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May 3, 2023

Legal Division Docket Manger
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Docket No. CFPB-2023-0010, RIN 3170-AB15 - Credit Card Penalty Fees (Regulation Z)

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("Bureau" or "CFPB") rule concerning credit card penalty fees under Regulation Z ("Proposed Rule").[2] ICBA believes that this proposed rule is fundamentally flawed and should be withdrawn immediately.

ICBA believes that the Proposed Rule is being rushed to completion as a result of political pressure, and the proposal is fundamentally and procedurally flawed in numerous respects. The Bureau's rush to judgment on this issue follows the White House's advertising of the Proposed Rule—as being a *fait accompli* to the industry—well before industry stakeholders were afforded an opportunity either to review the Proposed Rule or submit comments in support of or against its implementation. Indeed, the White House has persistently signaled to consumers and the financial services industry that credit card late fees will be reduced by 75%.[3] This statement made by the White House, as well as other statements discussed in further detail in the sections that follow, each predate the Bureau's publication of the Proposed Rule in the Federal Register.

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding $5.8 trillion in assets, $4.8 trillion in deposits, and $3.8 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at **www.icba.org**.
[2] 88 Fed. Reg. 18906 (Mar. 29, 2023).
[3] *See, e.g.*, @WhiteHouse, Twitter (Mar. 27, 2023, 11:00AM), http://twitter.com/WhiteHouse/status/1640368136917602305?lang=en ("The Biden-Harris Administration is working to cut credit card late fees by 75% - which would save consumers an estimated $9 billion a year.").

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The Rule is based on an admittedly incomplete set of data and assumptions about the credit card market. Consequently, the Bureau's perception of large card issuers' practices effectively saddles small issuers – including community banks – with an arbitrary, one-size-fits-all rule that is likely to drive many community banks out of the credit card market and deprive their customers of any choice but to use the same large banks to which the Proposed Rule is purportedly directed. Further, the Bureau bypassed the mandatory small business review process thus failing to obtain valuable information to avoid the impact on community banks that the Proposed Rule will have. The credit card market is not monolithic, and the Bureau's apparent desire to assume otherwise makes the Proposed Rule arbitrary and capricious as it relates to community banks.

In our view, this proposal, if adopted, would be detrimental to consumers by sending the message that punctual credit card payments are not a significant priority, which could result in more late payments, harming consumers' credit ratings in the long run. This, in turn, could result in consumers losing access to credit or paying higher interest rates if they make payments late more frequently. Moreover, this proposed rule risks undermining the integrity of the Administrative Procedures Act's rulemaking process. It is difficult to believe that the comment requirement of the notice and comment rulemaking process is anything more than a perfunctory exercise for the Bureau.

More specifically, we are concerned the Proposed Rule is flawed because:

- The Bureau's decision to bypass the SBREFA process in connection with this rulemaking was a procedural error that left the Bureau without the necessary feedback to consider the impact of the Proposed Rule on community banks.

- The Bureau predetermined the outcome of the Proposed Rule before going through the required notice and comment rulemaking process, as prescribed by the White House in prior communications.

- The Bureau relied on portfolio and account data representing only the industry's largest credit card issuers and inaccurately extrapolated the effects of the Proposed Rule on community bank credit card operations.

- The proposed 15-day grace period for late fees will be extremely confusing and detrimental to consumers and will directly interfere with consumers' ability to avoid the accrual of interest charges and otherwise manage their credit cards responsibly.

- The Bureau failed to consider how the effects of inflation will erode the true amount of the $8 late fee cap over time.

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For these reasons, ICBA respectfully suggests that the rulemaking should not proceed.

The Bureau Committed Procedural Error by Arbitrarily Bypassing the Small Business Review Panel Process Described in the Small Business Regulatory Enforcement Fairness Act of 1996

On August 1, 2022, the ICBA submitted a comment letter ("Letter") in response to the Bureau's Advanced Notice of Proposed Rulemaking ("ANPR") of the Proposed Rule.[4] Also, on January 20, 2023, the ICBA, alongside other trade associations within the financial services industry, submitted a joint comment letter ("Joint Letter") in response to the Bureau's ANPR of the Proposed Rule.[5] In the Joint Letter, the ICBA voiced its concern that any reduction in, or elimination of, the late fee safe harbor under the Proposed Rule would have a significant adverse impact on a substantial number of community banks with assets below $850 million[6] because compliance with the Proposed Rule would require these institutions to make significant changes to their business models. Consequently, ICBA reiterated its position that the Bureau was required to convene a Small Business Review Panel ("Panel") and solicit the advice and recommendations of the impacted community banks or their representatives prior to publishing the Proposed Rule in the Federal Register as set forth in the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").[7] The Bureau did not satisfy either of these obligations. In its analysis of the Proposed Rule, the Bureau noted it "[did not] have data with which to precisely estimate the effect of the proposed rule on late fee revenue" of small card issuers.[8] But instead of convening a small business panel to study the impact of its proposals on "small card issuers" or attempt to gather data it did not have to inform its rulemaking, the Bureau relied heavily upon extrapolated, but unrepresentative data sets to reach its flawed conclusion that a substantial number of small card issuers would not experience an economic impact because of the Proposed Rule.[9] The Bureau's conclusion is arbitrary and patently false. As discussed below, the credit card programs of community banks generate return on assets ("ROAs") that are much smaller than the large high volume credit card issuer benchmark of

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[4] https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/comments-on-credit-card-late-fees.pdf?sfvrsn=e8871b17_0

[5] https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/comments-on-late-fee-rulemaking.

[6] According to the Small Business Administration's Table of Size Standards, financial institutions that fall within the scope of "Savings Institutions and Other Depository Credit Intermediation" (NAICS Code 522180) and have a total amount of assets less than $850 million are to be considered entities that constitute "small" businesses. *See* Table of Small Business Size Standards, *U.S. Small Business Administration*, March 17, 2023, *available at* https://www.sba.gov/sites/sbagov/files/2023-03/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%281%29%20%281%29_0.pdf.

[7] *See* 5 U.S.C. § 603(d)(2); §609(b).

[8] *See* Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18940 (March 29, 2023) (to be codified at 12 CFR Part 1026).

[9] *See id.* at 18940.

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4.7%[10]. This datapoint implicitly confirms that there is not an excessive profit spread between the late fee revenue and pre-charge off collection costs of community banks. Therefore, the ultimate consequence of the $8 safe harbor is that it will reduce community banks' credit card revenue, in many cases to the point of turning small profits into net losses. The Proposed Rule will make community banks unable to offer economically viable credit card products to their customer base, which will worsen the "credit deserts" in rural communities and deprive customers in those communities of an important choice for financial services.

Because there is no evidence to support the Bureau's conclusion regarding the economic impact the Proposed Rule poses to community banks, the Bureau's decision to forego convening a Panel renders the Proposed Rule procedurally invalid and uninformed. In essence, the Bureau failed to ascertain the Proposed Rule's impacts on small banks, and then used that lack of information to justify not seeking input from those banks. This circular logic is directly contrary to the statutory mandate of SBREFA. The Proposed Rule cannot be finalized when violating SBREFA. Therefore, the CFPB should not proceed with finalizing the Proposed Rule.

The Bureau's Arbitrary Publication of the Proposed Rule Was Driven by Unfair Prejudgment in Violation of the Spirit and Letter of the Administrative Procedure Act
The Administrative Procedure Act ("APA") was enacted to avoid arbitrary and capricious actions by federal regulatory agencies.[11] Further, an implied principle of notice-and-comment rulemaking is that federal regulatory agencies must approach the rulemaking process with an open mind, assess public comment on a proposed rule, and finalize the rule in a manner that takes public comment into consideration.[12] Unfortunately, various public statements from both the White House and the CFPB suggest the predetermined the outcome of the Proposed Rule, thereby in violation of the APA.

On October 26, 2022, nearly six months *before* the Proposed Rule was published in the Federal Register, the White House issued a statement entitled *The President's Initiative on Junk Fees and Related Pricing Practices*. In the statement, the White House highlighted the Bureau's "junk fee initiative" and noted that the Bureau's actions have built upon "other Biden-Harris Administration actions that are already saving consumers billions."[13] When the CFPB issued a February 1, 2023 press release concerning the Proposed Rule, the White House also published a

[10] Q1 2022 US Credit Card Issuer Snapshot 27 May 2022, Accenture, https://bankingblog.accenture.com/q1-2022-us-credit-card-issuer-snapshot.
[11] *See generally* 5 U.S.C. § 553.
[12] *See id*.
[13] *See The President's Initiative on Junk Fees and Related Pricing Practices*, *available at* https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/ (last visited April 18, 2023).

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statement entitled, *President Biden Will Call for a Junk Fee Prevention Act to Eliminate Unfair and Costly Junk Fees*.[14]

Shortly thereafter, during President Biden's February 7, 2023 State of the Union address *and before* the public was afforded an opportunity to comment on the Proposed Rule, President Biden unequivocally stated that "[The Administration] is cutting credit card late fees by 75%, from $30 to $8."[15] These statements, which predate the publication of the Proposed Rule in the Federal Register by several months, make clear that the outcome of the Proposed Rule was predetermined by the Administration well before the Bureau published the Proposed Rule in the Federal Register or considered any public comments.

The test for determining whether an agency official should be disqualified from the rulemaking process on the ground of prejudgment is whether "there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding."[16] Given the evident (and predetermined) alignment of the White House and the Bureau on the Proposed Rule, we are deeply concerned that the Bureau's approach to this rulemaking will not permit industry comments to inform the provisions of the final version of the Proposed Rule. ICBA strongly encourages the Bureau to take all necessary measures to ensure this rulemaking fully complies with the APA – convening a SBREFA Panel and reproposing this rule after weighing public feedback and considering more inclusive data would help correct course and ensure a more thoughtful, informed, and compliant rulemaking process.

By Circumventing the SBREFA Process, the Bureau Failed to Obtain Portfolio and Account Data Representative of Community Banks and Arbitrarily Relied Upon Only Portfolio and Account Data Representative of the Industry's Largest Credit Issuers.

The FR Y-14M data the Bureau relied on to inform the Proposed Rule consists of domestic credit card data schedules of U.S. bank holding companies, U.S. intermediate holding companies of foreign banking organizations, and covered savings and loan holding companies with $100 billion or more in total consolidated assets. This data is not representative of community banks, the vast majority of which customarily have consolidated assets that do not exceed $1 billion in the aggregate. Throughout its analysis of the Proposed Rule, the Bureau concedes its lack of equivalent data relating to "smaller issuers," but the agency nevertheless makes little effort to meaningfully differentiate "smaller issuers" from large issuers, and instead subjects all to the

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[14] *See President Biden Will Call for a Junk Fee Prevention Act to Eliminate Unfair and Costly Junk Fees*, The White House*, available at* https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/01/fact-sheet-president-biden-highlights-new-progress-on-his-competition-agenda/ (last visited April 18, 2023).

[15] *See Remarks of President Joe Biden – State of the Union Address as Prepared for Delivery*, The White House, *available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/ (last visited April 18, 2023).

[16] *See FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 63 (D.D.C. 2022).

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same framework.[17] Furthermore, when analyzing the impact the Proposed Rule poses to consumers in rural areas—a consumer demographic that comprises a large percentage of the customer base of small community banks—the Bureau noted that "consumers in rural areas are somewhat less likely than other Americans to have a credit card . . . ." This simply is not true.

Although it is true that card issuers who submit FR Y-14 data comprise a large portion of the overall credit card loan market, community banks are highly concentrated in rural areas, and it is these banks – the smaller issuers that the Bureau did not solicit data from as required by SBREFA – that are predominantly responsible for providing credit to rural communities. According to ICBA data 48% of direct credit card issuing community banks identify as rural.

As the Board of Governors of the Federal Reserve System has noted, from 2012 through 2017, 40% of rural counties throughout the U.S. suffered bank branch closures.[18] More recently, in 2022, the Bureau published a report highlighting that " . . . rural communities are experiencing a fast-paced exodus of in-person banking services, with rural communities 10 times more likely than urban communities to be located in banking deserts."[19] Because the Bureau bypassed the SBREFA process and failed to solicit from community banks data that accurately reflects their credit card operations, the Proposed Rule will impose unique and disproportionate limitations on community banks' credit card services. The Proposed Rule will ultimately force many community banks to exit the credit card market, leaving consumers, and in particular, rural consumers, fewer options for financial services.

The Bureau primarily argues that the late fee income of large card issuers is "greater than five times [their] estimated pre-charge off costs," and given this disparity between late fee income and pre-charge off collection 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 [prior $40] maximum late fee amount, which is necessarily greater than average fee income per late payment."[20] However, this reasoning cannot be applied to community banks whose credit card late fee revenue **is not** five times greater than their pre-charge costs of collection. During the 2022 fiscal year, 99.8% of a group of 500 ICBA members that offer credit cards reported ROAs

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[17] *See, e.g.*, Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 188939 (March 29, 2023) (to be codified at 12 CFR Part 1026) (" . . . [T]he Bureau recognizes that most of its 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.").

[18] Board of Governors of the Federal Reserve System, *Perspectives from Main Street: Bank Branch Access in Rural Communities*, https://www.federalreserve.gov/publications/files/bank-branch-access-in-rural-communities.pdf (Pg. 3) (last visited April 20, 2023).

[19] Consumer Financial Protection Bureau, *CFPB Releases Report on Financial Challenges Facing Rural Communities*, https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-report-on-financial-challenges-facing-rural-communities/ (last visited April 20, 2023).

[20] *See* Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18917 (March 29, 2023) (to be codified at 12 CFR Part 1026).

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below the large card issuer ROA benchmark of 4.7%.[21] Notably, over 60% of those community banks reported an ROA below 1%.[22] Although the Bureau has concluded that large issuers are earning excessive profits on their card operations, the same is not true of community banks. Reducing late fees for community banks is likely to push their marginally profitable operations into being unprofitable, especially if the lower late fees have the natural effect of increasing the number of consumers who become delinquent on their credit card accounts. This is the financial impact on community banks that is invisible in the data the Bureau relied on for the Proposed Rule, but which is vitally important to community banks and the customers they serve. As it relates to community banks, an $8 late fee is arbitrary because it is not based on any data about community banks' credit card operations.

Community banks play an integral role in providing credit cards as a service to consumers within rural communities. Community banks offer credit cards to their customers as one part of a full suite of services. Community bankers want the name of the local community institution being shared as their customers transact with the merchants in the region. Making community banks' credit card operations unprofitable, and therefore more likely to be discontinued, not only removes a choice for rural customers, but it also harms the community banks' ability to compete with larger banks for other banking business like deposits, because the credit card as a daily touchpoint between the bank and its customers would be lost.

Community banks should not be pushed out of the credit card market through a generally applicable rule that is intended to bring the late fee revenue of large card issuers into equilibrium with their pre-charge off collection costs. The Bureau argues that it "expects . . . the proposed $8 amount would have a proportionately smaller impact on smaller issuers' late fee income, due to smaller issuers' having lower late fee amounts."[23] Such an uninformed conclusion assumes that community banks' credit card programs operate like scaled-down versions of large banks. To the contrary, there is no data to support this assumption, and indeed the much lower profit margins for community banks' credit card programs suggests that the Bureau's assumption is inaccurate.

Community banks should not be forced to pivot away from offering important credit card products due to a late fee mandate aimed at the practices of the largest banks in the country.

A Lower Late Fee Will Increase the Incidence of Late Payments Submitted by Consumers
The Bureau estimates that the 15-day late fee grace period tied to the $8 safe harbor will "cut the incidence of consumers charged the proposed $8 safe harbor amount by as much as half."[24] However, the Bureau failed to consider an additional potential consequence of the Proposed

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[21] Q1 2022 US Credit Card Issuer Snapshot 27 May 2022, Accenture, https://bankingblog.accenture.com/q1-2022-us-credit-card-issuer-snapshot.
[22] *See id.*
[23] *See id.*
[24] *See* Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18927 (March 29, 2023) (to be codified at 12 CFR Part 1026).

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Rule: the increased incidence of consumers who submit late payments. Simply put, under the Proposed Rule, it would be cheaper for consumers to submit late payments than before. The natural laws of economics suggest that when consumers perceive the cost of late payments to be lower, they will make late payments more frequently, especially for an unsecured debt like a credit card. But by encouraging consumers to see the $8 late fee as the cost of a late payment, the Bureau will mislead consumers into ignoring the other costs of late payments – the accrual of interest on their accounts, and if delinquency continues, other consequences like the loss of charging privileges and negative credit reporting.

The Bureau's Decision to Arbitrarily Prohibit Card Issuers from Imposing Late Fees Within 15 Calendar Days after Each Minimum Payment Due Date Will Confuse and Harm Consumers

The Bureau proposes to amend § 1026.52(b)(2) to provide a courtesy period which would prohibit card issuers from imposing late fees within 15 calendar days after each payment due date. According to the Bureau, "[a] 15-day courtesy period would directly benefit consumers who will pay late within 15 days of the original due date."[25] This conclusory statement by the Bureau ignores the conflicts between a 15-day grace period and the other provisions of the Credit Card Accountability Responsibility and Disclosure Act ("CARD Act") – conflicts that will confuse consumers and cause them to lose grace periods and pay more interest.

In 2009, Congress passed the CARD Act, as an amendment to the Truth in Lending Act ("TILA"), to establish fair and transparent practices relating to the extension of credit under an open-end consumer credit plan.[26] Regulation Z, the implementing regulation of TILA, defines the term "grace period" as "a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate."[27] Although the CARD Act does not require a card issuer to offer grace periods to its customers, if the card issuer chooses to do so, the card issuer must ensure that it delivers periodic statements to its customers *at least* 21 days prior to date of expiration of the grace period.[28] The timing of this grace period expiration notification is important because it is an industry practice for card issuers to position their customers' monthly payment due date within three days *before* the expiration of the grace period.

Card issuers implement this practice to ensure compliance with the CARD Act. More importantly, from a consumer protection perspective, if consumers' payment due dates always occur before the expiration of the grace period, the consumer will always retain grace so long as consumers pay their outstanding balances in full on or before their payment due dates. The Proposed Rule seeks to lengthen by 15 days the period by which a consumer may submit a

[25] *See id.* at 18937.
[26] *See* Pub. L. No. 111-24 (May 22, 2009).
[27] 12 CFR § 1026.5(b)(2)(ii)(B)(3).
[28] *See id. at* § 1026.5(b)(2)(ii)(B)(1)(i).

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payment without incurring a late fee. The consequence of this aspect of the Proposed Rule is quite simple: consumers will be misled into submitting payments within this new, 15-day late fee grace period and miss the window for retaining the interest-free accrual grace period, which will expire before the late fee grace period. By requiring card issuers to implement two distinct grace periods, the Proposed Rule will cause consumer confusion.

The Proposed Rule will directly encourage consumers to make untimely payments within the 15-day grace period for late fees; conduct that will increase interest costs for consumers and impose the very harm the Bureau is seemingly trying to address.
Transactor consumers (*i.e.*, consumers who pay their outstanding credit balances in full every month) may unknowingly become *revolving* consumers (*i.e.*, consumers who carry an outstanding credit balance from one monthly cycle to the next) by submitting their monthly payments in alignment with the 15-day late fee grace period under the Proposed Rule. Under the guise of protecting consumers from allegedly unreasonable late fees, the Proposed Rule will create consumer harm that is contrary to the Proposed Rule's purported purpose.

For example, consider a cardholder with a monthly payment due date that arises on the 20th day of every month. In accordance with the Proposed Rule, the cardholder's card issuer informs the cardholder that it cannot charge the cardholder a penalty fee for submitting an untimely payment until 15 days after the date that the cardholder's monthly payment becomes due. Assume that the card issuer implements a practice of positioning the cardholder's monthly payment due date within 3 days prior to the expiration of the cardholder's grace period to ensure compliance with the CARD Act. Therefore, if the cardholder's monthly payment due date falls on the 20th day of every month, the cardholder's cycle date (*i.e.*, the date that marks the end of a billing cycle for a particular month and the end of the interest-free grace period) will generally fall on the 23rd day of every month. In effect, the 15-day grace period under the Proposed Rule extends cardholder's monthly payment due date by 15 days and sequentially pushes that deadline to the month that follows the monthly payment due date reflected in the periodic statements that the card issuer provides. This extension will cause the cardholder to incur more costs through loss of grace. If the cardholder's statement balance must be paid by January 20 but the cardholder does not submit a payment to satisfy the outstanding balance until February 3, the cardholder will avoid the $8 late fee. Nevertheless, the cardholder will still incur interest charges on the January statement balance during the February billing cycle because the cardholder's payment of the January statement balance occurred after the expiration of the grace period, which would have expired on January 23.

Moreover, in addition to the loss of the interest-free grace period, the 15-day late-fee grace period will likely also lead consumers to experience a loss of charging privileges. It is common for credit card issuers to suspend approval of new transactions when a cardholder becomes 1-5 days delinquent in making a payment. If consumers treat the late-fee grace period as the "true" payment date, they are likely to suffer harm when they expect transactions to be approved on

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their credit cards, but those transactions are declined because of a delinquency that was within the late-fee grace period. Those transactions could be pre-authorized (like a recurring monthly payment) or at the point of sale, but either way, declines of such transactions will cause consumer harm and confusion.

Furthermore, the Proposed Rule will inappropriately *de facto* amend the CARD Act, which mandates that "[t]he payment due date for a credit card account under an open-end consumer credit plan . . . be the same day each month."[29] However, the Proposed Rule ignores this congressional mandate. The proposed 15-day grace period will falsely signal to consumers that the "true" payment due date would be different from the date that the consumer's payment is actually due. And when the consumer's due date falls in the latter half of a month, the varying number of days between months will mean that the perceived "true" due date to avoid late fees will fall on a different day every month. The existing law preserves clarity for consumers about their payment due date; the Proposed Rule would overshadow and nullify the provision of the CARD Act that requires this clarity.

The Bureau's Decision to Cease Applying the Annual Automatic CPI Adjustment to the $8 Late Fee Safe Harbor Arbitrarily Ignores the Realities of Inflation, Which Will Erode the True Amount of the Safe Harbor Over Time

Under the Proposed Rule, the Bureau proposes not to apply the annual adjustments for consumer price inflation ("CPI") currently available in § 1026.52(b)(1)(ii)(D) to the safe harbor amount for late fees. On this point, the Bureau notes that it is "concerned that credit card late fee amounts imposed pursuant to the current safe harbor amounts . . . far exceed card issuers' actual pre-charge-off collection costs resulting from late payment violations . . . ."[30]

However, under the current version of Regulation Z, the Bureau was required to adjust the late fee safe harbor annually for CPI and has not yet done so during 2023 to reflect significant 2022 inflation statistics. Therefore, the Bureau's claims about its inability to make *ad hoc* adjustments in the future are disingenuous.[31] More importantly however, the Bureau's rationale concerning discontinuing automatic annual CPI adjustments is misplaced for two reasons.

First, the Bureau's decision attempts to strong-arm card issuers into accepting the proposed $8 safe harbor amount as a universal (and perpetual) late fee cap, with the true amount of the late fee being continuously and further reduced over time because of inflation. Indeed, the Bureau has already taken this step by refusing to index the existing late fee safe harbor for the high inflation that occurred in 2022 – a decision that is also inconsistent with the Bureau's approach to other rules it has promulgated. For example, in the recently finalized § 1071 rule, the Bureau

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[29] *See* 15 U.S.C. § 1637(o).

[30] *See* Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18918 (March 29, 2023) (to be codified at 12 CFR Part 1026).

[31] *See id.* at 18926 (" . . .[T]he Bureau monitors the market so, under this proposal, the Bureau would be able to make adjustments to the safe harbor amount [according to CPI] on an ad hoc basis based on this monitoring . . . .").

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indexed the revenue threshold for small businesses whose credit applications are covered by the rule to inflation and stated that it would adjust that size threshold every five years.[32] The Bureau's inconsistent approach to including, or in this case not including, inflation data is arbitrary and punitive.

Second, the Bureau has determined the costs of late payment violations incurred by card issuers do not increase with inflation even though the Bureau has also admitted those costs are in fact "trending up."[33] In March 2022, the economy's inflation rate reached 8.5%, its highest point since 1981. During August 2022, when ICBA submitted its letter to the Bureau, CPI exhibited a 9.1% year over year increase. This 40-year high in inflation has not only increased the price of consumer goods and the costs larger card issuers incur, but it has also increased the costs that small card issuers incur to recover late payments. Therefore, the Bureau's conclusion that inflation is a non-dispositive determinant of increased costs are both arbitrary and nonsensical.

Conclusion

Through the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress created the Bureau to protect consumers from abusive financial services practices. Nevertheless, the Proposed Rule appears to merely further the White House's political agenda. The Bureau maintains that limiting the maximum late fee amount to $8 and providing consumers a 15-day late payment grace period will provide an important and noticeable benefit to consumers. In practice, however, these proposed mandates will drastically increase the incidence of consumer harm in the financial services industry, and they will particularly affect consumers who rely upon community banks. Had the Bureau solicited data from community banks as required by SBREFA, it would have been better positioned to understand the untenable nature of its claims regarding the purported "smaller negative impact" the Proposed Rule poses to community banks. Further, we respectfully ask that the Bureau understand the community bank relationship based business model by which it seeks to offer a full suite of services, including credit card products, to customers served.

Late fees and monetary penalties serve the purpose of discouraging tardy payments by providing a clear and universally understood incentive to fulfill one's obligations in a timely manner. By diminishing this incentive, the Bureau may be discouraging consumers from paying credit card bills on time, despite the fact that the long-term impact of failing to do so can be far greater than the cost of late fees.

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[32] *See* 12 CFR § 1002.106(b)(2).
[33] *See id*. at 18926.

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To ensure this proposed rule complies with the APA and does not impose harm on consumers, the CFPB must genuinely abandon or, at the very least restart and revise this proposed rulemaking, taking into account the factors detailed in this letter. Accordingly, ICBA respectfully suggests that the rulemaking should not proceed.

We appreciate the opportunity to comment on the Proposed Rule. If you have any questions or would like to discuss our letter in further detail, please do not hesitate to contact Kari Mitchum at kari.mitchum@icba.org or 202-821-4445.

Sincerely,

/s/

Anne Balcer
Senior Executive Vice President
Chief of Government Relations