



May 3, 2023

Via electronic mail to: 2023-NPRM-CreditCardLateFees@cfpb.gov

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

Re: Notice of Proposed Rulemaking Re: Credit Card Penalty Fees (Regulation Z) (Docket No. CFPB-2023-0010; RIN 3170-AB15).

Dear Director Chopra:

The Bank Policy Institute¹ is providing these comments in response to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") Notice of Proposed Rulemaking ("NPR" or "proposal") regarding Credit Card Penalty Fees,² in which the CFPB proposes sweeping changes to the provisions in Regulation Z regarding credit card late fees.³ In particular, the CFPB, proposes to significantly reduce the safe harbor for credit card late fee payments to \$8 from its current levels of \$30 for a first violation and \$41 for a subsequent violation within the next six billing cycles. BPI supports thoughtful, well-founded efforts to promote transparency, consumer choice and competition in financial products and services. But the CFPB's proposal is not well-grounded in law or fact and is deficient in multiple respects as

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 CFPB, Notice of Proposed Rulemaking, Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18906 (March 29, 2023), *available at* <https://www.govinfo.gov/content/pkg/FR-2023-03-29/pdf/2023-02393.pdf>.

³ This NPR follows a series of recent Bureau actions criticizing fees charged by consumer financial services providers, including a Request for Information on "Junk Fees," a Report on Credit Card Late Fees, a blog criticizing fees charged by credit card issuers, as well as an Advance Notice of Proposed Rulemaking seeking input on credit card late fees. See CFPB, Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services, 87 Fed. Reg. 5801 (Feb. 2, 2022), *available at* <https://www.govinfo.gov/content/pkg/FR-2022-02-02/pdf/2022-02071.pdf>; CFPB, *Credit card late fees*, (March 2022), *available at* https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf; CFPB Blog, Ashwin Vasani and Wei Zhang, *Americans pay \$120 billion in credit card interest and fees each year*, (Jan. 19, 2022), *available at* <https://www.consumerfinance.gov/about-us/blog/americans-pay-120-billion-in-credit-card-interest-and-fees-each-year/>.

detailed in this letter. If the CFPB does not address these deficiencies, any final rule that is substantially similar to the proposal would be arbitrary and capricious and contrary to law and would harm the very consumers the proposal purports to benefit.

I. Executive Summary

- Credit cards provide consumers with numerous benefits, such as enabling them to pay merchants anywhere in the world, fraud protection, and travel, cash back and other rewards, and at a 0% rate if the balance is repaid monthly by the payment due date. Additionally, credit cards are the primary way that consumers begin to build their credit histories.
- Congress has recognized that late fees incentivize prudent financial decisions by consumers and are an important risk management tool for card issuers.
 - Moreover, banks are subject to stringent prudential requirements to manage credit risk, and late fees are one tool banks use to manage that risk.
 - All fees are subject to comprehensive disclosure requirements administered by the Bureau.
- However, the NPR and related statements reflect a prejudgment that the Bureau is inherently opposed to credit card late fees.
- Moreover, the Bureau's proposal to reduce the late fee safe harbor to \$8 would ultimately result in consumer harm, which the Bureau acknowledges but arbitrarily disregards as a concern. For example, the CFPB notes in the NPR that:
 - If more consumers make untimely payments because "the fee for doing so is reduced," then "consumers could face costs for doing so, including costs like increased penalty interest rates or lower credit scores."⁴
 - Lower credit scores will also impact the ability of these customers to secure future credit, and increase the costs of doing so, both in unsecured and secured (e.g., mortgage and auto) lending, as they will appear to be riskier, yet the CFPB does not acknowledge this harm.
 - While lower credit scores and higher interest rates will impact late-paying customers directly, lenders will respond to their higher costs and reduced ability to offset those costs with the proposed lower late fees by constraining credit and increasing rates to all. Consumers who do or would pay on time will be unfairly made to bear the costs of those who pay late. The CFPB recognizes but disregards this consequence, simply noting that "[c]ardholders 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."⁵
 - The CFPB recognizes but dismisses as a concern the fact that riskier customers with little credit history or lower credit scores will suffer the most, noting that "interest rates or other charges of subprime credit cards might increase more than for other cards, and

⁴ 88 Fed. Reg. at 18933.

⁵ 88 Fed. Reg. at 18934.

some consumers might find these cards too expensive due to higher interest rate offers.”⁶

- The Bureau’s proposal also suffers from multiple legal and analytical deficiencies.
 - The Bureau has failed to propose standards for determining whether a late fee is “reasonable and proportional to the omission or violation” that considers all of the statutory factors set forth in Section 149 of Truth in Lending Act (“TILA”) and all of the costs incurred by creditors as a result of a customers’ omission or violation.⁷
 - The Bureau has not meaningfully considered all of the statutory factors and costs incurred by issuers in proposing the \$8 safe harbor and thus has not fulfilled its statutory obligation to ensure that any safe harbor is “reasonable and proportional to the omission or violation” of the card agreement.
 - Instead, the Bureau erroneously considers only whether the proposed safe harbor “would cover a reasonable and proportional amount of card issuers’ pre-charge-off collection costs.”⁸
- The Bureau’s analysis in support of the substantial reduction in the safe harbor amount is deeply flawed.
 - The Bureau has not complied with its obligation to release the data, analysis, or methodology it has purported to rely on in support of the proposed changes to the late fee safe harbor. The public, therefore, has no meaningful way to review and comment on the data and analysis upon which the Bureau has relied.
 - The limited “analysis” the Bureau has disclosed in the NPR is cursory and unsound in multiple ways.
- The Bureau has not demonstrated that the proposed late fee cap of 25 percent of the minimum balance is “reasonable and proportional to the violation or omission” considering all the required statutory factors.
- The Bureau’s proposal to eliminate the annual inflation adjustment for late payment fees ignores the fact that credit card issuers face the same inflationary forces that impact consumers, other businesses, and government entities, undermines issuers’ ability to recover their costs, and disregards the Bureau’s application of multiple inflation adjustments across a broad range of consumer protection laws and regulations.
- The Bureau’s suggestions for other revisions to the credit card penalty provisions discussed in the proposal without specific proposed language, such as a requirement that issuers provide a mandatory 15-day courtesy period for card payments and application of the proposed \$8 safe harbor to all penalty fees, should not be implemented for numerous legal and policy reasons, including the lack of empirical support or an analytical record to support such revisions.

⁶ *Id.* at 18934.

⁷ 15 U.S.C. § 1665d(a).

⁸ 88 Fed. Reg. at 18916.

II. Background

Credit cards provide consumers with numerous benefits, such as gaining the ability to pay merchants anywhere in the world; fraud protection; and travel, cash back and other rewards – all at a 0% interest rate if the balance is repaid monthly by the due date. Credit cards also provide many consumers with their first and often only source of liquidity to better match timing of their income and expenses at rates that reflect the riskiness of unsecured lending. Credit cards also can improve consumers' financial circumstances and habits, with CFPB research finding that credit cards are the primary way that consumers who are new to credit begin to build their credit histories,⁹ ultimately enabling more access to secured loans such as mortgages, and generally free access to their credit scores.¹⁰

Congress enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"), which mandated new disclosures and underwriting standards, curbed certain fees, and restricted interest rate increases on existing balances.¹¹ The purpose of the CARD Act was to create fairness and transparency in the credit card market in a way that would enable customers to be successful in the use of credit. The CARD Act led to disclosure enhancements in credit card agreements and statements, which led to a high level of transparency on rates and fees under Regulation Z, the implementing regulation, which is administered by the Bureau. Congress also recognized in the CARD Act that the ability to charge late fees is an important way card issuers promote responsible repayment behavior with their customers.¹² The CARD Act requires that any penalty fee – including a late fee – be reasonable and proportional to the omission or violation of the card agreement and that three factors must be considered in making this determination: the costs to the issuer, the deterrence effect of the penalty fee

⁹ The CFPB Office of Research, *CFPB Data Point: Becoming Credit Visible*, at 14 (June 2017), available at https://files.consumerfinance.gov/f/documents/BecomingCreditVisible_Data_Point_Final.pdf.

¹⁰ See CFPB, *CFPB Finds CARD Act Helped Consumers Avoid More Than \$16 Billion in Gotcha Credit Card Fees*, (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/>.

¹¹ See 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.

¹² An original version of the CARD Act introduced in the House - H.R.5244, the "Credit Cardholders' Bill of Rights Act of 2008" did not contain the requirement that fees be reasonable and proportional to the violation or omission of the card agreement. That provision was added during Senate consideration of the House bill. Variations of the standard were considered and not adopted. For example, S. 414 was introduced in the Senate on April 20, 2009, which provided that "the amount of any fee or charge that a card issuer may impose in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over the limit fee, increase in the applicable annual percentage rate, or any similar fee or charge, shall be reasonably related to the **cost to the card issuer of such omission or violation**" (emphasis added). See Credit Card Accountability Responsibility and Disclosure Act of 2009, S. 414, 111th Cong., available at <https://www.govtrack.us/congress/bills/111/s414/text>. The standard that was ultimately adopted in the CARD Act that penalty fees be reasonable and proportional to the violation or omission and that deterrence and consumer conduct, in addition to costs, must be considered reflects Congressional recognition that penalty fees, including late fees, serve purposes beyond enabling issuers to attempt to cover costs – such as encouraging responsible payment behavior and allowing issuers to offer credit to a broader range of consumers across the credit spectrum.

on the cardholder, and the conduct of the consumer. Charging late fees also gives issuers the latitude to offer better terms for consumers who do pay on time and to charge lower interest rates for those who do not pay on time. On-time payments help issuers to lower the volatility of risk outcomes, helping to better model losses and honor issuer payment obligations to third parties. Until very recently, the CFPB has never indicated, including in any of its five biennial credit card reports to Congress, that late fees generally or the safe harbor in particular present concerns. Late 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. Fees for late payments are a common feature of contracts involving scheduled payments for goods and services, including rent and utility payments, credit card and auto loan payments, mortgage payments, and so on. Federal, state and municipal governments consistently impose fees for late payments of income, property and other taxes, parking tickets or other fines and other payments owed. 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 taxes.¹³

Moreover, Congress, in enacting the Federal Civil Penalties Inflation Adjustment Act of 1990, recognized that penalty fees must be adjusted for inflation to ensure that they continue to serve the purposes for which they are levied – providing immediate and proximate feedback to customers who pay late to prevent late payments from happening and deter future violations.¹⁴ Congress reinforced the importance of inflation adjustments in 2015 by amending the Act to require the Government Accountability Office (“GAO”) to annually review agencies’ compliance with the annual inflation adjustments required by the act.¹⁵ Yet, the CFPB has proposed to eliminate the inflation adjustment to the safe harbor amount contained in the current rule.

We are deeply concerned that the proposed reduction in the late fee safe harbor and related Bureau statements are not based on robust data and analysis, but rather reflect a prejudgment that there is something inherently wrong with card issuers’ charging late fees, despite Congressional recognition that they are appropriate in the credit card marketplace, can help consumers manage their finances, and allow issuers to provide credit to consumers across the credit risk spectrum. Given the Bureau’s actions to date on this topic and the superficial analysis contained in the NPR in support of the substantial reduction in the safe harbor amount, we have serious concerns that the NPR may not be a genuine attempt to obtain information to help the CFPB determine what would be best for consumers’ overall financial habits and situation, what constitutes a “reasonable and proportional” late fee and whether a substantial downward adjustment to the safe harbor is warranted in light of the statutory factors, including deterrence, and the realities of the marketplace. We are concerned that the NPR is intended solely to create the appearance of a legitimate notice and comment rulemaking process, because, in reality, the CFPB has already decided, outside the APA rulemaking process, that it is going to reduce the late fee safe harbor substantially or eliminate it altogether.

¹³ Internal Revenue Service, *Collections, Activities, Penalties, and Appeals*, available at: <https://www.irs.gov/statistics/collections-activities-penalties-and-appeals>.

¹⁴ See e.g. GAO, *Civil Monetary Penalties: Federal Agencies’ Compliance with the 2021 Annual Inflation Adjustment Requirements*, GAO-22-105596 (Apr 28, 2022), available at <https://www.gao.gov/products/gao-22-105596>.

¹⁵ *Id.*

In January 2022, the CFPB issued a Request for Information (“RFI”) on so-called “Junk Fees” – an undefined term that the Bureau appears to use to refer to virtually any fee charged by banks (or other companies) for any product or service that the Bureau does not like. In accompanying remarks on the issuance of the RFI, Director Chopra stated that:

“[i]n 2019, bank revenue from overdraft and non-sufficient funds fees surpassed \$15 billion with the average cost of each charge between \$30 to \$35. But that’s not the only product where large financial institutions ***feast on their customers through fees***. In 2019, the major credit card companies charged over \$14 billion each year in late fees with an average charge of around \$35 . . . ***Our request for information will help us learn from the public about how we can address the explosion of junk fees***. I expect that this will translate into several actions: First, we will use the information to issue new rules and guidance to spur competition and transparency. This includes reviewing some of the rules the CFPB inherited at the agency’s inception from the Federal Reserve Board of Governors a decade ago,”

of which the regulations governing credit card penalty fees is one.¹⁶ The RFI reflected a biased view of fees, including credit card late fees, by requesting “how [the CFPB] can address the explosion of late fees” including through amendments to credit card late fee regulations. The RFI did not represent a legitimate effort to learn more about the costs and benefits of credit cards for consumers and information about the complex pricing structure and costs incurred by issuers in the credit card marketplace, but rather, served as a vehicle to solicit negative input about all manner of fees.

The CFPB then issued an Advance Notice of Proposed Rulemaking (“ANPR”) on credit card late fees in April 2022, again, purportedly to obtain information about the credit card marketplace.¹⁷ But the CFPB’s rhetoric around this issuance appears to indicate, again, an inflexible bias against late fees. In remarks accompanying the issuance of the ANPR, the director stated that the CFPB was issuing the ANPR to “review provisions originally developed by the Federal Reserve Board that ***allow credit card companies to sidestep Congressional mandates on reasonable penalty fees***. Our effort is particularly timely, given that the rule currently allows credit card companies to hike late fees by the rate of inflation.”¹⁸ This characterization of the safe harbor as enabling issuers to “sidestep” the law is simply false; Congress explicitly authorized the Federal Reserve, and subsequently the CFPB, to establish a safe harbor for late fees that would be presumed to be “reasonable and proportional” under the CARD Act. Additionally, the claim that banks “hike late fees by the rate of inflation” is also disingenuous because it is the CFPB, not banks, that sets the inflation adjustments, pursuant to Regulation Z that the CFPB administers.

¹⁶ CFPB, Rohit Chopra, *Prepared Remarks of CFPB Director Rohit Chopra on the Junk Fees RFI Press Call* (Jan. 26, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-junk-fees-rfi-press-call/>.

¹⁷ CFPB, Advance Notice of Proposed Rulemaking re: Credit Card Late Fees and Late Payments, (June 22, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_anpr_2022-06.pdf.

¹⁸ CFPB, Prepared Remarks of Director Chopra on Credit Card Late Fees ANPR Press Call (June 22, 2022) (emphasis added), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-chopra-on-credit-card-late-fees-anpr-press-call/>.

This characterization by Director Chopra of the safe harbor as permitting issuers to violate the law is not a unique occurrence – he has repeatedly and misleadingly referred to the safe harbor as an “immunity provision” or a “loophole.” In remarks accompanying the release of the NPR, Director Chopra stated that in implementing the CARD Act, the Federal Reserve included **“an immunity provision in its rules that allowed credit card companies to escape enforcement scrutiny even if it charged unjustifiably high fees.”**¹⁹ In those same remarks, the Director stated that the Bureau had “found that, over time, **this loophole has morphed into a multi-billion dollar bonanza.**” We worry that credit card companies are actually hoping that consumers are a day or two late.”²⁰ Once again, these remarks imply that late fees imposed **in full compliance with statutory and regulatory authorization** are nevertheless illegal and that banks are violating the law by charging late fees and “escaping enforcement scrutiny.” Given the hyperbolic rhetoric, it is important to note that the CARD Act was championed by congressional Democrats and then-Chair of the TARP panel Elizabeth Warren and signed into law by former President Obama. Enforcement scrutiny is warranted only when an action is illegal. But, the CFPB has consistently promoted the false narrative that credit card issuers are **illegally** charging late fees. This rhetoric reflects a deep bias against the current framework governing late fees and against the underlying statute itself, calling into question the CFPB’s neutrality and the legitimacy of the current rulemaking process as an effort to truly understand the complex economics and dynamics in the market for credit cards.

Likewise, the Bureau’s narrative that banks want customers to pay late so they can generate significant late fees is contradicted by the facts and data. First, Regulation Z mandates extensive disclosure requirements in any application or solicitation for a credit card account, of any late payment or other fee. In addition, banks provide numerous services to help consumers avoid paying 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 help consumers 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.

The fallacy of the narrative advanced by the Bureau is illustrated by card issuers’ actual conduct during the COVID-19 pandemic when many issuers waived late fees and other charges to help consumers who may have been experiencing financial or other hardship. Although the Bureau has previously highlighted the relief credit card issuers provided to consumers during the COVID-19 pandemic when consumers experienced economic hardships, the Bureau has not acknowledged these card issuer relief efforts for consumers in the RFI, ANPR, or the current proposal or in any related remarks or publications.²¹ For example, in the Bureau’s most recent report on the Credit Card Market,

¹⁹ CFPB, Director Chopra’s Remarks on Press Call for Credit Card Late Fees NPRM (Feb. 1, 2023), *available at* [Director Chopra’s Remarks on Press Call for Credit Card Late Fees NPRM | Consumer Financial Protection Bureau \(consumerfinance.gov\)](https://www.consumerfinance.gov/about-us/press-releases/director-chopras-remarks-on-press-call-for-credit-card-late-fees-nprm).

²⁰ *Id.* (emphasis added).

²¹ CFPB, *The Consumer Credit Card Market* at 5 (Sept. 2021) (“In response to pandemic-related hardship, issuers provided a considerable number of payment deferrals and fee waivers to their cardholders in 2020.”), *available at*: https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

the Bureau noted that “over 25 million consumer credit card accounts representing approximately \$68 billion in outstanding credit card debt entered relief programs in 2020, figures vastly higher than in prior years.”²² Issuers also waived late and NSF fees.²³ Indeed, the CFPB’s own analysis shows that late fees decreased in 2020, due to voluntary relief provided by issuers to consumers.²⁴ While 2020 is obviously unique, the CFPB Card Report’s data on the efforts of the card industry to provide relief to consumers on late fees is important in presenting a balanced view of the industry and recognizing its flexible and competitive fee practices. Despite these efforts by banks to assist consumers, the Bureau’s rhetoric has focused solely on criticizing late fees, sometimes in false and misleading ways, as discussed previously.

In addition, while the Bureau attempts to paint a picture of issuers’ charging late fees to “feast on their customers,” late fees serve as a disincentive for transactions that could result in consumers’ engaging in imprudent financial decisions that could cause them longer-term financial harm, drive up credit costs for everyone, and pose safety and soundness risks to the bank. Late fees are designed to encourage on-time payments and promote prudent financial behavior. Without the incentive of a late fee, consumers are more likely to miss payments and may be at further risk of account closure or accruing additional debt. More consumers may go delinquent as the “deterrent” is formed into a low “late payment convenience fee.” The result may be a reduction in consumer’s credit scores as consumers may choose, at the expense of their credit history, to prioritize: (i) other (nonreported) payments that impose the higher immediate cost (i.e., higher late fee); or (ii) extended convenience.

Indeed, the Bureau recognizes in the proposal that there may be negative implications for consumers as a result of the proposed \$8 safe harbor. For example, the Bureau “recognizes that late fees are a cost to consumers of paying late, and a lower late fee amount for the first or subsequent late payments might cause more consumers to pay late.”²⁵ In addition, the Bureau acknowledges that if more consumers make untimely payments because “the fee for doing so is reduced,” then “consumers could face costs for doing so, including costs like increased penalty interest rates or lower credit scores.”²⁶ Indeed, the Bureau acknowledges that subprime consumers may suffer from increased costs of and reduced access to credit as a result of the significantly reduced safe harbor late fee, noting that “interest rates or other charges of subprime credit cards might increase more than for other cards, and some consumers might find these cards too expensive due to higher interest rate offers.”²⁷ In short, late fees can be less consequential to consumers’ long term financial health than falling into a pattern of consistently late payments that are reported to the credit bureaus, which can significantly impact a consumer’s ability to secure credit in the future and the cost of any such credit, yet the CFPB disregards this likely consumer harm that would result from the proposed \$8 safe harbor.

²² *Id.* at 9.

²³ *Id.* at 54, 56, and 114-120.

²⁴ *Id.*

²⁵ 88 Fed. Reg. at 18919.

²⁶ *Id.* at 18933.

²⁷ *Id.* at 18934.

Despite the Bureau's recognition of the likely negative impact on consumers, the Bureau has nevertheless proposed the substantially reduced late fee safe harbor. We address below this deficiency with the Bureau's proposal and numerous other legal and analytical shortcomings that, if not addressed, would render any final rule at risk of being found arbitrary and capricious and thus set aside.

III. The CFPB must adhere to applicable legal standards in the APA governing agency rulemakings.

Courts have identified several requirements agencies must meet to satisfy the Administrative Procedure Act's ("APA") standards for notice-and-comment rulemaking. Agencies must rationally connect the evidence and chosen solution with their regulatory goals.²⁸ They must acknowledge and adequately account for all important aspects of the problem presented, including potential countervailing consequences of a proposed approach.²⁹ Agencies must consider reasonable, less-onerous alternatives to, and the costs and benefits of, their proposed action.³⁰ Agencies must respond to significant compliance and implementation challenges a commenting party identifies.³¹ And to permit meaningful opportunity for input by interested parties, agencies must "reveal[] for public evaluation" any data underlying their analysis.³² If the Bureau's rulemaking process or final rule violates the APA, a reviewing court must set aside the final rule.³³

The Bureau has not complied with its obligation to release the data, analysis, or methodology it has purported to rely on in support of the proposed changes. The NPR primarily relies, for example, on data collected by the Federal Reserve Board from the largest banks for stress-testing purposes – the Y-14 data collection.³⁴ But the Bureau has not complied with its obligation to release this underlying data or the Bureau's methodology or empirical analysis of this data.

BPI requested that the Bureau make such information available on March 16, 2023, but the Bureau has failed to do so.³⁵ Because the CFPB has not published the relevant data and analysis as requested,

²⁸ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, 24 F.4th 666, 674 (D.C. Cir. 2022).

²⁹ *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19-20 (D.C. Cir. 2010); *Chamber of Com. v. SEC*, 412 F.3d 133, 140, 144-45 (D.C. Cir. 2005).

³⁰ *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 942 (D.C. Cir. 2017) ("[T]extbook" administrative-law principles require agencies to consider "reasonably obvious" and less onerous regulatory alternatives that fit their goals); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986).

³¹ *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015); *Allied Loc. & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000); *Reytblatt v. U.S. Nuclear Regul. Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997).

³² *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Chamber of Com. v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006); see 5 U.S.C. § 553(b)(3).

³³ The APA directs the courts to "set aside agency actions, findings, and conclusions" that exceed the agency's authority, fail to comply with procedural requirements, or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

³⁴ The Bureau states that "the Bureau has considered data in developing this proposal that the Board collects as part of its Y-14M (Y-14) data," citing "Bd. of Governors. of the Fed. Rsrv. Sys., Report Forms FR Y-14M, [Federal Reserve Board - Reporting Forms](#) (for more information on the Y-14M collection)." 88 Fed. Reg. at 18910.

³⁵ The request we submitted is attached in an Annex.

we provide these comments in response to the proposal, but emphasize that our ability to evaluate the CFPB's proposal in a thorough and meaningful way has been significantly hampered by the lack of insight into the data, methodology, and analyses that form the basis of the CFPB's NPR.

As explained below, it is obvious based on the information the Bureau *has* provided in the NPR that the agency has relied on data that is unsuitable as a basis on which to propose significant changes to the existing regulatory framework. As mentioned, Y-14 data is collected from banks by the Federal Reserve for *stress testing* – a completely different purpose than figuring out the level at which credit card late fees are reasonable and proportional. There is no clearly defined list of data inputs that banks provide in reporting “collection costs” on the Y-14. Furthermore, the analyses that the CFPB has conducted are superficial and deeply flawed in multiple ways.

IV. The Bureau has failed to meet numerous statutory obligations under TILA.

A. The Bureau has not proposed reasonable and proportional standards as required by the statute.

The CFPB has not met numerous statutory obligations under TILA, as amended by the CARD Act. The CARD Act added a new Section 149 to the “TILA” to address reasonable penalty fees.³⁶ TILA Section 149(a) provides that the “amount of any penalty fee or charge that a card issuer may impose” with respect to a credit card account . . . in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, . . . shall be reasonable and proportional to such omission or violation.”³⁷ TILA Section 149(b) requires the Bureau to issue “rules . . . to establish standards for assessing whether the amount of any [such] penalty fee or charge . . . is reasonable and proportional to the omission or violation to which the fee or charge relates” (“Reasonable and Proportional Standards”).³⁸ When issuing the required penalty fee rules, TILA Section 149(c) provides that the Bureau shall consider: “(1) the cost incurred by the creditor from such omission or violation (“Cost Factor”); (2) the deterrence of such omission or violation by the cardholder (“Deterrence Factor”); (3) the conduct of the cardholder (“Conduct Factor”); and (4) such other factors as the Bureau may deem necessary or appropriate.”³⁹

TILA's mandate to establish Reasonable and Proportional Standards *by rule* promotes bedrock principles of due process and fair notice. “Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”⁴⁰ That is, issuers “acting in good faith [should] be able to identify, with ascertainable certainty,” what late fees they may charge.⁴¹ Congress recognized

³⁶ Pub. L. No. 111-24, 123 Stat. 1734, codified in relevant part to 15 U.S.C. § 1665d.

³⁷ 15 U.S.C. § 1665d(a).

³⁸ *Id.* at § 1665d(b).

³⁹ *Id.* at § 1665d(c).

⁴⁰ *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

⁴¹ *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citation omitted).

that principle in requiring the Bureau to “establish standards” by “rule[]” for “assessing whether the amount of any penalty fee or charge . . . is reasonable and proportional to the omission or violation to which the fee or charge relates.”⁴² The Bureau’s proposed rule does not comply with that requirement or with its bedrock obligation to “provide regulated parties fair warning of the conduct [it] prohibits or requires.”⁴³

TILA Section 149(e) also authorizes the Bureau to issue a safe harbor amount for a late payment or other penalty fee or charge that “is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates” (“Safe Harbor”).⁴⁴ Nothing in the statute, however, relieves the Bureau of its obligation to issue rules to establish Reasonable and Proportional Standards for penalty fees, considering all of the relevant statutory factors, based on the adoption of a Safe Harbor amount.

The regulation issued by the Federal Reserve Board, and adopted without change by the Bureau in 2011, to implement the TILA penalty fee provisions does not establish Reasonable and Proportional Standards in accordance with the requirements of the statute. Instead, Section 1026.52 of Regulation Z contains a “fees based on costs” provision that gives card issuers the ability to impose a penalty fee that “represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation.”⁴⁵ The “fees based on costs” provision is inconsistent with the statutory mandate that the Bureau establish Reasonable and Proportional Standards because it focuses *solely* on card issuer costs, i.e. the Cost Factor, and entirely omits consideration of the statutory Deterrence and Conduct Factors.⁴⁶ The failure of the Board and the Bureau to incorporate in the standards any consideration of two of the three statutorily-mandated factors – the Deterrence Factor and the Conduct Factor – renders the existing standards and the proposed rule legally deficient.

The Board adopted the “fees based on costs” provision in its 2010 rulemaking, purportedly to satisfy the statutory mandate of establishing Reasonable and Proportional Standards.⁴⁷ At that time, industry commenters objected to the “fees based on costs” provision because the statute requires the standards to reflect the cost, deterrence, *and* conduct factors.⁴⁸ The Board also proposed, but ultimately did not adopt, an alternative standard for setting penalty fees based *solely* on the Deterrence Factor.⁴⁹

⁴² 15 U.S.C. § 1665d(a).

⁴³ *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012).

⁴⁴ 15 U.S.C. § 1665d(e).

⁴⁵ 12 CFR § 1026.52(b)(1)(i).

⁴⁶ See 15 U.S.C. § 1665d(c). To the extent the Bureau 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. 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).

⁴⁷ 75 Fed. Reg. 37526, 37526-27 and 37531-32 (June 29, 2010).

⁴⁸ *Id.* at 37532-33 and 37532 n.18.

⁴⁹ 75 Fed. Reg. 12333, 12334-35, 12341-43, and 12359-60 (March 15, 2010); see also 75 Fed. Reg. at 37532-33 (rejecting deterrence-based fee proposal).

Significantly, the Board proposed the “fees based on costs” and the “fees based on deterrence” provisions as separate and independent alternatives, such that card issuers would have to choose one or the other as the exclusive basis for establishing reasonable and proportional penalty fees.⁵⁰ Industry commenters objected to this one-or-the-other approach, arguing that it “was inconsistent with Section 149 insofar as it required issuers to choose between basing penalty fees on costs or deterrence” when the statute “uses the conjunctive ‘and’ rather than the disjunctive ‘or’ when listing the factors.”⁵¹ The Board rejected industry’s statutory argument without any basis for its different reading of the statutory language.⁵²

Congress clearly intended for penalty fees, including late payment fees, to encapsulate more than just the costs associated with late payments given the express language of TILA Section 149. The existing “fees based on costs” provision is inconsistent with the express language of the statute and Congressional intent because it focuses *solely* on the Cost Factor without considering the Deterrence Factor or the Conduct Factor. The Bureau must fix this deficiency and propose and adopt rules for Reasonable and Proportional Standards that comply with the requirements of TILA Section 149.

The existing “fees based on costs” provision of Regulation Z, which allows card issuers to charge late fees consistent with that provision, generally appears consistent with the statutory Cost Factor.⁵³ The Commentary to Regulation Z, originally adopted by the Board, however, excludes from the costs that may be recovered through late fees losses resulting from late payments, the cost of reserves held against potential losses of such amounts, and the costs of funding delinquent amounts.⁵⁴ The Bureau has not explained why the Board appropriately excluded costs from “losses” in the Cost Factor. Moreover, even if it is appropriate to not consider losses to be *costs*, the *risk* of loss may appropriately be considered in pricing a late fee based on the issuer’s overall risk-based pricing function, consistent with the statute, which requires that a fee be reasonable and proportional to the omission or violation. Because some accounts with missed payments will ultimately lead to losses for the issuer, including the risk of that possibility in pricing a late fee is appropriate under issuers’ risk-based pricing function and consistent with the statutory factors.

The Cost Analysis is a deficient standard because it is based solely on costs and does not include consideration of the other statutory factors – including the possibility of loss, or, credit risk. Indeed, in explaining that it had excluded losses from the Commentary, the Board noted that “it has taken credit risk into consideration when implementing Section 149 . . . [through] the safe harbors in § 226.52(b)(1)(ii) [that] address concerns that accounts that experience multiple violations over a particular period pose a greater credit risk than accounts that experience a single violation over the

⁵⁰ 75 Fed. Reg. at 12334-35, 12341-43, and 12359-60.

⁵¹ 75 Fed. Reg. at 37532 n.18.

⁵² *Id.*

⁵³ 12 C.F.R. § 1026.52(b)(1)(i). The regulation allows card issuers to impose late payment fees that represent a reasonable proportion of the “total costs” incurred by the issuer as a result of the violation.

⁵⁴ 12 C.F.R. Part 1026, Supp. I, § 1026.52(b)(1)(i)-2 (excluding from the cost analysis “[l]osses and associated costs (including the cost of holding reserves against potential losses and the cost of funding delinquent accounts”).

same period.”⁵⁵ Thus, the Board excluded losses themselves in the Commentary to Regulation Z, but recognized that it was appropriate to consider risk of loss in pricing late fees and included that consideration in establishing the safe harbors. By contrast, as discussed extensively throughout this comment, the Bureau has erred in not meaningfully or sufficiently accounting for the statutory factors – costs, deterrence, and consumer conduct, which includes consideration of credit risk, or risk of default or loss, in proposing the substantially reduced \$8 late fee safe harbor.

Thus, again, the Bureau must propose and adopt rules for Reasonable and Proportional Standards that comply with the requirements of TILA Section 149 and amend the Commentary to clarify how the risk of losses may be considered as part of an appropriately comprehensive standard consistent with TILA Section 149, which permits issuers to establish late fees that are reasonable and proportional to the violation or omission, taking into consideration costs, deterrence, and consumer conduct which includes consideration of the risk of loss, or credit risk, as the Board did in establishing the safe harbor provisions in 2010.

1. The proposed rule compounds the legal deficiencies in the existing rule.

The Bureau’s proposed rule compounds and amplifies the legal deficiencies in the existing rule in several important ways.

First, the Bureau fails to propose revisions to the legally deficient “fees based on costs” provision and establish Reasonable and Proportional Standards that incorporate consideration of the statutorily mandated Cost, Deterrence, and Conduct Factors. Instead, the Bureau focuses on revising the Safe Harbor provision to propose an arbitrary and unjustifiable 75 percent decrease in the Safe Harbor late payment fee amount from an inflation-adjusted \$30 (\$41 in the case of recurring late payments within the next six months) to a fixed \$8.

Second, if the proposal is adopted, some card issuers may have a strong incentive to rely on the Reasonable and Proportional Standards, rather than the inadequate Safe Harbor amount. Under the current regulation, issuers typically rely on the safe harbor – which appropriately reflects deterrence and consumer conduct in addition to costs – and had little reason to challenge the rules specifying a cost-only calculation of late fees or other penalty fees. Now that the Bureau proposes lowering the safe harbor to \$8 for late fees based on an analysis that excludes deterrence, consumer conduct, and the full range of costs, issuers have much more reason to care about the calculation of “reasonable and proportional” penalty fees, including late fees, outside of the safe harbor.

The Bureau acknowledges that its proposed \$8 Safe Harbor is likely lower than the costs incurred by many issuers,⁵⁶ who then may seek to rely on the Reasonable and Proportional Standards even to cover their costs. And all issuers would have to rely on the Reasonable and Proportional Standards to reflect

⁵⁵ 75 Fed. Reg. at 37538 n. 41.

⁵⁶ 88 Fed. Reg. 18906, 18919 (March 29, 2023) (“[T]he Bureau preliminarily concludes that a late fee of \$8 for the first and subsequent violations is appropriate to cover pre-charge-off costs for card issuers *on average*.” (emphasis added)).

Deterrence and Conduct in their late fees. The proposed rule thus makes the legal deficiencies in the “fees based on costs” provision all the more problematic for card issuers. The Bureau maintains that the proposed Safe Harbor is not a requirement and card issuers may instead rely on the “fees based on costs” provision of Regulation Z in setting late payment fees.⁵⁷ But statements by the CFPB Director and the Bureau’s relentless and pre-judgmental attacks on so-called “junk fees” belie the assertion that card issuers have any meaningful alternative to the Safe Harbor amount.⁵⁸ The Bureau, in essence, is proposing to establish an arbitrary *de facto* \$8 fee cap on late payment fees through the proposed Safe Harbor amount without meeting its statutory requirement to establish legally sufficient Reasonable and Proportional Standards independent of the Safe Harbor. Absent clear, workable, and comprehensive Reasonable and Proportional Standards that take into consideration *all* three of the required statutory factors, card issuers have no practical way to set defensible late payment fees that are higher than the proposed Safe Harbor without triggering regulatory scrutiny and criticism. This risk is even more pronounced in light of the Bureau’s recently issued “Policy Statement on Abusive Acts or Practices,” which made it clear that the Bureau may deem practices or fees “abusive” retroactively then bring an enforcement action after the fact.⁵⁹ And complying with the Bureau’s obligation to establish Reasonable and Proportional Standards by rule is all the more important given the immense change being proposed to the Safe Harbor.

Third, the Bureau’s proposed rule further limits the costs that card issuers are permitted to consider under the “fees based on costs” provision.⁶⁰ The Bureau’s current regulation allows a card issuer to impose a late fee that represents a reasonable proportion of the “total costs incurred by the card issuer” as a result of the late payment.⁶¹ The associated commentary states that an issuer may not include costs associated with losses⁶² but that the costs incurred by a card issuer “include the costs associated with the collection of late payments.”⁶³ In other words, the existing regulation provides only one specific cost exclusion and one non-exclusive cost issuers may consider. Yet, the Supplementary Information to the proposal states that its consideration of pre-charge off collection costs are the only “costs that card

⁵⁷ 88 Fed. Reg. 18906, 18933 (March 29, 2023).

⁵⁸ See, e.g., CFPB, Director Chopra’s Remarks on Press Call for Credit Card Late Fees NPRM (Feb. 1, 2023) (characterizing credit card late payment fees as “junk fees” that “have no purpose beyond padding the credit card companies’ profits” and describing the CFPB’s own penalty fee regulations as “a loophole [that] has morphed into a multi-billion dollar bonanza”); CFPB, CFPB Initiates Review of Credit Card Company Penalty Policies Costing Consumer \$12 Billion Each Year (June 22, 2022); CFPB, Prepared Remarks of Director Chopra on Credit Card Late Fees ANPR Press Call (June 22, 2022); CFPB, Credit card late fees (March 2022); CFPB, Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services, , 87 Fed. Reg. 5801 (Feb. 2, 2022); CFPB, Prepared Remarks of CFPB Director Rohit Chopra on the Junk Fees RFI Press Call (Jan. 26, 2022); and CFPB, Ashwin Vasan and Wei Zhang, *Americans pay \$120 billion in credit card interest and fees each year*, (Jan. 19, 2022).

⁵⁹ See CFPB, Policy Statement on Abusive Acts or Practices, (April 3, 2023), *available at* <https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/>.

⁶⁰ See 12 C.F.R. Part 1026, Supp. I, § 1026.52(b)(1)(i)-2.

⁶¹ 12 C.F.R. § 1026.52(b)(1)(i).

⁶² See *Id.* at Comment 52(b)(1)(i)-2.

⁶³ See *Id.* at Comment 52(b)(1)(i)-6 (emphasis added).

issuers are permitted to take into account for purposes of determining the amount of a late fee under the costs analysis provisions” of the regulation.⁶⁴ The Bureau also quotes the commentary to the rule, purports to “clarify” that “costs” refer only to pre-write-off costs, and explains its justification for that purported “clarification.” This arbitrary whittling down of the costs able to be used in the calculation is without support and contrary to the statute.

The Bureau’s proposed limitation on post-charge-off collection costs is not supported by the language of the statute: the Bureau’s analysis reflects an unreasonable interpretation of “costs.” TILA requires consideration of “the cost incurred by the creditor from such omission or violation.” It makes little sense to say that post-charge-off collection costs are not “costs” incurred from a consumer’s late payment. Whether the issuer has written off the debt or not, the collection costs arise directly from the consumer’s failure to pay on time. The accounting change does not change the fact that the issuer is incurring collection costs. The Bureau’s assertion that the costs are “related to mitigating a loss” is a non-sequitur; the issuer needs to expend costs “related to mitigating a loss” *because* the cardholder did not pay on time. The Bureau’s interpretation is unreasonable. The proposed exclusion of post-charge off collection costs also directly contradicts the commentary on uncollected fees, which expressly allows card issuers to consider fees it is unable to collect, including “fees imposed on accounts that have been charged off by the issuer.”⁶⁵

The Bureau’s failure to establish Reasonable and Proportional Standards that consider *all* of the statutory factors and *all* of the costs incurred by creditors as a result of a customers’ omission or violation is inconsistent with the statutory requirements of TILA Section 149 and is arbitrary and capricious. Specifically, the Bureau’s failure to propose or establish Reasonable and Proportional Standards that take into consideration the Deterrence Factor and the Conduct Factor and its proposed exclusion from the existing “fees based on costs” provision of certain costs incurred by card issuers, including post-charge off collection costs, renders the proposed rule legally defective. Indeed, the Federal Reserve Board recognized that one important factor in implementing Section 149(a) was “the need for general regulations that can be consistently applied by card issuers and enforced by the federal banking agencies.”⁶⁶ The Bureau’s proposed approach—which combines a manifestly inadequate safe harbor with blatantly inadequate standards for complying with Section 149(a)’s mandate—completely ignores this important aspect of the problem. And it violates bedrock principles of due process and fair notice by failing to give issuers advance warning of what the regulation requires.

The Bureau should withdraw the proposed rule and start over with a more transparent, inclusive, and rigorous rulemaking process.⁶⁷ Any new proposal should establish Reasonable and Proportional

⁶⁴ 88 Fed. Reg. at 18906, 18916.

⁶⁵ See 12 C.F.R. Part 1026, Supp. I, § 1026.52(b)(1)(i)-5.

⁶⁶ 75 Fed. Reg. at 37532.

⁶⁷ As discussed in the sections that follow, the Bureau needs to take a number of steps before considering a new proposal, including without limitation: (a) using its existing regulatory tools to collect and analyze data from large and small card issuers for the purpose of determining reasonable and proportional late payment fees; and (b) convening a Small Business Regulatory Flexibility Act review panel to obtain required input from representatives of small entity card issuers.

Standards in accordance with the terms of TILA Section 149 and not limit those standards to a subset of card issuer costs, ignoring the Deterrence Factor and the Conduct Factor.

B. The CFPB has failed to evaluate the proposed \$8 safe harbor against the mandatory statutory standard in violation of Section 149 of TILA.

In proposing the revised late fee safe harbor amount of \$8, the CFPB has essentially rewritten the statutory standard. The Bureau has not considered whether the proposed safe harbor would **be reasonable and proportional to the omission or violation of the card agreement**, as the statute requires. As noted previously, Section 149(a) of TILA provides that “[t]he amount of any penalty fee or charge that a card issuer may impose with respect to a credit card account . . . in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over-the-limit fee, or any other penalty fee or charge shall be reasonable and proportional to such omission or violation.” The statute also authorizes the Bureau to establish a safe harbor for fee amounts that are presumed to be reasonable and proportional to the omission or violation.

The proposed safe harbor does not comply with the statutory standard because the statute requires that the fee be reasonable and proportional **to the omission or violation**. Yet, the CFPB has proposed the revised safe harbor basing its reasonable and proportional determination **solely on certain costs incurred by issuers**. In the NPR, the CFPB states that “[i]n developing the proposed late fee safe harbor amount, the Bureau carefully considered several sources of data and other information **to determine the amount that would cover a reasonable and proportional amount of card issuers’ pre-charge-off collection costs**.”⁶⁸ The CFPB criticizes the current safe harbor because it allows for late fees that “**far exceed card issuers’ actual pre-charge-off collection costs resulting from late payment violations and thus are not reasonable and proportional**.”⁶⁹ In addition, the CFPB’s press release on the proposal said the changes would “ensure that late fees meet the [CARD] Act’s requirement to be ‘reasonable and proportional to the costs’ incurred by issuers to handle late payments.”⁷⁰

By considering only whether the \$8 safe harbor is aligned with pre-charge-off collection costs, the proposed safe harbor conflicts with the plain text of the CARD Act and distorts the statutory standard Congress enacted. Congress directed that the safe harbor set by the Bureau would be “presumed to be reasonable and proportional to the **omission or violation** to which the fee or charge relates,” not solely to the **costs to the issuer** resulting from such omission or violation.⁷¹ And Congress instructed the regulators, first the Fed and subsequently the Bureau, to consider not just costs, but also deterrence and cardholder conduct in determining whether a penalty fee is “reasonable and proportional.”⁷² To read the mandate in Section 149(a) and the rulemaking requirement in Section 149(b) as permitting the CFPB

⁶⁸ 88 Fed. Reg. at 18916.

⁶⁹ *Id.* at 18918.

⁷⁰ CFPB, *CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees*, (Feb. 1, 2023) (emphasis added), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/>

⁷¹ 15 U.S.C. § 1665d(e) (emphasis added).

⁷² *Id.* at § 1665d(c)(2)-(3).

to consider only costs: ignores that Congress could have limited the considerations to costs if it had intended to, but instead, Congress required the consideration of costs as only one of several non-discretionary factors. Indeed, the Senate considered a prior version of the CARD Act that provided that “the amount of any fee or charge that a card issuer may impose in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over the limit fee, increase in the applicable annual percentage rate, or any similar fee or charge, shall be reasonably related to the **cost to the card issuer of such omission or violation**.”⁷³ This version of the bill was not adopted, however.

Furthermore, a standard that only considers costs also would render TILA Section 149(c)(1), the cost factor, duplicative and unnecessary. Such a construction would violate longstanding principles of statutory construction, and would render Sections 149(c)(2)-(3), the requirements to consider deterrence and consumer conduct, respectively, superfluous and irrelevant.

The Bureau has not considered whether the revised safe harbor is consistent with the statutory standard; thus, the proposal is deficient as a matter of law, and the Bureau must evaluate its proposed safe harbor under the appropriate standards and publish that assessment for public comment.

C. The CFPB has failed to give due consideration to the required statutory factors in proposing the \$8 safe harbor in violation of Section 149 of TILA.

As noted previously, TILA authorizes the Bureau to establish a safe harbor amount for a late payment or other penalty fee or charge that “is presumed to be reasonable and proportional to the omission or violation;” as noted, in making such determination, costs, in addition to deterrence and consumer conduct, must be considered.

As discussed extensively in Section IV.C. above, in proposing the safe harbor that is presumed to be “reasonable and proportional to the omission or violation,” the CFPB’s estimate of issuer costs is deeply flawed, and the agency has failed to give due consideration to the deterrence of the omission or violation and the conduct of the cardholder, in violation of the statute.

V. The Bureau’s Proposed Revisions to the Safe Harbor are Legally and Analytically Deficient.

A. The CFPB has arbitrarily disregarded the consumer harm that will result from an \$8 late fee safe harbor.

The Bureau acknowledges that “late fees are a cost to consumers of paying late, and a lower late fee amount for the first or subsequent late payments might cause more consumers to pay late” and that the Bureau “does not have direct evidence on what consumers would do in response to a fee reduction

⁷³ See Credit Card Accountability Responsibility and Disclosure Act of 2009, S. 414, 111th Congress, *available at* <https://www.govtrack.us/congress/bills/111/s414/text>. In addition, the “Durbin Amendment,” passed by the same Congress as part of the Dodd-Frank Act, specifically provides that debit card interchange fees must be “reasonable and proportional to the actual cost” of processing the transaction. 15 U.S. Code § 1693o–2.

similar to those contained in the proposal.”⁷⁴ The Bureau provides a superficial analysis of the possible negative impact on consumers that could result from the proposed reduction in the late fee. The Bureau states that “[t]otal 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.”⁷⁵ However, the Bureau points to two studies as “tentatively suggesting less than full offset, if any,” and calculates “an upper bound of the potential offsetting effect” by considering “the increase in interest income required to offset lost late fee income” over the last 12 months.⁷⁶ Had late fees been limited to \$8 during that time period, the late fee revenue of Y-14 issuers would have been reduced by \$4.11 billion, “even if some issuers use the cost analysis provisions to determine the amount of the late fee as discussed above.”⁷⁷ Because total interest income at those issuers was \$71.4 billion over the same 12 months, offsetting the lost fee revenue would require increasing interest revenue by \$4.11 billion, or 5.8 percent, amounting to, according to the CFPB, “less than 2 percentage points on an APR that is below 34.7 percent.”⁷⁸

Even if we accept this analysis using the Y-14 data, the CFPB implies that this two percent increase in APR is de minimis. However, the CFPB acknowledges, but dismisses, the fact that any increase in APR may have a material effect on those who can least afford it, noting that “interest rates or other charges of subprime credit cards might increase more than for other cards, and some consumers might find these cards too expensive due to higher interest rate offers.”⁷⁹ That is especially concerning for consumers who are actively paying their bills on time, as they will now be forced to pay more for the same credit in order to subsidize those who do not. Moreover, the Bureau further notes that “it is also possible that some consumers’ access to credit could fall if issuers could adequately offset lost fee revenue expected from them only by increasing APRs to a point at which a particular card is not viable, for example, because the APR exceeds applicable legal limits.”⁸⁰ The Bureau recognizes this possibility and “seeks data and other information to help assess the likelihood of offsetting price changes and any related changes in credit access,” yet still proposes the significant reduction in the safe harbor, seemingly without having given appropriate consideration to studying this important issue before proposing the \$8 safe harbor.⁸¹

Moreover, because calculating the cost of an APR is more complex than a simple late fee penalty amount, an increased APR will not have the same deterrent or learning effect as a late fee. Despite the CFPB’s admission that it does not know how issuers or consumers will respond to the proposed \$8 late fee safe harbor and its superficial consideration of a potential APR increase as a result, the NPR

⁷⁴ 88 Fed. Reg. at 18919.

⁷⁵ *Id.* at 18933.

⁷⁶ *Id.* at 18934.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

proposes an \$8 maximum safe harbor penalty for the first and subsequent late payments, arguing, without adequate support, that this would provide sufficient incentive for cardholders to pay on time.

The CFPB's proposed \$8 safe harbor likely would lead to further consumer harm in additional ways. Card issuers cannot use late fees as a risk management tool when the fees lose their deterrent effect and cannot tailor their cost recovery when they are prohibited by regulation from recovering costs caused by only a very small subset of cardholders. The result will be that **all** cardholders are likely to see some form of adverse impact, either through increased costs (APRs, other fees), reduction in benefits/services (rewards, customer service assistance, fee waivers, etc.), or reduction in credit (e.g., lower credit lines, tighter credit box). Issuers would have to consider higher upfront pricing for virtually all consumers, including those who will never violate terms, particularly those who pay on time but carry a balance.

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 may have to price more consumers as if they were going to violate account terms. 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 customers that carry a balance from month to month. 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 may have fewer lending options that are a component of their credit card, such as cash advances. The CFPB does not attempt to study the impact of more frequent missed payments, which could lead to higher delinquency rates and more credit bureau reporting, more accumulation of debt, which, as noted, ultimately may be worse off for the consumer in the long run. Nor does the CFPB attempt to determine the increased cost on borrowers who pay on time or demonstrate that over time consumers indeed would be better off and would pay less overall.

To the contrary, the CFPB concedes that on-time payers will incur costs, noting that “if the proposed \$8 safe harbor amount is not sufficient to cover a particular card issuer’s pre-charge-off costs card issuers “may undertake efforts to reduce collection costs or use interest rates or other charges to recover some of the costs of collecting late payments.”⁸² The CFPB dismisses this concern, noting that “building those costs into upfront rates would provide consumers greater transparency regarding the cost of using their credit card accounts.”⁸³

The CFPB thus inappropriately seeks to distribute the costs incurred by those who violate the terms of their card agreements among all cardholders ***contrary to the explicit authorization of the statute to impose penalty fees for the violation of terms of the credit card agreement***. Indeed, the title of the relevant provision of the CARD Act requiring that late fees be “reasonable and proportional” to the

⁸² *Id.* at 18919.

⁸³ *Id.* We also note that the TILA disclosure regime is predicated on the assumption that consumers will meet the obligations of their card agreements. However, folding late fees into the APR is counter to that assumption; thus, incorporating a late fee into an APR, as the CFPB suggests, would conflict with the principles on which TILA disclosure is based.

omission or violation is “Limitation of Penalty Fees.” Black’s Law Dictionary defines a “penalty,” in part, as “a punishment imposed by statute as a consequence of the commission of a certain specified offense.”⁸⁴ Supreme Court precedent provides that a “penalty” is a non-compensatory payment intended to deter and punish.⁸⁵ This definition aligns with Congress’s design that deterrence and consumer behavior be considered along with costs in determining whether a penalty fee is reasonable and proportional to the omission or violation. The Bureau errs in effectively construing “penalty” to mean the amount necessary to compensate issuers only for certain collection costs. Fees based solely on costs (and, as discussed throughout, on a narrow view of the costs that issuers incur in connection with missed payments) that were borne by all, and not just those who had violated the terms of the card agreement, would no longer be a penalty, and thus would be inconsistent with the very language and standards articulated in the statute. This redistribution effect also stands in stark contrast to one of the primary missions of the CFPB – to protect consumers and ensure that markets for consumer financial products and services are fair, transparent, and competitive.⁸⁶ The mission to protect *all* consumers and ensure that the markets for consumer financial products and services are fair is not served when those who manage their accounts responsibly would be required to compensate for the behavior of consumers who do not.

Indeed, the CFPB acknowledges that the proposed \$8 safe harbor, if adopted widely in the industry, would likely result in further consumer harm, as banks may cease offering certain products or services or charge more to consumers for other services. The CFPB estimates that “any losses to credit access would be limited. However, the Bureau acknowledges that late fee revenue has been concentrated on certain market segments, suggesting that any price responses are also likely to be focused in those segments. In particular, interest rates or other charges of subprime credit cards might increase more than for other cards, and some consumers might find these cards too expensive due to higher interest rate offers.”⁸⁷ Again, however, the CFPB dismisses this as a concern, stating that “[e]ven if this were to happen, it would not result from a higher average consumer cost of using credit cards but from greater transparency about the cards’ actual expected cost of ownership. Lost credit to consumers consciously declining offers because of the card’s actual price becoming more salient would constitute no harm to them.”⁸⁸ This unsubstantiated terse conclusion ignores the reality that for many consumers, rather than consciously choosing to decline offers of credit, options that they currently have for credit cards will be foreclosed to them. The Bureau then does briefly acknowledge that “it is also possible that some consumers’ access to credit could fall if issuers could adequately offset lost fee revenue expected from them only by increasing APRs to a point at which a particular card is not viable, for example, because the APR exceeds applicable legal limits” and “seeks data and other information to help assess the likelihood

⁸⁴ See The Law Dictionary, Penalty Definition & Meaning, *available at* [https://thelawdictionary.org/penalty/#:~:text=A%20punishment%3B%20a%20punishment%20imposed,of%20a%20certain%20specified%20offense.\(last visited April 6, 2023\)](https://thelawdictionary.org/penalty/#:~:text=A%20punishment%3B%20a%20punishment%20imposed,of%20a%20certain%20specified%20offense.(last%20visited%20April%206%2C%202023).).

⁸⁵ See, e.g., *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017) (“[A] pecuniary sanction operates as a penalty only if it is sought ‘for the purpose of punishment, and to deter others from offending in like manner’ —as opposed to compensating a victim for his loss.”).

⁸⁶ 12 U.S. Code § 5511(a).

⁸⁷ 88 Fed. Reg. 18934.

⁸⁸ *Id.*

of offsetting price,” but seems to dismiss – without any empirical support – the very real potential that certain consumers may lose access to credit.⁸⁹

The likelihood of the increased cost of credit for consumers, particularly for subprime cardholders, and the potential loss of credit access – and the CFPB’s lack of data on those possibilities – does not deter the CFPB from proposing the significantly reduced \$8 late fee safe harbor, however. Instead, the CFPB recognizes that it is likely that the incidences of late payments will rise with a lower late fee amount, but dismisses that as a concern, because the consumer may have “additional transparency” and may perhaps be able to pay off a higher level of revolving debt with a lower late fee. However, as discussed further in Section V.D.2, while empirical studies demonstrate that this repayment behavior may be observed in the subprime population, the instances of paying late is likely to increase across all credit risk levels.⁹⁰ By removing a deterrent effect of higher late fees, the CFPB may in fact be doing consumers a disservice, as late payments may trigger other negative consequences, as acknowledged by the CFPB, such as additional finance charges, a lost grace period, penalty rates, and reporting of the late payment to a credit bureau which could affect the consumer’s credit score and longer-term financial health. There may be reduced credit availability for those at the lower end of the credit spectrum, including those trying to build credit. 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 have to turn to non-bank providers of certain products and services that, as the CFPB has acknowledged, may “charge higher fees and interest rates.”⁹¹

Finally, consistent with the CFPB’s own stated desire for clarity and transparency with straightforward rules,⁹² the CARD Act authorized a safe harbor for fee amounts, because, 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.”⁹³

However, in proposing the new safe harbor of \$8, the CFPB acknowledges in the NPR that approximately one-third of the issuers that submit the Y-14 may not rely on the safe harbor and may instead use the “cost analysis provisions” to charge late fee amounts above \$8, which would be directly

⁸⁹ *Id.*

⁹⁰ See discussion in Section V.D.2, *supra*.

⁹¹ CFPB, Shawn Sebastian, *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/>.

⁹² CFPB, Rohit Chopra, *Rethinking the approach to regulations*, (June 17, 2022), available at: <https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/> (“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.”).

⁹³ 75 Fed. Reg. 37526, 37,540 (June 29, 2010).

contrary to the CFPB's goal of making consumer financial regulation "simpler and clearer."⁹⁴ Moreover, as discussed previously, the CFPB's analysis significantly underestimates the costs related to accounts that do not pay on time, and thus it is likely that an even greater number of issuers would seek to determine what is "reasonable and proportional to [the] omission or violation" rather than using the safe harbor, which will be woefully inadequate to cover many issuers' costs for a large percentage of customers.⁹⁵ And, the proposed safe harbor has not sufficiently accounted for its deterrence effect or consumer behavior. Thus, under the CFPB's proposed approach, a significant number of consumers may not benefit from the consistency and predictability a safe harbor would provide.

There are other benefits to consumers that late fees provide that could be degraded by the significantly reduced \$8 late fee safe harbor. Late fees serve as an important risk management tool for card issuers, allowing issuers to extend credit knowing that consumers are incentivized to pay on time. Credit cards are unsecured products, so there is no security interest guaranteeing the loan. Thus, repayment is based solely on a borrower's willingness and ability to pay, unlike secured loans where there is an additional incentive in the form of collateral to make payments.⁹⁶ Moreover, unlike other closed-end credit scenarios, underwriting is for not only any particular loan, but also for the line of credit going forward for an indefinite period of time. As a result, mechanisms like late fees are necessary to create some risk-management parity with other types of credit and provide incentive to pay on time. Moreover, banks are subject to stringent prudential requirements to manage credit risk.

However, if late fees are lowered to such a level that consumers miss payments more frequently, issuers will lose insight into whether the consumer is in the early stages of financial distress and whether the account presents additional risk.⁹⁷ Late fees, when appropriately calibrated, reduce banks' exposure to delinquency risk, and thereby allow banks to offer credit to a broader range of consumers across the credit risk spectrum. Appropriate fees also can discourage consumers from overextending themselves or accumulating too many card accounts. Issuers have imperfect information about whether consumers who are shopping for a new card intend to replace an old card, or simply add a new one without replacing the old one (which can result in overextending themselves).⁹⁸ Late fees and other tools that

⁹⁴ CFPB, Rohit Chopra, *Rethinking the approach to regulations*, (June 17, 2022), available at: <https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/>.

⁹⁵ As discussed further herein, the "cost analysis" does not reflect the statutorily required analysis for determining what is "reasonable and proportional," which must consider deterrence and consumer behavior

⁹⁶ The OCC recognizes this fact in its Examination Manual. See OCC, Comptroller's Handbook: Credit Card Lending, Version 2.0 at 8 (April 2021), available at <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/credit-card-lending/pub-ch-credit-card.pdf> ("Because credit card debt is generally unsecured, repayment depends primarily on a borrower's willingness and capacity to repay.").

⁹⁷ BPI, Paul Calem, *The Role of Credit Card Late Fees in Encouraging Timely Repayment Is Essential to Efficient Functioning of the Market* (January 18, 2023), available at <https://bpi.com/the-role-of-credit-card-late-fees-in-encouraging-timely-repayment-is-essential-to-efficient-functioning-of-the-market/>.

⁹⁸ Paul Calem and Loretta Mester, *Consumer Behavior and the Stickiness of Credit-Card Interest Rates* (December 1995) also describe an associated adverse selection problem whereby ex-post higher risk consumers (those more likely to add rather than replace a card) may be more responsive to offers of credit, creating a further impediment to competition.

promote financial discipline among consumers mitigate this problem and make the market more competitive, along with efforts to improve the general financial literacy and attentiveness of the population.⁹⁹

Late fees can help minimize adverse incentive effects associated with repayment plans and renegotiations.¹⁰⁰ A late fee that lacks a sufficient deterrent effect likely will incentivize customers to miss more payments – and this effect could be amplified if consumers believe they can simply reschedule past due amounts.¹⁰¹ This effect would disincentivize banks from offering renegotiation opportunities in the first place—even to borrowers experiencing unavoidable, unexpected expenses or drops in income.¹⁰² Thus, reducing late fees potentially could harm the long-term financial health of the borrower population, by curtailing the ability of banks to offer renegotiation options.

B. The Bureau’s reliance on Y-14 data to support the proposed \$8 safe harbor is deeply flawed because the data has not been disclosed and is not appropriate for determining the costs incurred or fees obtained by issuers in connection with missed payments.

The Bureau justifies the proposed \$8 safe harbor primarily on its estimate of the ratio of issuers’ fee income to collection costs (as explained further below, the CFPB uses 75 percent of the collection costs contained in the Y-14 data in the ratio) – the so-called “estimated pre-charge-off collection costs.”¹⁰³ The Bureau primarily relies on undisclosed Y- 14 data for issuer costs and late fee revenue data in calculating this ratio. The Y-14 data is provided by banks with \$100 billion or more in total consolidated assets (\$50 billion pre-2019) to the Federal Reserve for stress testing purposes – in other words, the data is provided to an entirely different agency for an entirely different purpose. The Y-14 data is ill-suited for estimating issuer costs and net late fees assessed for purposes of determining whether the current safe harbor should be reduced, as the CFPB proposes. We describe the significant shortcomings of using this data and the Bureau’s related analyses further below.

1. The Bureau has not complied with its obligation to publicly release the data, methodologies, and analysis on which it relies.

As noted in Section III, the Bureau has not complied with its obligation to release the data, analysis, or methodology it has purported to rely on in support of the proposed changes. In support of the dramatic reduction in the late fee safe harbor and other proposed changes, the Bureau relies primarily on confidential data collected by the Federal Reserve Board for stress testing purposes – the Y-14 data collection – as well as other “[i]nformation provided in response to a series of data filing orders made to

⁹⁹ Improved data and risk modeling, which enable more accurate risk screening of card applicants, also can promote a more competitive market by mitigating informational barriers.

¹⁰⁰ BPI, Paul Calem, *The Role of Credit Card Late Fees in Encouraging Timely Repayment Is Essential to Efficient Functioning of the Market* (January 18, 2023), available at <https://bpi.com/the-role-of-credit-card-late-fees-in-encouraging-timely-repayment-is-essential-to-efficient-functioning-of-the-market/>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 88 Fed. Reg. at 18916.

several industry participants, comprised of two distinct sets” and refers repeatedly to analyses it conducted using such data.¹⁰⁴ The Bureau has not complied with its obligation to release to the public this underlying data or the methodology or empirical analysis on which the Bureau relies. Without this information, it is virtually impossible to understand or replicate the analysis in any meaningful way, significantly hindering our ability to provide thoughtful input.

The data on which the CFPB relies to support the unprecedented reduction in the safe harbor is supervisory data that may raise confidentiality concerns if released. The Bureau’s decision to rely on this data, however, does not relieve the Bureau of its obligations under the APA. The failure to release this data, along with the Bureau’s methodology and resulting analysis, conflicts with bedrock principles of administrative law. As the D.C. Circuit has explained, it “is the agency’s *duty* to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.”¹⁰⁵ “An agency commits serious procedural error when,” as in the NPR here, “it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”¹⁰⁶

To ensure that the public has a meaningful opportunity to comment on its sweeping proposal, the APA requires the Bureau to “expose[]” its studies and data “to refutation” in the rulemaking proceeding.¹⁰⁷ The Bureau also “must explain the assumptions and methodology” it used “and, if the methodology is challenged, must provide a complete analytic defense.”¹⁰⁸ In short, the Bureau must disclose the “most critical factual material” on which it relied and provide “further opportunity to comment.”¹⁰⁹ In light of the Bureau’s legal obligation to provide the underlying data and analysis on which it has relied in connection with the proposed rule, we respectfully request that the CFPB publish this information immediately and extend the comment period to ensure that interested members of the public have adequate time and opportunity to review and meaningfully comment on this information so critical to the proposal. If it does not do so, the Bureau cannot rely on that data and related analysis in support of the proposal.

¹⁰⁴ The NPR refers to the 2021 Annual Credit Card Report, which states that the two sets are: “a) Data requested from a broad and diverse group of issuers to address a range of topics that neither CCP nor Y-14 data can address. This report refers to these data as Mass Market Issuer (MMI) data. These data cover application and approval volumes, rates, and channels, deferred interest, digital account servicing, certain aspects of the impact of COVID-19 on consumers and issuers, and loss mitigation policies and practices, including debt collection. b) Data requested from a diverse group of specialized issuers. These summary data, which focus on basic indicators of usage and cost, in places supplement the Y-14 to allow for a broader or more detailed perspective into certain facets of the market than either the Y-14 or [the Bureau’s Consumer Credit Panel] allow. Where these data supplement Y-14 data, those data are collectively called “Y-14+.”” See, 88 Fed. Reg. at 18910, n. 58 (citing to page 17 of the Bureau’s 2021 Card Report).

¹⁰⁵ *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) (emphasis added; citation omitted).

¹⁰⁶ *Id.* (citations omitted).

¹⁰⁷ *Id.* at 202.

¹⁰⁸ *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) (citation omitted).

¹⁰⁹ *Chamber of Commerce v. SEC*, 443 F.3d 890, 900-01 (D.C. Cir. 2006).

2. The Y-14 data is only provided by certain issuers.

Although the Bureau has not complied with its obligation to publish the data on which it relied – or its related methodologies and analysis – some of the flaws in its data and analysis are already apparent. To begin with, the Y-14 data is not fit for purpose as a basis for the CFPB to reduce the safe harbor four-to-five fold. The Y-14 data is submitted to the Board by banks with greater than \$100 billion in total consolidated assets for stress testing purposes (pre-2019, banks with \$50 billion or more in total consolidated assets submitted this data) and not for CARD Act compliance. The CFPB’s reliance on this data and related analysis is misplaced for several reasons. First, this data does not reflect the entire universe of card issuers, many of which do not report Y-14 data. The CFPB itself recognizes this limitation, yet dismisses this shortcoming with no reasonable explanation or basis.

The CFPB stated in its 2021 biennial CARD Act report that “the Y-14 data cover a large but **not representative** portion of the credit card market.”¹¹⁰ The 2021 CARD Act Report also provides that “[t]he remainder of the market, **representing a substantial number of consumer credit cards**, are outside the scope of the Y-14 data used by the Bureau because, among other reasons, they are issued by banks with assets of less than \$50 billion, or are issued by non-banks, such as credit unions. Results reported from Y-14 data throughout this report should be interpreted accordingly.”¹¹¹ In both the CARD Act Report and the proposal, the CFPB also uses in some instances a broader data set that the CFPB refers to as the “Y-14+ data,” which includes Y-14 data and “[i]nformation provided in response to a series of data filing orders made to several industry participants, comprised of two distinct sets.”¹¹² With respect to that broader data set, the CFPB stated in the CARD Act Report that the Y-14+ data “cover a larger and more representative portion of the credit card market, **but the remaining uncovered portion is still substantial**, and the Y-14+ data should similarly not be considered representative of that uncovered portion.”¹¹³

The proposal states that the “Bureau recognizes that the **analysis...is based on data from the largest issuers, and may not be representative of smaller issuers**, who do not report to the Y-14 collection . . . **Although the Bureau does not have data equivalent to the Y-14 data for smaller issuers’ pre-charge-off collection costs, it has no reason to expect that smaller issuers exhibit substantially**

¹¹⁰ See CFPB, The Consumer Credit Card Market at 17, n. 29, (Sept. 2021) (emphasis added) *available at* https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

¹¹¹ See *Id.* at 16, n. 26 (emphasis added).

¹¹² See *Id.* at 17, n. 29 (emphasis added). The 2021 CARD Act Report explains that those two data sets are: “a) Data requested from a broad and diverse group of issuers to address a range of topics that neither CCP nor Y-14 data can address. This report refers to these data as Mass Market Issuer (“MMI”) data. These data cover application and approval volumes, rates, and channels, deferred interest, digital account servicing, certain aspects of the impact of COVID-19 on consumers and issuers, and loss mitigation policies and practices, including debt collection. b) Data requested from a diverse group of specialized issuers. These summary data, which focus on basic indicators of usage and cost, in places supplement the Y-14 to allow for a broader or more detailed perspective into certain facets of the market than either the Y-14 or [the Bureau’s Consumer Credit Panel] allow. Where these data supplement Y-14 data, those data are collectively called “Y-14+”.” *Id.* at 17.

¹¹³ See *Id.*

higher pre-charge-off collection costs than larger issuers.¹¹⁴ It does not appear that the Bureau sought to obtain data about the late fees collected or the costs incurred by issuers that do not report Y-14 data. For example, the CFPB could have engaged in targeted data collection efforts under Section 1022 of the Dodd-Frank Act or convened a SBREFA panel (as it should have done) to obtain information about issuers outside of the Y-14 filers. The CFPB's reliance on data to support the proposed \$8 safe harbor that the CFPB itself recognizes is not representative of the overall market is arbitrary and capricious.

3. The Y-14 data is not reported in a uniform manner across filers.

The cost and fee data reported on the Y-14 also is not a sufficiently uniform or defined data set for purposes of assessing (i) card issuer costs associated with late payments, or (ii) late fees collected by issuers to justify the proposed amendments to the current safe harbor or the other proposed changes. The Bureau purportedly considered data reported on the Y-14 regarding the "costs incurred to collect problem credits" including "the total collection cost for delinquent, recovery, and bankrupt accounts," as well as the data reported via the Y-14 for "net fees assessed." However, the Y-14 reporting instructions do not define these terms or provide further direction and are not reported in a uniform manner by BPI members, as discussed in greater detail in Section V.C. below. For example, some banks include certain overhead and fixed costs such as real estate and IT in this line item on the Y-14, while others do not. In addition, some banks may net out fees on accounts that enter repayment plans or are otherwise renegotiated, while others may not. Thus, the Bureau's analysis that relies on this information is unsound since the data is not uniformly reported by issuers.¹¹⁵

Certainly, the NPR does not suggest that the Bureau attempted to discern whether the data is uniformly reported by issuers or explain why any reliance on data that is not uniformly reported would be sound. For stress testing purposes, it is not important whether each institution allocates costs across divisions or functions in the same manner, so long as each reports costs in some way in the reporting forms overall. Thus, for example, some institutions may not allocate overhead or fixed costs to different functions, such as the credit card collection function, but rather, report those costs in other line items on the Y-14. The same is true for how late fees are reported. Yet, for the purposes for which the Bureau seeks to use the information – to calculate issuers' total costs and fees to determine whether to propose a substantially reduced late fee safe harbor, uniformity of what is reported in each category is critical in order to produce analytically sound results.

4. The CFPB did not have to rely on Y- 14 data, contrary to its assertions.

The CFPB repeatedly states that it was forced to rely on Y-14 data because it did not receive any data in response to the ANPR and had no other option.¹¹⁶ This assertion fails to recognize the good faith attempts of the industry to provide robust responses to the CFPB's ANPR. First, consistent with the

¹¹⁴ 88 Fed. Reg. at 18917 (emphasis added).

¹¹⁵ Indeed, the Board in 2010 rejected the "results of a study of the costs associated with late payments on credit card accounts issued by ten of the largest credit card issuers" in part, because "the Board is unable to determine whether the cost information collected from the participants was accurate or consistent from issuer to issuer . . . the participants presumably do not track their costs in a uniform fashion." 75 Fed. Reg. at 37541.

¹¹⁶ *Id.* at 18918.

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. Second, the timeframe provided to respond to the multiple detailed and complex questions set forth in the ANPR was inadequate for issuers to provide comprehensive responses or useful data. BPI and several other trade associations requested an extension of the comment period, yet the CFPB provided only an additional ten days at the very end of the original comment period. This was not nearly enough time to allow for more meaningful input from commenters, particularly at the very end of the comment period.

Furthermore, the CFPB has the authority under Section 1022 of the Dodd-Frank Act to issue targeted data requests in which the CFPB could have precisely defined the type of data it was seeking to ensure the uniformity of submissions from issuers of varying sizes. The CFPB did not use this significant data collection tool in its rush to issue this proposal, even though it has relied on Section 1022 in other rulemakings. The CFPB also could have, and should have, engaged in a SBREFA process to obtain additional information about what costs and fees are appropriate for consideration in determining whether to propose amendments to the late fee safe harbor. The CFPB's failure to take any of these actions to collect appropriate data and its decision to rely on data that is ill-suited for the purpose for which the CFPB uses it is unreasonable and arbitrary and capricious.

Below we provide further discussion about the CFPB's misplaced reliance on Y-14 data and its deficient analysis using that data in support of the proposed changes to the safe harbor and other proposed revisions to the regulations governing credit card late fees.

C. The Bureau's evaluation of the statutory factors using the Y-14 data is flawed and arbitrary and capricious.

Because the Y-14 data is not fit for purpose, the analysis in which the Bureau engages in reliance on that data to support the proposed \$8 late fee safe harbor is deeply flawed. In particular, as discussed further below, the Bureau relies on the Y-14 data throughout the NPR in attempting to justify its proposed Safe Harbor with respect to Costs, Deterrence, and Conduct. Because the Bureau has not complied with its obligation to disclose that data or its related methodologies and analysis, it is impossible for commenters even to check the Bureau's math, much less to spot and raise significant analytical defects. Nonetheless, as explained more fully below, some of the fatal deficiencies in the Bureau's methodologies and analysis using the Y-14 data with respect to each of the statutory factors are nonetheless apparent.

1. The Bureau's calculation of issuer costs and fees assessed using Y-14 data is deeply flawed and deficient.

The proposed safe-harbor limit rests on a cost-based calculation where the Bureau determines that an \$8 fee is sufficient to cover the costs associated with late or missed payments. However, the Bureau's

calculation incorporates four types of significant error or omission, each of which implies potentially substantial upward bias in the calculated ratio of net assessed fees to cost of late payment. These are:

- The data used by the Bureau excludes some of the costs associated with late payments generally, which include but are not limited to costs related to credit card collections. The Bureau also excludes certain collections-related costs, resulting in an overstatement of the measured payment-to-cost ratio. Moreover, the collection costs omitted from the calculation vary by institution.
- The Bureau calculates the industry average payment-to-cost ratio weighting by number of accounts; this can make the calculation sensitive to measurement error and augment upward bias.
- The Bureau's exclusion of collection costs incurred after the loan is charged-off is arbitrary and lacks economic justification.
- The Bureau does not adequately consider the macroeconomic conditions during the period of analysis, which is not representative of a typical economic cycle. As a result, the measured payment-to-cost ratio appears to be higher than its long-run average.

The data and procedure used in this calculation are inadequate and insufficient for determining adequacy of the \$8 limit based on costs. Also, by basing the safe-harbor limit solely on this calculation, the Bureau does not meaningfully consider the deterrence role of late fees or consumer conduct, in violation of the statute.

Even if the CFPB's consideration of costs alone were consistent with the statute, which it is not, as it has ignored deterrence and consumer conduct, the CFPB's cost analysis is deficient for multiple reasons.

For its calculation, the Bureau relies primarily on data collected by the Federal Reserve Board for stress testing purposes, the Y-14 data collection. The calculation uses two data items from the Y-14: "Total Non-Interest Expense - Collections Expense" and "Fee Income – Late Fee Income."¹¹⁷

¹¹⁷ Specifically, these are line items 32 and 37 from schedule D-2 (Domestic Credit Card – Portfolio Level Table) of the Y-14M. Federal Reserve, FR Y-14M, *available at* https://www.federalreserve.gov/apps/reportingforms/Report/Index/FR_Y-14M. Additionally, the Bureau relies on data collected from a survey of the debt collection and loss mitigation practices of several large issuers, conducted as part of its biennial review of the consumer credit card market. The Bureau notes that as part of its biennial review, it "surveys several large issuers to better understand practices and trends in credit card debt collection." Data collected in response to data filing orders for the 2021 review were used as the basis for estimating the share of total collection costs that are incurred after charge-off. The Bureau has not provided the data and analyses from its biennial review of the consumer credit card market to the public in connection with the proposal, and thus we are not able to meaningfully comment on the use of the data or the CFPB's analysis related thereto. The CFPB's failure to reveal, in a format appropriate for public consideration, the data and analyses on which it relied in drawing this conclusion that 25 percent of commission paid to third party debt collectors is paid post-charge off, violates administrative law principles, as discussed previously.

The calculation proceeds as follows.¹¹⁸ First, the Bureau excludes costs associated with collection activities that occur after an account has been charged off from the calculation of costs associated with late payments. The Bureau's decision to exclude these costs appears to be based on a seemingly arbitrary interpretation of commentary in the current regulation, rather than on an economic argument. Next, the Bureau estimates, using the above two data sources, the share of total collection costs that derive from commissions paid to collection agencies for recoveries on charged-off accounts, as a proxy for costs incurred after charge-off.

The Bureau then applies the latter estimate to Y-14 data and proceeds to calculate the ratio of net assessed fees to before charge-off collection costs for banks that report these data, by month, for each month in January 2016 through March 2022. The Bureau observes that since August 2021 "late fee income has exceeded the relevant estimated pre-charge-off costs more than fivefold" and that this "resembles" what is observed for the 2019, pre-pandemic period.¹¹⁹

Based on these observations, the Bureau infers that the average net assessed fee is at least five times larger than necessary to cover the typical issuer's pre-charge-off collection costs. Therefore, since most issuers currently charge late fees ranging as high as \$40 as permitted under the safe harbor for a subsequent violation, the Bureau concludes that an \$8 late fee "would still recover the average issuer's pre-charge-off collection costs, as that fee represents one-fifth of the maximum late fee amount, which is necessarily greater than average fee income per late payment."¹²⁰

The discussion below explains each of these in turn. The bottom line is that the Bureau's calculation exhibits multiple serious shortcomings. The correct calculation would imply a markedly higher penalty fee to cover the cost of collection activities compared to the proposed \$8 limit.

The Bureau fails to consider the limitations of the Y-14 data items.

For data on collection expenses, the Bureau relies solely on the line in the Y-14, "Collections Expense." The instructions for line item 32 provide: "Report costs incurred to collect problem credits. Include total collection cost for delinquent, recovery, and bankrupt accounts." However, the statute requires consideration of "the cost incurred by the creditor from *such omission or violation*" – not merely collection costs" for certain accounts.¹²¹ The regulation likewise requires consideration of "the total costs incurred by the card issuer as a result of that type of violation."¹²² Yet, the Bureau explicitly

¹¹⁸ For further details, see the Bureau's summary of the calculation in "Credit Card Late Fees: Revenue and Collection Costs at Large Bank Holding Companies", Consumer Financial Protection Bureau (February 2023), available at: [Revenue and Collection Costs at Large Bank Holding Companies \(consumerfinance.gov\)](https://www.consumerfinance.gov/revenue-and-collection-costs-at-large-bank-holding-companies)

¹¹⁹ See 88 Fed. Reg. at 18916-18917.

¹²⁰ *Id.* at 18917 ("Given the finding that, in the most recent data, late fee income is greater than five times estimated pre-charge-off costs, the Bureau expects that an \$8 late fee would still recover the average issuer's pre-charge-off collection costs, as that fee represents one-fifth of the maximum late fee amount, which is necessarily greater than average fee income per late payment.").

¹²¹ 15 U.S.C. § 1665d(c) (emphasis added).

¹²² 12 C.F.R. § 1026.52(b)(1)(i).

states, without any support, that “[t]he 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.”¹²³ The CFPB has not stated with certainty or specificity what costs are included in the cost line item, or how those costs align with those permitted under the statute or regulation, and the CFPB does not attempt to reconcile the two in any meaningful way in the proposal. Indeed, it does not appear that the Bureau itself knows or attempted to determine what costs are included by Y-14 filers. Moreover, the Bureau did not account for the possibility that the reporting of this line item differs across issuers.

Table 1 outlines the different types of costs associated with credit card collections or related activity. In general, however, banks’ Y-14 reporting incorporates only the variable costs borne directly by the collections department, which is the first group in the table. Banks generally do not report many of the other types of costs listed in Table 1, such as fixed costs and supporting services from other area of the bank. As a result, the line item in the Y-14 is *not* comprehensive and typically omits a large share of the overall cost of collection or related activities.

Table 1: Cost Categories for Credit Card Collections

Variable Costs Borne Directly by the Collections Department

- Compensation and benefits for collection servicing agents and managers
- Supplies and equipment expensed directly
- Phone, internet, mail, other communication costs
- Dedicated resources for information technology and security
- Dedicated resources for customer service, loan servicing, etc.
- Training costs
- Payments to vendors and third-party collectors

Fixed Costs

- Dedicated office space and furnishings
- Computers and other technology equipment

Support Services from Other Areas of the Bank

- Information Technology
- Information Security
- Regulatory Compliance

¹²³ 88 Fed. Reg. at 18916.

Finance and Accounting
Retail Customer Service
Retail Loan Servicing
Legal
Risk Management
Building Operations and Security
Purchasing
Human Resources
Internal Audit, Governance, and Control

However, the extent to which a collections department relies on other areas of the bank, and therefore the share of total collection costs included in the Y-14 line item, varies across institutions. For example, some banks may have substantial, dedicated IT resources within their collections department, while others may rely entirely on outside IT support. Some may have their own internal audit and control teams, relying only partially on outside support, while others will rely entirely on support services from the bank's audit department.

Similarly, some collection departments will arrange and operate their own training programs for servicing agents, while others may rely on the HR department to arrange and operate such programs. The share of collection and recovery costs included in the reported Y-14 item would also depend on the extent to which a bank sells delinquent accounts to companies that specialize in managing troubled debt if these sale transactions are primarily conducted outside of the collections department.

Commissions and fees paid to external agents and vendors typically are included in the Y-14 item. Therefore, a bank that relies more heavily on vendors and outside agents generally will have more complete reporting of collections expenses.

However, there are exceptions to the latter rule; for example, not all BPI reporting banks include commissions paid to third party collection agencies after a loan has been charged off. Because the Bureau's calculation assumes that the Y-14 line item consistently incorporates such commissions and applies an adjustment to the data to net out these costs, the calculation will be incorrect as applied to these banks, further biasing upward the calculated payment-to-cost ratio.

In addition, there are costs associated with late payments—such as those completed within 30 days of the due date—that are borne outside of the collections department. These costs are typically incurred by the customer service area, which handles calls and inquiries from those seeking information about their late payment or requesting fee waivers. Those costs are not likely not included in the Y-14 item, because they are not “collection” costs or generally associated with delinquent accounts.

Based on these considerations, the degree to which the Y-14 collection cost item incorporates all relevant costs of late payment – including but not limited to direct collections costs – will vary considerably across issuers, and in general the reported collection cost item substantially understates

these costs. Banks that report a less comprehensive share of costs will report a higher fees-to-cost ratio. As a result, the range of measured ratios across institutions may be relatively wide.

An additional data issue is that Y-14 item for fee income is the sum of fees assessed during the month minus fee reversals and refunds applied during the month (which include reversals due to charge-off). However, in accordance with banks' loss mitigation practices, each month some delinquent accounts may be modified through re-aging or converted into fixed payment plans while others may be closed in a debt settlement, without explicit reversal of late fees but with concessions to the borrower.¹²⁴ These implicit reversals of fee income are not captured in the Y-14 item for net fees assessed, which therefore may overstate realized fee income.

The Bureau fails to consider the disadvantages of weighting by number of accounts.

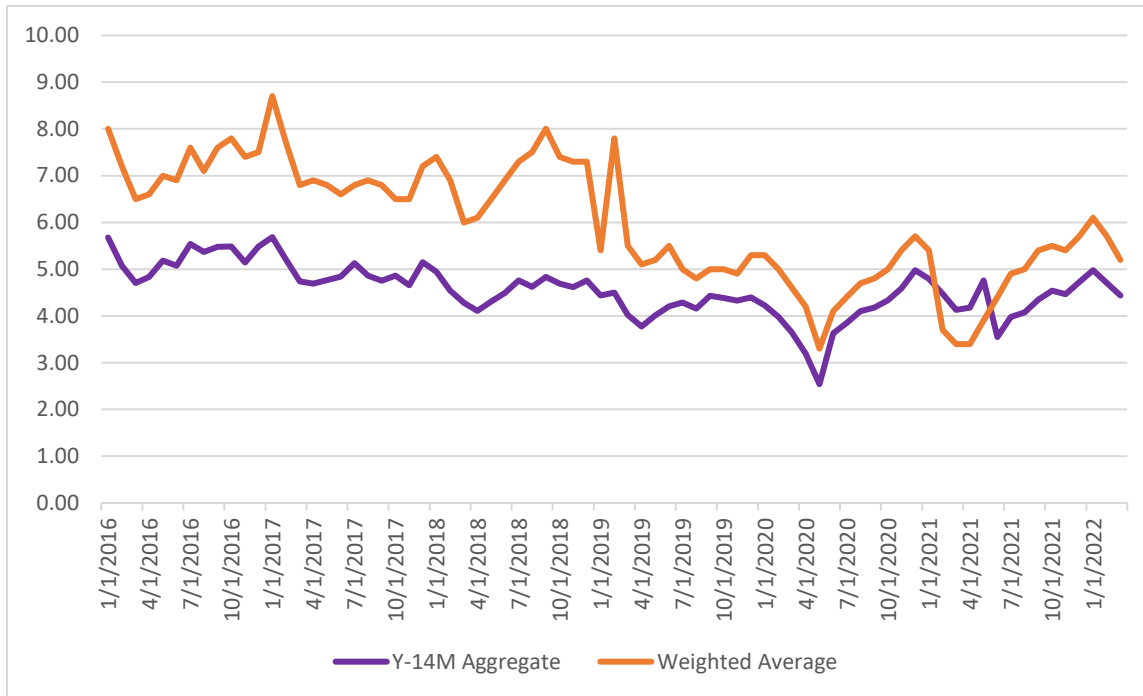
The Bureau calculates an industry average payment-to-cost ratio by weighting each Y-14 reporting institution according to the number of accounts it has. This weighting also makes the calculation more sensitive to measurement error, including those resulting from excluded cost categories, as well as to outliers among large institutions.

Figure 1 compares the Bureau's account-weighted average ratio to the Y-14 aggregate ratio, where the latter equals the sum of net assessed fees across all Y-14 reporting institutions divided by the sum of before charge-off collection costs of these institutions. The account-weighted ratio is relatively volatile and is also systematically larger, raising concern that it may be overly influenced by a few outlier institutions with unusually high and volatile fee income relative to costs. Moreover, it seems plausible that the measurement error issue discussed previously may contribute to the presence of such outliers—a few large institutions may have a relatively large, missing cost component, resulting in large upward bias of their measured ratios and greater sensitivity of these ratios to variation in fee income over time.

In other words, account-weighting might allow undue influence of a few large institutions that have a relatively high payment-to-cost ratio due to excluded cost components, given the objective of determining an appropriate safe harbor limit. Overall, the Figure 1 comparison raises a concern that weighting by number of accounts yields a less reliable estimate of the ratio due to enhancing the influence of outliers, including by augmenting the upward bias caused by the measurement error in reported collection costs.

Figure 1: Account-Weighted Average versus Y-14 Aggregate Payment-to-Cost Ratio

¹²⁴ See the Bureau's [2021 Consumer Credit Card Market Report](#) for a discussion of these loss mitigation practices.



Ratio of net assessed fees to the sum of before charge-off collection costs.

Source: [Revenue and Collection Costs at Large Bank Holding Companies \(consumerfinance.gov\)](https://www.consumerfinance.gov/revenue-and-collection-costs-at-large-bank-holding-companies)

The Bureau does not discuss these potential limitations of using the account-weighted average for deriving the proposed safe harbor limit or explain why it chose to do so. Nor does the Bureau provide any information on the distribution of the measured ratios across institutions; why they appear to be correlated with institution size (number of accounts); the reasons for volatility of the weighted average ratio; and whether and how outliers may have been addressed. Because the account-weighted average might be sensitive to outliers and exacerbate effects of measurement error in the data, it would seem preferable for the Bureau to utilize the Y-14 aggregate ratio.

Moreover, use of the aggregate ratio may be more appropriate even if the gap between the account weighted average and Y-14 aggregate ratios is not solely due to measurement error. Even with the ratios measured accurately, if a minority of relatively large institutions have comparatively large ratios, the Y-14 aggregate ratio may still be the more appropriate measure.

Two hypothetical examples, presented in Table 2 illustrate why this is so. Each of these examples posits banks with differing ratios of total fee income to total collection cost, with a weight representing their market share of accounts. The gap between the account-weighted average and the Y-14 aggregate ratios is similar to that observed in the actual data in Figure 1 since June 2021, and reflects the influence of a single large bank with a relatively large payment-to-cost ratio (Bank 1).

The last two columns show the result of a fee cap based on the account-weighted average ratio (dividing current fee income by this ratio), which is essentially what the Bureau has proposed doing. Each bank's fee income would decline to what is shown in the next to last column, resulting in the new, payment-to-cost ratio shown in the last column.

Table 2: Examples illustrating effects of using the account-weighted average.

Example 1							
	weight	fees	costs	ratio	wgt avg ratio	proposed (capped) fees	ex-post ratio
Bank 1	0.4	6	1	6		1.2	1.2
Bank 2	0.5	4.5	1	4.5		0.9	0.9
Bank 3	0.1	6	2	3		1.2	0.6
Aggregate		16.5	4	4.125	4.95	3.3	0.8
Example 2							
	weight	fees	costs	ratio	wgt avg ratio	proposed (capped) fees	ex-post ratio
Bank 1	0.1	3	0.2	15		0.6	3.1
Bank 2	0.4	4	1	4		0.8	0.8
Bank 3	0.6	6	2	3		1.2	0.6
Aggregate		13	3.2	4.0625	4.9	2.7	0.8

Because of the outsized influence of Bank 1 on the account-weighted average ratio, Banks 2 and 3 are unable to recoup their costs, and aggregate fee income falls short of aggregate costs. This outcome is neither sensible nor fair. To the extent that Bank 1's high ratio is due to measurement error, this outcome would be even less desirable.

The Bureau is wrong to exclude collection costs incurred after charge-off.

As noted earlier, the Bureau excludes costs incurred after an account has been charged off in calculating the payment-to-cost ratio used to derive the proposed safe-harbor limit. These costs make up a material portion of overall collection costs. The Bureau has not provided a compelling reason for their exclusion, and calculating the safe-harbor limit without considering these costs could have undesirable consequences.

To justify the exclusion of these costs, the Bureau refers to Federal Reserve Board commentary on the original, 2010 rulemaking which suggests that "losses and associated costs" should not be factored into the "cost of the violation" for determining whether a penalty fee is reasonable and proportional. The Bureau then interprets the term "losses and associated costs" to include collection expenses

incurred after charge-off, which is an arbitrary interpretation of the commentary on the rule rather than the 2010 rule itself.¹²⁵

This attempt to expand the definition of “losses and associated costs” to include collection costs incurred after charge-off is inconsistent with business practice and economic logic. Collections activity is an ongoing business activity of a credit card lending institution. The debt collections process commences shortly after a payment due date is missed, typically as an account nears 30-day delinquency, and continues after charge-off in much the same manner as before, as is well documented in the Bureau’s biannual *Consumer Credit Card Market Report*.

Although banks typically rely mostly on outside collection agencies to pursue recovery on credit card debt after it has been charged-off, paying commissions to the agencies for the amounts recovered, such third-party agents act on behalf of the bank. There is no fixed period after which the cost of collecting on delinquent or charged-off debt ceases to be an operating cost of the bank. Nor do lending institutions automatically transition from internal to third party collection activity when a charge-off occurs. Banks frequently rely on third-party collectors for debt not yet charged off, and often continue to rely on their internal collections function for charged-off card debt.

An analogy can be made to companies that specialize in loan servicing. Collecting on delinquent and defaulted debt is an integral part of the business model of such companies, and the costs of collection activities are an ongoing cost of their business operations, with no discontinuity arising from a charge-off. Costs of continuing to collect on loans that have charged off are ongoing operating costs for these companies.

For example, as originally noted by the Federal Reserve Board in its commentary on the 2010 rulemaking, the cost of reserves held against potential losses on a delinquent consumer loan and the cost of funding the loan are costs associated with the loss should the loan be charged off. In the case of a mortgage default, the costs associated with a legal foreclosure process and sale of a foreclosed property are likewise costs associated with a loss. In either case, however, compensation paid to company staff assigned to service the charged off loan would be considered an ongoing operating cost, not a cost associated with the loss.

Another important factor to consider is that when a consumer misses a payment date, from the point of view of the card issuer (who cannot know the reason for the missed payment) the probability that the account may eventually go to charge-off increases. Economic principles imply that issuers should update their risk assessments and risk pricing when consumers pay late, including by setting late fees to cover potential future costs, including costs after charge-off.

Moreover, the Bureau’s decision to exclude costs incurred post charge-off has potentially adverse implications for consumers. These costs won’t disappear simply because the Bureau places them off-limits to reimbursement through late fees. Banks will seek other ways to offset them.

¹²⁵ See 88 Fed. Reg. at 18913.

One likely response of lenders would be to increase up-front interest rates or make credit cards less available, especially for consumers who are seen as less creditworthy due to having lower credit scores. Thus, while consumers with prime credit scores who on occasion pay late (and by doing so indicate an increased risk of default) now share substantially in these costs, the Bureau's proposal will shift more of that share onto consumers with lower credit scores that may never pay late. Such an outcome seems contrary to what the Bureau has set out to achieve.

Clearly, there is wide scope between fully excluding costs incurred after charge-off and ensuring that late fees remain reasonable and proportional. The role of the safe harbor is to accomplish the latter objective. It is the Bureau's obligation to determine the appropriate safe harbor limit based on a careful analysis, and not just arbitrarily declare all such costs to be out-of-scope for that determination.

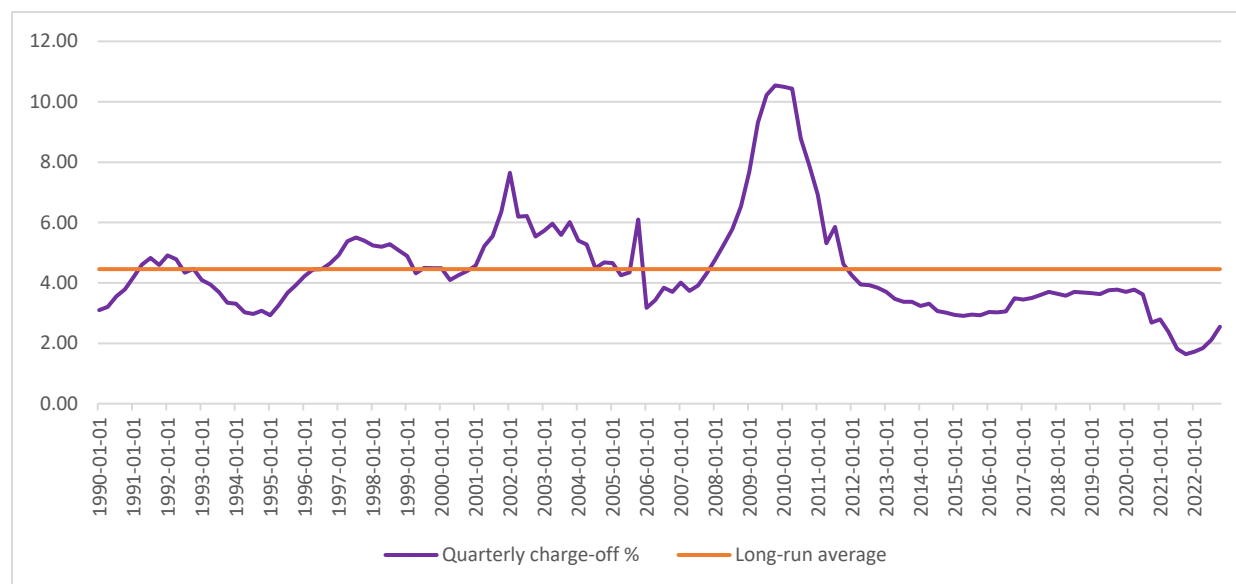
The Bureau does not adequately consider the macroeconomic context around its analysis.

The Bureau's analysis of credit card late fee income and collection costs uses monthly data from January 2016 through March 2022, with an emphasis on the subperiod since August 2021. However, this period is not representative of the longer-term performance of the credit card market. It was relatively benign in terms of credit card delinquency and loss, and particularly so in the subperiod since August 2021. Consequently, the Bureau's analysis is flawed because it did not adequately consider the macroeconomic context of the observed period.

This limitation of the analysis is evident from Figure 2, which depicts the historical time series of credit card charge-off rates since January 1990. No major downturn affecting household debt repayment performance occurred during this time. Charge-off rates since 2016 have been well below the long-term average of about 4.5 percent, with no major downturn affecting household debt and repayment performance occurring during this period. Charge-off rates fell to historically low levels in the wake of the Great Recession as lenders tightened credit standards and began to slowly normalize after mid-2016. After 2020, charge-off rates plummeted to unprecedentedly low levels, reflecting the drop in consumer spending alongside the income transfers and other government support for households that occurred during the pandemic.

Because of this benign environment, the data very likely understate quite materially the long-run average payment-to-cost ratio. In particular, during a period of stress, collection costs would greatly increase as banks expand their collection activities in line with rising delinquency. Late fee income would likely decline or at least remain flat (with the increase in assessed fees being offset by increased reversals due to the spike in charge-offs).

Figure 2: Quarterly Charge-Off Rate on Credit Card Loans—Q1 1990 through Q3 2022



All commercial banks, seasonally adjusted.

Source: Federal Reserve Economic Data (<https://fred.stlouisfed.org>)

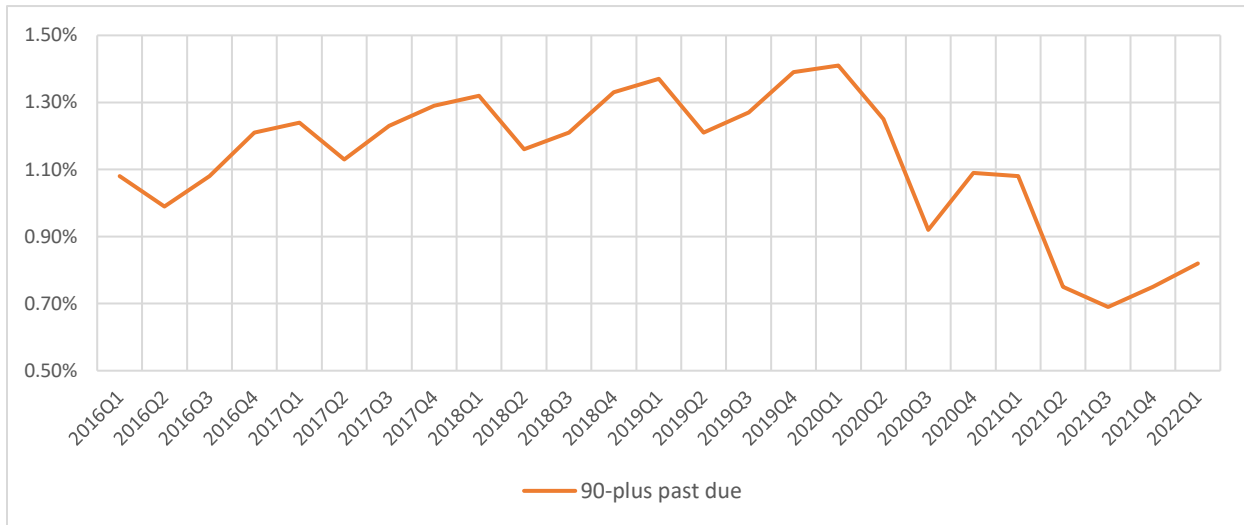
Although the Bureau’s analysis period is relatively benign for credit losses, there is enough variation in the data to shed some light on the relationship among repayment performance, net assessed fees, and collection costs. Figure 3 depicts the quarterly, 90-day plus balance delinquency rate (delinquent as a share of total balances) for this period. Figure 4 shows total collection costs and total net assessed fees for this period relative to (normalized by) their January 2016 values.

Collection costs trend upward through April 2021, consistent with the rising delinquency rate into the first quarter of 2021. After January 2021, collection costs trend downward, consistent with the sharp drop off in delinquency, providing more evidence that collection costs are influenced by macroeconomic factors.

Net assessed fees are quite stable through this period (subject to seasonal variation), consistent with the increase in assessed fees being offset by increased frequency of reversal due to charge-off. Net assessed fees are volatile since the start of the pandemic, reflecting the various unusual factors at play during this period, including forbearance and expiration of forbearance toward skipped payments.¹²⁶

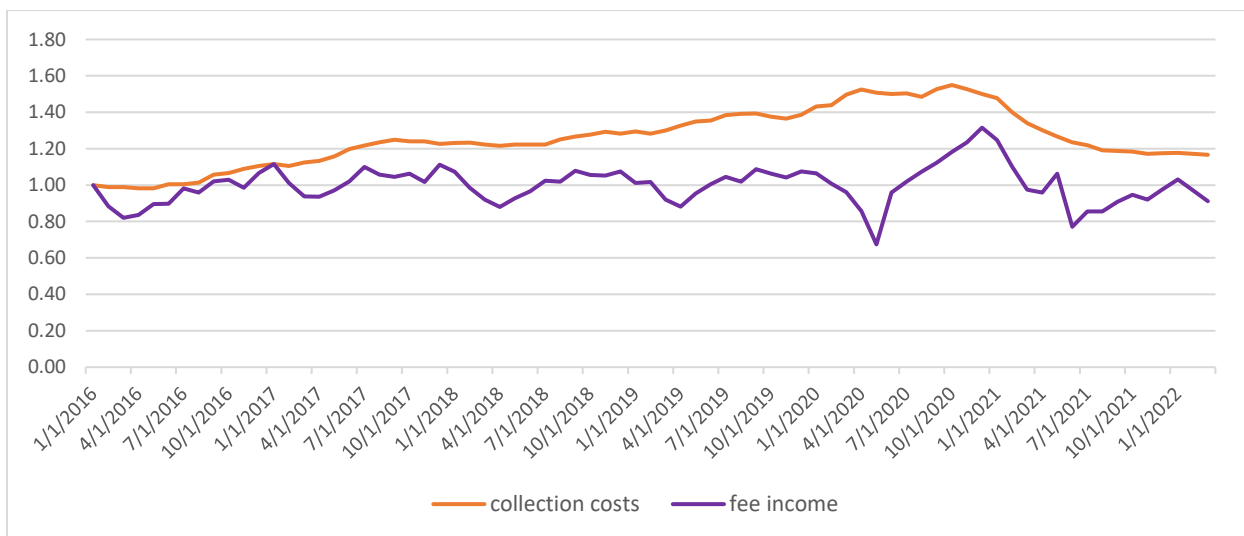
Figure 3: Quarterly Delinquency Rates on Credit Card Balances—Q1 2016 through Q1 2022

¹²⁶ Another factor likely contributing to recent volatility of net assessed fees as reported in the Y-14M is that this line item nets out reversals taking place in the current month from fees assessed in the current month. Since reversals in the current month to a large extent are tied to late fees assessed in prior months, they may not accurately approximate future reversals of current assessed fees. Because many late fee reversals occur if and when an account is charged off, the Y-14M line item will overstate the realized net assessed fees when rates of transition from delinquency to charge-off are declining and understate them when these rates are increasing. This procyclical error can contribute to volatility of the measure.



Source: Federal Reserve Bank of Philadelphia, [Large Bank Consumer Credit Data](#)

Figure 4: Total Collection Costs and Total Net Assessed Fees: January 2016 through March 2022



Data are expressed as a ratio to the January 2016 value.

Source: [Revenue and Collection Costs at Large Bank Holding Companies \(consumerfinance.gov\)](#)

Bottom line assessment.

The Bureau's finding that card issuers' late fee income has, on average, exceeded the costs associated with late payment by a multiple of no less than five is based on an inaccurate and upward biased calculation.

One major problem with the calculation is that it relies on data from 2016 through early 2022, which was relatively benign and does not incorporate a stress period with respect to credit card delinquency and losses. Thus, the calculation cannot be considered representative of the long-term average relationship between fee income and costs. Another problem is that in deriving an industry average

payment-to-cost ratio, the Bureau weights each institution by number of accounts, which appears to exacerbate effects of measurement error and outliers.

Looking again at Figures 3 and 4, note that the delinquency rate reaches its maximum level in the first quarter of 2020, and collection costs likewise. Thus, the first quarter of 2020 is closest to “normal” credit card market conditions that can be observed during the analysis period. For this quarter, the industry aggregate ratio of fee income to collection costs prior to charge-off is 3.95 (see Figure 1).

Thus, adjusting only partially for the influence of the benign market conditions and swapping in the industry aggregate ratio for the weighted average brings the calculated ratio down from 5 to about 4. However, this still excludes the Bureau’s estimated amount of collection costs incurred after charge-off. The Bureau has not provided a compelling justification for excluding these costs and their exclusion conflicts with business practice and economic reasoning. Reincluding these costs brings the corrected ratio down to 3.

Yet, this is still a substantial overestimate due to the remaining problems: the omission of many relevant and important cost categories from the Y-14 collection cost item and the lack of data from a stress period. Thus, the Bureau’s own analysis shows that there is no support for its proposed five-fold reduction in the safe harbor.

2. The Bureau’s analysis of the deterrent effect of an \$8 late fee using Y-14 data is deeply flawed and deficient.

As discussed in greater detail in Section V.D.3, the Bureau asserts that it considered deterrence, based in part on a new empirical analysis it developed using Y-14 data, which purportedly tests the likelihood of late payments increasing in the seventh month after an initial late payment when the late payment safe harbor would be lower than permitted during the prior six months. The Bureau asserts that it observed no increase in late payments in month seven and interprets this as an absence of a deterrence effect related to the difference in late fees permitted between month seven and the preceding six months. Indeed, the Bureau rejects, “at conventional confidence levels,” the hypothesis that the likelihood of late payment increases in month seven when the permitted late fee would be lower. The Bureau’s failure to disclose the data and methodology is particularly egregious with respect to this analysis. We have absolutely no way to check the Bureau’s work. The Bureau provides no information about parameter estimates, standard errors and statistical significance levels, other than the reference to “conventional confidence levels, which is not defined or explained. We do not know details about the sample design; the Bureau merely states that it looked at data from 2019 for accounts that incurred a late payment once and then paid on time for the following six months. It is not clear whether the entirety of the payment history considered occurred in 2019 or whether it simply began in 2019, rendering it impossible to determine whether, for example, payment behavior could have been influenced by seasonal factors or the onset of the pandemic.

3. The Bureau’s analysis of consumer conduct in considering an \$8 late fee using Y-14 data is deeply flawed and deficient.

As discussed in greater detail below in Section V.E., the Bureau relies on the Y-14 data to conclude that “it is not clear that multiple late payments during a relatively short period are associated with increased credit risk and reflect a more serious consumer violation.” Based on this vague conclusion, the CFPB determines that an increased late fee for a subsequent violation within a relatively short period of time, as currently authorized under the safe harbor, is unnecessary. The “justification” offered by the Bureau for this conclusion is that the Y-14 data shows that only 13.6 percent of accounts incurred a late fee and then no additional payments were made on that account” and that one-third of accounts paid an overdue payment within five days of the payment due date, half the accounts paid the amount due within 15 days of the payment due date, and three out of five accounts paid the amount due within 30 days of the payment due date. Even if these statements are true, which we are not able to assess given the lack of information provided by the CFPB, they do not support the CFPB’s conclusions regarding increased credit risk or more serious consumer violations as they do not address – at least not as described by the Bureau – a situation in which multiple violations have occurred. Rather, the CFPB appears to be using this purported repayment behavior to rationalize a substantially lower late fee safe harbor for *all late payments*: because some portion of consumers that pay late ultimately end up paying their bills within 30 days of the payment date, even if this occurs multiple times, the CFPB seems to be saying that those consumers do not present a greater credit risk and thus there is no need to impose a higher fee for subsequent late payments. Yet again, however, there is simply no way to assess the Bureau’s conclusions or reasoning without access to the data and methodology it employed.

D. The CFPB has not meaningfully considered the deterrent effect of the proposed \$8 late fee safe harbor in violation of TILA and the APA.

In developing the proposed safe harbor of \$8, the CFPB has failed to meet the statutory requirement to give due consideration to the deterrence of the omission or violation – in this instance, of paying late. The CFPB provides a lengthy description of how it purportedly considered deterrence, but the analysis is superficial and not supported by credible data and research. The rule establishing the existing safe harbor has been in place for over 12 years and was deliberately set to provide a deterrent effect.¹²⁷ The CFPB has purposefully avoided doing the same in this proposal.

The Bureau purported to analyze available data to consider the extent to which lower late fees for both the first and subsequent late payments could potentially lessen deterrence. The Bureau recognizes that:

- A lower late fee amount for the first or subsequent late payments might cause more consumers to pay late; and
- It does not have direct evidence on what consumers would do in response to a fee reduction similar to those contained in the proposal.¹²⁸

Despite these uncertainties, the CFPB concludes that the \$8 safe harbor would still have a deterrent effect; in reaching this conclusion, the Bureau says it:

- (1) compared the proposed \$8 late payment safe harbor amount to minimum payment amounts on accounts in the Y-14 data; and

¹²⁷ 2010 final rule, 75 Fed. Reg. 37526, 37532-7533; 37542-7543.

¹²⁸ 88 Fed. Reg. at 18919.

- (2) reviewed available empirical evidence on the effects of credit card late fees on the prevalence of late payments.¹²⁹

We discuss the CFPB's analysis below.

1. The CFPB's Y-14-based comparison analysis regarding deterrence is deeply flawed and deficient.

a) The Bureau errs in several ways when assessing deterrence effects.

The Bureau acknowledges that it lacks "direct evidence on what consumers would do in response to a fee reduction similar to those contained in the proposal." Nonetheless, the Bureau asserts that an \$8 penalty for both first and subsequent late payments would provide sufficient incentive for on-time payment. The Bureau states that, in addition to "available empirical evidence," this assertion rests on "a comparison of the proposed \$8 late payment safe harbor amount to minimum payment amounts on accounts in the Y-14 data."¹³⁰

This "comparison" as presented in the proposal consists of a simple calculation representing the choice made by consumers who are "rational" and "pay attention to financial penalties," *at the time a card payment is due*, whether to delay the minimum required payment past the due date. The calculation equates this decision with the consumer choosing whether to "borrow" the minimum payment due, such that the "cost" of this borrowing is the late fee. Thus, annualized percentage rates (APRs) are calculated for hypothetical "borrowed" amounts and brief "borrowing" periods subject to the \$8 late fee.

The CFPB then concludes that these APRs are sufficiently elevated to deter late payment. For example:

"As the median minimum due was \$39 for all cardholders between October 2021 and September 2022 in the Y-14 data, and around half of late payers made a payment in less than 10 days past the due date, the effective APR could be higher than 730 percent for some consumers. Thus, the Bureau has preliminarily determined that the proposed \$8 late fee safe harbor amount is still a powerful deterrent to those consumers who pay attention to financial penalties."¹³¹

This conceptual exercise is inadequate, however, for evaluating the overall, deterrence role of a late fee. It improperly assumes that late fees play a deterrence role solely on the payment due date. It also assumes that consumers are "attentive to their payment obligations" allowing no role for behavioral biases whereby consumers make spending and borrowing decisions contrary to their long-run best

¹²⁹ 88 Fed. Reg. at 18919.

¹³⁰ See e.g., *Id.* at 18919-18920.

¹³¹ *Id.* at 18920.

interest or are prone to mistakes.¹³² The proposal later mentions a few types of consumers who tend to make mistakes in their borrowing decisions, such as “consumers for whom high late fees serve as a valuable commitment device without which they would have a harder time responsibly managing their credit card debt.”¹³³ However, the proposal provides inadequate discussion of potential incentive effects of late fees for these consumer types, as discussed further below.

Within the narrow context of the hypothetical scenario to which the above calculation applies, provided the late penalty is non-trivial and the consumer has the cash on hand and no dire, alternative need for it, the non-behaviorally-biased consumer in that narrow context will pay. But the claim that the incentive role of the late fee is limited to such a scenario is an arbitrary and unreasonable perspective.¹³⁴ Late fees serve as a motivating deterrence factor over the long term as consumers are making financial choices.

The incentive role of a late fee primarily is to motivate greater, long-run attention by consumers to their spending and finances and how these may affect their ability to meet their debt obligations. However, the CFPB appears to believe that is relevant only on the payment due date – such that just on this day, assuming the consumer is “rational” and “attentive,” the late penalty motivates the consumer to submit his or her payment.

In other words, the deterrence or incentive effects of a late fee are not appropriately measured at the time a payment comes due. Rather, they should be considered and observed over the prior month or, better yet, over the course of many prior months when the consumer is making choices about his or her spending and saving. In general, by the time the payment is due, a consumer is not faced with a choice whether to pay; either the consumer is able to pay, or not.

In sum, the Bureau’s argument is overly simplistic and tangential and does not appropriately consider when the deterrence effect of a late fee would be observed – during the month or months leading up to the payment due date. In doing so, the Bureau avoids substantive discussion of the potential adverse consequences for deterrence of reducing the safe harbor maximum.

b) The Bureau errs by failing to account for the risk pricing aspect of a late fee.

One essential role of a late fee is to price delinquency risk, which increases with a late payment. A consumer would factor this price into the overall APR of the card to inform his or her borrowing decisions – that is, in deciding to open a credit card account and deciding whether to accumulate a

¹³² See Jonathan Slowik, “Credit Card Act II: Expanding Credit Card Reform by Targeting Behavioral Biases,” UCLA Law Review volume 59, pages 1292-1341, *available at* <https://heinonline.org/HOL/Page?handle=hein.journals/uclalr59&div=37&id=&page=&collection=journals>.

¹³³ 88 Fed. Reg. at 18935.

¹³⁴ Furthermore, a missed payment is not a loan—it is, plain and simple, a missed payment. Any decision made on the due date is not one related to the deterrence effect of the late fee or a hypothetical APR, but rather, the perceived benefit to the consumer of holding onto the money for some additional days or weeks; that is, the “opportunity cost” of not retaining the minimum payment for a short period.

revolving balance. For purposes of the statute, the risk of nonpayment constitutes a “cost associated with the violation.”

Consumers, when selecting and then using the card, would weigh the possibility that they might have to delay a payment beyond the due date and thereby incur the late fee, knowing that this risk increases as the balance and minimum required payment increases. The higher the late fee, the more strongly the consumer would be encouraged to mitigate the risk of late payment by using their card more cautiously.¹³⁵

The CFPB’s proposal ignores this justification for a late fee entirely.

c) The Bureau errs by downplaying how late fees affect consumers who are prone to inattention, mistakes, or well-documented behavioral biases.

The case of consumers who make mistakes. The proposal contains a few references to consumers who make mistakes. These are:¹³⁶

- Consumers who ignore or downplay late fees because they do not expect to be late, although many may end up paying late.
- Consumers who pay more attention to late fees than to other consequences of paying late, who thus “might be harmed in the short run if a reduction in late fees makes it more likely that they mistakenly miss payments.”
- “Consumers for whom high late fees serve as a valuable commitment device without which they would have a harder time responsibly managing their credit card debt.”

The Bureau makes little effort to assess the potential importance of incentive effects of late fees for such consumers. Nor does the Bureau provide any empirical evidence on the fraction of the population with credit cards that are not prone to behavioral biases and the fractions associated with each of the above three categories.

Once bitten, twice shy. The proposal describes the first category of consumers above as those who “may mistakenly expect high fees to be unimportant to them, as they are overly optimistic about not missing a payment.” The Bureau asserts that “such consumers would benefit from the proposed changes to late fee amounts, which lower the cost of this mistake,” thus dismissing any potential incentive role of late fees for such consumers. The CFPB appears to be saying that someone who doesn’t see any likelihood of missing a payment, as mistaken as that notion might be, would have no reason to behave any differently in the presence of a late fee, large or small. But it is overly simplistic to conclude that late fees have no role in relation to this type of consumer.

¹³⁵ For example, suppose a consumer has accumulated an average balance of \$3,000 on a card with a baseline APR (assuming no late payments) of 15 percent and late payment penalty of \$8, and expects with this sized balance to miss one payment over the next year. Then the consumer’s total expected payment during the year, inclusive of the late fee, will be $0.15 \times \$3,000 + \$8 = \$458$, which translates into an APR of approximately 15.3 percent. By comparison, if the late fee instead was \$40, the effective APR would increase to 16.3 percent.

¹³⁶ 88 Fed. Reg. at 18935.

While a consumer might discount late fees prior to incurring a first one, the consumer would be highly likely to consider late fees from that point forward. To the extent that the late fee changed consumer behavior for the life of the lending relationship, it would substantially reduce risk to the lender.

Indeed, there is solid empirical evidence of a learning effect associated with incurring a late fee. For example, a National Bureau of Economic Research study (Agarwal et. al 2008), using a proprietary dataset from a large U.S. bank, found that incidence of late fee payments declines sharply as a new credit card account ages.¹³⁷ The analysis attributes this decline to consumers' learning to pay on time after experiencing a late payment penalty.¹³⁸ Thus, even inexperienced consumers are likely to be incentivized by late fees, albeit only after experiencing an initial late payment event.

Also, if consumers were overly optimistic about their ability to make required payments on time, then it seems likely that they would be prone to other mistakes in managing their debt, such as a tendency to over borrow. To the extent that consumers do not consider the full cost of their borrowing, they are apt to become overextended.¹³⁹ Thus, following their first late payment event, such consumers may not only become more attentive to paying on time, but also are likely to make better financial decisions in a variety of ways, such as better managing their finances.

By considering only the "reduced cost of mistake" aspect of a reduced late fee while ignoring these other relevant factors, the Bureau fails to meaningfully consider the deterrence role of late fees.

Late fee saliency. The second type of behavioral bias-prone consumer mentioned in the proposal is consumers who "pay more attention to late fees than to other consequences of paying late." In other words, for these consumers the late fee is more important than other factors that another borrower would consider. The latter factors could include "interest charges, penalty rates, credit reporting, and the loss of a grace period."¹⁴⁰

¹³⁷ Another, more recent study using data from the U.K. similarly finds that incidence of late payment fees declines sharply over time for new accounts. The analysis suggests that this effect is tied to consumers adopting automatic payments as a preventive measure after experiencing a late payment event. John Gathergood, Hiroaki Sakaguchi, Neil Stewart, and Joerg Weber (2019), "How Do Consumers Avoid Penalty Fees? Evidence From Credit Cards," available at <https://ssrn.com/abstract=2960004>.

¹³⁸ The analysis also indicates some backsliding as memory of the late payment event recedes. On net, however, "knowledge accumulation dominates knowledge depreciation" so that over time, fee payments decline dramatically.

¹³⁹ As discussed in a previous BPI research note, evidence shows that behavioral biases, including over-confidence, can adversely affect consumers' use of credit card debt. See BPI, Paul Calem, *The CFPB's Deeply Flawed Proposal on Credit Card Late Fees – Part 1*, (April 13, 2023), available at <https://bpi.com/the-cfpbs-deeply-flawed-proposal-on-credit-card-late-fees-part-1/>.

¹⁴⁰ By listing "interest charges" and "loss of a grace period" together with "penalty rates" and "credit reporting," the NPR is conflating consequences for an individual who general pays in full each month and misses a due date with consequences for an individual who has a revolving balance. The former, by having missed the due date, would now have a revolving balance with interest charges and loss of a grace period. Those who already are

Again, the Bureau offers an assessment, which boils down to the following assertions:

- These consumers “might be harmed in the short run if a reduction in late fees makes it more likely that they mistakenly miss payments”.
- “The Bureau has not quantified this effect.”
- The Bureau “notes that reducing late fees may increase issuer incentives to find other approaches to make the consequences of late payment salient to consumers, including reminders or warnings.”

The first statement subtly downplays the role of late fees by referring to “mistakenly missed payments,” suggesting that the role of late fees is limited to countering inattention or forgetfulness. But, as noted previously, late fees can also have an important role in countering consumers’ behavioral biases, such as by discouraging over-spending that increases the likelihood of missing a payment due date. Moreover, to the extent that they are more salient than other consequences, late payment penalties will be more effective in this way. Thus, the Bureau sidesteps a full discussion of incentive effects.

Furthermore, the assertion that a lower safe harbor maximum “may increase issuer incentives to find other approaches to make the consequences of late payment salient to consumers, including reminders or warnings” comes without evidence or explanation.

It is standard practice for many banks to send reminders and warnings to loan and credit card customers who have missed a payment. Typically, banks also send out reminders of upcoming due dates to credit card customers who have been regularly paying on schedule. Thus, it is not clear why the Bureau believes that banks will increase their use of reminders if the safe harbor maximum is lowered – many already use these tools.¹⁴¹

Moreover, the Bureau provides no evidence to suggest that warnings and reminders are as effective as late fees in affecting consumer behavior. Relatively few studies have explored the effectiveness of payment nudges on likelihood of late payment on non-delinquent credit cards or other consumer loans, and these are limited in context and scope.¹⁴² The studies suggest that reminders or warnings can

revolvers may see their interest rate increased or their account being reported as delinquent, but typically only if the late payment episode extends beyond 30 days.

¹⁴¹ The NPR suggests that banks “profit from late payment fees” and therefore have insufficient incentive to discourage customers from paying late. But that reasoning fails to consider banks’ primary motivation for issuing warnings and reminders: to reduce costly incidence of delinquency and default.

¹⁴² Most studies examining payment nudges focus on nudges targeted at increasing repayment by delinquent borrowers, which are used extensively and often. See e.g., Daniel Campbell, Andrew Grant, and Susan Thorp, “Reducing Credit Card Delinquency Using Repayment Reminders”, *Journal of Banking and Finance*, volume 142 (September), available at <https://www.sciencedirect.com/science/article/abs/pii/S0378426622001431>. Other studies focus on motivating consumers to increase their monthly payments above the required minimum amount. See e.g., H. Sakaguchi, N. Stewart, J. Gathergood, P. Adams, B. Guttman-Kenney, L. Hayes, and S. Hunt, “Default Effects of Credit Card Minimum Payments,” *Journal of Marketing Research*, 59(4), 775–796, available at <https://doi.org/10.1177/00222437211070589>.

reduce the frequency of late payments or have other positive effects in specific contexts with certain consumers.¹⁴³ All of these studies hold in place existing fee structures; little is known about the effectiveness of *substituting* reminders and warnings for reduced late fees.

Significantly, another study compared the effectiveness of reminders with and without mention of a penalty fee for missed payment and found that the reminders that referred to the penalty were far more effective – further corroborating the important deterrence effect of appropriately sufficient late fees.¹⁴⁴

Sticking to a plan. Another type of consumer prone to behavioral biases mentioned in the proposal is one for whom a sufficiently high late fee provides an incentive to stick to a monthly spending and debt management plan. The Bureau notes that without the incentive provided by the late payment penalty, these consumers “would have a harder time responsibly managing their credit card debt.”

The notion that there are “present-biased” consumers who may fail to stick to self-set debt paydown plans has a strong foundation in the behavioral consumer finance literature.¹⁴⁵ Thus, the

¹⁴³ For instance, Bracha and Meier and Roll and Moulton focus on the effects of reminders for samples drawn from special credit counseling programs. Some individuals within each sample were randomly selected to receive monthly reminders linked to their financial goals and payment obligations, and outcomes for the treatment group (those who received reminders) were compared to those for the control group (those who did not). Anat Bracha and Stephan Meier, “Nudging Credit Scores in the Field: The Effect of Text Reminders on Creditworthiness in the United States,” Research Department Working Paper no. 15-2, Federal Reserve Bank of Boston, *available at* bostonfed.org; Stephen P. Roll and Stephanie Moulton, “The Impact of Automated Reminders on Credit Outcomes: Results from an Experimental Pilot Program”, *Journal of Consumer Finance* volume 53, issue 4, pages 1693-1724, *available at* <https://onlinelibrary.wiley.com/doi/abs/10.1111/joca.12252>. The reminders and outcomes concerned general debt obligations, not specifically credit card. Bracha and Meier found a positive effect of reminders on credit scores for subprime consumers, apparently associated with a reduction in debt, but not for others. Roll and Moulton found that “consumers offered reminders were 21% less likely than the control to experience a 60 day or longer payment delinquency and 12% less likely to experience a 30+ delinquency”. *Id.* Roll et. al report on the outcomes of a randomized field experiment conducted in a large Midwestern credit union, testing various types of nudges intended to improve payment outcomes of credit union members on non-mortgage installment loans. Stephen Roll, Yung Chun, Olga Kondratjeva, and Sam Bufe, “Prevention, Resolution, or Counseling: Testing Three Approaches to Preventing Debt Payment Delinquencies in a Large-Scale Field Experiment” *available at* <https://ssrn.com/abstract=4282388>. The experiment was conducted mostly in 2021, and thus overlapped with the pandemic period. *Id.* A series of monthly reminder emails containing a basic reminder of the due date, an offer of financial assistance resources if needed, and a link to set up automatic payments (for those that did not already have autopay set up), and additional information intended to encourage timely payment was found to be effective in reducing delinquency incidence. *Id.*

¹⁴⁴ See Daniel Schwartz, “The Rise of a Nudge: Field Experiment and Machine Learning on Minimum and Full Credit Card Payments,” NA – Advances in Consumer Research, Volume 49, eds. Tonya Williams Bradford, Anat Keinan, and Matthew Thomson, Duluth, MN : Association for Consumer Research, Pages: 362-363, *available at* <https://www.acrwebsite.org/volumes/3000661/volumes/v49/NA-49>.

¹⁴⁵ See e.g., Theresa Kuchler and Michaela Pagel, “Sticking to Your Plan: The Role of Present Bias for Credit Card Paydown,” *Journal of Financial Economics*, Volume 139, Issue 2, pages 359-388, *available at* <https://doi.org/10.1016/j.jfineco.2020.08.002>

Bureau is acknowledging an important potential incentive effect of card late fees. But again, the Bureau sidesteps meaningful discussion of the issue, instead asserting:

“To the extent that late fees benefit some consumers in this way, any harm to such consumers may be mitigated to the extent that the proposal creates additional incentives for issuers to emphasize reminders, automatic payment, and other mechanisms that maintain similar or better payment behavior, as discussed below.”

No evidence is provided in support of these assertions. As noted above, research has demonstrated that reminders are no substitute for late payment fees.

Thus, while the Bureau acknowledges that “late fees are a cost to consumers of paying late, and a lower late fee amount for the first or subsequent late payments might cause more consumers to pay late,” the Bureau proposes an \$8 maximum safe harbor penalty for the first and subsequent late payments, arguing that this would provide enough incentive for cardholders to pay on time, but without sound evidentiary support for this assertion.

2. The CFPB’s review and dismissal of available empirical evidence is arbitrary and capricious.

The Bureau purports to have considered relevant research studies. However, as described further herein, the Bureau arbitrarily finds that the available evidence from published studies regarding the deterrent or incentive effects of late fees lacks relevance to the exercise of determining the appropriate safe harbor late fee limit.

There are significant weaknesses in the Bureau’s review of the published research studies. The review is incomplete and one-sided. The published research, in fact, is more relevant and more robust than the Bureau acknowledges. The Bureau also fails to address all relevant, available studies in the proposal.

The Bureau arbitrarily dismisses *Grodzicki et al. (2022)*, which demonstrates that consumers had a lower likelihood of paying late prior to imposition of the CARD Act imposed safe harbor cap, controlling for other risk factors including account age and changes in employment and earnings by county of residence.¹⁴⁶ The study concludes that cardholders consider the amount of the late fee when making decisions that affect whether they pay on schedule, such as spending decisions that increase their minimum payment amount or induce them to pay late. While the Bureau recognizes that this paper suggests that consumers may engage in more late payments when they are less costly to consumers, the Bureau does not consider this robust evidence that the proposed \$8 safe harbor late fee amount would

¹⁴⁶ 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>.

have a much-diminished deterrent effect. The Bureau also notes that the conclusions in the paper may have been confounded by other market changes at the time of the analysis (2010).¹⁴⁷

Specifically, Grodzicki, et al., (2022) examines a random sample of general-purpose card accounts from the CFPB's Credit Card Database, which encompasses over 85 percent of U.S. credit card accounts. This database tracks monthly purchase volumes, revolving and total balance, delinquency status, interest rate, assessed fees, and the primary cardholder's credit score for individual accounts. The analysis sample comprises accounts that are continually present and not in serious delinquency (never more than 60 days past due) between September 2009 and September 2011.

The study tests the impact of a reduction in the late fee penalty amount on the incidence of late payments and on debt levels by tracking monthly account-level outcomes and comparing frequency of late payment before and after implementation of the late fee cap mandated by the CARD Act and implemented in the Board's final rules. Implementation of this cap in August 2010 was accompanied by substantial reductions in late fee penalty amounts. For first instances of a missed payment, according to the study, the cap lowered most accounts' late fee from \$39 to \$25.

The analysis indicates that consumers had a lower likelihood of paying late prior to imposition of the cap – i.e., that there were fewer instances of late payments when most late fees were \$39 as compared to when the fees fell to \$25 – controlling for consumer risk factors including account age, prior (previous month's) balance, a cubic time trend, and changes in employment and earnings by county of residence. According to the authors, this finding indicates “that cardholders incorporate the late fee into their optimal repayment choice – as opposed to paying late purely by accident.”

This finding holds across all risk segments; that is, all quintiles of the cardholder credit score distribution. In addition, except for subprime cardholders (the bottom two quintiles of the score distribution), the analysis indicates that purchases rise and balances increase when the late fee declines. For cardholders in the bottom score quintile, the decrease in the late fee is associated with a material decrease in balance and purchase volume.¹⁴⁸

The Bureau contends that the Grodzicki, et al., (2022) analysis is not sufficiently robust because the response to the late fee changes “could be confounded by other market changes” coinciding with the rule going into effect.”¹⁴⁹ Specifically, the Bureau notes that when the rule was implemented in August 2010, “the U.S. economy was still dealing with the aftermath of the Great Recession,” making it “difficult

¹⁴⁷ The CFPB specifically notes that “The late fee provisions in the Board's 2010 Final Rule were implemented in August 2010, as the U.S. economy was still dealing with the aftermath of the Great Recession, and thus it was difficult to attribute consumer finance statistical trends to particular events. The Board's 2010 Final Rule affected all consumers and all issuers, so there was no suitable control group of consumers that were charged the same amount of late fees before and after the implementation of the Board's 2010 Final Rule. 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 uncertainty around that time.” 88 Fed. Reg. at 18920.

¹⁴⁸ For those in the next lowest quintile, it is associated with an increase in purchase volume but shows no material relationship to balance.

¹⁴⁹ 88 Fed. Reg. at 18920.

to attribute consumer finance statistical trends to particular events.”¹⁵⁰ Also, because the analysis compared consumer behavior in the year before and the year after the implementation date, “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 uncertainty around that time.”¹⁵¹

The NPR, however, omits any discussion of the substantial efforts made by Grodzicki, et al., (2022) to mitigate potential confounding influences of “other market changes,” which the authors acknowledged as potential influencing factors. These include, as noted previously, controlling for changes in employment and earnings by county, which capture evolving economic conditions at the regional level. The analysis also incorporates an aggregate time trend to capture other, broad macroeconomic influences.

One potentially confounding factor is changing account balances, which can affect likelihood of incurring a late fee. A consumer’s account balance could increase post-implementation of the rule because of a reduced deterrence effect on the consumer’s spending and debt accumulation or because of generally improved economic conditions. However, Grodzicki et al. (2022) control for the consumer’s beginning-of-month balance and still find that the likelihood of incurring a late fee in any given month is greater post-implementation, indicating that lessened deterrence, rather than improving economic conditions, is the primary factor.

Finally, Grodzicki et al. (2022) acknowledge that, despite these included control variables, there may remain some confounding effects tied to the volatile and uncertain economic conditions that characterized the study period. Therefore, a special robustness test is implemented, described in the study as follows:

“To test for this, we construct a sample which excludes cardholders living in states highly exposed to the crisis as determined by the Economic Security Index (ESI) (Hacker et al. 2012; Hacker et al. 2014). We find that our demand estimates using this new sample are nearly unchanged and interpret this as further suggestive evidence that, though perhaps still not completely eliminated, any bias from the recession on our estimates may not be a first order concern.”

As a result, the Bureau’s dismissal of the study’s findings from consideration in setting the late fee safe harbor is not appropriate. The cited limitations do not negate the overall findings, which strongly suggest that lower late fees may erode deterrence and result in more frequent late payments. Thus, the study provides important evidence to consider in weighing the proposed \$8 safe harbor limit. In dismissing the Grodzicki, et al., (2022) study, the Bureau fails to meet its statutory obligation to consider the required factors.

Moreover, the Bureau appears willing to consider only such evidence that would directly support its contention that its proposed \$8 safe harbor late fee provides adequate deterrence – although the Bureau does not define, let alone attempt to quantify, what level of deterrence is “adequate.”

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

The Bureau also arbitrarily dismisses a study by Agarwal, et al., (2008/2013) that demonstrates a learning and deterrence effect of late fees. Specifically, the study reviewed four million credit card statements and found that a consumer who incurs a late payment fee is 40 percent less likely to incur a late payment fee during the next month, although this effect depreciates approximately 10 percent each month.¹⁵²

The Agarwal, et al., study uses a proprietary dataset from a large U.S. bank, comprising a sample of credit card accounts followed monthly over the three-year period January 2002 through December 2004. The dataset includes information on payment, spending, credit limit, balance, debt, purchase and cash advance annual percentage rate (APR), and fees paid from monthly billing statements.

The study finds that incidence of fee payments declines substantially as a new credit card account ages. In the first three years of account tenure, the monthly frequency of late fee payments drops from 36 percent to 8 percent. The analysis attributes at least part of this decline to consumers learning to pay on time after experiencing a late payment penalty. The analysis also indicates some backsliding as memory of the late payment event recedes. On net, however, “knowledge accumulation dominates knowledge depreciation” so that over time, fee payments decline dramatically.

The Bureau contends that this study “is of limited relevance as to whether the late fee amount impacts late payment incidence” because the analysis does not directly address the effect of reducing the late fee to \$8.¹⁵³ According to the NPR:

“First, the study considers the months following any late fee and compares them to months with no recent late payment...Second, even if the study had compared to months where a payment was missed but no late fee was charged, that comparison still would not be relevant to the proposal in that the proposal would reduce the safe harbor amount to \$8, not completely eliminate the late fee.”¹⁵⁴

In declaring Agarwal et al. to be of “limited relevance” for this reason, the Bureau again appears willing to consider only such evidence that specifically supports its contention that its proposed \$8 safe harbor late fee provides adequate deterrence.

An additional critique of the Agarwal et al. study noted in the NPR is that the study “did not separate the effects of the late fee itself from other possible consequences of a late payment, which could include “additional finance charges, a lost grace period, penalty rates, and reporting of the late payment to a credit bureau which could affect the consumer’s credit score.”¹⁵⁵

¹⁵² 88 Fed. Reg. at 18921 (citing Agarwal, et al.).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

Once again, however, this limitation does not negate the study's findings of a learning effect from late penalties. The findings still support the general principle that monetary penalties, including late payment fees, have a learning and deterrence effect.

Moreover, late payment fees are likely to be more easily understood, more salient, and less remote than a finance charge calculation. A late payment is a simple, fixed payment amount, whereas the other consequences may require complex calculations (to transform into a monetary cost) and are variable (depend on the contemporaneous account balance). In fact, research has shown that complexity can generate behavioral biases resembling those associated with present bias and over optimism.¹⁵⁶ Therefore, late payment fees may have the dominant deterrence effect. Also, late fees apply to any late payment, whereas these other consequences do not.¹⁵⁷

The study's findings strongly suggest that consumers learn from the experience of a late fee to be more careful with their debt obligations. Reducing the late fee may weaken this deterrence effect and result in more frequent late payments. Thus, the study provides important evidence to consider in weighing the proposed significant reduction in the late fee safe harbor limit. In dismissing the Agarwal et al. study, the Bureau again falls short on its statutory obligation to consider all relevant factors.

a) The Bureau arbitrarily omits studies from its purported consideration of the deterrence effect of the proposed \$8 safe harbor.

The NPR arbitrarily omits any discussion of two other studies that demonstrate learning and deterrence effects of late fees. Gathergood et. al (2019) present evidence consistent with Agarwal et al., finding that incidence of late payment fees declines sharply over time for new accounts, supporting the learning effect of late fees. Schwartz (2021) finds that payment reminders sent to cardholders are more effective when they include a warning about late fees, demonstrating the deterrent effect of the threat of a late fee.

Gathergood et al. (2019) analyze monthly account-level data from multiple card issuers in the U.K, comprising a sample of credit card accounts opened during 2013 through 2014. The data include date open and credit limit, monthly purchases and repayments, average daily balances, revolving balances, interest and fee charges. The data also indicate whether cardholders pay their card manually each month or utilize automated payments.

¹⁵⁶ For instance, Enke, Graeber, and Oprea (2023) present experimental evidence demonstrating that "intertemporal choice anomalies are highly correlated with indices of complexity responses including cognitive uncertainty and choice inconsistency." Benjamin Enke, Thomas Graeber and Ryan Opera, "Complexity and Time," (March 10, 2023), *available at* https://benjamin-enke.com/pdf/Complexity_time.pdf.

¹⁵⁷ The loss of a grace period and becoming subject to finance charges applies only to consumers who generally have paid their balance full each month and happen to miss a payment due date, while penalty interest rates are applied only after an account becomes 60 days past due. Reporting to a credit bureau occurs after an account becomes 30 days past due and even then, an isolated instance of early delinquency might not be reported and has little effect on a credit score if reported.

The analysis tracks the monthly performance of these accounts and finds that the incidence of late payment fees declines sharply over time. Moreover, this effect appears tied to some consumers adopting automatic payments as a preventive measure after experiencing a late payment event.¹⁵⁸

Schwartz (2021) compares the effectiveness of reminder notices with and without mention of a penalty fee for missed payment. The study finds that the reminders that referred to the penalty were far more effective --- further corroborating the important deterrent effect of sufficiently large late fees.

3. The Bureau’s Y-14 seventh month analysis is deeply flawed and fails to provide a sufficient basis for concluding that an \$8 late fee safe harbor would not affect the late fee’s deterrent or incentive effect.

The Bureau dismisses relevant and important studies and instead provides a new empirical analysis developed by Bureau staff.¹⁵⁹ This so-called “Y-14 seventh month” analysis uses a random subsample of monthly account-level data from the credit card Y-14 reports from 2019 - a very narrow set of data that does not even encapsulate a year, let alone a full economic cycle. These data include amounts of any late fees paid each month, other balance and payment information, and various account and borrower characteristics such as origination credit score.¹⁶⁰ According to the Bureau, unlike the CARD Act-era data that Grodzicki, et. al., (2022) considered, “the variation in late fees does not correspond to other big changes or differences that might plausibly affect late payment.”¹⁶¹

The analysis exploits the fact that the current rule sets a higher late fee safe harbor amount for any late payment event occurring within six billing cycles of the account’s previous late payment event.¹⁶² As noted, the current regulations permit, under the safe harbor, a first late fee of \$30 and a second late fee amount of \$41 if the second payment is late within the next six billing cycles. If a second late payment is not made within those six months, the late fee safe harbor resets to \$30 in month seven. The CFPB reviewed Y-14 data to see whether the lower late fee amount in month seven “leads to a distinct rise in late payments.”¹⁶³ The Bureau’s analysis purportedly tests whether the lower late fee amount in month seven leads to a distinct rise in late payments among borrowers whose most recent late payment was seven months prior. Specifically, as described in the NPR:

¹⁵⁸ In the U.K., late payment fees are modest and capped by regulation at a maximum £12 per month, with no limit on the number of successive months in which a consumer can incur the fee. A late payment also may immediately trigger a penalty interest rate and credit limit reduction. Thus, the late payment fee is not necessarily the sole factor for deterrence.

¹⁵⁹ See *generally*, 88 Fed. Reg. at 18920-21.

¹⁶⁰ The NPR touts the Y-14 seventh-month analysis as a superior approach because “it avoids confounding factors that often are found in other studies of late fees, including the 2022 paper by Grodzicki et al., discussed above.” Because the analysis relies on Y-14 data from 2019, when economic conditions were relatively stable, concerns around potential confounding effects of economic variables are mitigated. *Id.* at 18920.

¹⁶¹ *Id.*

¹⁶² Consistent with the safe harbor provisions, the empirical data show that one or more late payments within the six months after an initial late payment are associated with higher late fee amounts, according to the NPR.

¹⁶³ 88 Fed. Reg. at 18920.

“The Bureau estimated whether there are discontinuous jumps in late payments in the seventh month after the last late payment. This analysis focused on these potential jumps to isolate the potential impact that the lower late fee that would apply in month seven might have on late payment rates, given that month seven is generally comparable to month six other than the lower late fee amount.”¹⁶⁴

The underlying, tested hypothesis is that a sizeable cohort of consumers is deterred by the elevated late fee from another late payment for the first six months, and the reduced late fee in month seven weakens this deterrence and begets a discrete jump in their likelihood of paying late. ***In other words, the analysis tests for a comparatively rapid (within the course of a month) effect of a marginally reduced late fee, although the NPR doesn’t describe it as such. The NPR simply asserts that the analysis provides a test for “deterrence,” without any further elaboration.***

The analysis rejects, “at conventional confidence levels”, the hypothesis that likelihood of late payment increases in month seven.¹⁶⁵ The Bureau interprets this as absence of a deterrence effect tied to the difference in late fees between month seven and the preceding six months, and uses this as support that the proposed reduction in the late fee safe harbor will not significantly reduce the deterrent effect of the late fee.

However, this interpretation is flawed. The result merely demonstrates absence of a *rapid* reduction in the deterrence effect, detectable in month seven. The result does not rule out the realistic possibility that the consequences of reduced deterrence gradually unfold. For example, consumers with a bias toward overspending might begin to increase their spending and card balances in month seven leading to a gradual rise in probability of paying late. Moreover, to the extent that the Bureau concludes that the difference in late fees between month seven and the preceding six months – dropping from approximately \$41 to \$30 – does not demonstrate a difference in deterrent effect between those amounts, the CFPB proposes a vastly greater reduction in the late fee safe harbor – from either \$30 or \$41 to \$8 – an order of magnitude difference which the Y-14 analysis does not capture.

The Bureau acknowledges that the variation in late payments in the Y-14 seventh-month analysis discussed above is not the same as the changes that would result from the proposed rule. Nonetheless, the Bureau concludes that “this evidence suggests the prevalence of late payments is not highly sensitive to the level of late fees at the current order of magnitude.”¹⁶⁶ The Bureau further recognizes that its findings “from the Y-14 seventh-month analysis is still contingent upon the fact that some consumers understand that their issuers charge lower late fees starting the seventh month after an initial violation,” which may not be the case.¹⁶⁷ The Bureau also recognizes that “the higher late fees for subsequent late payments within the next six billing cycles might be more of a deterrent if consumers understand them better in 2022 than they did in 2019, but the Bureau has no evidence to indicate that

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

is the case.”¹⁶⁸ Again, this conclusion is unsubstantiated—the Bureau simply dismisses that possibility outright without attempting to determine whether consumers may understand higher late fees in 2022 than they did in 2019.

Another serious flaw in the Bureau’s analysis that it does not recognize is that, because it is comprised of individuals who experienced a late event within the preceding seven months, it is subject to severe sample selection bias. The selected population is not representative of the typical cardholder.

For instance, the sample likely includes a relatively large share of consumers who manage their debt obligations appropriately (perhaps due to deterrence effects of late fees) but who experience a late payment event due to external factors beyond their control. The decrease in the late fee in month seven would be of little relevance to these consumers. The sample also is likely to include a substantial share of consumers who experience multiple late fees prior to recovering from the late payment event, resulting in a relatively large deterrence effect. For these reasons (combined with the fact that any effect of the reduced late fee may play out gradually), the effect of a lower late fee may be comparatively weak and difficult to detect in this population.

Compounding these shortcomings is the Bureau’s inadequate description of the analysis. Despite the dispositive reliance the Bureau places on its analysis, the Bureau provides no information about parameter estimates, standard errors and statistical significance levels (other than the reference to “conventional confidence levels”). Nor does the discussion indicate what (if any) factors have been controlled for or other details about the statistical approach, rendering its validity impossible to assess.

The NPR also omits key information on the sample construction, other than that it consists of data from 2019 and accounts that incurred a late payment event followed by six months of on-time payments, with observation of payment behavior in the seventh month. It is not clear whether the sample includes only accounts with a full seven months of observed behavior in 2019. If that is the case, then the sample consists of accounts that had late payment events during the first five months of 2019, and the results might at least partly reflect seasonal factors. Nor is it clear whether accounts are included for which the late episode ended in December 2019. If that is the case, then the results might be influenced by banks’ implementation of forbearance policies, which included frequent waiving of late fees, at the onset of the pandemic. In addition, pursuant to a provision in Regulation Z, a consumer that has paid late in a calendar year is reminded each month on their periodic statement that they paid a late fee in that calendar year.¹⁶⁹ This may explain why the Bureau did not observe an increase in late payments in month seven when the late fee cost returned to \$30.

The Bureau has an obligation to explain its findings to the public as fully and transparently as possible subject to usual standards respecting confidentiality of the underlying data. The Bureau has failed to do so, and the “evidence” it has marshaled to support the proposed reduction in the safe harbor is incomplete and deficient.

¹⁶⁸ *Id.*

¹⁶⁹ 12 CFR § 1026.7(b)(6).

Appended to the discussion of the Y-14 seventh-month analysis is the following, rather murky observation:

“In addition, as a separate observation, the Bureau observed that for consumers that incurred a higher fee for a late payment during the six months after the initial late payment, the payment of that higher late fee did not lead to a discernibly lower chance of late payment for a third time in the future than for those consumers whose second late fee was lower because they paid late seven or more months after their first late payment.”¹⁷⁰

Since the sample for the seventh-month analysis consists of accounts that had no late payment for six consecutive months following the most recent late payment, this observation clearly derives from a different sample. However, no information is provided about the underlying sample construction or any other aspect of the separate analysis that yielded this observation.

By including this comment, the Bureau appears to be suggesting that a higher late fee incurred during a delinquency spell involving at least two late payments within six months (thus triggering the higher late fee amount) has no greater deterrence impact (over an unspecified, future time horizon) than two, more isolated, late payment events not triggering the higher late fee amount. However, if this is so, it may simply reflect that consumers with the more concentrated spell of two or more late payments are more problematic payers in general (they may have lower credit scores)—if not for the deterrence effect of higher late fees their likelihood of a repeat spell might be even greater.

a) The Bureau’s additional analyses purporting to consider deterrence are superficial and logically flawed.

The NPR presents two minor, additional arguments in support of an \$8 late fee, loosely based on empirical studies or historical experience. The logic of these arguments is patently flawed.

The first argument notes that some studies of consumer financial behavior suggest that often, “small and relatively costless changes in behavior” can lead to substantial improvement in repayment performance, including avoidance of late payments.¹⁷¹ The Bureau reasons that because such behavioral changes are not costly in a monetary sense, they can be incentivized by small penalties:

“Empirical investigations into the correlates of late fee amounts and late fee incidence noted that late fee payment can often be avoided by small and relatively costless changes in behavior. This suggests that the lower proposed \$8 late fee safe harbor amount would still be higher than the costs of making a timely payment.”¹⁷²

No further explanation or any specific examples accompany the above statements in the NPR.

¹⁷⁰ 88 Fed. Reg. at 18920.

¹⁷¹ *Id.* at 18921.

¹⁷² *Id.* (internal citations omitted).

This reasoning seems to assume that the “cost” to the consumer of a change in behavior can be simply converted to a monetary value and compared to a fee penalty – and that when the behavior change “costs” less than the fee in a monetary sense, the consumer will choose the “lower cost” option and change the behavior. For instance, consumers who tend to overspend might be able to attend, at little or no cost, financial health counseling sessions that enable them to correct that behavioral bias. However, these consumers first must be willing to address their behavioral bias and sign up for the counseling sessions and actually attend the counseling sessions. The CFPB’s simplistic comparison fails to consider that the “cost” of behavior change goes beyond the explicit quantifiable costs of implementing the change, but must factor in the individual’s attitude, inclination and motivation to change, personal utility function, and how they value the time it would take to implement the change versus doing something else with that time.

The second argument focuses on the historical experience in the United Kingdom, which in 2006 (through the U.K. Office of Fair Trading) instituted a limit of 12 British pounds on credit card late payment penalties. The Bureau declares in the NPR that:

“The Bureau...is not aware of evidence suggesting that the £12 limit the OFT imposed on default charges (including late fees) in 2006 meaningfully increased late payments in the United Kingdom (U.K.). As fees were routinely as high as £25 (\$43.75 on the day of the rule) until that spring, this episode is the closest to what the Bureau would foresee as the outcome to its proposal: a salient reduction in late fees impacting the entire marketplace at once, letting both issuers and cardholders learn and adapt to the lower later fees.”¹⁷³

Thus, the Bureau implies that the lack of known studies documenting an increase in late payments following the imposition of this rule in the U.K. in 2006 is evidence that deterrence was not weakened. The Bureau infers from the apparent absence of evidence from the U.K. experience a conclusion that the Bureau’s proposed reduction would not weaken deterrence, which amounts to deriving “something from nothing.” Simply because the Bureau “is not aware” of any evidence suggesting an increase in late payments as a result of a fee cap, does not mean that that is not the case; nor does the CFPB appear to have attempted to obtain any such evidence. Furthermore, the proposed decrease in the safe harbor amount is multiple times the decrease that occurred in the U.K., so the U.K. experience is not comparable, even if the CFPB had data supporting its conclusion.

b) The Bureau arbitrarily rejects consumer survey data regarding the deterrence effect of late fees.

The Bureau also acknowledges that “several industry commenters on the ANPR discussed a survey conducted by Argus Advisory, a TransUnion Company, in 2010. The commenters indicated that this survey demonstrates that there is a threshold which late fees must reach in order to encourage cardholders to pay on time. The commenters indicated that this survey shows that to deter a majority of cardholders from making a late payment, a significantly higher fee than \$8 would be required. The Bureau acknowledges that an order of magnitude higher fee amounts is likely to deter more consumers from paying late but finds that questions to consumers on hypothetical late payment amounts are less

¹⁷³ *Id.*

informative about the effects of late payment fees in practice,” thus dismissing a tangible demonstration of what consumers view as a sufficiently high late fee penalty to deter late payment behavior.¹⁷⁴

An updated version of this survey was conducted in December 2022 research by Argus Advisory, a TransUnion Company, finding that late fees many times greater than the proposed \$8 safe harbor would be necessary to deter a majority of cardholders from making a late payment.¹⁷⁵ The survey found that more than 4 in 5 consumers (83 percent) said that a \$10 late fee would be insufficient to deter them from paying late. Only 6 percent of respondents said that a fee of \$10 would have a deterrent effect. For those who have paid a late fee in the past year, the deterrence effect of a \$10 fee is even lower: only 4.3 percent said that such a fee would deter them from paying late. The survey also found only 15 percent said that concern about credit ratings was the most important reason to pay on time.

The CFPB’s outright dismissal of survey data is arbitrary and capricious, as the CFPB provides no substantive basis on which it rejects such data or support for its assertion that it is “less informative.” Survey data – including the updated version – reflects an important data point regarding the deterrence effect of late fees at different amounts that should be incorporated into the CFPB’s consideration of any revisions to the late fee safe harbor.

c) The Bureau seeks to discourage the use of late fees as a method of deterrence, in violation of the statute and Congressional intent.

Finally, the Bureau states that card issuers have methods to deter late payment behavior other than charging higher late fees. The Bureau states that “card issuers also have other tools to deter late payment behavior, and therefore, minimize the potential frequency and cost to card issuers of late payments, such as reporting the late payment to a credit bureau which could affect the consumer’s credit score, decreasing the consumer’s credit line, and imposing penalty rates.”¹⁷⁶ The availability of other method of deterrence is accurate, but that fact does not authorize the CFPB to disregard Congress’s clear recognition that ***late fees are an important incentive tool for encouraging responsible consumer financial behavior***, and that the deterrent effect, consumer conduct, and costs to the issuer arising from the isolation or omission of the card agreement must be considered in determining what penalty fees are reasonable and proportional. Additionally, these other cited deterrent tools may be less effective than late fees because they occur later in time than when late fees are charged and may be more difficult for consumers to fully internalize as consequences for a late payment, as opposed to a late fee which is disclosed when a customer first obtains a credit card and, if charged, appears on the consumer’s next bill. Thus, those other potential tools may have less deterrent effect than late fees.

The CFPB further asserts that since “the Board’s 2010 Final Rule went into effect, access to real-time changes in consumers’ credit scores ***have likely increased their awareness of any decline related to late***

¹⁷⁴ *Id.* at 18921, n. 118.

¹⁷⁵ ABA *et al.* Comment Letter on Notice of Proposed Rulemaking on Credit Card Late Fees and Late Payments, Docket No. CFPB–2023–0010 (May 3, 2023).

¹⁷⁶ *Id.* at 18922.

payments. Thus, the deterrent effect of any negative credit score impact *is likely greater* than in 2011 and further encourages payment within one billing cycle of the due date without the imposition of additional financial penalties.”¹⁷⁷ Once again, the CFPB draws conclusions based solely on speculation rather than any research, data, or analysis. Moreover, even if that statement were true, the CFPB makes no effort to quantify the deterrent effect of the current safe harbor versus the alleged increased awareness of the credit score impact of late payments. The CFPB essentially rejects the importance of late fees as a deterrent and seeks to force issuers to rely instead on other tools that *may* have deterrent effect, without evidentiary support. Thus, in setting the \$8 safe harbor amount, the CFPB did not carry out its statutory obligation to consider the deterrence effect, contrary to Congress’s clear instruction that those be considered in connection with setting penalty fees, including late fees.

4. The Bureau’s conclusion that the proposed \$8 safe harbor would have a deterrent effect on late payments is based on a superficial and deeply flawed analysis.

Based on the foregoing, there is no support for the Bureau’s preliminarily finding that “the available evidence indicates that the proposed \$8 safe harbor amount for the first and subsequent late payments would still have a deterrent effect on late payments, although that effect may be lessened by the proposed change to some extent, and other factors may be more relevant (or may become more relevant) towards creating deterrence.”¹⁷⁸ This conclusion is based on an inadequate and superficial analysis that serves to provide cover for the CFPB’s predetermined conclusion that the late fee safe harbor is “too high.” The CFPB has not fulfilled its statutory responsibility to meaningfully consider the deterrent impact of lowering the safe harbor four to five times from its current level and therefore the proposal fails to comply with the requirements under TILA and the APA.

The CFPB further diminishes any deterrent effect by rejecting any type of adjustment to the safe harbor to compensate for inflation. Even assuming that an \$8 late fee would have some deterrent effect in 2023 or 2024, an \$8 late fee is likely to have less and less deterrence effect with each passing year, even if inflation reverts to 2 percent.

The CFPB states it will monitor the safe harbor amount for deterrent effect and revise the regulations accordingly. But the APA requires the CFPB to explain its “reasons for believing that more good than harm will come of its action.”¹⁷⁹ It does not permit the CFPB to regulate first and figure out whether the regulation complies with its statutory mandate later. And, as the CFPB has demonstrated, it does not appear to bind itself to the terms of its regulations – the CFPB has not yet followed its own regulatory requirement to provide an inflation adjustment for the current safe harbor for all penalty fees.

E. The CFPB has not meaningfully considered consumer conduct in proposing the \$8 late fee safe harbor in violation of TILA and the APA.

¹⁷⁷ *Id.* (emphasis added).

¹⁷⁸ *Id.* at 18933.

¹⁷⁹ *Maryland People’s Couns. v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985).

Consumer conduct is one of the statutory factors that the Bureau must consider in determining whether a late fee is reasonable and proportional to the violation or omission. The CFPB has disregarded consumer behavior in setting the new late fee safe harbor, in direct contravention of the statute. The CFPB acknowledges that the Federal Reserve Board took consumer conduct into account when it originally established the higher \$35 fee for a subsequent late payment within six billing cycles of a first late payment. The Board explained its belief that “multiple violations during a relatively short period can be associated with increased costs and credit risk and reflect a more serious form of consumer conduct than a single violation.”¹⁸⁰ As explained previously, the Board also recognized that credit risk, or risk of loss, while not explicitly considered a cost under the Cost Analysis, was reflected in the Board’s safe harbor by the higher fee for a subsequent late payment after an initial missed payment.¹⁸¹ However, the CFPB “has preliminarily determined that the proposed \$8 late fee safe harbor amount for the first and subsequent late payments better reflects a consideration of consumer conduct. For example, it is not clear from analysis of the Y-14 data and other relevant information that multiple violations during a relatively short period are associated with increased credit risk and reflect a more serious consumer violation.”¹⁸²

The CFPB provides no empirical evidence to support this preliminary determination; the only “justification” it offers is that the Bureau’s conclusion that “[b]ased on the account-level Y-14 data, the Bureau estimated that only 13.6 percent of accounts incurred a late fee and then no additional payments were made on that account” and that “for accounts that incurred a late fee, the Bureau estimates that a third of accounts paid the amount due within five days of the payment due date, half the accounts paid the amount due within 15 days of the payment due date, and three out of five accounts paid the amount due within 30 days of the payment due date.”¹⁸³ These facts, however, even if true (which we are not able to assess given the lack of information provided by the CFPB) do not address whether multiple violations during a relatively short period are associated with increased credit risk or reflect a more serious consumer violation or whether an increased late fee for subsequent violations is appropriate.

Rather, the Bureau’s assertions simply describe purported repayment behavior by consumers after missing a payment deadline once. The CFPB seems to be using this purported repayment behavior to rationalize a substantially lower late fee safe harbor for all instances of late payments – first and subsequent violations. The Bureau appears to be asserting that because some portion of consumers that pay late ultimately end up paying their bills within 30 days of the payment date, even if this occurs multiple times, they do not present a greater credit risk and thus there is no need to impose a higher fee for subsequent late payments. We cannot be sure whether this is the Bureau’s assertion, as the Bureau has not complied with its obligation to release its data or methodology. Furthermore, on its face, this rationale ignores the statute that authorizes card issuers to charge a penalty fee that is reasonable and proportional to the violation of the account agreement – which is the failure to pay by the due date set forth in that agreement. This rationale essentially ignores the consumer’s behavior of paying late –

¹⁸⁰ 75 Fed. Reg. at 37533.

¹⁸¹ *Id.* at 37538, n.41.

¹⁸² 88 Fed. Reg. at 18923.

¹⁸³ *Id.*

which the CFPB is required to consider by statute. Whether a consumer misses a payment by one day or 29 or 59, the consumer conduct of paying late is what must be considered per the statute, and for reasons explained further below, there are important reasons why the consumer conduct of repeated violations should be considered in establishing a late fee safe harbor.

The CFPB also asserts that it “recognizes that some consumers may pay late chronically but otherwise make a payment within 30 days for, among other reasons, cash flow issues, that do not necessarily indicate that they are at significant risk of defaulting on the credit,” citing a “study from 2021 [that] suggests that some consumers who are paid on a bi-weekly basis may not make the required payment by the due date but will make the required payment within 30 days after the due date from their next paycheck.”¹⁸⁴ Again, the Bureau seems to be saying that certain chronic late payers do not present increased risk, thereby essentially disregarding issuers’ right – and statutory obligation – to consider the consumer behavior of paying late and of repeated instances of paying late as a relevant factor that must be considered in establishing a late fee. Furthermore, even if “some” consumers pay late but make a payment within 30 days regularly and the Bureau wishes to reflect that fact through the late fees that may be charged to those consumers, the CFPB has not quantified what portion of overall cardholders that represents; reducing the safe harbor to \$8 for *any* late payment is an overly broad approach to addressing the particular circumstances of small cohorts of cardholders.

The Bureau also points to the Metro 2 reporting format for reporting information to credit bureaus and asserts that “for risk management purposes, the industry itself does not appear to consider the consumer’s conduct in paying late to be a serious form of consumer conduct until the consumer is 30 or more days late.”¹⁸⁵ As discussed further in Section IX.A., the CARD Act does not condition the imposition of a late payment fee based on when a card issuer reports to credit bureaus, and thus, this fact has no relevance to a card issuer’s assessment of a late payment fee or to the underlying consumer behavior that is one of the factors that must be considered in determining whether a late payment fee is reasonable and proportional to the violation or omission. Moreover, credit bureau reporting is generally done in batch on a monthly reporting cycle, not in real-time, and credit bureaus report late payments on credit trade lines in fixed increments starting at 30-days late, and thus, issuers’ reporting to credit bureaus after 30 days of not receiving a payment is related to the reporting conventions of the credit bureaus and not to an issuer’s assessment of the seriousness of the consumer conduct that must be considered in evaluating a late fee amount.

The Bureau also notes that card issuers have methods other than late fees to address credit risk, such as reducing a cardholder’s credit line or repricing new transactions according to a penalty rate in some cases. After 60 days, the Bureau’s regulations permit these issuers to take actions to reprice the entire outstanding balance on the account according to a penalty rate in certain circumstances.¹⁸⁶ These assertions disregard the fact that the statute explicitly authorizes issuers to impose late fees that are reasonable and proportional to the omission or violation and that consumer behavior is one factor that must be considered in evaluating whether a fee is reasonable and proportional. Congress recognized

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ 12 C.F.R. § 1026.55(b)(4).

that it is appropriate for issuers to use penalty fees to manage consumer credit risk, regardless of other tools they may also use for this purpose.

Furthermore, consideration of consumer conduct is not limited to what it may reveal about a consumer's credit risk. For example, the existing safe harbor rule, in place for over 12 years, has permitted higher late fees in cases of a second late payment within six-months after the first instance of a late payment in part to reflect increased credit risk, but also because this increase is appropriate, as making timely payments is a contractual obligation under credit card agreements, and paying late is inconsistent with that voluntarily assumed obligation; an increased penalty for a subsequent late payment is likewise appropriate, as the second late payment is an additional violation of a contractual obligation.

The CFPB essentially ignores consumer conduct in setting the late fee, which could result in harm to consumers themselves. The late fee serves as an initial toll designed to prevent subsequent consequences that may have greater negative effects on the consumer, such as increased APRs or negative credit bureau reporting. Multiple missed payments could result in harm to the consumer herself, as the likelihood of credit bureau reporting and other negative effects increases with multiple instances of late payments. Based on undisclosed non-public data and evaluation, the CFPB dismisses the benefits to consumers of having a greater disincentive for subsequent violations to help discipline their financial behavior. The proposal would treat consumers that only pay late one time the same as consumers that pay late multiple times. Thus, the CFPB fails to consider behavior in setting a one-size-fits-all late fee safe harbor and rejects the important consumer benefit of imposing a higher fee for subsequent late payments after an initial missed payment.

In addition, the CFPB disregards the behavior of customers who pay on time and seeks to shift the burden from those that pay late to all cardholders – as one likely effect of the proposal, if finalized, will be that the cost of credit cards will rise for all customers – through annual fees, increased APRs, or other changes. The CFPB acknowledges that consumers who pay on time are likely to be harmed by the rule, given that overall costs of credit are likely to increase, benefits are likely to decrease, or some combination thereof. The Bureau states in the NPR that “[n]aive consumers” – those that are “overly optimistic about not missing a payment . . . would benefit from the proposed changes to late fee amounts, which lower the cost of this mistake. Sophisticated consumers, inasmuch they would have been cross-subsidized by naive customers’ costly mistakes, may pay higher maintenance fees or interest or collect fewer rewards if the issuer offsets the revenue lost to naive consumers. The Bureau considers that to the extent there are offsetting changes to card terms, some of these changes are likely but has not quantified their magnitude.”¹⁸⁷ Such an imposition on consumers who are complying with their obligations under their agreements is the antithesis of what was intended under the CARD Act and indeed violates its requirement that a penalty fee be reasonable and proportional to the violation. Reducing the late fee from its current levels to \$8, which is likely to result in shifting costs to those who do not violate the terms of their card agreements, indicates that the proposed \$8 safe harbor is not reasonable and proportional to the violation, but rather, is lower than appropriate. The CFPB recognizes that:

¹⁸⁷ 88 Fed. Reg at 18935.

“[a]ny offsetting changes, like the decrease in late fees, would affect different consumers differently depending, for example, on how often they pay late and whether they carry a balance. 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.”¹⁸⁸

Thus, the CFPB acknowledges that in setting the safe harbor at \$8, the CFPB is prioritizing consumers with certain characteristics over others, contrary to the statute and intent of the CARD Act. Furthermore, the CFPB has not given sufficient consideration to the statutorily required factor of consumer behavior in establishing the proposed \$8 safe harbor – and in fact, has disregarded differences in consumer behavior that would warrant a higher safe harbor amount and a higher fee for subsequent missed payments so as not to shift costs to those who pay on time.

F. The catch-all provision does not authorize the Bureau to disregard the required statutory considerations.

The Bureau fails to give due consideration to the statutorily required factors of deterrence and consumer behavior and instead places undue emphasis on the catch-all provision in the statute that authorizes the CFPB to consider other factors it believes are necessary or appropriate in determining whether a late fee is reasonable and proportional to the violation or omission. The CFPB states that “[e]ven if the proposed \$8 safe harbor increases the frequency of late payments by some percentage . . . the Bureau has preliminarily determined that some cardholders may benefit from the proposed \$8 safe harbor threshold amount . . . in considering the appropriate safe harbor amount for late fees, the Bureau is guided by the factors in TILA Section 149(c), which provides that the Bureau can consider such other factors that the Bureau deems necessary or appropriate.”¹⁸⁹ The Bureau concludes that it “preliminarily finds that it is both necessary and appropriate when considering whether a late fee is reasonable and proportional to take into account the possible impact of lower late fees on cardholders’ repayment behavior and finances.”¹⁹⁰ The CFPB believes that “[f]or the more constrained cardholders, like subprime borrowers, who pay a disproportionate proportion of late fees, the current, higher late fee may be impacting cardholder repayment conduct—i.e., the higher late fee amount could have gone toward a payment on the account.”¹⁹¹ The Bureau bases this conclusion on its estimate that “reducing the safe harbor for late fees to \$8 would likely reduce late fee revenue by billions of dollars.”¹⁹²

¹⁸⁸ *Id.* at 18934.

¹⁸⁹ *Id.* at 18919.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 18922.

¹⁹² *Id.*

The CFPB acknowledges that “issuers may respond to this reduction in revenue from late fees by adjusting interest rates or other card terms to offset the lost income” but “expects less than full offset, with consumers gaining in total from reduced late fees. This expected savings would benefit consumers. The money saved by cardholders on late fees may go toward repayment.”¹⁹³ The CFPB cites the aforementioned Grodzicki et al., (2022) paper – that it had dismissed previously and arbitrarily as not demonstrating a greater deterrence effect of higher late fees – that found that for **subprime cardholders**, a “decrease in late fees after the implementation of the CARD Act increased borrowing for prime borrowers but triggered repayment for subprime cardholders.”¹⁹⁴ The Bureau reasons that “[i]f this prediction held true for the current proposed reform, it would imply that lowering late fees may provide some benefits to subprime consumers in terms of a greater ability to repay revolving debt. This effect might also lower issuers’ losses from delinquencies, as it could subsequently reduce the likelihood and the severity of default in the population most prone to default.”¹⁹⁵ The CFPB provides no evidence to support this assertion – it is simply conjecture. In addition, the Grodzicki et al., (2022) paper also found that **for all risk segments, including subprime**, lower late fees lead to more frequent late payments, consistent with a reduction in the fee’s deterrence effect, which could have other negative consequences for subprime and consumers in other risk segments, such as increased credit bureau reporting for increased instances of late payments or APR increases.

Thus, while the CFPB asserts that reduced late fees would “benefit consumers” generally, this theoretical benefit would at most inure only to one cohort of consumers – subprime cardholders. The Bureau does not attempt to muster any additional evidence supporting this potential benefit, but rather, concludes that it “preliminarily finds that the combined benefits of these effects [alleged benefits to consumers and potential reduction in the likelihood/severity of default] are necessary and appropriate factors to take into account, along with deterrence, in determining whether a late fee safe harbor amount is reasonable and proportional. The Bureau also preliminarily finds that a late fee safe harbor amount of \$8 for the first and subsequent late payments strikes the appropriate balance of these considerations.”¹⁹⁶ The Bureau is authorized to consider other factors it deems appropriate under the statute; what the statute does not permit the Bureau to do, however, is dismiss the required statutory factors and essentially replace those with other factors it deems relevant. The catch-all is additive, not a substitute for the statutory factors. The CFPB cannot consider the overall benefit of lower late fees to the exclusion of considering the deterrence effect, consumer conduct, or the costs to the issuer arising from the violation or omission.

G. The Bureau has arbitrarily ignored two factors the Board deemed “necessary or appropriate” in violation of the APA.

Finally, the Bureau’s proposed rule ignores two factors that the Federal Reserve Board deemed “necessary or appropriate” to consider under TILA section 149(c). The Board considered (1) the need for

¹⁹³ *Id.*

¹⁹⁴ *Id.* (emphasis added).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

general regulations that can be consistently applied by card issuers and enforced by the federal banking agencies”; and (2) “the need for regulations that result in fees that can be effectively disclosed to consumer in solicitations, account-opening disclosures, and elsewhere.”¹⁹⁷ And the Board determined that setting a “generally applicable safe harbor[]” would fulfill those needs by “facilitat[ing] compliance by issuers and increas[ing] consistency and predictability for consumers.”¹⁹⁸

The Bureau’s failure to consider those two factors or explain how its proposal serves them is arbitrary and capricious. The APA’s “requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.”¹⁹⁹ “An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”²⁰⁰ And it “must show that there are good reasons for the new policy.”²⁰¹ The Bureau has not complied with any of those requirements. Its proposal does not even mention the additional factors identified by the Board, much less explain why the Bureau no longer considers them to be necessary or appropriate to consider. And the Bureau does not attempt to explain how its proposal serves those factors. Nor could it. As discussed above, the Bureau has not set Reasonable and Proportional Standards by rule, even though the dramatic reduction in the safe harbor will prompt significant numbers of issuers to charge late fees in excess of the safe harbor. As a result, there are no regulations that can be consistently applied by those issuers or enforced by the Bureau. In addition, by prompting issuers to use the inadequate cost-based approach rather than the safe harbor, the Bureau’s proposal will decrease consistency and predictability for consumers. For example, the late fees an issuer may charge under the cost-based approach may vary unpredictably over time, meaning that they cannot be “effectively disclosed” in “solicitations” or “account-opening disclosures.”²⁰²

Again, the Bureau should go back to the drawing board and, through a more transparent, inclusive, and rigorous rulemaking process, develop a proposal that appropriately accounts for all of the factors listed in TILA section 149(c), including the factors the Board considered necessary or appropriate but that the Bureau’s proposal ignores.

VI. The Bureau has not demonstrated that the proposed late fee cap of 25 percent of the minimum balance is “reasonable and proportional to the violation or omission” considering all the required statutory factors.

The CFPB proposes to limit the dollar amount of a late payment to 25 percent of the required minimum periodic payment due immediately prior to assessment of the late payment, but provides no explanation for how the limitation would result in a fee that is “reasonable and proportional” to the

¹⁹⁷ 75 Fed. Reg. at 37532.

¹⁹⁸ 75 Fed. Reg. at 37540.

¹⁹⁹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² 75 Fed. Reg. at 37532.

omission or violation, as required by the statute. Rather, the CFPB refers only to what it believes is **reasonable and proportional to the collection costs** associated with a missed minimum payment. Moreover, as with its analysis in support of the \$8 proposed late fee safe harbor, in proposing the 25 percent cap on late fees, the CFPB fails to consider the total costs associated with late payments, or the other statutory factors of deterrence and consumer behavior.

Rather than engaging in a robust analysis as required by the statute, the CFPB attempts to rationalize the proposed cap based primarily on its desired outcome:

“[T]o the extent card issuers cannot recover all of their costs through a late fee when a late payment involves a small dollar amount, **the proposed limitation will likely encourage card issuers to undertake efforts to either reduce costs incurred as a result of violations that involve small dollar amounts or to build those costs into upfront rates, which has the additional benefit of resulting in greater transparency for consumers regarding the cost of using credit card accounts.**”²⁰³

The CFPB makes a weak attempt to justify the proposed cap, stating that “when considering collection costs incurred by card issuers, it is likely that allowing a late fee that is 100 percent of the minimum payment is not reasonable and proportional **to such costs**. Generally, most card issuers do not incur, and should not be expected to incur, collection costs that are 100 percent of the amount they are trying to collect. The Bureau has preliminarily determined that lowering the limitation on late fees to 25 percent of the minimum payment due **would still likely allow card issuers to cover contingency fees paid to third-party agencies for collecting the amount of the minimum payment prior to account charge-off.**”²⁰⁴

The Bureau also states that based on data it collects for purposes of its periodic CARD Act reports to Congress “card issuers that contract with third-party agencies for pre-charge-off collections pay a contingency fee that is a percentage of the amount collected, which may include an amount (if collected) exceeding the minimum payment. These contingency fees can range from 9.5 percent to 23 percent, further supporting that the proposed 25 percent of minimum payment due is more reasonable and proportional than permitting 100 percent of the 85 minimum payment.”²⁰⁵ The CFPB then states that “[i]t appears that the Board did not consider or have access to such figures when it limited the dollar amount associated with a late payment to 100 percent of the required minimum periodic payment. With this additional data, the Bureau proposes a limitation on late fees that it has preliminarily determined is more reasonable and proportional than what was set forth in the Board’s 2010 Final Rule.”²⁰⁶

In addition, the CFPB concludes that:

²⁰³ *Id.* at 18929.

²⁰⁴ *Id.* at 18928.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

“the proposed 25 percent limitation would most likely impact the amount of the late fee a card issuer can charge when (1) the minimum payment is small, and (2) the card issuer is using the cost analysis to set the late fee amount. Based on the distribution of minimum payments in the Y-14 data, the Bureau estimates that this may occur infrequently.”²⁰⁷

The CFPB further notes that:

“[i]f a card issuer is using the proposed late fee safe harbor of \$8, however, the instances where 25 percent of the minimum payment may be less than the proposed \$8 safe harbor appear to be even less frequent. For instance, based on the distribution of minimum payments due in the Y-14 on a monthly basis from October 2021 to September 2022, if card issuers could only charge up to 25 percent of the minimum payment, only 7.7 percent of accounts would have been charged a late fee of less than \$8.”²⁰⁸

As stated throughout, the CFPB does not provide the data or analyses on which it has relied in drawing the above conclusions regarding the 25 percent limitation, significantly limiting our ability to evaluate the CFPB’s analysis.

Moreover, as explained previously, the CFPB did not meaningfully consider the deterrent effect of an \$8 safe harbor late fee. The CFPB has not considered whether, to the extent that the proposed 25 percent cap reduces this safe harbor late fee, which the CFPB acknowledges is likely in some cases, that lower amount below \$8 will serve as a deterrent.

Nor does the CFPB meaningfully consider cardholder behavior in proposing the 25 percent cap. The CFPB states that:

“the proposal could have the potential to limit the late fee to an amount that is insufficient to cover a card issuer’s costs in collecting the late payment. However, permitting a late fee that is 100 percent of the minimum payment does not appear to be reasonable and proportional to the consumer’s conduct of paying late when the minimum payment is small. For instance, in situations where the dollar amount associated with the late payment is small and the card issuer is permitted to charge a late fee that is 100 percent of the minimum payment then a consumer is essentially required to pay double the amount of a missed payment in the next billing cycle in addition to the minimum payment due for that next billing cycle. ***This result is neither reasonable nor proportional to the consumer’s conduct in paying late.***”²⁰⁹

The CFPB thus dismisses the conduct of paying late “when the minimum payment is small.” Yet this 25 percent proposed cap does not relate to consumer behavior. The violation is the missed payment,

²⁰⁷ *Id.* at 18929 (“Y-14 data from October 2021 to September 2022 shows that for those months in which an account was late, only 12.7 percent of accounts had a minimum payment of \$40 or less. Additionally for those months in which an account was late, at least 48.5 percent of accounts had a minimum payment above \$100.”).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

regardless of the minimum payment amount due, and the missed payment violation is the behavior being addressed by the fee.

Moreover, the CFPB again has misstated and misapplied the statutory standard in drawing conclusions about the proposed changes to the late fee regulations. The Bureau evaluates the 25 percent limitation according to whether that limitation is “reasonable and proportional to the consumers’ conduct in paying late.” Yet, the standard requires that the fee be reasonable and proportional to the violation or omission, ***with consumer conduct being one of the factors that must be considered, but not the sole factor***. Deterrence and cost must be considered as well. The deterrent effect lessens as the fee drops, as detailed extensively throughout this response. In addition, the costs to the issuer for late payments are not directly tied to the amount of the minimum payment. For example, the costs of engaging with the consumer about missed payments and initiating collection efforts are the same regardless of the amount due.

The CFPB thus dismisses the issuer’s inability to cover its collection costs as a concern; does not address deterrence; and dismisses the behavior of paying late when the minimum payment is low.

The CFPB concludes, based on this inaccurate and incomplete analysis, that it has preliminarily determined that restricting the late fee to 25 percent of the minimum payment “is more consistent with Congress’ intent to prohibit penalty fees that are not reasonable and proportional to the violation than the current rule that allows for a card issuer to potentially charge a late fee that is 100 percent of the minimum payment.”²¹⁰ It is strange for the CFPB to speculate about Congressional intent when, as set forth in Section IV.A. the CFPB has not met Congress’s clear and explicit direction that it establish standards to determine when a fee is reasonable and proportional. Thus, we have no basis on which to evaluate the CFPB’s assertion as to what fees are reasonable and proportional.

Furthermore, the CFPB has determined in the proposal, erroneously we believe, that a safe harbor of \$8 is reasonable and proportional to the issuer’s collection costs (but does not demonstrate how a late fee that in some cases would be lower than this “reasonable and proportional” safe harbor would ***also*** be “reasonable and proportional.”

Here, again, the CFPB has failed to abide by the statutory requirement that it must determine that any late fee or fee cap of 25 percent of the minimum amount due is reasonable and proportional to the violation or omission considering all of the required statutory factors. Rather, the CFPB is articulating a predetermined policy outcome not supported by law or available evidence.

Furthermore, while the CFPB considers building costs into upfront rates as a positive, that change would shift the costs of late payers to all consumers, in effect penalizing consumers who pay on time for the conduct of consumers who pay late. Such an approach is contrary to the CFPB’s mission to protect all consumers and ensure the markets for consumer financial products and services are fair.²¹¹ Any increase in APRs likely would be borne primarily by those consumers least able to afford it because APRs are priced according to risk.

²¹⁰ *Id.* at 18928.

²¹¹ 12 U.S. Code § 5511(a).

VII. The elimination of the annual inflation adjustment is arbitrary and capricious.

The Bureau’s proposal to eliminate the annual inflation adjustment for late payment fees is arbitrary and capricious. The Bureau assumes, without credible evidence or support, that card issuers do not face the same inflationary forces that impact consumers, other businesses, and government entities. The Bureau also asserts, without evidence or support, that adjusting the late payment fee safe harbor based on the Consumer Price Index (“CPI”) would not necessarily result in a safe harbor that is “reasonable and proportional” to the omission of paying on the payment due date.

The Bureau proposes to eliminate the annual inflation adjustment because “[w]hile issuers’ costs do appear to be trending up, it does not appear that they are doing so lockstep with inflation . . .” and “factors outside of inflation [] may impact when issuers’ cost goes up and by how much.”²¹² If, as the Bureau acknowledges, issuer costs are “trending up,” then some inflation adjustment is warranted. Further, the Bureau fails to identify or explain what “factors outside of inflation” may impact issuer costs.

Instead, the Bureau relies on a line item in the Y-14 data “not previously available to the Board” indicating that annual adjustments based on the CPI do not necessarily reflect how the cost of late payments to issuers changes over time and, therefore, may not reflect the “reasonable and proportional” standard in the statute.²¹³ As described above, the Y-14 data on which the Bureau relies is ill-suited for accurately estimating issuers’ costs for late payments. The Bureau’s reliance on the Y-14 data is arbitrary and capricious, particularly since the Bureau has authority to itself collect specific cost information from credit card issuers in a uniform manner and has chosen not to do so.

Additionally, the Bureau maintains that the Board, when it initially implemented the CPI adjustment for the safe harbor, did not expressly consider the effect that CPI adjustments to the safe harbor may have on the reasonableness and proportionality of the late payment fee to rationalize its decision to eliminate the annual inflation adjustment.²¹⁴ The Bureau, however, does not provide any reason why eliminating the inflation adjustment would result in reasonable and proportional late payment fees. It just relies on inaccurate and incomplete cost information to conclude that card issuers do not face the same inflationary forces that impact consumers, other businesses, and government entities.²¹⁵

The Bureau’s proposed alternative to the annual inflation adjustment would be to “monitor the safe harbor amount for late fees for potential adjustments as necessary.”²¹⁶ The Bureau notes that it could make adjustments to the safe harbor amount through “ad hoc adjustments when the safe harbor

²¹² 88 Fed. Reg. at 18926.

²¹³ *Id.*

²¹⁴ *Id.* at 18925.

²¹⁵ *Id.* at 18926.

²¹⁶ *Id.* at 18925.

amounts are revisited.”²¹⁷ Such an ad hoc approach fails to ensure that card issuers, particularly small card issuers, can cover their costs if they rely on the safe harbor or that the safe harbor continues to be reasonable and proportional to the omission or violation if card issuers’ costs, as impacted by inflation, are not reflected in the safe harbor amount.

The Bureau does not say when or how it will make such adjustments, identify the metrics it would use to make such adjustments, commit to revisiting the safe harbor amount annually or on some other regular cadence, or identify certain circumstances when it would consider ad hoc adjustments. The Bureau’s periodic reviews of its regulations often do not occur for a decade or longer and such a delay would fail to ensure that the safe harbor amount reflects card issuers’ changing costs.

Further, the Bureau has a poor track record in complying with its own regulatory requirements related to the annual inflation adjustment of the safe harbor amount. The annual inflation adjustment provision in Regulation Z, 12 C.F.R. § 1026.52(b)(1)(ii), requires the Bureau to make an annual inflation adjustment based on the CPI. These adjustments typically are issued late in the prior year for the upcoming year. For 2023, however, the Bureau has failed to comply with Regulation Z and adopt the annual inflation adjustment to the safe harbor amount in 12 C.F.R. § 1026.52(b)(1)(ii). The Bureau has not provided any explanation for this clear violation of law. If the Bureau ignores the legal obligations it has undertaken through its own regulations, it is difficult to give credence to the Bureau’s vague promise to make “ad hoc” adjustments to the safe harbor amount to reflect changes in inflation.

VIII. The Bureau’s proposed effective date of 60 days after publication of the final rule in the *Federal Register* is contrary to TILA Section 105(d), arbitrary and capricious, and unworkable in practice.

The Bureau’s proposed effective date of 60 days after publication of the final rule in the *Federal Register* is contrary to law and signals a desire by the Bureau to evade Section 105(d) of TILA.²¹⁸ Moreover, such a truncated effective date would be unworkable from a practical perspective. Section 105(d) sets forth the minimum effective dates for Bureau regulations containing new or changed TILA disclosure requirements and legally requires the CFPB to provide a statutory minimum period of time for regulated institutions to change their product disclosures following regulatory amendments. The Bureau’s stated reasons for ignoring Section 105(d) have no basis in law and do not satisfy any recognized exception for allowing a shorter effective date. Finally, the Bureau fails to consider the significant changes the proposed rule, if finalized, would require card issuers to make to revise multiple disclosures and implement systems’ changes to give effect to the revised regulations. The effective date for the final rule should adhere to the timeline set forth in TILA Section 105(d).

A. The proposed rule is based on Part A of TILA and TILA Section 105(d) applies to any Bureau regulation promulgated under Part A of TILA requiring new or revised disclosures.

Section 105(d) of TILA provides that “**any regulation** of the Bureau, **or any amendment** or interpretation thereof, **requiring any disclosure which differs from the disclosures previously required**

²¹⁷ *Id.* at 18926.

²¹⁸ 15 U.S.C. § 1604(d).

by” Part A, Part D, or Part E of the statute “**or by any Bureau regulation promulgated thereunder** shall have an effective date of that October 1 which follows by at least six months the date of promulgation.”²¹⁹ In other words, Section 105(d) requires an October 1 effective date for new or revised disclosures, but whether that effective date must be October 1 of the current year or the next year depends on whether those changes are finalized at least six months prior, i.e., March 31 of that year. For example, TILA disclosure changes finalized **before** March 31, 2023, are statutorily required to have an effective date of October 1, 2023, while changes finalized **after** March 31, 2023, are statutorily required to have an effective date of October 1, 2024. The Bureau’s proposal cannot be finalized before March 31, 2023, as this date has passed, yet the Bureau disregards the statutory effective date which would be October 1, 2024, in favor of an unreasonably short effective date of 60 days after publication of the final rule.

The Bureau’s stated legal authority for the proposed rule is based on TILA Sections 102(a) and 105(a),²²⁰ and those two provisions are in Part A of TILA.²²¹ While the Bureau’s proposal would amend disclosures required by Parts B and C of TILA,²²² the Bureau’s reliance on Part A of TILA as the basis for its legal authority makes TILA Section 105(d) applicable because the proposed rule, if finalized, will be a “**Bureau regulation promulgated**” under Part A of TILA to amend existing disclosure requirements. Furthermore, when the Federal Reserve Board initially promulgated the regulation implementing the TILA penalty fee provisions, it expressly relied on TILA Sections 105(a) and (f), contained in Part A of TILA, as the basis for its legal authority.²²³ Therefore, the Bureau’s proposed 60-day effective date would violate the statutory mandate for an October 1 compliance date that is at least six months from the date of promulgation.

- a. The Bureau has not met the statutory exception for shortening the effective date and the Bureau’s stated grounds for proposing a 60-day effective date are arbitrary, capricious, and contrary to law.**

TILA Section 105(d) contains a statutory exception that permits the Bureau to lengthen the period of time permitted for creditors to adjust their forms to accommodate new requirements, but only permits the Bureau to **shorten** the length of time “when it makes a specific finding that such action is necessary to comply with the findings of a court or to prevent unfair or deceptive disclosure practices.”²²⁴ In the proposed rule, the Bureau did not make, or attempt to make, the statutorily-required specific finding necessary to shorten the statutory effective date. Further, it would be arbitrary and capricious for the Bureau to reclassify existing late fee practices and disclosures as “unfair or deceptive” when they are fully consistent with TILA and the Bureau’s Regulation Z penalty fee safe harbor provision, and have been for over 12 years since the safe harbor provision was adopted.

²¹⁹ *Id.* at § 1604(d).

²²⁰ *Id.* at §§ 1601(a) and 1604(a).

²²¹ 88 Fed. Reg. at 18911.

²²² See 15 U.S.C. §§ 1637 (periodic statements, Part B) and 1665d (penalty fees, Part C).

²²³ 75 Fed. Reg. 37526, 37528 (June 29, 2010).

²²⁴ 15 U.S.C. § 1604(d).

Instead, the Bureau makes the surprising, and legally deficient, arguments that TILA Section 105(d) does not apply on two grounds. The Bureau first argues that the proposed rule, if finalized, “would not differ from the current requirement to disclose late fee amounts; instead, it **would solely result in a change to the amount of the late fees** disclosed for issuers using the safe harbor.”²²⁵ This argument implies that even major adjustments to the product features the disclosures are designed to convey is insufficient to trigger Section 105(d). This argument finds no support in the statute.

Section 105(d)’s effective date provision applies to disclosures “any regulation of the Bureau, or any amendment . . . thereof, requiring any disclosure which differs from the disclosures previously required by” Parts A, D, or E of TILA “or by **any Bureau regulation promulgated thereunder.**” The initial penalty fee regulations of Regulation Z were promulgated under and the Bureau’s proposed amendments to those regulations will be promulgated under Part A of TILA, and thus would be subject to Section 105(d) of TILA.

Congress could have limited the scope of Section 105(d) to exclude proposed regulatory amendments requiring only certain numerical changes, if that had been Congress’s intent, but Congress did not so limit Section 105(d). The Bureau has no legal authority to rewrite the statute enacted by Congress to create such a limitation. The Bureau’s attempt to minimize the importance of late fee disclosures is belied by the Bureau’s relentless focus on late fees and the importance of accurate disclosures of late fee dollar amounts.

Further, the Bureau’s statement that the only change will be to the amount of the late fees is simply not accurate. The proposed rule would impose a new fee cap of 25% of the minimum required payment. If adopted, card issuers will be required to disclose and explain this new fee cap of 25% of the minimum required payment and how it relates to the \$8 fee cap, plus update their systems to operationalize it. In addition, the proposed rule would eliminate the higher late payment fee for recurring late payments by consumers within a six-month period, and existing disclosures relating to such higher late payment fees would need to be eliminated. Subsection VIII.A.b below discusses in greater detail the impracticality of a 60-day effective date.

The Bureau’s second argument is that “this change in amount applies to the safe harbor, which is an amount that **card issuers may elect but are not required to use.**”²²⁶ Here again, the Bureau’s argument has no basis in the statute. TILA Section 105(d) does not cease to apply when a regulation affords card issuers or other covered persons multiple options for complying with a mandatory disclosure requirement. Just because 12 C.F.R. § 1026.52(b)(1) provides two options for determining the amount of late payment fees that card issuers are required to disclose to consumers it does not make proposed amendments to the safe harbor option outside the scope of TILA Section 105(d). Late payment disclosures are still required by TILA and Regulation Z, regardless of which regulatory option card issuers use to comply with those requirements.

²²⁵ 88 Fed. Reg. at 18931.

²²⁶ *Id.*

The Bureau's second argument fails to acknowledge that most card issuers rely on the existing safe harbor and thus will be required to change their current disclosures **regardless** of how they elect to demonstrate their compliance with the late payment fee limitations going forward. Card issuers relying on the safe harbor will be required to revise multiple disclosures and more than just a numerical value, as discussed in Subsection VIII.A.b below. Card issuers electing to disclose late fees they determine are "reasonable and proportional" to the omission or violation, rather than rely on the safe harbor, will be required to revise their disclosures to demonstrate compliance with TILA's "reasonable and proportional" standards (assuming the Bureau proposes and adopts workable "reasonable and proportional" standards, as required by TILA.) In sum, **both** elective approaches under 12 C.F.R. § 1026.52(b)(1) will **require** card issuers to revise their disclosures and, as a result, TILA Section 105(d) applies.

Congress could have limited the scope of Section 105(d) to exclude Bureau regulations creating or amending regulatory safe harbors, if that had been Congress's intent, but Congress did not so limit Section 105(d). The Bureau has no legal authority to rewrite the statute enacted by Congress to create such a limitation. Finally, the Bureau's argument that card issuers can provide disclosures under the "reasonable and proportional" standards is disingenuous since the Bureau has shirked its statutory obligation to promulgate "reasonable and proportional" standards for implementing that option, considering all of the required statutory factors.

In contrast to the Bureau, the Board, when it promulgated the penalty fee provision initially, shortened the effective date in reliance on two **statutory** grounds. First, the Federal Reserve Board relied on statutory exceptions available to the Federal banking agencies when promulgating rules applicable to insured depository institutions based on a determination of good cause and a requirement to make a regulation effective on a date determined by Act of Congress.²²⁷ These exceptions apply solely to the Federal banking agencies, and do not confer to the Bureau.²²⁸ And the Bureau has not attempted to rely on these exceptions previously. Second, the Federal Reserve Board determined that the effective dates set forth in the new TILA Sections 148 and 149 (CARD Act Sections 101(c) and 102(b)) "override the general provision in TILA Section 105(d)."²²⁹ Here, the Bureau cannot point to a conflicting statutory effective date as grounds for overriding TILA Section 105(d) and shortening the effective date of the final rule. As a result, the proposed 60-day effective date is arbitrary, capricious, and contrary to law.

b. The proposed 60-day effective date is not workable in practice and provides inadequate time for card issuers to modify their disclosures and systems.

The Bureau's proposed 60-day effective date ignores the full impact of the proposed revisions and the substantial changes to disclosures and systems that will be necessary to comply with the revised regulation. Card issuers must revise multiple disclosures to reflect the changes in the legal obligations of the parties. Card issuers also must make numerous systems changes to ensure that they can

²²⁷ 75 Fed. Reg. at 37528; *see also* 12 U.S.C. §§ 4802(b)(1)(A) and (C). These provisions do not apply to the Bureau.

²²⁸ 12 U.S.C. § 1813(z) (defining "Federal banking agency" to mean the Office of the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation); *see also* 12 U.S.C. § 1813(q) (similarly defining the term "appropriate Federal banking agency").

²²⁹ 75 Fed. Reg. at 37528.

operationalize any new late payment fee standards. Card issuers will need far more than 60 days to update their systems and revise their disclosures once a final rule is issued.

Card issuers will need to reprogram their systems and revise multiple disclosures that contain or incorporate late payment fee disclosures, including: (1) credit card application disclosures (12 C.F.R. § 1026.60); (2) account opening disclosures (12 C.F.R. § 1026.6(b)(2)(viii)); (3) periodic statements (12 C.F.R. § 1026.7) (including total fees, minimum payment amount, as an itemized fee (for the statement period and calendar year to date); (4) renewal of credit card notice (12 C.F.R. § 1026.9(e)); (5) change in terms notice (12 C.F.R. § 1026.9(c)(2)); (6) annual statement / alternative summary statement (12 C.F.R. § 1026.9(a)); and (7) credit card agreement required to be posted on the internet or provided to customers upon request (12 C.F.R. § 1026.58).²³⁰

The Bureau focuses solely on the proposed \$8 fee cap, but fails to acknowledge how other proposed changes will require additional explanation in card disclosures beyond revisions to numerical disclosures. For example, the revised disclosures will need to explain the new fee cap of 25% of the minimum required payment and how it relates to the \$8 fee cap. Card issuers will also need to update their systems to operationalize the new fee cap of 25% of the minimum required payment. Such updates may be burdensome for card issuers and would require testing before the updates can become operational. Further, existing disclosures relating to a higher late payment fee for subsequent late payments within the next six months will need to be eliminated. Sixty days is an inadequate amount of time to make these and similar changes. Finally, any further changes the Bureau may make in the final rule, such as adopting a 15-day courtesy period, will require additional changes to operating systems and other non-numerical revisions to disclosures that card issuers have no practical way to implement within 60 days.²³¹

IX. The Bureau should not adopt other potential changes because neither the factual record nor the law supports such changes.

²³⁰ The Bureau does acknowledge a subset of the places where the late fee is disclosed in the Regulation Z model forms:

The Bureau solicits comment on whether the late fee amounts of \$35 in these sample forms or clauses, as applicable, should be revised to set forth late fee amounts of \$8, and whether the maximum late fee amounts of “Up to \$35” in these sample forms or clauses, as applicable, should be revised to set forth a maximum late fee amount of “Up to \$8” so that the late fee amounts and maximum late fee amounts in the examples are consistent with the proposed \$8 late fee safe harbor amount set forth in proposed § 1026.52(b)(1)(ii). The Bureau notes that the 11 forms or clauses discussed above are just samples; card issuers would need to disclose the late fee amount that they charge or the maximum late fee amount on the account, as applicable, consistent with the restrictions in § 1026.52(b).

88 Fed. Reg. at 18930.

²³¹ Although the penalty fee caps became effective on August 22, 2010, the Federal Reserve Board recognized that it would take card issuers longer to revise their fee disclosures and, therefore, established a mandatory compliance date of December 1, 2010 for the amendments to the penalty fee disclosure requirements. 75 Fed. Reg. at 37563.

A. The CFPB should not establish a 15-day courtesy period, after the payment due date, before late payment fees can be assessed.

The Bureau requested comment on whether it should establish a 15-day courtesy period, after the payment due date, before any late payment fees can be assessed. BPI opposes any such courtesy period. The Bureau has no statutory authority to adopt such a courtesy period.

Imposing a courtesy period would completely upend how banks assess credit risk and negatively impact access to credit, especially for the most vulnerable consumers. Banks cannot tell if a consumer is late because they forgot to pay on time or because they are actually going to go into delinquency or default. Without being able to assess a fee when the consumer is late, the bank will be forced to reassess credit risk standards for consumers across the board to manage to the riskiest of consumers. Additionally, consumers may be confused when their payment is *actually* due – whether it’s the due date or 15 days later – which further complicates repayment risk assessments and fosters poor financial habits. Imposing an arbitrary 15-day courtesy period, without research or authority, would completely impact the funding and credit risk standards. This would impose unintended negative consequences on consumers and credit access that have not been appropriately studied.

A courtesy period would upend how banks assess credit risk and inappropriately would encourage late payments by consumers. Absent the ability to impose late payment fees during a 15-day courtesy period, consumers may consider the date their payments are due not to be the payment due date, but the end of the courtesy period. A courtesy period, in effect, would extend the 25-day payment due date to 40 days and would likely result in and encourage more late payments.

The CARD Act permits a card issuer to impose a late payment fee “due to the failure of the obligor to make payment *on or before the payment due date* for such payment.”²³² The phrase “on or before the payment due date” means exactly what it says. Had Congress intended to create, or allow the Bureau to create, a courtesy period, it could have done so. Rather, Congress made it clear in the CARD Act that late fees can be assessed when a payment is not made on the payment due date.²³³ The Bureau cannot rewrite the statute (or card issuer contracts) to change the timing of when a card issuer can impose a late payment fee.

The Bureau attempts to rationalize a courtesy period by asserting that “card issuers may not incur *significant* costs to collect late payments immediately after a late payment violation.”²³⁴ However, banks are immediately incurring costs and the CARD Act does not require that card issuers’ costs reach some minimal threshold before card issuers can impose late payment fees. In fact, cost is only one consideration the statute identifies as relevant to establishing penalty fees. Congress recognized that

²³² CARD Act Section 202, 123 Stat. 1745 (15 U.S.C. § 1637(b)(12)(A)) (emphasis added).

²³³ Under Section 163 of TILA, a creditor can “treat a payment on a credit card account under an open end consumer credit plan as late for any purpose” so long as “the creditor has adopted reasonable procedures designed to ensure that each periodic statement including the [statement disclosures required pursuant to 15 U.S.C. § 1637(b)] is mailed or delivered to the consumer not later than 21 days before the payment due date.” 15 U.S.C. § 1666b.

²³⁴ 88 Fed. Reg. at 18927 (emphasis added).

deterrence and conduct of the consumer – two considerations that the Bureau dismisses – also are relevant for setting reasonable and proportional penalty fees. A 15-day courtesy period would undermine and fail to give effect to the statutory considerations of deterrence and conduct of the consumer.

The Bureau further attempts to rationalize a 15-day courtesy period by explaining that late payments are not reported to credit bureaus until a cardholder is 30 days past due and past due accounts are sent to third-party debt collectors until 2-6 months of repeated late payments.²³⁵ Banks count the consumer late immediately, but are giving the consumer some time to correct before potential putting a negative mark on their credit report. The Bureau should support banks not reporting consumers late on the first day, instead of using it to support this misplaced argument. Legally, the CARD Act does not condition the imposition of a late payment fee based on when a card issuer reports to credit bureaus or sends delinquent accounts to third-party debt collectors and these factors should have no bearing on when a card issuer can assess a late payment fee. In practical terms, credit bureau reporting is generally done in batch on a monthly reporting cycle, not in real-time, and credit bureaus report late payments on credit trade lines in fixed increments starting at 30-days late. Similarly, credit card issuers generally do not send accounts with late payments to outside collections until some period of time has elapsed without receipt of payment.

The Bureau notes that “late payments may be caused by problems with unavoidable processing delays.”²³⁶ The Bureau provides no data on the frequency of such delays. The one example provided by the Bureau involves electronic payments made over the weekend. This example does not justify a 15-day courtesy period. Moreover, consumers who wait until the last minute to pay their bills risk paying late, whether they pay by mail, telephone, electronically moving funds from one financial institution to another, or seek to pay outside of a card issuer's branch network. Processing delays may also arise if consumers wait until the end of any courtesy period to make their payments, so the proposed courtesy period does not solve the purported problem.

B. The proposed rule should not apply to all credit card penalty fees.

The Bureau requested comment on whether it should change the safe harbor to \$8 for all credit card penalty fees, not just late payment fees. The Bureau has not produced any data or analysis to support applying an \$8 fee cap to all credit card penalty fees. The Bureau admitted in the proposal that such data is lacking.²³⁷ Applying the proposed \$8 safe harbor to all credit card penalty fees without any record indicating that such a change in the safe harbor results in fees that are reasonable and proportional to the omission or violation would be arbitrary and capricious.

Further, as the Bureau has noted, penalty fees other than late payment fees represent a very small percentage of total penalty fees (about 1% of all penalty fees imposed by major card issuers).²³⁸ In

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 18914.

²³⁸ *Id.*

limiting the proposal to late payment fees, the Bureau noted that late fees “pose far greater consumer protection concerns than do other penalty fees totaling less than \$0.2 billion.”²³⁹ Thus, applying the proposed \$8 safe harbor to all penalty fees would have limited impact on consumers.

a. The safe harbor for penalty fees should not be eliminated (including for penalty fees other than late payment fees).

The Bureau requested comment on whether it should eliminate the safe harbor for penalty fees. BPI opposes the elimination of the safe harbor for penalty fees, including for penalty fees other than late payment fees. The safe harbor provides compliance certainty for credit card issuers and card issuers have relied on the safe harbor since the Board implemented it in 2010. The Bureau has not provided any evidence or support for why the penalty fees safe harbor should be eliminated.

Furthermore, elimination of the penalty fees safe harbor would introduce considerable uncertainty into the permissibility of any particular penalty fee, including late payment fees. As discussed in Section IV above, the Bureau has not established adequate standards for determining whether the amount of any penalty fee is “reasonable and proportional” to the omission or violation to which the fee relates.²⁴⁰ The existing “fees based on cost” provision in Regulation Z provides that 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.”²⁴¹ This standard, however, ignores deterrence and the conduct of the consumer, and disallows consideration of certain costs. It would be arbitrary and capricious for the Bureau to eliminate the penalty fees safe harbor without first promulgating adequate standards for use by card issuers in determining a reasonable and proportional penalty fee.

Additionally, as the Bureau noted in its proposal, no commenters on the Bureau’s 2022 ANPR supported eliminating the safe harbor provisions.²⁴² To the contrary, most industry commenters “expressly opposed” elimination of the safe harbor provisions, and “[n]o card issuers stated that they use the cost analysis provisions to determine the amount of late fees” provided in 12 C.F.R. § 1026.52(b)(1)(i).²⁴³

Finally, elimination of the safe harbor would require card issuers to change their systems to apply the “fees based on costs” provisions of 12 C.F.R. § 1026.52(b)(1)(i) for determining the appropriate amount of penalty fees to charge, including late payment fees. Card issuers would require adequate time to conduct such a cost analysis and implement such a cost analysis into their systems. As described above, the effective date of 60 days after publication of the final rule would not be an adequate time for issuers to implement such changes.

²³⁹ *Id.*

²⁴⁰ *See* 15 U.S.C. § 1665d(b).

²⁴¹ 12 C.F.R. § 1026.52(b)(1)(i).

²⁴² 88 Fed. Reg. at 18924.

²⁴³ *Id.*

C. The CFPB should not require card issuers to offer an auto payment option, provide additional notification of the payment due date within a certain number of days prior to the due date, or both, as a prerequisite or prerequisites for relying on the penalty fee safe harbor.

The Bureau requested comment on whether it should require card issuers to offer an auto payment option and/or provide additional notification of the payment due date in order to rely on the penalty fee safe harbor. BPI acknowledges that auto payment options and notifications of upcoming payment due dates are practices that may help consumers avoid late payment fees. Many card issuers have adopted one or both of these options without a regulatory mandate. But for some consumers, these tools may not be optimal, and little is known about the effectiveness of *substituting* reminders and warnings for reduced late fees.²⁴⁴

TILA's penalty fee safe harbor provision, however, does not authorize the Bureau to impose such conditions on card issuers seeking to rely on the safe harbor. TILA explicitly provides that the Bureau "may issue rules to provide an amount for any penalty fee or charge . . . that is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates."²⁴⁵ The statute does not authorize the Bureau to make the safe harbor subject to prerequisites or conditions. If Congress intended to so limit card issuers' ability to use the safe harbor, it would have made any such prerequisites or conditions explicit in the statute or expressly granted the Bureau the authority to adopt such prerequisites or conditions.

Additionally, a regulatory provision that card issuers provide one or both of these options in order to rely on the safe harbor would limit issuer flexibility and increase compliance costs.

Finally, any such requirement would require time for issuers not currently offering auto payment options or notifications of the payment due date to implement such changes to their systems and operating procedures. As described above, the effective date of 60 days after publication of the final rule does not provide adequate time for issuers to implement such changes.

X. Conclusion

Credit cards provide consumers with numerous benefits, and late fees help to incentivize prudent financial decisions by consumers. Additionally, banks are subject to stringent prudential requirements to manage credit risk, and late fees are one tool banks use to manage that risk. The Bureau's proposal to substantially reduce the late fee safe harbor to \$8 would ultimately cause considerable consumer harm, which the Bureau acknowledges but arbitrarily disregards as a concern. Moreover, as described extensively throughout this letter, the Bureau's proposal suffers from multiple legal and analytical deficiencies. If the CFPB does not address these deficiencies, the proposal would be vulnerable to legal

²⁴⁴ See Paolina C. Medina (2011). "Side Effects of Nudging: Evidence from a Randomized Intervention in the Credit Card Market", *The Review of Financial Studies*, Volume 34, Issue 5, Pages 2580–2607, available at <https://academic.oup.com/rfs/article-abstract/34/5/2580/5903746?login=true>.

²⁴⁵ 15 U.S.C. § 1665(e).

challenge and at risk of being set aside and would harm the very consumers the proposal purports to benefit.

* * * * *

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

Respectfully submitted,

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Annex



March 16, 2023

Via electronic mail

The Honorable Rohit Chopra
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1700 G Street, NW
Washington, D.C. 20552

Re: **NPR on Credit Card Penalty Fees (Regulation Z) (Docket No. CFPB-2023-0010; RIN 3170-AB15)**

Dear Director Chopra:

The Bank Policy Institute, American Bankers Association, Consumer Bankers Association, Credit Union National Association, and the National Association of Federally-Insured Credit Unions²⁴⁶ are writing with respect to the Consumer Financial Protection Bureau's notice of proposed rulemaking regarding Credit Card Penalty Fees (Regulation Z).²⁴⁷ The NPR proposes sweeping changes to the provisions of Regulation Z related to credit card late fees. Among other changes, the proposal would reduce the credit card late fee safe harbor to \$8 from its current levels of \$30 for a first violation and \$41 for a subsequent violation within the next six billing cycles. In support of that dramatic reduction and other proposed changes, the Bureau relies extensively on data from the Federal Reserve Board's Y-14M data collection and other "[i]nformation provided in response to a series of data filing orders made

²⁴⁶ See Appendix for association descriptions.

²⁴⁷ The NPR has not yet been published in the Federal Register, but was published on the CFPB's website on February 1, 2023, available at: [Credit Card Penalty Fees \(Regulation Z\) \(consumerfinance.gov\)](https://www.consumerfinance.gov/credit-card-penalty-fees-regulation-z/).

to several industry participants, comprised of two distinct sets” and refers repeatedly to analyses it conducted using such data.²⁴⁸

We support regulatory efforts to promote transparency, consumer choice and competition in the markets for financial products and services, and we intend to comment on the Bureau’s NPR. Yet the Bureau has not released to the public the underlying data and empirical analysis on which the Bureau relies. The Associations understand that releasing the Y-14M data and other data on which the Bureau has relied may raise confidentiality concerns; accordingly, we request only that the Bureau release such data in a manner that is anonymized and/or aggregated to the extent necessary to protect confidential bank information. Without this information, it is virtually impossible to understand or replicate the analysis in any meaningful way, significantly hindering the public’s ability to provide thoughtful input.

The Bureau’s decision to rely on data and analysis that it has not publicly disclosed conflicts with bedrock principles of administrative law.

As the D.C. Circuit has explained, it “is the agency’s *duty* to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.”²⁴⁹ “An agency commits serious procedural error when,” as in the NPR here, “it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”²⁵⁰ After all, “[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency.”²⁵¹

To comply with its obligations —and to ensure that the public has a meaningful opportunity to comment on its sweeping proposal — the Bureau must “expose[]” its studies and data “to refutation” in the rulemaking proceeding.²⁵² It also “must explain the assumptions and methodology” it used “and, if the methodology is challenged, must provide a complete analytic defense.”²⁵³ In short, the Bureau must

²⁴⁸ The NPR refers to the 2021 Annual Credit Card Report, which states that the two sets are: “a) Data requested from a broad and diverse group of issuers to address a range of topics that neither CCP nor Y-14 data can address. This report refers to these data as Mass Market Issuer (MMI) data. These data cover application and approval volumes, rates, and channels, deferred interest, digital account servicing, certain aspects of the impact of COVID-19 on consumers and issuers, and loss mitigation policies and practices, including debt collection. b) Data requested from a diverse group of specialized issuers. These summary data, which focus on basic indicators of usage and cost, in places supplement the Y-14 to allow for a broader or more detailed perspective into certain facets of the market than either the Y-14 or [the Bureau’s Consumer Credit Panel] allow. Where these data supplement Y-14 data, those data are collectively called “Y-14+”.” See, NPR at 19, note 58, citing to the Bureau’s 2021 Card Report, at 17.

²⁴⁹ *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) (emphasis added; citation omitted).

²⁵⁰ *Id.* (citations omitted).

²⁵¹ *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

²⁵² *Id.* at 202.

²⁵³ *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) (citation omitted).

disclose the “most critical factual material” on which it relied and provide “further opportunity to comment.”²⁵⁴

In light of the Bureau’s legal obligation to provide the underlying data and analysis on which it has relied in connection with the proposed rule, we respectfully request that the CFPB publish this data and analysis, including the methodologies the CFPB has used, immediately. Further, the Bureau must extend the comment period to ensure adequate time for the public to review and meaningfully comment on the proposal in light of that critical information.²⁵⁵ To reiterate, we recognize that the Y-14M data or other data could raise confidentiality concerns and request only that the Bureau release such data and analysis in a manner that is anonymized and/or aggregated to the extent necessary to protect bank confidentiality. But the Bureau must either do so or refrain from relying on the data and related analysis in support of its proposed rule.

Finally, to reiterate, we intend to respond to the proposal, and our response may include other comments related to the Bureau’s reliance on Y-14M and other data and its analysis of such data. However, because of the immediate need for the data and analysis on which the Bureau relied, we are first raising this issue for the Bureau’s prompt attention.

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

Respectfully submitted,

Bank Policy Institute
American Bankers Association
Consumer Bankers Association
Credit Union National Association
National Association of Federally-Insured Credit Unions

²⁵⁴ *Chamber of Commerce v. SEC*, 443 F.3d 890, 900-01 (D.C. Cir. 2006).

²⁵⁵ The Associations previously requested an extension of the comment period to provide sufficient time to respond to the NPR. See Letter from ABA, et. al. to the CFPB (Feb. 28, 2023), available at: [Request for Extension of Comment Period for Credit Card Penalty Fees \(aba.com\)](#).

Appendix

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 bank-originated small business loans, and are an engine for financial innovation and economic growth.

The American Bankers Association is the voice of the nation's \$23.6 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$19.2 trillion in deposits and extend \$12.2 trillion in loans.

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.

Credit Union National Association (CUNA) is the only national association that advocates on behalf of all of America's credit unions, which are owned by 130 million consumer members. CUNA, along with its network of affiliated state credit union leagues, delivers unwavering advocacy, continuous professional growth and operational confidence to protect the best interests of all credit unions.

The National Association of Federally-Insured Credit Unions (NAFCU) advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 134 million consumers with personal and small business financial service products. The association provides members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment. NAFCU proudly represents many smaller credit unions with relatively limited operations, as well as many of the largest and most sophisticated credit unions in the Nation. NAFCU represents 78 percent of total federal credit union assets and 63 percent of all federally-insured credit union assets.