Submitted via *regulations.gov*

August 1, 2022

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

RE: ADVANCE NOTICE OF PROPOSED RULEMAKING (ANPR] ON CREDIT CARD LATE FEES AND LATE PAYMENTS [DOCKET NO. CFPB-2022-0039]

Dear Director Chopra,

The Independent Community Bankers of America (ICBA)[1] appreciates this opportunity to respond to the Consumer Financial Protection Bureau's (CFPB) Advanced Notice of Proposed Rulemaking seeking information from credit card issuers, consumer groups, and the public regarding credit card late fees and late payments.[2]

Background

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (The CARD Act) permits issuers of credit cards to charge a reasonable and proportionate fee "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."[3] It gives the CFPB authority "to establish standards for assessing whether the amount of any penalty fee or charge described … is reasonable and proportional to the omission or violation to which the fee or charge relates."[4] In issuing such rules the Bureau must consider four statutory factors:

(1) the cost incurred by the creditor from such omission or violation;
(2) the deterrence of such omission or violation by the cardholder;

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[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 constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5.8 trillion in assets, over $4.8 trillion in deposits, and more than $3.5 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] 87 Fed. Reg. 38679.
[3] 15 U.S.C. 1665d(a).
[4] 15 U.S.C. 1655d(b).

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(3) the conduct of the cardholder; and
(4) such other factors as the Bureau may deem necessary or appropriate.[5]

Regulation Z (Reg Z), which implements the provisions of the CARD Act, holds that a creditor 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" OR under the provisions of a safe harbor which allows fees of a fixed rate.[6] Today, the safe harbor limits, which were designed to increase with inflation, are $30 for the first late payment and $41 for a subsequent late payment within 6 billing cycles.

In May of 2022, the CFPB issued a report on credit card late fees ("Late Fees Report"). The report acknowledged that "[m]ost smaller banks and credit unions charge a maximum late fee of $25 or less, but almost all of the largest credit card issuers contract at or near the higher fee amounts that are specified by regulation."[7] The report concluded by noting that, "the credit card market continues to rely on late fees that negatively affect millions of consumers. For some households, late fees are a costly mistake for payments that may only be a day or two late; for others, they are a significant added hardship during a time of financial precarity. For credit card companies, especially private label and subprime specialist issuers, late fees continue to bolster their bottom line."[8] Small bank insurers, buy contrast, have a different business model which is significantly less dependent on late fees.

Following this report, the Bureau issued this ANPR, invoking its authority to adjust the late fee provisions of Reg Z and asking card issuers, consumer groups, and the public to comment regarding the industry's late fee practice.

ICBA Position

By way of background, and as provided more fully below, consumers that do not pay the minimum payment obligation on the accrued balance may incur late fees that are based on disclosed contractual obligations. Failure to pay at least the minimum amount due could result in a reduction in the consumer's credit score making future access to credit less accessible or more expensive. Accordingly, ICBA sets forth the following in response to the proposed rulemaking:

- The proposed Rule mischaracterizes late fees as "junk fees" – late fees or other penalties that result from nonpayment of a contractually obligated debt are fully disclosed and serve a legitimate role in deterring late payments. As stated above, this deterrent effect of late fees helps to ensure that credit cards remain paid as agreed and ensure the smooth functioning of credit markets. Without appropriate late fees, card issuers would have to offset the cost of late payments, likely by charging higher APRs or declining to extend credit to borrowers deemed at higher risk of late payment.

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[5] 15 U.S.C. 1655d(c).
[6] 12 C.F.R. 1026.52(b).
[7] CFPB, "Credit card late fees" ("Late Fees Report") (March 2022), available at: https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf.
[8] *Id*.

- Credit card late fees should continue to be indexed to inflation. The costs of the underlying goods and services paid for using credit cards is tied to inflation just as late fees and other key metrics that serve as economic indicators of macroeconomic imbalances evidenced by inflation. Since late fees both offset the cost of late payments to the issuers, they also act as a deterrent to increasing debt and paying even more for goods or services through future credit issuance. If late fees are not permitted to increase over time, this deterrent effect will be eroded until it is no longer meaningful to customers.

- A reduction in or elimination of the safe harbor would have an disproportionate impact on small financial institutions. If the late fee safe harbor is set at a level that is too low for small banks to recoup the costs associated with processing late payments, small banks may exit the credit card market or reduce the issuance of credit cards to borrowers at higher risk of late payment. Because lowering the safe harbor would have a significant effect on small financial institutions, the Bureau must comply with the Small Business Regulatory Enforcement Fairness Act (SBREFA) by convening a SBREFA panel in any late fee rulemaking. Accordingly, the safe harbor for late fees is set at an appropriate level and provides an important source of regulatory certainty for card issuing community banks. The Reg Z safe harbor should not be revised or eliminated.

Context

According to the Federal Reserve, 83% of Americans had a credit card in 2020.[9] Credit cards have achieved this near ubiquitous popularity because they provide consumers with valuable benefits including fraud protection, the ability to pay for large, unexpected expenses, rewards, and the ability to build their credit rating. When consumers enter into a contract with a credit card issuer, they understand that they will be subject to certain terms – for example that they may be charged interest on credit balances or that failing to pay by the due date may result in a late payment fee. These terms are not concealed from customers – in fact, they are disclosed in clear terms as proscribed by the Bureau.

Therefore, we reject suggestions by the Bureau that there is something unfair or improper about card issuers charging late fees pursuant to contracts voluntarily entered into by consumers. We reject characterizations that community bank card issuers have "made late fee penalties a core part of their profit model."[10] The reality, as Director Chopra's statement acknowledges, is that late fees represent roughly 10 percent of the cost of credit cards to customers. On the other side of the ledger, small issuers face significant costs notifying customers of delinquency, processing late payments, and incurring the opportunity cost of the lost use of the delinquent payment. In light of these costs, it is clear that the small portion of total card revenue that is attributable to late fees is neither inappropriate nor unfair to consumers.

As we commented in response to the Bureau's Request for Information pertaining to "Junk Fees," banks, like any business, must charge for the services they provide. Assertions by the Bureau that bank fees

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[9] Board of Governors of the Federal Reserve System, "Economic Well-Being of U.S. Households in 2020 – May 2021," available at: https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-banking-and-credit.htm.

[10] Prepared Remarks of Director Chopra on Credit Card Late Fees ANPR Press Call (Jun 22, 2022), available at: https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-chopra-on-credit-card-late-fees-anpr-press-call/.

"are not subject to competitive processes that ensure fair pricing,"[11] or are otherwise harmful to consumers are damaging to the public's trust in what is already one of the most competitive and highly regulated industries in America.

Community Bank Practices

We do appreciate the Bureau's recognition – which aligns with feedback that we have heard from our members – that many community bank credit card issuers often charge late fees that are less than the safe harbor amount in Regulation Z. Because community bankers live and work in the same communities as the customers they serve, there is an alignment of incentives to ensure that their customers can build a credit history that will allow them to qualify for a mortgage to purchase a home or a loan to start a small business. Having a credit card and keeping current with payments is often an important part of building this history. Community banks frequently work with customers who are experiencing financial difficulties, waiving first time late payment fees, and offering features like autopay that help to ensure that customers can keep their accounts current.

However, it is important for card issuers of any size, including community banks, to have an effective tool to deter serial late payments – late fees fill this role. If this deterrent mechanism did not exist or was not sufficient to encourage customers to keep their accounts current, late payments would be more likely to occur. This is obviously harmful to the lender, whose operating budget and ability to make additional loans depends on receiving timely payment, but it is also harmful to borrowers who pay late because they can incur significant damage to their credit scores and eventually become subject to legal judgment. The credit damage sustained by delinquent borrowers could make it impossible – and would likely make it more expensive – for them to obtain larger, wealth creating, loans like a mortgage or business loan.

Smaller issuers also frequently lack the economies of scale of large issuers and have higher processing costs associated with customer late payments for costs already incurred. Accordingly, it is important for the safe harbor rate to remain at a level sufficient for these banks to recoup their costs or they will be forced to exit the credit card market or reduce credit card issuance. Because lowering the late fee safe harbor would have a significant impact on a substantial number of small bank and credit union card issuers with less than $750 million assets, the CFPB must convene a panel of small entity representatives, as described in the SBREFA.[12]

Late Fees are Subject to Rigorous Disclosure

The freedom to enter a contract and to be bound by that contract is central to both U.S. law and a properly functioning economic system. The freedom to contract can be frustrated when contractual terms are hidden or unclear. However, Reg Z already mandates extensively which disclosures creditors must provide to debtors at the time of account opening – including by requiring specific disclosure of late payment fees.[13]

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[11] *Id.*
[12] 5 U.S.C. 609.
[13] 12 C.F.R. 1026.6(b)(2)(viii).

Previously, this CFPB issued a Request for Information (RFI) on what it called "Junk Fees" charged by financial services providers.[14] In that RFI, the CFPB defined Junk Fees as "exploitative, back-end, hidden, or excessive fees." Credit card late fees are neither exploitative nor excessive. The requirements of Reg Z alone prove that they are not back-end or hidden – they are disclosed in clear terms at the time of account opening and agreed to by the consumer. For this reason, they plainly do not belong in the Bureau's category of "Junk Fees" and do not warrant additional scrutiny or limitation by the Bureau.

Deterrence

The major reason for the existence of late fees is as a deterrent. Contrary to the Bureau's characterization, late fees do not make up a significant portion of the income from card issuance. As the Bureau notes in its Late Fees Report, late fees only amount to roughly 10% of the total fees and interest associated with card issuance – this is not a large enough portion of revenue to characterize issuers as "relying" on late fees.[15] Late fees exist to modify customer behavior and to ensure that customer accounts remain paid as agreed. This deterrent effect has a beneficial effect on credit makers as lenders will be more willing to extend credit if they believe accounts are likely to remain paid as agreed. A fee's deterrent effect is enshrined as one of the statutory factors that the Bureau must consider when implementing fee regulation.

Ensuring that accounts remain current is beneficial to both the creditor and the debtor as accounts in default can be referred to collections, creating losses to the creditor and damages to consumers' credit ratings. It can also require significant costs to collectors and the legal system until the debt is collected. Charging a late fee – to the extent that it deters consumers from sliding down a path of making delinquent payments and damaging their credit score – can be beneficial for their long term financial health. If late fees did not exist or were significantly minimized, the cost of defaulting would seem lower in the short term, potentially preventing customers from bringing accounts current before the most serious financial harms occurred.

Competition

Director Chopra, in his remarks accompanying the release of this ANPR, has stated that the Bureau intends "to make sure that Congress' goal to ensure a fair, transparent, and competitive credit card market holds true."[16] We share the Bureau's interest in ensuring a competitive market, however, the proposed Rule serves to deter a robust and competitive market going forward.

Card issuers compete for customers intensely – with many consumers receiving multiple offers and holding multiple cards – each of which tout unique rewards programs, APRs, fee structures, and special promotions. While fee structures for cards differ, there is a floor on the price of late fees because all issuers must maintain late fee pricing sufficient to recoup the cost of processing and to deter late payments. It is not a failure of competition that a service must be priced above its marginal cost.

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[14] 87 Fed. Reg. 5801.

[15] Late Fees Report at 13.

[16] Prepared Remarks of Director Chopra on Credit Card Late Fees ANPR Press Call (Jun 22, 2022), available at: https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-chopra-on-credit-card-late-fees-anpr-press-call/.

Late Fees Should Keep Pace with Inflation

CFPB Director Chopra has called the Bureau's effort to reexamine Reg Z "particularly timely since current rules might give companies the incentive to impose big hikes based on inflation."[17] The safe harbor late fee under Reg Z is designed to increase annually in step with Consumer Price Index (CPI) inflation.[18]

This year, the trajectory of inflation has changed. In the June CPI inflation report, the most recent number available at the time of this writing, demonstrates an 9.1% year over year increase.[19] This increase in CPI could lead to increases to the Reg Z safe harbors. This is an example of a regulation functioning as it is intended to. The supply of U.S. Dollars has ballooned dramatically, customers' deposit account balances remain high, and the buying power of the dollar has diminished. If late fees are not permitted to increase along with inflation, the real cost of late fees will decrease, causing them to lose their necessary deterrent effect.

We strongly urge the CFPB not to amend 12 CFR 1026.52(b)(1)(ii)(D) in response to a single year of higher than normal inflation. It is important, in the face of historic levels of inflation, to ensure that the late fees in the Reg Z safe harbor maintain their deterrent effect and continue to increase indexed to inflation.

Conclusion

Thank you again for the opportunity to provide feedback in response to the Bureau's ANPR regarding Credit Card Late Fees. Please feel free to contact me at (202) 821-4411 or Michael.Marshall@icba.org if you have any questions about the positions stated in this letter.

Sincerely,

Mickey Marshall
Director, Regulatory Legal Affairs

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[17] Press Release, Consumer Financial Protection Bureau, "CFPB Initiates Review of Credit Card Company Penalty Policies Costing Consumers $12 Billion Each Year" (June 22, 2022), available at: https://www.consumerfinance.gov/about-us/newsroom/cfpb-initiates-review-of-credit-card-company-penalty-policies-costing-consumers-12-billion-each-year/.

[18] See 12 CFR 1026.52(b)(1)(ii)(D).

[19] U.S. Bureau of Labor Statistics, Consumer Price Index, May 2022, available at: https://www.bls.gov/cpi/.