August 1, 2022

Via Electronic Mail

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

Re: Advance Notice of Proposed Rulemaking Re: Credit Card Late Fees and Late Payments [Docket No. CFPB-2022-0039]

Dear Director Chopra:

The Bank Policy Institute[1] is providing these comments in response to the Consumer Financial Protection Bureau's Advance Notice of Proposed Rulemaking Re: Credit Card Late Fees and Late Payments through which the CFPB "is seeking information relevant to certain provisions related to credit card late fees in the Credit Card Accountability Responsibility and Disclosure Act of 2009 and Regulation Z."[2] This ANPR follows a series of recent CFPB missives criticizing fees charged by consumer financial services providers, including a Request for Information on "Junk Fees," a Report on Credit Card Late Fees, and a blog criticizing fees charged by credit card issuers.[3]

Banks provide products and services that help consumers meet their financial needs, and BPI members take very seriously the important role they play in the financial lives of consumers, families, businesses,

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[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] Advance Notice of Proposed Rulemaking re: Credit Card Late Fees and Late Payments, Consumer Financial Protection Bureau (June 22, 2022), available at: cfpb_credit-card-late-fees_anpr_2022-06.pdf (consumerfinance.gov).

[3] *See* "Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services," Consumer Financial Protection Bureau, 87 Fed. Reg. 5801 (Feb. 2, 2022), available at: 2022-02071.pdf (govinfo.gov); Consumer financial Protection Bureau Report re: Credit card late fees (March 2022), available at: cfpb_credit-card-late-fees_report_2022-03.pdf (consumerfinance.gov); Ashwin Vasan and Wei Zhang, "Americans pay $120 billion in credit card interest and fees each year," Consumer Financial Protection Bureau Blog (Jan. 19, 2022), available at: Americans pay $120 billion in credit card interest and fees each year | Consumer Financial Protection Bureau (consumerfinance.gov).

communities, and the nation's economy. Banks are continuously innovating to better meet their customers' needs in a highly competitive marketplace, a marketplace that includes banks of all sizes as well as increasingly intense competition from nonbank Big Tech and fintech firms providing a range of credit and payments products and services.

We provide below observations about the ANPR and the CFPB's related statements and highlight the administrative law principles and statutory obligations with which the CFPB must comply if it seeks to amend Regulation Z. We also note important facts about the credit card market that the CFPB should weigh in evaluating the credit card market and credit card payments and late fees, including the significant benefits consumers derive from credit cards, the competitiveness of the market, and the recognition by Congress, as reflected in the CARD Act, that in order to provide consumers with maximum benefit at the lowest cost, credit card issuers must have the ability to charge penalty fees, including late fees.

I. The comment timeframe is insufficient to provide robust empirical data.

BPI supports CFPB efforts to protect consumers and to promote transparency, consumer choice and competition in financial products and services, including the CFPB's efforts to gather empirical data to further inform its knowledge about the credit card industry. However, the ANPR asks 38 questions, some with multiple parts, seeking a vast volume of complex data yet initially provided only 30 total days from publication on the CFPB's website to respond. That time period is woefully insufficient to allow card issuers to gather and validate data that would be valuable and useful to the CFPB in assessing the credit card market and fees, or to develop a plan to submit the data in a way that would mitigate the risk of disclosing confidential business information to the public. In light of the need for additional time to respond, BPI and several other trades submitted a request for an extension of the very short comment period. Five days before the original deadline, the CFPB provided only an additional ten days to respond to the ANPR. We respectfully submit that the CFPB's ability to make informed decisions about potential adjustments to the existing regulatory framework governing credit card late fees is substantially undermined by the insufficient time provided to respond to the ANPR. Put simply, it is not possible for issuers to provide the "empirical evidence with real data" requested by the CFPB if the CFPB does not allow them sufficient time to gather such evidence.[4] Indeed, the Federal Reserve recognized the difficulty of collecting and analyzing meaningful data in implementing the CARD Act fee requirements and safe harbor in 2010.[5]

In addition, the CFPB's proposed timeline – even with the short comment extension – contradicts recommended minimum time periods for administrative agency comment periods and is inconsistent

[4] https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-chopra-on-credit-card-late-fees-anpr-press-call. Consistent with the instructions in the ANPR, BPI reached out to the Bureau and shared that its members were seeking more information on providing submissions containing confidential commercial information and the protections that would be afforded this data. Despite knowing of this interest, the Bureau took several weeks to respond to BPI's request, providing guidance only one week before the original comment deadline, which is not nearly enough time for banks to decide whether to submit confidential information after understanding the process for such submission and the protections that the information would be provided.

[5] 75 Fed. Reg. 37526 (June 29, 2010).

with similar CFPB ANPRs in the past that provided for substantially more time to provide input.[6] Moreover, the CFPB has been critical of the rule originally promulgated by the Federal Reserve, but the ANPR does not appear to be designed to actually gather information that would be useful to the CFPB in considering the factors Congress specifically enumerated in the CARD Act in evaluating the current safe harbor provision, late fees, or the credit card market more generally.

In addition, before initiating a proposed rulemaking, the CFPB would be required to convene a Small Business Regulatory Enforcement Fairness Act panel to consider the cost of the regulation on small entities.[7] Any reduction in the safe harbor amount or elimination of the safe harbor would have an impact on the thousands of credit card issuers operating in this market, including small issuers, and thus a SBREFA process would be mandatory.[8]

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[6] *See* Admin. Conference of The U.S., A Guide To Federal Agency Rulemaking 124 (1983) (recommending a 60-day comment period for complicated proposals that involve specialized, scientific, or industrial materials because 30 days is an inadequate period of time for people to respond to complicated proposals. Furthermore, the CFPB allowed the public 108 days to respond to its debt collection ANPR (79 Fed. Reg. 2384 (Jan. 14, 2014) (extending comment period from 90 to 108 days)); 90 days to respond to its section 1033 ANPR (85 Fed. Reg. 71003 (Nov. 6, 2020); and 60 days to respond to its prepaid card ANPR (77 Fed. Reg. 30923 (May 24, 2012)).

[7] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857-874 (codified at 5 U.S.C. §§ 601 *et seq.*). SBREFA amended the Regulatory Flexibility Act, which requires all agencies to include an initial and final regulatory flexibility analysis with any rulemaking that describes the impact of the rule on small entities, unless "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). SBREFA adds additional requirements to the RFA for three "covered agencies," the CFPB, the EPA, and OSHA, and additional SBREFA provisions were added in 2010 that apply solely to the CFPB. 5 U.S.C. §§ 603–604; *see* 5 U.S.C. § 609. Among other requirements, "the CFPB (unlike any other agency) must include a description of "any projected increase in the cost of credit for small entities," "any significant alternatives to the proposed rule" which would accomplish its objectives while minimizing the increase in the cost of credit for small entities, and any "advice and recommendations" from the small business representatives consulted under the SBREFA process. Similarly, in addition to the usual requirements for a final regulatory flexibility analysis, the CFPB alone must include "a description of the steps [it] has taken to minimize any additional cost of credit for small entities." 5 U.S.C. § 604(a)(6); *see also* Adam J. Levitin, "The Consumer Financial Protection Bureau: An Introduction," Review of Banking & Financial Law, Vol 32. 321, 349-350, internal citations omitted, (2012-2013) available at: Microsoft Word - RBFL v32 FM first proof.doc (bu.edu).

[8] As reported by the Federal Reserve, "over 5,000 depository institutions, including commercial banks, credit unions, and savings institutions, issue Visa and Mastercard credit cards and independently set the terms and conditions on their plans." Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions, Board of Governors of the Federal Reserve System (June 2017) at 9, note 7, available at: Report to the Congress on the Profitability of Credit, June 2017 (federalreserve.gov). The Federal Reserve's subsequent annual reports to Congress on the Profitability of Credit Card Operations of Depository Institutions for 2018-2021 each provides that the credit card market includes "thousands of issuers." *See* Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions, Board of Governors of the Federal Reserve System (July 2018) at 7, note 7 (including the same language as the 2017 report), available at: Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions, July 2018 (federalreserve.gov); "Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions," Board of Governors of the Federal Reserve System (July 2019) at 7 ("several thousand . . . banking organizations and credit unions offer credit cards to consumers and these institutions are free to set their terms and conditions"); available at: Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions, July 2019 (federalreserve.gov); Report to the Congress on the Profitability of Credit Card Operations of Depository

II. The credit card market is highly competitive, and penalty fees are an integral part of most payment obligations.

In this submission and in an effort to assist in supporting a robust and thoughtful rulemaking process, we provide several key observations about the credit card market, as well as the ANPR and related CFPB statements. In particular, we are concerned that the ANPR and related CFPB statements reflect several serious misconceptions about credit cards and the credit card market. First, they appear to reflect the CFPB's belief that the credit card market is non-competitive. In reality, however, in part due to the entry of online-only banks, fintechs, and other nonbank providers of consumer financial products and services, this industry has seen a significant increase in competition and innovation in recent years, and a corresponding increase in consumer choice. Indeed, credit card issuers must invest significant time and resources marketing the products and services they offer to compete for new customers and expand and retain existing customer relationships. The CFPB's most recent CARD Act Report found that the average cardholder carried 3.8 cards in 2020.[9]

One need look no further than the multiple credit card solicitations consumers routinely receive via various channels to recognize the fierce competition that exists in the credit card market. Furthermore, banks compete on fees. Numerous card issuers advertise credit cards with very low or no late fees, and numerous websites exist to assist consumers in comparison shopping for credit cards.[10]

We also are concerned that the ANPR reflects a prejudgment that there is something inherently wrong with card issuers charging late fees and that the regulations implementing the CARD Act of 2009 that the CFPB administers do not achieve the consumer protection purposes of the statute. Penalty fees are an integral part of most payment obligations – both in the public and private sectors – where one party has an obligation to make a payment and does not do so. For example, in 2021, the Internal Revenue Service itself imposed more than $37 billion in penalties where taxes were not paid on time, over $17 billion of which were related to individual and estate tax returns.[11] Using only the aggregate number of late fees alone, and ignoring the prevalence of late fees by both public and private entities, as well as the deterrent purpose and effect of late fees for consumers' benefit, the CFPB criticizes the late fee safe harbor provision first established by the Federal Reserve – and explicitly authorized by the CARD Act –

Institutions, Board of Governors of the Federal Reserve System (Nov. 2020) at 7 ("several thousand . . . banking organizations and credit unions offer credit cards to consumers and these institutions are free to set their terms and conditions"), available at: Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions, November 2020 (federalreserve.gov); Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions, Board of Governors of the Federal Reserve System (July 2021) at 7 ("Several thousand . . . financial institutions offer credit cards to consumers, and these institutions are free to set their terms and conditions"), available at: Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions, July 2021 (federalreserve.gov).

[9] https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf (p27).

[10] *See*, *e.g.*, 11 Excellent Credit Cards of 2022 - NerdWallet; Compare Credit Cards: Find the Best Card for You | U.S. News (usnews.com); Compare Credit Cards – Forbes Advisor; and Best Credit Cards for August 2022 | The Ascent (fool.com).

[11] Internal Revenue Service, *Collections, Activities, Penalties, and Appeals*, available at: https://www.irs.gov/statistics/collections-activities-penalties-and-appeals.

including both the methodology the Board used in determining the safe harbor and the inclusion of an inflation adjustment provision.

III. The current regulatory regime benefits consumers and issuers, as the CFPB has recognized.

The CFPB's criticism of late fees and the safe harbor is in direct contravention with the CARD Act in which Congress implicitly acknowledged that late fees are appropriate in the credit card market and merely specified that penalty fees, including late fees, must be "reasonable and proportional to the omission or violation to which the fee or charge relates."[12] Consistent with the CFPB's own stated desire for clarity and transparency with straightforward rules,[13] the CARD Act also specifically authorized a safe harbor for fee amounts that are presumed to be reasonable and proportional to the omission or violation. Director Chopra recently published a blog in which he explained the CFPB's intention "to move away from highly complicated rules that have long been a staple of consumer financial regulation and towards simpler and clearer rules."[14] The Federal Reserve established a safe harbor in Regulation Z, and the CFPB has adjusted that safe harbor for inflation annually after the administration of the CARD Act and its related regulation were transferred to the CFPB.[15] As recognized by the Federal Reserve, making individualized determinations on fee limitations would not be feasible, while safe harbors would "facilitate compliance by issuers and increase consistency and predictability for consumers."[16] Thus, the elimination of the safe harbor would be directly contrary to the CFPB's goal of making consumer financial regulation "simpler and clearer."

The CFPB has acknowledged repeatedly the CARD Act's positive impact on consumers and on competition in the credit card market. On March 29, 2022, a CFPB press release stated that the CARD Act "created a range of protections for cardholders, including limiting how much credit card companies could charge for penalties such as over-the-limit fees and late fees, as well as limits on interest rate increases. Many of these protections have been effective in reducing the total cost of credit for consumers, improving competition, and creating transparency on pricing."[17] In its biennial credit card

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[12] 15 U.S.C. § 1665d(b). Importantly, basic rules of statutory construction make clear that these penalty fees look to more than just the costs associated with the violation. Compare *id*. at § 1665d(c) (setting forth a number of factors to be considered and included, including costs) with 15 U.S. Code § 1693o–2(a)(2) (indicating that the "amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.") (emphasis added).

[13] Rohit Chopra, Rethinking the approach to regulations, available at https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/ (June 17, 2022) ("Markets work best when rules are simple, easy to understand, and easy to enforce. The CFPB is seeking to move away from highly complicated rules that have long been a staple of consumer financial regulation and towards simpler and clearer rules.")

[14] Rohit Chopra, Rethinking the approach to regulations, available at https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/ (June 17, 2022) ("Markets work best when rules are simple, easy to understand, and easy to enforce.")

[15] CFPB, *Credit card late fees*, at 4 (March 2022), available at: https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf.

[16] 75 Fed. Reg. 37526 (June 29, 2010) at 37,540.

[17] CFPB Finds Credit Card Companies Charged $12 Billion in Late Fee Penalties in 2020 (March 29, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-credit-card-companies-charged-12-billion-in-late-fee-penalties-in-2020/.

report from 2017, the CFPB made clear that it "did not see any evidence that the Act had negatively affected the consumer cost of credit cards. In fact, we found that all-in costs to cardholders had fallen in the wake of the Act's passage and continued to fall through its implementation."[18] As recently as last year, the CFPB noted, "CARD Act pricing restrictions have resulted in a substantial decline in overall fee costs to consumers since the pre-CARD Act period."[19] Until very recently, the CFPB has never indicated, including in any of its biannual credit card reports to Congress, that fees generally or the safe harbor in particular present concerns with regard to the competitiveness of the credit card market or consumer harm.

IV. In adopting new regulations, the CFPB must comply with basic administrative law principles.

Despite the ANPR's departure from the CFPB's prior findings and conclusions regarding the CARD Act and its implementing regulations, the ANPR does not meaningfully articulate the basis of the CFPB's newfound concerns, nor has the CFPB engaged in any type of fact-finding that would enable it to fully study and articulate any basis for any possible revisions to or elimination of the safe harbor for credit card fees. As noted, the timeframe provided to respond to the multiple detailed and complex questions set forth in the ANPR is inadequate for issuers to provide comprehensive responses or data. If the CFPB intends to proceed with a rulemaking on the premise that it will increase competition in the credit card market, then it is critical for the CFPB to conduct research to explain why changes to the regulation are justified to increase competition in this regard. After all, "an agency regulation must be designed to address *identified* problems."[20] "Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address."[21] Among other things, the CFPB should, at a minimum, study the relative importance of different card features to a consumer's decision to select one card over another, the effectiveness of different penalty fees in deterring certain consumer behavior, and quantitatively measure the possible benefits and harms to consumers any potential changes are intended to provide. Further, the CFPB must consult with other prudential regulators to understand the impact that any modification to the existing rule would have on the safety, soundness, and overall accessibility of credit to Americans.[22]

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[18] CFPB, *The Consumer Credit Card Market*, at 6-7 (December 2017), available at: https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf.

[19] *See* CFPB, *The Consumer Credit Card Market*, at 52, n. 94 (Sept. 2021), available at: https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

[20] *New York Stock Exch. LLC v. SEC*, 962 F.3d 541, 556 (D.C. Cir. 2020) (emphasis added).

[21] *Id.* at 556-57; *see also, e.g., Maryland People's Couns. v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985) (agencies must articulate its "reasons for believing that more good than harm will come of its action").

[22] See 15 U.S.C. § 1665d(b) ("The Bureau, in consultation with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, and the National Credit Union Administration Board, shall issue final rules not later than 9 months after May 22, 2009, to establish standards for assessing whether the amount of any penalty fee or charge described under subsection (a) is reasonable and proportional to the omission or violation to which the fee or charge relates.") (emphasis added). See also 15 U.S.C. § 1665d(e) ("The Bureau, in consultation with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, and the National Credit Union Administration Board, may issue rules to provide an amount for any penalty fee or charge described under subsection (a) that is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates.")

Satisfying those obligations is particularly important here, because the Federal Reserve's regulation implementing the CARD Act has, as noted, been effective and benefited consumers and issuers for more than a decade. Before departing from that regulation, the CFPB "must show that there are good reasons for the new policy."[23] And to make that showing, the CFPB would need to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[24] The CFPB cannot examine the relevant data if it fails to allow commenters sufficient time to gather responsive information to any proposed rule. Nor can the CFPB adopt a new rule implementing the CARD Act without considering the factors Congress directed it to take into account, including not just costs, but also "deterrence" and the "conduct of the cardholder."[25] And any replacement regulation the CFPB adopts must provide fair notice to banks "of the substance of the rule."[26] That is, issuers "acting in good faith [should] be able to identify, with ascertainable certainty," whether the late fees they charge are reasonable and proportional.[27]

V. The CFPB must also fulfill its statutory obligations.

As noted, the CARD Act requires that penalty fees, including late fees, must be "reasonable and proportional to the omission or violation to which the fee or charge relates."[28] In the CARD Act, Congress set forth several statutory factors that the Federal Reserve (and now the CFPB) "shall consider," including not only "the cost incurred by the creditor from such omission or violation," but also "the deterrence of such omission or violation by the cardholder" and "the conduct of the cardholder."[29] The CARD Act also allowed the Federal Reserve to establish a safe harbor for penalty fee amounts that are presumed to be reasonable and proportional to the violation. The Federal Reserve, in issuing the final rule implementing the CARD Act, explained why the adoption of the safe harbor was appropriate. The Board recognized that "specific safe harbor amounts cannot perfectly reflect the factors listed in new TILA Section 149(c) insofar as the costs incurred as a result of violations, the amount necessary to deter violations, and the consumer conduct associated with violations will vary depending on the issuer, the consumer, the type of violation, and other circumstance will vary depending on the issuer, the consumer, the type of violation, and other circumstances. However . . . it would not be feasible to implement" the limitation on fees "based on individualized determinations. Instead, the Board believes that establishing generally applicable safe harbors will facilitate compliance by issuers and increase consistency and predictability for consumers."[30] Further, the Board

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[23] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[24] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[25] 15 U.S.C. § 1665d(c).

[26] *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

[27] *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citation omitted).

[28] 15 U.S.C. § 1665d(b).

[29] 15 U.S.C. § 1665(c). Importantly, basic rules of statutory construction make clear that these penalty fees look to more than just the costs associated with the violation. Compare *id*. with 15 U.S.C. § 1693o–2(a)(2) (indicating that the "amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.") (emphasis added).

[30] 75 Fed. Reg. 37526 (June 29, 2010) at 37,540.

acknowledged comments raising concerns that "smaller institutions that may lack the resources to perform the cost analysis required by" the rule.[31] The CFPB must consider this robust legislative and regulatory history that has informed these legal standards for over a decade.

VI. The CFPB should retain the safe harbor.

To provide fair notice, properly account for the statutory factors, avoid imposing burdensome and unnecessary obligations on banks, and promote certainty, transparency, and consistency for issuers and consumers alike, the CFPB should retain the safe harbor. Before the CFPB revises or eliminates the existing safe harbor, moreover, the CFPB would have to take into account all of the statutory factors that must be considered: the costs incurred as a result of violations, the amount necessary to deter violations, and the consumer conduct associated with violations. That is a task the Federal Reserve did not perform because, it concluded, adoption of the safe harbor made it unnecessary; if the CFPB were to abandon the safe harbor, it could no longer rely on that rationale to neglect this other part of its statutory responsibility. Specifically, in establishing its rule, the Federal Reserve rejected a proposal that would have allowed issuers to impose late fees that they determined were "reasonably necessary to deter" particular types of violations.[32] "Instead, the Board … revised the safe harbors … to better address concerns regarding deterrence."[33] Similarly, the Board explained that the safe harbor would "address consumer conduct by allowing issuers to impose higher penalty fees" in certain circumstances.[34] And because the Board accounted for those factors through the safe harbor, it did not include them in its alternative approach, which was based solely on "the total costs incurred by the issuer."[35] The CFPB could not now eliminate the safe harbor and simply adopt a cost-based approach that ignored all other statutory factors. Instead, it would need to adopt an alternative approach that accounts for deterrence and consumer conduct as well.

Nor could the CFPB adopt an alternative approach that failed to provide clear guidance for how it and issuers should assess whether a fee is "reasonable and proportional." As the Federal Reserve explained, important factors to consider in this regard include "the need for general regulations that can be consistently applied by card issuers and enforced by the federal banking agencies," as well as "the need for regulations that result in fees that can be effectively disclosed to consumers."[36] At a minimum, the CFPB would need to provide industry with fair notice about how to determine whether a particular fee is "reasonable and proportional" in light of all of those factors. And it is doubtful that, as a practical matter, the CFPB could eliminate the safe harbor and replace it with an approach that better facilitates compliance by issuers while increasing consistency and predictability for consumers. To the contrary, an approach that does not include a safe harbor would likely result in regulatory uncertainty and ever-changing late fees that would confuse consumers. Because establishing a test for assessing whether a fee would meet the statutory standard would be a tremendously complex and data intensive exercise, the CFPB should commence a study to consider what fees would meet this standard, taking into account

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[31] *Id*.

[32] 75 Fed. Reg. at 37,532-33.

[33] *Id.* at 37,533.

[34] *Id.* at 37,533-34.

[35] *Id.* at 37,532.

[36] *Id*.

the required statutory factors, including by comparing the effect of different fee amounts on consumers, competition, issuers, and the credit card market more broadly.

In addition, were the CFPB to eliminate the clarity and certainty of the safe harbor, the "reasonable and proportional" requirement would itself be vulnerable to a challenge that it is impermissibly vague. As the Federal Reserve noted, the CARD Act "does not define" those terms, nor is there "any generally accepted definition for those terms when used in conjunction with one another."[37] The CFPB cannot demand that issuers comply with an impossibly vague standard; it must provide clear guidance and fair notice for how to do so. Indeed, that is the specific and unequivocal directive of Congress in 15 U.S.C. § 1665d(b). And to the extent the CFPB concludes that it need only consider in enforcement—rather than implement in rulemaking—the statutory factors that constrain its discretion, the statute's "reasonable and proportional" standard would itself be subject to challenge as delegating legislative authority without a sufficiently intelligible principle.[38]

VII. Credit cards provide consumers with significant benefits.

Credit cards provide consumers with numerous benefits. For example, consumers reap significant benefits from opening a credit card account, such as gaining the ability to pay merchants anywhere in the world, and at a 0% rate if the balance is repaid monthly; fraud protection; and travel, cash back and other rewards. As the CFPB noted in the past, consumers generally also receive free access to their credit scores.[39] Additionally, CFPB research shows that credit cards are the primary way that "credit invisibles" begin their credit histories.[40] Credit cards remain quite popular with consumers, as the CFPB's biennial credit card report has consistently documented.[41]

As then-Acting Director David Uejio stated in the CFPB's most recent biennial credit card report in September 2021: "Credit cards are one of the most commonly-held and widely-used financial products in America — over 175 million Americans hold at least one credit card. During the COVID-19 pandemic, credit cards played a vital role as both a source of credit in emergencies and a payment method as more transactions occurred online."[42]

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[37] 75 Fed. Reg. at 37,531-32.

[38] *See Jarkesy v. SEC*, 34 F.4th 446, 460-63 (5th Cir. 2022) (grant of enforcement discretion without "intelligible principle" for guiding such discretion violated non-delegation doctrine).

[39] *See*, *CFPB Finds CARD Act Helped Consumers Avoid More Than $16 Billion in Gotcha Credit Card Fees,* CFPB (December 3, 2015), available at: https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-card-act-helped-consumers-avoid-more-than-16-billion-in-gotcha-credit-card-fees/.

[40] https://files.consumerfinance.gov/f/documents/BecomingCreditVisible_Data_Point_Final.pdf at 14.

[41] *See* CFPB, The Consumer Credit Card Market, at 6 (August 2019), ("Consumer satisfaction with credit cards remains high)," citing Press Release, J.D. Power, "Credit Card Rewards Battle Continues as Customers Seek Better Programs, J.D. Power Finds" (Aug. 16, 2018), available at https://www.jdpower.com/business/press-releases/2018-credit-card-satisfaction-study, available at: cfpb_consumer-credit-card-market-report_2019.pdf (consumerfinance.gov).

[42] CFPB, *The Consumer Credit Card Market* (Sept. 2021) at 1, available at: https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

Credit cards are priced based on a complex set of factors. While some risk can be accounted for in the aggregate as part of standing risk-based pricing associated with the account at origination and thereafter, other risks, like late payments, are more appropriately covered through assessment at the individual account level — rather than covering the risk of late payments through pricing that would effectively require customers paying on time to subsidize those customers who do not.

VIII. The credit card market is highly competitive.

The credit card market is extremely competitive, with multiple providers offering a wide variety of cards with different benefits and fee structures. For example, some providers offer no-late-fee credit cards to certain consumers, as the CFPB itself has acknowledged.[43] Director Chopra's prepared remarks in connection with the ANPR state incorrectly that "it has almost become a uniform industry standard" to charge the late fees of $30 and $41 and wrongly ascribes that situation to a lack of competitive pricing pressure for late fees. Indeed, the CFPB's own recent study of late fees shows that 232 issuers had late fees between $21 and $25.[44] Further, while some card offerings state that up to $40 may be charged in late fees, a close reading of various account agreements shows that there is variation. For example, some banks waive the first late fee then charge $29; some banks charge up to $29 for the first late fee, and then escalate; and others charge according to a sliding scale based on how many times a consumer misses a payment. Still others waive late fees if the account balance is below a certain amount in a payment period or if the previous balance consisted only of a late fee. Some issuers provide grace periods within which consumers can make a payment and avoid incurring a late fee. Others waive fees if some portion of the minimum payment amount is received on time. In addition, the CFPB previously has recognized this variation in fee practices across providers.[45] These various fee structures reflect, again, a highly competitive market for consumer credit.

Further, Regulation Z requires extensive disclosures in any application or solicitation for a credit card account of any late payment or other fee, which allows consumers to comparison shop based on these different fee structures. These disclosures enable consumers to select the bank products and services that best meet their needs, thereby enhancing consumer choice and competition. This framework has been administered and further refined by the CFPB and includes model disclosures designed and extensively consumer-tested by the Federal Reserve.[46] In addition, Regulation Z requires disclosure in

[43] *See* Consumer financial Protection Bureau Report re: Credit card late fees (March 2022) at 15, available at: cfpb_credit-card-late-fees_report_2022-03.pdf (consumerfinance.gov); *see also* Holly Johnson, *The best credit cards with no late fees for 2022,* Business Insider (Nov. 19, 2021), available at: https://www.businessinsider.com/personal-finance/credit-cards-with-no-late-fees.

[44] *See* Consumer financial Protection Bureau Report re: Credit card late fees (March 2022) at 15, available at: cfpb_credit-card-late-fees_report_2022-03.pdf (consumerfinance.gov).

[45] For example, the Bureau's most recent Card Report notes that "issuers may as a courtesy offer to reverse late fee charges if the cardholder has a history of paying on time, particularly for cardholders with superprime scores." *See The Consumer Credit Card Market* (Sept. 2021) at 56, available at: https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

[46] *See* 75 Fed. Reg. 7658, 7669, 7679-81, 7690, 7694, 7728, 7742, 7762, and 7769 (Feb. 22, 2010) (summarizing consumer testing conducted in developing credit card disclosures). Prior to the establishment of the Bureau by the Dodd-Frank Act in 2010, other federal regulatory agencies administered these disclosure requirements. Thus, this disclosure regime has been developed and refined over many years.

each billing cycle statement of the payment due date and any late fees.[47] This fee variation, coupled with the requirements in Regulation Z requiring disclosure of any late payment or other fee, allows consumers to comparison shop to select the credit card that best meets their unique financial needs.[48]

Banks also provide numerous services to help consumers avoid paying fees and in fact compete on these tools to help consumers avoid such fees. For example, banks offer the ability to pay by phone or via digital channels for immediate crediting. Banks send due date reminders through various channels, including text messages, offer and encourage autopay enrollment, and educate consumers about the importance of responsible credit management. All of these programs and initiatives operate to avoid substantial late payments and demonstrate a fundamental truth about the credit card industry and issuing banks — banks want their customers to be successful and pay on time. Banks are most successful when their customers are successful, and any narrative or claim that banks want customers to pay late so they can generate significant late fees is contradicted by the facts and data.

Ultimately, issuers compete on dozens of parameters, including the types and amounts of fees charged to cover a bank's costs of providing consumers credit cards, to attract customers within an existing regulatory regime that ensures disclosure and transparency of pricing and fees.

IX. Congress has recognized that late fees are important in enabling consumers to reap significant benefits from credit cards.

Congress recognized in the CARD Act that late fees can be appropriate and authorized the Federal Reserve to establish a safe harbor for fees presumed to meet the statutory standard.[49] The CARD Act requires late fees be "reasonable and proportional" to the relevant violation of account terms.[50] Under the Consumer Financial Protection Act, Congress transferred the authority over the CARD Act and the related authority to adjust the late fee provisions from the Fed to the CFPB. The CFPB has adjusted the safe harbor annually for inflation and acknowledged repeatedly the CARD Act's positive impact on consumers and on competition in the credit card market. Indeed, the CFPB's own biennial credit card report has consistently noted that there is robust competition and broad consumer satisfaction within the credit card industry, despite a temporary spike in credit card complaints during the height of the COVID-19 pandemic.[51] The CFPB's most recent report stated: "In 2019 and 2020, innovation continued

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[47] 12 CFR 1026.7(b)(11)(i)(B).

[48] 12 CFR § 1026.60(b).

[49] 15 U.S.C. § 1665d(a)-(c).

[50] 15 U.S.C. § 1665d(a).

[51] *See,* e.g., CFPB, *The Consumer Credit Card Market* at 14-15 (December 2017) ("The quantitative and qualitative indicators outlined above generally suggest a positive picture for consumers in the credit card market. Direct surveys of consumers support that proposition. J.D. Power reported that in 2017 consumers reported their highest levels of satisfaction with this market" *citing* "Press Release, J.D. Power, Cash-Back Credit Cards Score Highest as Banks, Card Companies Wage Incentive War, J.D. Power Finds" (Aug. 17, 2017), available at http://www.jdpower.com/press-releases/2017-jd-power-credit-cardstudy (reporting that "overall customer satisfaction with credit card issuers reaches its highest level in the history of the study . . .")).” *See also* CFPB, *The Consumer Credit Card Market* at 6 (August 2019), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2019.pdf ("Consumer satisfaction with credit cards remains high," noting that "J.D. Power reported that in 2018 consumer satisfaction with credit cards remained near its record high," *citing* "Press

to reshape the credit card market for both users and providers. New providers, including large and small financial institutions as well as startup and mainstream technology companies have entered—or are in the process of entering—the market with competing products, features, and methods for issuing credit cards."[52]

Congress recognized that the ability to charge late fees is an important way card issuers promote responsible repayment behavior with their customers. Charging late fees allows issuers the latitude to offer better terms for consumers who do pay on time and charge lower interest rates for those who do not. On-time payments help issuers to lower volatility of risk outcomes, helping to better model losses and honor payment obligations to third-party investors. Servicing past due accounts entails higher costs, and credit losses are higher. Costs issuers incur associated with late fees generally include operational costs, including:

- Engaging with customers who are delinquent (collections), including agents, operational support and third parties;
- Recovery expenses (e.g. agents, operational support, third parties);
- Servicing costs (e.g. letters, calls associated with fees and payments, credit bureau support);
- Business segment staff group strategy & support related to managing credit;
- Technology support related to managing credit; and
- Risk management support related to managing credit.

Costs also include capital costs, including costs associated with holding more capital for riskier customers, and provision costs, which are costs associated with holding additional reserves for riskier customers. There also is the opportunity cost of late or missed payments that banks are not able to put to other productive uses.

Furthermore, late fees also serve as a disincentive for transactions that harm consumers, drive up bank costs for everyone, and pose safety and soundness risks to the bank. Late fees are designed to encourage on-time payments and promote responsible financial behavior. Without the disincentive of a late fee proximate to a late payment, consumers are more likely to miss payments and may be at further risk of account closure or accruing additional debt. Late fees can be less consequential to consumers' long term financial health than falling into a pattern of consistently making late payments that are reported to the credit bureaus and can significantly impact a consumer's ability to secure credit in the future as well as the cost of such credit. Indeed, robust empirical evidence has demonstrated the deterrence effects of credit card late payment penalties, including research conducted by the CFPB itself.[53]

Release, J.D. Power, Credit Card Rewards Battle Continues as Customers Seek Better Programs, J.D. Power Finds (Aug. 16, 2018), available at https://www.jdpower.com/business/press-releases/2018-credit-card-satisfaction-study).

[52] CFPB, *The Consumer Credit Card Market* at 6 (Sept. 2021), available at: https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

[53] For instance, Grodzicki et al., finds that a late fee "reduces the likelihood of paying late, indicating that cardholders incorporate the late fee into their optimal repayment choice - as opposed to paying late purely by accident." This study also finds that, in the case of subprime borrowers, the direct effect is augmented by an indirect effect of inducing them to also borrow less, further lowering their likelihood of delinquency. Grodzicki et al., *Consumer Demand for Credit Card Services* (March 1, 2018), Consumer Financial Protection Bureau Office of

Further, if the ability to charge appropriate late fees were eliminated or severely restricted, the result could be harmful to consumers, as banks may be forced to cease offering certain products or services or charge more to consumers for other services. There may be reduced credit availability for those at the lower end of the credit spectrum, including those trying to build credit. Indeed, the Government Accountability Office recently reported that multiple studies and market participants had concluded that the limits on interchange fees imposed by the Durbin Amendment and Regulation II "are associated with increases in the costs of checking accounts."[54]

Issuers would have to consider higher upfront pricing for virtually all consumers, including those who will never violate terms. Rather than determining price at the beginning of a consumer relationship as if they will comply with account terms and using penalty fees to adjust pricing only on those who do not, issuers would be forced to price more consumers as if they were going to violate account terms. Issuers also may have to shift the burden of loss recovery from transactors (customers who pay their balance in full ever month) onto revolvers (customers who carry a balance from month to month). If issuers are prevented from assessing late fees to offset the increased risk and operational expenses they face, then such losses may have to be recovered through interest rate increases which only impact revolvers. Those revolvers will bear the higher costs regardless of whether they pay late. Consumers would likely face higher costs for credit, including through the removal or shortening of introductory APR duration, limited refinance opportunities, increased standard APRs, and have fewer lending options, such as cash advances.

Additionally, if in response to sharply restricted late fees banks were to cease offering certain types of credit cards or cease offering credit cards to consumers presenting higher credit risk, consumers may be forced to turn to non-bank providers of certain products and services that, as the CFPB has acknowledged, may "charge higher fees and interest rates."[55]

X. <u>The CFPB should keep the safe harbor provisions in Regulation Z</u>.

While the CFPB recently has criticized the statutorily permissible safe harbor implemented through Regulation Z (and affirmed annually by the CFPB through the inflation adjustment process), the safe harbor in fact benefits both consumers and issuers. First, the safe harbor offers consumers predictability and the industry operational simplicity. The cost analysis is highly complex and lacks clarity and consistency, as compared to the certainty of the safe harbor. Further, the cost analysis may be

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Research Working Paper No. 2018-03, available at: https://ssrn.com/abstract=3135421. Agarwal et al. find that the "negative feedback" from paying a late fee teaches consumers to avoid triggering future fees: "Paying a fee last month reduces the likelihood of paying a fee in the current month by about 40%. Controlling for account fixed effects, monthly fee payments fall by 75% during the first three years of account life." Agarwal et al., *Learning in the Credit Card Market* (February 2008), NBER Working Paper No. w13822, available at: https://ssrn.com/abstract=1093660.

[54] Government Accountability Office, Report to Congressional Requesters, Banking Services, "*Regulators Have Taken Actions to Increase Access, but Measurement of Actions' Effectiveness Could Be Improved*," GAO-22-104468 (February 2022), 22-26, available at: GAO-22-104468, BANKING SERVICES: Regulators Have Taken Actions to Increase Access, but Measurement of Actions' Effectiveness Could Be Improved.

[55] Shawn Sebastian, CFPB Blog, "New effort focused on financial issues facing rural communities," (Mar 10, 2022), available at: https://www.consumerfinance.gov/about-us/blog/new-effort-focused-on-financial-issues-facing-rural-communities/.

more difficult for smaller institutions to calculate, as the Federal Reserve acknowledged when it issued the rules implementing the CARD Act, which could ultimately lead to decreased competition. Furthermore, the cost of offering card products to consumers likely will increase if each issuer must calculate the complicated and cascading impacts of late payments, which could impact credit access. The current safe harbor was based on a comprehensive data-gathering and rulemaking process.

As we have explained in detail in this letter, there is robust competition and transparency in the credit card market, including with respect to fees. Regulations requiring fee disclosure and imposing limitations on credit card fees and the safe harbor were based on extensive research and a comprehensive rulemaking effort by the Federal Reserve that the CFPB has endorsed year after year since taking over administration of the CARD Act and Regulation Z over a decade ago. CFPB reports have highlighted the CARD Act's and Regulation's Z effectiveness in fostering transparency, competition, and consumer benefits. Any future changes to the carefully crafted regulations governing credit cards that are not rational and reasonably explained, including by not allowing commenters sufficient time to gather responsive information, would risk being found arbitrary, capricious and not well-grounded in fact. Furthermore, as noted, BPI is working with its members to determine whether we are able to gather information in response to the ANPR/any future NPR, but this effort requires significantly more time than what the CFPB has provided. BPI also stands ready to work with the CFPB to evaluate whether there are ways to improve disclosures to consumers regarding the terms, including fees, of credit cards or the customer experience overall.

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If you have any questions, please contact the undersigned by phone at 703-887-5229 or by email at paige.paridon@bpi.com.

Sincerely,

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