-to-income ratio play a large role, such that a card issuer may choose not to extend credit to a borrower on the cusp of having sufficient remaining income after repayment of the debt. Having the ability, at minimum, to permit a bank to incorporate additional factors or data based on an existing customer relationship, particularly in the case where a consumer chooses to reopen an account, as a part of the ability-to-repay determination required under the CARD Act and Regulation Z, could have significant beneficial effects of increasing access to credit for these borrowers in successive applications for a credit card product.

Further, even in the case of secured cards, which often serve to incorporate the underbanked and unbanked into the credit card market, the ability-to-repay provisions of the CARD Act and Regulation Z can restrain expanded access to credit.[5] Specifically, the ability-to-repay requirements require card issuers to assess the ability of the borrower to make minimum monthly payments on an unsecured credit card account based on the borrower's income and asset obligations. For most credit cards, the minimum payment due is 2% or less of the credit line. For a secured card, the security deposit provided by the consumer is an asset that covers the credit line that on its own should satisfy the ability-to-repay requirements, because consumers agree that a security deposit, once provided, can be used to repay amounts borrowed on the credit card account. In this way, secured cards more than adequately meet ability to pay requirements because they support payment above the minimum monthly payment. Allowing consideration of the security deposit in the ability-to-pay determination would thus expand access to credit for the unbanked or underbanked, enabling these borrowers to receive credit card products and improve financial health through consistent repayments and use.

---

5 CFPB, *The Consumer Credit Card Market Report* (Dec. 2017) (discussing secured cards as offering a path towards establishing or building credit scores for traditionally underbanked or unbanked consumers).

B. **The use of alternative data and machine learning technology could foster increased access to consumer credit cards for higher-risk and non-prime borrowers, but regulatory clarity is needed to provide an appropriate testing ground for the use of this technology.**

Banks continue to explore using alternative data in credit scoring models to further expand access to credit card products. Machine learning and artificial intelligence have the potential to provide a more nuanced perspective for demonstrating a customer's repayment ability. For example, an applicant's ability to make consistent utility, cellular or medical payments could both predict a borrower's ability to make credit card payments and yield greater insight into a borrower's credit behavior to assess factors beyond those used in a traditional credit score to assess credit risk.[6] Moreover, incorporating machine learning or other artificial intelligence methods into the traditional credit card underwriting process would aid in further streamlining the process and increase efficiencies, in turn reducing costs for borrowers.

However, while the use of alternative data in the credit card underwriting process holds promise, all stakeholders would benefit from clearer rules of the road and a more robust and consistent framework in which to test its use. For example, to appropriately ensure that the use of this data benefits borrowers, additional clarity is needed regarding how to provide borrowers with notification of an adverse action under the Equal Credit Opportunity Act and the Fair Credit Reporting Act and the reasons for that action where alternative data is used.

In addition, the CFPB should account for considerations raised by the use of alternative data as it continues to assess the disparate impact framework under fair lending laws. Specifically, as part of a broader discussion regarding the application of disparate impact, the CFPB should outline how that framework may be applied to credit scoring models that use alternative data, allowing banks to assess the appropriate risk weights and proxies to mitigate any risk of disparate impact concerns. Further, the CFPB should coordinate with the federal banking agencies to ensure appropriate safety and soundness considerations regarding the modeling and use of alternative data. We believe that gaining this additional clarity also will ensure consistent application of these requirements across banks and non-banks in a manner that promotes access to responsible and safe credit card products, including for borrowers that traditionally have had less access to these products.

II. **Innovations in online servicing continue to increase efficiencies, offering consumers greater control over their use of credit card products, but fully streamlining these online servicing capabilities requires updating the implementing regulations of the CARD Act to align with how consumers interface with these products today.**

Technology related to credit card marketing and offers has changed considerably since the advent of the CARD Act. While direct mailings continue to play a large part in credit card solicitations, consumers increasingly use online and mobile methods to apply for credit card products and access credit card services. Banks have sought to

---

[6] Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process, 82 Fed. Reg. 11183 (Feb. 21, 2017) (noting that "the use of traditional data and modeling techniques has left some important gaps in access to mainstream credit for certain consumer groups and segments); GAO, *Agencies Should Provide Clarification on Lenders' Use of Alternative Data*, GAO-19-111 (Dec. 2018) (stating that both fintech lenders and banks see the benefits of additional clarity regarding the use of alternative data as a part of underwriting models); *see also* Greg Baer & Naeha Prakash, *Machine Learning and Consumer Banking: An Appropriate Role for Regulation* (Mar. 14, 2019).

adapt to this movement by streamlining the application and servicing processes in digital channels, providing additional features to enable ease of use and increase transparency regarding repayments.

Digital channels offer several benefits to borrowers. From a servicing standpoint, digital channels, such as mobile applications, allow consumers to review their credit card balances, schedule payments, and manage transactions, including locking a credit card account in the event of fraud. Additionally, through digital channels, banks can provide additional communications to borrowers, including notifying the borrower of an upcoming or delayed payment, thus facilitating the ability for customers to limit the risk of non-payment or delinquency. Further, digital channels allow consumers to more quickly raise fraud concerns and initiate transaction disputes, without first providing written documentation or speaking with a customer service representative. As an additional benefit to consumers, banks also provide associated features that encourage responsible spending, such as offering a summary of monthly and yearly spending or allowing the borrower to opt-in to monitor their credit score.

These technological improvements greatly benefit borrowers, but also provide an opportunity to modify and update Regulation Z to further enable innovative servicing methods. In particular, three areas that could enhance servicing based on technological advances include:

- Periodic statement requirements imposed pursuant to 12 C.F.R. 1026.7(b) should be modified, so as to accommodate for current technologies, which allow borrowers to regularly view their transactions and balances online or through a mobile application.

- In addition, many credit card issuers make balance transfers periodically available on a promotional basis. However, currently under Regulation Z,[7] at the time an issuer discloses a promotional balance transfer fee, it must also disclose the standard fee in close proximity, even though that standard fee may not necessarily be included in future offers. In such a situation, requiring only the balance transfer fee terms that apply to the specific transaction being offered would streamline disclosures, particularly because the consumer would have access to the standard fee information through online or mobile channels. Similarly, if a promotional offer applies for the life of a particular balance, Regulation Z's requirements to disclose the "go to" rate that would apply to similar transactions after the promotional period ends only serve to complicate the terms of the offer.

- Consumers also can more easily dispute transactions through online or mobile channels, but these methods would be better effectuated by clarifying the requirements of 12 C.F.R. 1026.12-13 to more explicitly acknowledge notification procedures conducted through digital channels.

Thus, while the CARD Act and Regulation Z seek to increase transparency for borrowers, the current framework neither adequately accounts for how consumers currently interact with and use credit card products, nor sufficiently leverages banks' most innovative technology and servicing techniques. The result is an inability of banks to appropriately streamline their servicing processes to meet consumer demand to engage via digital channels.

---

[7] *See* Regulation Z, 12 C.F.R. 1026.52; 1026.55; 1026.60.

III. The disclosure regime outlined by the CARD Act, and implemented by Regulation Z, should be improved and updated to reflect the digital environment in which consumers operate, as the current disclosure framework creates operational challenges and inefficiencies for banks interfacing with consumers through these channels.

A. The disclosure framework and requirements implemented under Regulation Z, pursuant to the CARD Act, should be modified and streamlined to accommodate the provision of disclosures to consumers through online, mobile and other digital channels.

The increased use of digital channels also highlights the shortcomings of the overarching disclosure regime mandated by the CARD Act. As a threshold matter, the CARD Act and its implementing regulations represent a disclosure framework from a prior time, and one that no longer aligns with the realities of how consumers interact with financial institutions. In short, consumers directly engage with banks through these digital channels and expect the full user experience to be conducted through these platforms.

As a result of increased consumer interaction through digital platforms, banks are faced with unduly burdensome operational challenges to comply with the CARD Act mandated disclosures. Of particular note is the provision of disclosures through mobile devices, which creates unique challenges. For example, given the digital nature of consumer-bank interactions, limitations and uncertainty regarding the delivery of electronic disclosures, such as with respect to gathering consent under the Electronic Signatures in Global and National Commerce Act, continue to pose challenges for banks. As another example, consumers reviewing credit card disclosures on mobile devices must scroll through numerous screens, not just during the application process, but for all instances where disclosures are required during the product lifecycle. As a result, consumers face complex and unwieldy disclosures on a digital platform, thwarting well-intended attempts to make their interactions simpler and more transparent.

Other industries, such as technology companies or advertisers, have sought to streamline consumer disclosures through "just-in-time" disclosures, icons or dashboards, driven largely by increased mobile device usage on the part of consumers.[8] Unlike these companies, however, banks operate in a unique space—one that requires balancing consumer demand for the use of digital platforms with ensuring appropriate compliance with the relevant consumer financial protection obligations. As such, many card issuers currently are seeking to implement stopgap measures, such as having consumers access disclosures through a separate link that takes them to the bank's website to review the relevant disclosures.

A longer-term solution, therefore, would be for the CFPB to comprehensively address these issues by enhancing the CARD Act disclosure regime through modification of Regulation Z. For example, disclosures could be modernized by providing for a presumption in favor of electronic delivery when a consumer applies for a product via a digital channel or interacts with an issuer via a mobile application, while continuing to allow banks to deliver disclosures through other channels depending on the circumstances. In parallel, the requirements for tabular disclosures could accommodate a responsive mobile design. For example, instead of a fixed table, disclosures may be permitted to use a "dashboard" type of solution, where the primary tabular disclosures are clearly displayed, but secondary features, such as rewards, would be provided through collapsible titles, providing for ease of use to the consumer. Further, the challenges regarding delivery of electronic disclosures through digital channels, such as mobile devices, could be addressed by (i) clarifying that in certain contexts, "written" disclosure could be satisfied by

---

8 *See* FTC Report, *Mobile Privacy Disclosures: Building Trust Through Transparency* (Feb. 2013).

a variety of means, without regard to the E-Sign Act, and (ii) providing more certainty through incorporating the mailbox rule more explicitly, such as by allowing receipt to be deemed upon sending an email or link containing the disclosures.

As the CFPB continues to consider improvements to Regulation Z, pursuant to the CARD Act disclosure regime, we would encourage it not to look at the solutions in binary or distinct terms, but rather to view improvements to the disclosure framework in a comprehensive manner—so as to not only address the current operational issues, but also to consider any future uses or technologies that may become prevalent in the future.

B. The disclosure regime implemented by Regulation Z pursuant to the CARD Act can be further improved through simplification of the E-Sign Act consent procedures.

In conjunction with modernization of the disclosure regime under the CARD Act and Regulation Z, simplification of the disclosures and consumer consent required under E-Sign Act would further mitigate issues related to the provision of these obligations through digital channels. As currently conceived, prior to providing disclosures in electronic form, a card issuer must receive consent from the consumer by providing a full E-Sign Act statement. However, as borrowers increasingly apply for a credit card product through an online or mobile platform, banks face operational challenges providing the E-Sign Act statement and consent documentation in a clear and conspicuous manner. As such, it is necessary to also modernize E-Sign Act consent documentation in a manner that both meets the E-Sign Act requirements and matches the format in which it is provided—whether through a text message, mobile application or e-mail. For example, one potential solution to mitigate the current operational issues would be to permit card issuers to provide a link that directly takes the consumer to the additional information required prior to E-Sign consent.[9]

In addition, the lack of regulatory clarity regarding what constitutes a consumer's "reasonable demonstration of access" under the E-Sign Act stifles innovation and creates practical impediments to fulfilling consumers' requests to receive disclosures electronically. Consumers increasingly choose to receive disclosures and other account documentation in an electronic form for a variety of reasons, including convenience, security, and ease of accessibility. Yet current regulatory requirements impede the advancement of electronic disclosures, particularly when a consumer must demonstrate his or her ability to access electronic documents when using a financial institution's hardware and software to open an account. Exempting financial institutions from meeting the requirements of the E-Sign Act under Regulation Z (which the CFPB has already done under certain provisions of Regulation Z) would modernize credit card and other disclosures in an era in which paper disclosures have become increasingly obsolete. At a minimum, the CFPB should provide greater clarity around the "reasonable demonstration of access" requirement of the E-Sign Act as it applies to consumer disclosures.

C. The CFPB should expressly and publicly acknowledge that LIBOR will be "unavailable" for purposes of Regulation Z's substitution of index staff interpretation no later than January 1, 2022 and allow credit card issuers to transition to prime within thirty days of that acknowledgement.

We encourage the Bureau to update its regulations or otherwise clearly address an unintended consequence of the CARD Act and Regulation Z arising from the planned banking industry transition from LIBOR to

---

9 *See* Regulation Z, 12 C.F.R. 1026.5(a)(1)(iii).

replacement reference rates, scheduled to occur by January 1, 2022. While most variable-rate credit cards are based on the industry standard Prime index, other accounts are based on LIBOR. This creates the potential for significant legal uncertainty[10] regarding compliance with certain requirements under the CARD Act and Regulation Z as card issuers transition from LIBOR.

Since a new index may over time yield a different rate than the index it replaces, which could be either higher or lower, Regulation Z generally does not permit issuers to change a variable rate index applicable to existing credit card balances. While the official staff commentary on Regulation Z section 1026.55(b)(1) expressly permits a change in index if the original index "becomes unavailable,"[11] there is significant uncertainty as to whether this provision would apply to LIBOR-based balances. First, while we expect LIBOR to be *unreliable* (and more volatile) by January 1, 2022 (or earlier), the rate may technically continue to exist in some form, raising the possibility it is not yet "*unavailable*".[12] Second, if the Bureau waits until January 1, 2022, to declare LIBOR "unavailable," issuers would not have sufficient time to inform consumers of the replacement index and update their systems to implement the change, and consumers with LIBOR-based cards would be subject to an increasingly unreliable and volatile rate without knowing when, or if, their balances may be switched to the industry standard Prime rate.[13]

For this reason, we suggest that the Bureau expressly and publicly acknowledge that (i) LIBOR will be "unavailable" for purposes of Regulation Z's "Substitution of index" staff interpretation no later than January 1, 2022, and (ii) because LIBOR may be unreliable before that date, issuers can begin moving to the industry standard Prime rate within thirty days of publication of that express and public acknowledgement, to allow for appropriate disclosure to consumers and a less disruptive transition. Finally, the acknowledgement should affirm that historical fluctuations in LIBOR and Prime are sufficiently similar, satisfying the technical requirements of the "Substitution of index" staff interpretation.[14]

* * * * *

---

10 CARD Act, Section 101(b); 12 C.F.R. 1026.55(a)-(b).

11 12 C.F.R. pt. 1026, Supp. I 55(b)(2)-6 ("Substitution of index").

12 For example, language suggested in April 2019 by the Alternative Rates Reference Committee (ARRC) defining a "benchmark transition event" for commercial contract index changes states that parties may switch from LIBOR when the rate is still published but is "no longer representative."

13 While the banking industry expects the Secured Overnight Funding Rate (SOFR) to replace LIBOR in many commercial contexts, the Bureau should permit consumer credit card issuers to replace LIBOR with Prime since Prime is the industry standard rate index for consumer credit cards.

14 Regulation Z creates a similar unintended consequence with respect to new balances on LIBOR-based credit cards. While issuers can apply Prime-based rates to future balances with 45 days advance notice, the CARD Act and Regulation Z require issuers to reevaluate that rate change at least every six months, in perpetuity, to see whether the rate change should be entirely or partially undone. 12 C.F.R. 1026.59. This requirement serves no purpose in the case of LIBOR because the change away from LIBOR cannot reasonably be undone and the new Prime rate is industry standard. Therefore, the CPFB should expressly affirm that the subsequent re-evaluation of the new rate every six months is not required where the index being replaced is no longer reliable or available.

BPI appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at (202) 589-2429 or by email at *Naeha.Prakash@bpi.com*.

Respectfully submitted,

Naeha Prakash
Senior Vice President & Associate General Counsel for
Consumer Regulatory Affairs
Bank Policy Institute