

The CFPB's Misrespresentation about the Evidentiary Support for its Policies: Latest Examples

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As we have highlighted in past posts, the CFPB has developed a proclivity for misrepresenting, exaggerating or skewing the empirical support for its assertions and actions. Most prominently, beginning in January 2022, the CFPB began a crusade against what it termed "junk fees," despite the fact that the term "junk fees" has no legal meaning and no place in the CFPB's underlying statutory authority.

The first target of the CFPB's "junk fee" campaign was credit card late fees. Late fees serve legitimate purposes. They are designed to encourage timely payments and compensate the lender or service provider for the delay in receiving the expected payment. Of course, late fees are commonly charged in various situations, such as rent payments, utility bills, tax filings and membership fees.

The CFPB's analysis supporting the proposed rule, however, was highly skewed and error-ridden.[1] For example, the agency cherry-picked and downplayed evidence from some published research studies and ignored altogether other key relevant studies. The agency also conducted its own empirical analysis, which suffered from multiple flaws and biases. Nevertheless, the Bureau asserted that the findings from its literature review and empirical analysis supported the reduction of the late fee safe harbor from $30 to $8.

[1] *See* Paul Calem, BPI, "The CFPB's Deeply Flawed Proposal on Credit Card Late Fees – Part 1" (April 13, 2023), The CFPB's Deeply Flawed Proposal on Credit Card Late Fees - Part 1 - Bank Policy Institute (bpi.com); Paul Calem, BPI, "The CFPB's Deeply Flawed Proposal on Credit Card Late Fees – Part 2" (May 5, 2023), The CFPB's Deeply Flawed Proposal on Credit Card Late Fees - Part 2 - Bank Policy Institute (bpi.com); Paul Calem, BPI, "The CFPB's Deeply Flawed Proposal on Credit Card Late Fees – Part 3" (June 6, 2023), The CFPB's Deeply Flawed Proposal on Credit Card Late Fees – Part 3 - Bank Policy Institute (bpi.com).

The proposed rule targeting credit card late fees has been finalized, and not surprisingly several trade associations representing credit card issuers have challenged the rule in court, arguing against the CFPB's deficient analysis and methodology and the legitimacy of the rule itself.[2]

Credit Card Interest Rates

This pattern of misconstruing or biasing research to support favored policy positions continued in February of this year when the CFPB released a paper accusing large credit card issuers of charging non-competitive interest rates. The paper contended that the credit card APRs of large issuers are significantly higher than those of smaller issuers. However, as pointed out in a previous BPI blog post, the Bureau's analysis was superficial and misleading and drew questionable conclusions. The paper had several shortcomings, including that the analysis failed to separate out credit unions and specialty card programs. These cards have important distinctions regarding the APRs they can offer, rendering comparison to general purpose cards inappropriate. For instance, federal credit unions can offer lower interest rates for several reasons, including that they are legally prohibited from charging interest (inclusive of all finance charges) above 18 percent currently.[3] Additionally, most credit unions are small, which means they may only have the capacity to issue cards with relatively small credit lines, which also may mitigate delinquency risk. Therefore, comparing credit cards issued by credit unions to general purpose cards is inappropriate.

Similarly, specialty cards, such as retail co-branded and travel- or entertainment-related, and others such as secured cards, are targeted to narrow population segments. Therefore, pricing can differ between these specialized card plans and generic cards, as well among the specialty plans, due to differences in the nature of the benefits provided or because of differences in consumer spending patterns and repayment behaviors that affect delinquency risk. Therefore, these, too, have important distinctions from general purpose cards, rendering comparison to general purpose cards inappropriate.

Complexity in Pricing

A repetition of the CFPB's departure from accurately representing its research findings came when the Bureau published a paper on April 30, 2024 that describes a "laboratory experiment" that "investigated the effects of price complexity on market outcomes."[4] The implications of this research were lavishly misconstrued and misrepresented by the Bureau.

In the "laboratory experiment," the elements of pricing became less observable to buyers as the complexity of pricing increased. The study's main finding, which is not controversial, is that:

> On average, additional complexity [in pricing] led sellers to set higher prices, increased the likelihood that consumers made mistakes, and increased transaction prices.[5]

In other words, the experiment demonstrated that when pricing structures become more complex and less transparent, sellers tend to charge higher prices; consumers are more likely to make errors in their

[2] *See* Chamber of Commerce of the United States of America et al. v. Consumer Financial Protection Bureau (N.D. Tex, Case No. 4:24-CV-213). BPI filed an amicus brief in support of plaintiffs' claims, highlighting the deficiencies with the CFPB's data and methodology.
[3] *See* https://www.nafcu.org/compliance-blog/rates-charges-and-fees-vs-ncuas-interest-rate-limitation.
[4] Consumer Financial Protection Bureau, "Price Complexity in Laboratory Markets," Prepared by Dustin Beckett (April 2024), Price Complexity in Laboratory Markets (consumerfinance.gov)
[5] *Id*. at 45.

decision-making; and the overall prices of transactions increase. This finding suggests that pricing transparency and simplicity are beneficial for consumers.

However, the CFPB issued a press release announcing its new research, and that press release went well beyond the study's actual conclusion. The Bureau asserted:

> [the study's] findings contribute to a ***growing consensus of research and real-world observations showing that junk fees increase overall prices beyond what a fair and competitive market would allow*** (emphasis added).[6]

The press release then lists the elements of complex pricing in the markets for credit cards, checking and savings accounts, mortgages and auto loans.

The CFPB's assertions grossly misrepresent the experiment's results. The study did not specifically address any particular pricing elements, fees or markets. Furthermore, the press release conveniently omits a key finding of the study: increased competition in these laboratory markets reduced the negative effects of complexity for consumers. Of course, the markets for the products listed (credit cards, checking and savings accounts, mortgages and auto loans) are generally regarded as competitive.[7]

The press release also fails to acknowledge a vast regulatory regime administered by the CFPB and how it mitigates potential negative effects of non-transparent pricing tied to complexity.

Also missing from the narrative is the reason behind different pricing structures for different consumer financial products and services: card issuers can serve a wider range of consumers across the income and risk spectrums when they can offer different pricing structures. The types and amounts of fees charged by banks are the result of robust competition to provide products and services to consumers across the income and risk spectrum.[8]

Ironically, the study itself cautions against extrapolating the study's findings to make real-world conclusions,[9] yet the CFPB violates this precept in sensationalizing the study's results.

Credit Card Rewards

A report on credit card rewards that the CFPB issued on May 9 is the latest instance of the Bureau misrepresenting and skewing the conclusions that can reasonably be drawn from its research and data.[10]

The report provides a fair amount of useful information about the nature of the consumer complaints submitted to the CFPB concerning card rewards programs, highlighting specific areas where credit card issuers could potentially enhance customer service related to these programs. Once again, however, the

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[6] CFPB Press Release: "CFPB Publishes Research Finding Higher Price Complexity Leads Consumers to Pay More" (April 30, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-publishes-research-finding-higher-price-complexity-leads-consumers-to-pay-more/.

[7] *See, e.g.,* Paul Calem and Benjamin Gross BPI, "The Credit Card Market is Not Even Close to Being Overly Concentrated" (April 18, 2024), The-Credit-Card-Market-is-Not-Even-Close-to-Being-Overly-Concentrated.pdf (bpi.com).

[8] For example, banks generally do not charge a single, monthly fee for deposit-related services, such as payments services and other transactions, because such fees have proven unpopular with consumers, who prefer a menu of fees for component services. Therefore, banks generally charge fees for (i) use of a particular product or service – for example, foreign ATM or safety deposit fees – in order to keep unavoidable charges low, and (ii) behavior that indicates risk – for example, NSF fees – that if provided free of charge could harm the safety and soundness of the institution, put consumers at risk of account closure or entering a debt spiral, or both. Further, if banks were not able to charge for services, or were limited as to the amount they could charge, the result could be harmful to consumers, as banks may simply cease offering certain products or services or charge more to consumers for other services, and consumers may be forced to turn to non-bank providers of certain products and services that, as the CFPB has acknowledged, may "charge higher fees and interest rates."

[9] CFPB, "Price Complexity in Laboratory Markets," at 46.

[10] CFPB, "Credit Card Rewards: Issue Spotlight," (May 2024), Credit Card Rewards Issue Spotlight (consumerfinance.gov).

assertions made in the accompanying press release and in the report itself go beyond what the data can support.

Specifically, the CFPB asserts in the press release accompanying the report that "consumers encounter numerous problems with credit card rewards programs," implying that these problems are widespread and rampant.[11] In reality, complaints about rewards programs are relatively infrequent compared to other credit card complaints submitted to the Bureau by card customers. The report is based on just 1,200 complaints related to rewards programs in 2023, which accounts for just 2 percent of the 57,000 total credit card complaints that year. This small number cannot reasonably support an inference of widespread dissatisfaction with rewards programs.

Furthermore, solely examining complaints provides an inherently one-sided view that fails to present a balanced perspective on how customers view these programs overall. Complaints data alone cannot adequately capture the full range of customer sentiments and experiences, both positive and negative, especially in light of the fact that there are over 190 million credit cards outstanding.[12]

In other words, a relatively small number of complaints from consumers alleging that they were misled about the benefits offered by a rewards credit card is not evidence of a widespread or systematic problem. Yet, the CFPB's press release asserts that companies "***often use*** rewards programs as a "***bait and switch***" by burying terms in vague language or fine print and changing the value of rewards after people sign up" (emphasis added).[13] This "bait and switch" allegation has no root in the data or the study itself. Like "junk fees," "bait and switch" is another loaded term of the type that regulatory agencies historically have never used.

Of course, if there is evidence that individual issuers are deceiving consumers, the CFPB can and should address those practices through supervisory and enforcement actions. And, if there is evidence that the relevant disclosures are ineffective or confusing, the CFPB has broad authority to design, test, and update disclosures with respect to virtually all consumer financial products and services.

Worse yet, slipped into the report and press release are multiple assertions completely divorced from any complaints the CFPB has received. Their inclusion in a report purportedly based on complaints data gives the impression that they are grounded in data (a form of bait-and-switch in itself). These assertions appear to be nothing more than a recitation of the CFPB's criticisms of card rewards programs in general, untethered to any data supporting those criticisms.

One such unsupported assertion is that "rewards programs distort the true costs of credit cards."[14] Again, this conclusion is not supported by any complaint data; nor is any other direct evidence offered to support it. Instead, to support this contention, the report inserts (without explanatory context) a few observations from previous studies, which at best can be seen as broadly compatible with this view but can hardly be deemed evidence. For example, the discussion contains a reference to the fact that some consumers focus on rewards and sign-up offers – rather than on pricing terms – when shopping for a card. But this fact does not constitute evidence that rewards programs mislead or confuse consumers about the "true cost of credit."[15] To the contrary, transactors – those who pay their balances in full

[11] CFPB Press Release: "CFPB Publishes Research Finding Higher Price Complexity Leads Consumers to Pay More."
[12] CFPB "The Consumer Credit Card Market" (Oct. 2023) at 4, 2023 Consumer Credit Card Market Report (consumerfinance.gov).
[13] CFPB Press Release: "CFPB Publishes Research Finding Higher Price Complexity Leads Consumers to Pay More."
[14] CFPB Rewards Report at 4; CFPB Press Release: "CFPB Publishes Research Finding Higher Price Complexity Leads Consumers to Pay More".
[15] Another observation cited is that "[c]onsumers who carry revolving balances often pay far more in interest and fees than they get back on rewards." This statement bears no relation to the question of "true cost of credit" and is a non sequitur: rewards are not designed or marketed as a means of defraying interest costs associated with borrowing. The discussion also refers to the notion that "cardholders with near-prime

every month – and who constitute approximately ***half of credit card users*** – logically would rationally focus primarily on rewards and similar offers rather than interest rates that are irrelevant to them.[16]

Additionally, the press release states that credit card companies "focus marketing efforts on rewards, like cash back and travel, instead of on low interest rates and fees," suggesting, without merit, that issuers are doing something wrong or even illegal by choosing what features to highlight in their marketing campaigns.[17] For cards with rewards, issuers may choose to highlight those benefits simply because they "frequently influence credit card applications, as consumers report that rewards and sign-up offers are top factors influencing their shopping decisions."[18] Focusing marketing efforts on the elements of cards of most interest to consumers makes sense. Card issuers are free to promote the features they believe will appeal to customers, which does not inherently suggest any wrongdoing. Moreover, card issuers offer a variety of cards, some with reward programs, and some without, as acknowledged by the Bureau's report, to appeal to consumers with different preferences.[19]

Remarkably, in making these assertions the CFPB's press release and study ignore the CFPB's own role in the marketplace.[20] Since the mid-2000s, disclosure laws now overseen by the CFPB have been subject to extensive consumer testing to ensure clarity of terms and consumer understanding.[21] Yet, the report makes no mention of this disclosure scheme or what the CFPB learned from prior testing.

And perhaps most egregiously of all, the report attempts to characterize the credit card market as noncompetitive, asserting, among other things, that "dominant credit card issuers increasingly market credit card products based on rewards . . . create a barrier to entry for would-be competitors, and make it harder for smaller issuers with often lower pricing to compete with sizeable rewards offerings by the largest banks."[22] Yet, nothing in the report supports such a statement about the industry, which is highly competitive by all standard measures.[23]

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and subprime scores typically pay more in interest and fees on a rewards card than a card without rewards, even after accounting for the value of earned rewards." However, the study from which this observation is drawn explains that it reflects increased spending and higher balances on the cards with rewards (crucial omitted context), which may or may not reflect consumers' perceptions of the "true cost of credit."

[16] Board of Governors of the Federal Reserve System, Research and Analysis, "Economic Well-Being of U.S. Households in 2023" (May 2024) at 40 (Noting that "Eighty-two percent of adults had a credit card in 2023. They were nearly evenly split between the people who paid off their balances in each of the previous 12 months and people who carried balances from month to month at least once in the prior year. Just about one-quarter said they carried a balance most of the time during the prior 12 months."), Economic Well-Being of U.S. Households in 2023 - May 2024 (federalreserve.gov).

[17] *Id*.

[18] *Id*.

[19] Rewards Report at 4 ("The offering of rewards is a feature added on to credit cards and is not necessary for the underlying extension of credit or the processing of transactions and payments – indeed, not all credit cards have a rewards component.).

[20] Comprehensive consumer fee disclosure statutes and regulations administered by the CFPB include: (i) the Truth in Lending Act ("TILA") and Regulation Z, 15 U.S.C. § 1601 *et seq.* and 12 CFR part 1026; (ii) the Real Estate Settlement Procedures Act ("RESPA") and Regulation X, 12 U.S.C. § 2601 *et seq.* and 12 CFR part 1024; (iii) the Electronic Fund Transfer Act ("EFTA") and Regulation E, 15 U.S.C. § 1693 *et seq.* and 12 CFR part 1005; (iv) the Truth in Savings Act ("TISA"), 12 U.S.C. § 4301 *et seq.* and 12 CFR part 1030; and (v) Consumer Leasing Act ("CLA") and Regulation M, 15 U.S.C. § 1667 *et seq.* and 12 CFR part 1013. TILA requires fee disclosures for all types of consumer credit products including credit cards, mortgages, auto loans, and installment loans, while TILA and RESPA collectively require mortgage and mortgage closing disclosures. The EFTA and TISA collectively require fee disclosures related to deposit products, electronic fund transfers, overdrafts, remittance transfers, prepaid cards, and gift cards. The CLA requires fee disclosures related to consumer leases.

[21] *See, e.g.,* 81 Fed. Reg. 83,934, 83,954-56 (Nov. 22, 2016) (discussing extensive consumer testing of prepaid card disclosures "to gather in-depth information about how consumers shop for prepaid cards and the factors they consider when acquiring such products" and noting that "[g]enerally, participants were able to understand the basic fee information presented in all of the prototype disclosure forms."); 78 Fed. Reg. 79,730, 79,732 & n.26, 79,742, 79,746-50, 79,753, 79,756 (Dec. 31, 2013) (discussing extensive consumer testing conducted in developing the TILA-RESPA integrated disclosure forms); 77 Fed. Reg. 6194, 6200, 6227-28, 6230, 6232-33. 6269-70 & n.88 (Feb. 7, 2012) (discussing reliance on consumer testing in developing remittance transfer disclosures); 75 Fed. Reg. 7658, 7669, 7679-81, 7690, 7694, 7728, 7742, 7762, and 7769 (Feb. 22, 2010) (summarizing consumer testing conducted in developing credit card disclosures); 74 Fed. Reg. 59,033, 59,034-36, 59,039, 59,047-49 (Nov. 17, 2009) and 74 Fed. Reg. 5584, 5586-88 (Jan. 29, 2009) (discussing consumer testing for overdraft fee and opt-in disclosures).

[22] Rewards Report at 4.

[23] BPI, Paul Calem & Benjamin Gross, "The Credit Card Market is Not Even Close to Being Overly Concentrated" (April 18, 2024), The-Credit-Card-Market-is-Not-Even-Close-to-Being-Overly-Concentrated.pdf (bpi.com).

Conclusion

In research, the data and analysis should speak for themselves. Yet, in several instances, described herein and in previous notes, the CFPB has not upheld that principle. Rather, the CFPB has mischaracterized data and crafted its analyses to support pre-determined outcomes, which appear to be politically driven. By overstating the conclusions that can be reasonably drawn from its data, the CFPB is undermining public trust in the agency, which will ultimately hinder its ability to serve its core mission of helping consumers.

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