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CHAIRMAN

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United States House of Representatives
One Hundred Eighteenth Congress
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

March 1, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Dear Director Chopra:

We write to express serious concerns about the Consumer Financial Protection Bureau's (CFPB) latest actions to increase the cost of credit for all credit card users.

In December 2022, the CFPB broke with precedent and for the first time failed to address credit card late fees when it issued the annual fee adjustments as required under Regulation Z.[1] The annual adjustments have typically reflected changes to safe harbor fee levels to reflect changes in a Consumer Price Index (CPI) measure produced by the Bureau of Labor Statistics.

It is notable that the CFPB refused to adjust in 2022, a year of runaway inflation in consumer prices at rates not seen since the early 1980s. Inflation during 2022 skyrocketed to highs not seen in more than 40 years, due in large part to reckless and partisan fiscal policy pursued by Democrats in March of 2021. American workers, families, and businesses of all sizes were impacted through higher living costs, and costs of producing goods and services.

In prior years when the CFPB did not make inflation adjustments, because inflation was low, it explained the statistical basis for not indexing the fee. However, the CFPB has yet to explain or justify why there was not an increase in the most recent annual adjustment announcement—a striking lack of transparency and accountability, and especially so in an era of outsized inflation.

Picking and choosing whether to make adjustments to reflect inflation among the various provisions of Regulation Z amounts to selective indexation which, in turn, is junk economics. Failure to comply with the CFPB's own regulatory requirements and consistently implement simple inflation adjustments also, unfortunately, reflects current CFPB leadership's normative views. It reflects the CFPB's seeming inability to understand that any service provision by the

[1] Consumer Financial Protection Bureau (CFPB), Truth in Lending (Regulation Z) Annual Threshold Adjustments (Credit Cards, HOEPA, and Qualified Mortgages) (Dec. 27, 2022) https://www.consumerfinance.gov/rules-policy/final-rules/truth-lending-regulation-z-annual-threshold-adjustments-card-act-hoepa/; and 15 U.S. Code § 1665d(e).

private sector involves costs, all of which ought not to be redistributed to others and effectively socialized.

Following the lack of adjustment in CFPB's recent action, on February 1, 2023, the CFPB issued a notice of proposed rulemaking to constrain credit card issuers' ability to charge late fees.[2] The CFPB declared that the proposed rule could save Americans as much as $9 billion dollars per year and would ensure that the "credit card market is fair and competitive."[3] As proposed, the rule would (i) lower the safe harbor dollar amount for first- time and subsequent-violation late fees to $8; (ii) end the practice of annually adjusting the late fee safe harbor for inflation, and (iii) cap permissible late fee amounts at 25% of the required minimum payment.[4]

As detailed in our March 30, 2022, letter on the CFPB's "junk fees" request for information (RFI), we agree that consumer education and simplification of disclosures should be addressed.[5] However, the provision of credit and other financial products have associated costs, which late fees often help to offset. The late fees targeted in this proposal will ultimately result in negative consequences. Credit providers will be forced to offset lost income and potential account charge-offs by increasing interest rates for all borrowers (i.e., socialize the costs of late and defaulting payors) or limiting extension of unsecured credit to borrowers with low credit scores. The CFPB acknowledged this fact in the proposed rule, stating it is "possible that some consumers' access to credit could fall" as a result of limiting late fees.[6] Indeed, that result is highly likely, not simply possible.

In a statement accompanying the proposed rule release, the CFPB stated, "By our estimates, 75% of late fees have no purpose beyond padding the credit card companies' profits."[7] However, this claim, amounting to an unsubstantiated accusation of intent, disregards the calculation of risk and realization of risk on the downside. Unsecured loans and extensions of credit to borrowers are inherently riskier activities relative to secured lending. Lenders are required to maintain higher capital levels on those activities through loan loss reserves. To account for the loss of income from the CFPB's proposals, lenders will be forced to shift their lending portfolios to only highly qualified borrowers who are less likely to remit late payments and raise interest rates on all extensions of credit. That result will be amplified for extensions of credit that typically result in increased instances of late payments. This means not only higher costs for all borrowers, even those who dutifully remit payment on time, but also more limited credit access to those borrowers who may need it most.

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[2] CFPB, *Proposed rule with request for public comment on Credit Card Penalty Fees (Regulation Z)* (Feb. 1, 2023), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees-nprm_2023-01.pdf

[3] CFPB, *CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees* (Feb. 1, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/.

[4] *Id.*

[5] See letter from Financial Services Committee Republicans to Director Chopra regarding fees, dated March 30, 2022.

[6] CFPB, *Proposed rule with request for public comment on Credit Card Penalty Fees (Regulation Z)* (Feb. 1, 2023), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees-nprm_2023-01.pdf at 150.

[7] CFPB, *Director Chopra's Remarks on Press Call for Credit Card Late Fees NPRM* (Feb. 1, 2023), https://www.consumerfinance.gov/about-us/newsroom/director-chopras-remarks-on-press-call-for-credit-card-late-fees-nprm/.

A further impact which we believe the CFPB did not appropriately consider is how this rule is likely to impact consumer behavior. Credit card late fees are not intended as a tool to punish consumers who do not pay on time, as the CFPB alleges. Rather, they provide incentives for customers to pay on time and discourage repeat underpayments or lack of payments. The fees and associated set of incentives are agreed upon by both parties when opening the unsecured line of credit. Without the incentive to pay on time, and facing only a maximum penalty of $8, it is highly likely that timely payment rates will decrease as borrowers see little downside for late payments. That, of course, means more shifting of delinquent payment costs to other, innocent, consumers who absorb the associated costs through higher rates or inability to further access unsecured credit that they may need to smooth their consumption. With inflation, purchasing power of a dollar fades, and the purchasing-power value of $8 becomes lower, eroding any late-payment disincentive effects that help deter payment delinquencies. This is why it is important for the CFPB to continue to annually adjust the safe harbor dollar amount that it determines to be reasonable and proportionate and as it has done since 2014. It is especially important in times of punishingly high inflation as was experienced last year.

In addition, credit card users frequently benefit from rewards, such as points-based systems, which are only provided because of net income that such credit extensions generate for lenders. Should those net incomes be negatively impacted, it is likely that reward programs would be the first area in which lenders would cut, erasing value to customers. The CFPB understands and acknowledges this possibility as a result of the proposed rule, stating a "full offset could manifest in higher maintenance fees, lower rewards, or higher interest on interest-paying accounts."[8] The CFPB understands and acknowledges adverse effects of its proposals on consumers that almost surely would arise, but, oddly, appears not to be concerned.

In addition to the unsettling policy consequences of the CFPB's recent actions, we are concerned that the CFPB has not fulfilled its statutory obligation to comply with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[9] Removing the late fee safe harbor would without doubt result in an economic impact on small banks and credit unions with under $850 million in assets. As a result, the CFPB's obligation to convene a Small Business Review Panel would be triggered.[10]

The proposed rule states that, "detailed information about sources of credit card revenue is not available for most small banks."[11] As noted above, this is a problem that could be avoided by fulfilling the statutory mandate under SBREFA. We demand that the CFPB abide by the mandate promptly and analyze not just the loss of fee income but, also, the additional burdens of compliance cost, debt collection cost, customer service cost, and operational cost, which are inherently higher for smaller banks and credit unions.

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[8] *Id*, at 103.
[9] Public Law 104-121, 110 Stat. 857 (1996) (5 U.S.C. 609) (amended by Dodd-Frank Act section 1100G).
[10] CFPB, *Fact Sheet: Small Business Review Panel Process,* https://files.consumerfinance.gov/f/documents/201510_cfpb_fact-sheet-small-business-review-panel-process.pdf.
[11] CFPB, *Proposed rule with request for public comment on Credit Card Penalty Fees (Regulation Z)* (Feb. 1, 2023), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees-nprm_2023-01.pdf at 126.

Given CFPB's efforts to restrict consumer access to credit and raise borrowing costs, we request that you provide answers to the following questions.

1. Given the broad applicability of this rule making to small institutions, why did the CFPB not convene a SBREFA panel?

2. Please provide all economic and quantitative analyses that the CFPB has conducted on the projected impacts, including with respect to consumer access to credit and costs of obtaining credit, of the proposed rule.

3. How did the CFPB arrive at the determination that $8 would be sufficient for most issuers to cover collection costs incurred as result of late payments? Please provide all market analysis and any other supporting documentation for this determination, along with robustness analysis that determined that $8, rather than other possible dollar values, is a preferred value.

4. Using whatever analysis CFPB performed to arrive at the $8 value, how does that analysis compare with analyses elsewhere in the federal government with respect to late fees? For example, are values for any caps on late fees assessed by the Internal Revenue Service arrived at using the same or similar analyses as those performed by the CFPB, or are such numbers merely randomly and arbitrarily selected?

5. How did the CFPB determine that inflation is not necessarily reflective of how collection costs change over time? Please provide any and all analysis which led to this conclusion.

6. If the CFPB determined that $8 is the average cost to cover costs incurred because of late payments, it would appear that this is a fixed cost regardless of balance owed, including inflation in business input costs. If it is indeed a fixed fee and magically invariant to inflation, then why would the CFPB change the balance percentage limit on the fee to 25 percent of the required minimum payment from 100 percent and mandate that a fee equal the smaller of $8 or 25 percent of the minimum payment?

7. What communications and coordination did the CFPB have with the Administration and/or any other federal government agencies in the development of this proposal? Given that the CFPB is intended to be an independent bureau, it is troubling that the White House released a thematically similar statement on the same day as the announcement of this rulemaking.[12] Moreover, President Biden announced "We're cutting credit card late fees by 75 percent, from $30 to $8" in his State of the Union Address, suggesting the CFPB has predetermined the outcome of this rulemaking and is simply going through the motions of issuing a proposed rule for comment.[13]

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[12] White House, *FACT SHEET: President Biden Highlights New Progress on His Competition Agenda* (Feb. 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/01/fact-sheet-president-biden-highlights-new-progress-on-his-competition-agenda/.
[13] White House, *President Biden's State of the Union Address* (Feb. 7, 2023) https://www.whitehouse.gov/state-of-the-union-2023/.

We appreciate your attention to this request. Please respond as soon as possible, but no later than March 15, 2023. Please note that attaching the proposed rule is not a sufficient response to our questions.

If you have any questions, please do not hesitate to contact Megan Guiltinan (Megan.Guiltinan@mail.house.gov) and Kathleen Palmer (Kathleen.Palmer@mail.house.gov).

Sincerely,

Andy Barr
Member of Congress

Patrick McHenry
Member of Congress

Pete Sessions
Member of Congress

Bill Posey
Member of Congress

Blaine Luetkemeyer
Member of Congress

Ann Wagner
Member of Congress

Roger Williams
Member of Congress

Alex X. Mooney
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