May 3, 2023

VIA ELECTRONIC SUBMISSION

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

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

Dear Director Chopra:

On March 29, 2023, the Consumer Financial Protection Bureau (CFPB) published a proposed rule titled Credit Card Penalty Fees.[1] This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule. Advocacy is concerned about the Regulatory Flexibility Act (RFA) section of the notice of proposed rulemaking (NPRM). Advocacy recommends that the CFPB maintain the status quo for small entities until the CFPB has sufficient data to perform a more thorough analysis of the economic impact that the proposed rulemaking may have on small entities.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within

[1] 88 FR 18906, March 29, 2023.

the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[4] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.[5]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[6]

The Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. The Office of Advocacy held a roundtable with small entities on February 6, 2023, to discuss the potential impact of this NPRM and less burdensome alternatives to the rule as proposed. Advocacy also held conference calls on this issue on March 17, 2023, and April 19, 2023. Advocacy's comments reflect the feedback that it received from the organizations about the potential impact of the proposal on their small members.[7]

B. The Proposed Rule

On March 29, 2023, the CFPB released a NPRM on credit card fees to amend 12 CFR § 1026.52(b) and its accompanying commentary as they relate to credit card late fees. Currently, under § 1026.52(b)(1), a card issuer must not impose a fee for violating the terms or other requirements of a credit card account, such as a late payment, exceeding the credit limit, or returned payments, unless the issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the issuer for that type of violation as set forth in § 1026.52(b)(1)(i) or complies with the safe harbor provisions set forth in § 1026.52(b)(1)(ii). Section 1026.52(b)(1)(ii) sets the safe harbor at $30 for penalty fees and at $41

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[2] 5 U.S.C. §601 et seq.
[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[4] Small Business Jobs Act of 2010 (PL. 111-240) §1601.
[5] *Id*.
[6] *Id*.
[7] *See,* Small Business Administration Table of Size Standards, [Table of size standards | U.S. Small Business Administration (sba.gov)](#).

for each subsequent violation of the same type that occurs during the same billing cycle or in one of the next six billing cycles.[8]

The proposed rule would amend 12 CFR § 1026.52(b) which implements the Truth in Lending Act (TILA), to better ensure that the late fees charged on credit card accounts are "reasonable and proportional" to the late payment as required under TILA. The proposal would reduce the safe harbor dollar amount for late fees from $30 to $8 and eliminate a higher safe harbor dollar amount for late fees for subsequent violations of the same type; (2) provide that the current section that allows for annual inflation adjustments for the safe harbor dollar amounts would not apply to the late fee safe harbor amount; and (3) provide that late fee amounts must not exceed 25 percent of the required payment.

A depository financial institution is considered small if it has less than $850 million in total assets. For this particular rulemaking, the CFPB estimates that there are approximately 3,780 small banks, of which approximately 498 report outstanding credit card debts on their balance sheets. The CFPB also estimates that there are approximately 4,586 small credit unions, of which 2,785 report credit card assets.[9]

Advocacy's Small Business Concerns

In the RFA section, the CFPB certified that the rule will not have a significant economic impact on a substantial number of small entities. Pursuant to section 605(b) of the RFA, an agency may forego the requirements of an initial and final regulatory flexibility analysis, including a discussion of significant, burden-reducing alternatives, if the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. Such a certification must be supported by a factual basis.[10]

Advocacy has four chief concerns with the rule. They are:

1) Advocacy is concerned that the CFPB does not have the necessary data to develop an adequate factual basis for its certification.
2) Advocacy is also concerned that the CFPB does not have sufficient information to indicate that small institutions contribute to the problem that is the target of the regulation.
3) Advocacy is further concerned about the CFPB's reliance on the reasonableness test as an option for small entities.
4) Finally, Advocacy is concerned that the rulemaking could be problematic for the small depository institutions and the consumers, including small businesses, which rely on them.

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[8] 88 FR 18906.

[9] 88 FR at 18940.

[10] 5 USC 605(b).

A. The Agency Lacks the Necessary Data to Develop a Factual Basis to Certify that the Proposed Rule Will Not Have a Significant Economic Impact on a Substantial Number of Small Entities, As Required by the RFA.

Courts have held that agencies must conduct an adequate analysis before certifying a rulemaking.[11]As noted in Advocacy's RFA guide, an agency should be able to answer the following types of questions in order to certify a rule:

- Which small entities will be affected?
- Have adequate economic data been obtained?
- What are the economic implications/impacts of the proposal or do the data reveal a significant economic impact in a substantial number of small entities?[12]

The CFPB issued an advance notice of proposed rulemaking (ANPRM)on June 29, 2022.[13] As noted in the preamble of the proposed rule, several industry trade group commenters asserted that because lowering the safe harbor would have a significant impact on small financial institutions, the CFPB must comply with Sec. 609 of the RFA by convening a small business review panel prior to any late fee rulemaking.[14] However, the CFPB dismissed these concerns of small institutions because the commenters did not provide specific data that would lead the CFPB to doubt its conclusion that the rule would not have a significant economic impact on a substantial number of small entities.[15]

1. The CFPB's certification lacks specific data on the impact of reduced fees, reductions in card issuances, costs of changes to risk analysis and other internal processes and impacts on the cost of credit.

In support of its certification, the CFPB states:

> Credit cards represent a small fraction of both assets and revenue for small banks. In terms of assets, only 13 small banks reported credit card assets at 1 percent of total assets or higher. Among the remaining small banks with asset share below 1 percent, 29 had a credit card revenue share above 1 percent of total revenue. While the Bureau does not have a precise estimate of the share of total bank credit card revenue generated by late fees, it expects this share to be well below 20 percent of total credit card revenue at most banks. Thus, for the vast majority of small banks, even a large reduction in credit card

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[11] *See*, North Carolina Fisheries v. Daley, 16 F. Supp. 2nd 647 (E.D. Va. 1997); Southern Offshore Fisheries v. Daley, 995 F. Supp. 1411 M.D.Fla.1998).

[12] U.S. Small Business Administration, Office of Advocacy, "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act," p. 11.

[13] 87 FR 38679 (June 29, 2022).

[14] 88 FR at 18940.

[15] Id.

> late fee revenue would represent well below 1 percent of bank revenue and, therefore, would not have a significant economic impact.[16]

Advocacy asserts that the information provided is insufficient. Given the range of fees that banks charge, CFPB should present a more granular analysis of impacts. For example, the CFPB should provide a breakdown of the average late fees charged for the smallest of the smalls, the mid-range of the smalls, and the smalls that are in the upper range of the side standard.

By grouping all small banks and credit unions together, the CFPB may be underestimating the impact of the proposal on small depositories. The costs may be higher for small depositories that have less revenue. By grouping all of the small depositories together, the CFPB may be underestimating the impact on the smallest of the small businesses.

Moreover, small banks and credit unions may experience impacts of the rule beyond what CFPB has addressed. A reduction in fees may result in banks or credit unions extending credit to fewer borrowers or reducing credit to existing or future borrowers. CFPB should include the lost revenue from cards that would no longer be issued as a cost of the rule. If there remain uncertainties around those costs to small entities, CFPB should convene a panel.

CFPB should also consider the role these fees play in incentivizing on-time payment. In cases where banks still find it prudent to issue cards, they may need to change their assessment of risk or other internal processes to account for the change in incentive.

In addition, Advocacy has concerns about the effects of the rule on availability of credit for small entities. Reducing the fees that banks may collect can result in banks offering reduced or no credit to marginal borrowers, some of whom may be using these cards to help finance small businesses.

2. The CFPB lacks data on small depository institutions.

The CFPB admits that it does not have data about the activities of small banks. It has information about the activities of larger institutions over $10 billion, but not sufficient information about small institutions. Instead of collecting the data, the CFPB states that:

> "As with other issuers, depository institutions and credit unions with $10 billion or less in total assets would generally lose fee revenue as a result of the proposed rule. The Bureau has no reason to believe that depository institutions and credit unions with $10 billion or less in total assets would experience effects qualitatively different from those discussed above in part VII.D. However, with respect to precharge-off collection costs, the 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."[17]

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[16] Id.

[17] 88 FR at 18939.

On the one hand, the CFPB assumes that the impact on this rulemaking will be the same for small depository institutions with assets below $850 million as it is for larger institutions with assets above $10 billion. On the other hand, the CFPB acknowledges that much of the analysis that it has performed for this rulemaking is based on data from the largest issuers and may not represent small issuers. The statements appear to be contradictory, but the bottom line is the CFPB does not know the actual impact of the rulemaking on small issuers because it does not have data.

It is unclear why CFPB lacks the data necessary to evaluate the cost of this rule for the small financial entities that it regulates. Without a factual basis, the agency may not certify under Section 605(b) and must publish an Initial Regulatory Flexibility Analysis under Section 603 of the RFA.

B. The Agency Lacks Adequate Information to Indicate that Small Entities Are Part of the Problem

By failing to provide data from small entities, the CFPB has failed to indicate that small entities are part of the problem late fees charged on credit card accounts that are not “reasonable and proportional” to the late payment as required under TILA. In the NPRM, the CFPB states that it collects card agreements from many more smaller issuers than issuers for which the Bureau has financial data. Based on a review of those agreements from over 500 credit card issuers, the CFPB determined that in 2020, small issuers had a maximum late fee of $25. In contrast, in 2020, the average late fee for the large issuers in the Y–14+ data was $31.[18] At a minimum, this suggests that small credit issuers should not be treated the same as the larger institutions charging higher fees.

The CFPB provides information on whether, for example, the $25 fee covers the costs incurred by a small institution. It provides no information on whether the fee is sufficient to encourage on-time payments. It provides no information on whether the proposed $8 fee will cover the costs that small depository institutions incur when processing late payments, nor does it provide information on the burden that may result in small depository institutions no longer offering the product. That type of information is germane to determining the impact on small entities and whether the amount being currently charged is reasonable.

C. The Reasonableness Test Is Not a Viable Option for Small Entities.

As noted above, under § 1026.52(b)(1), a card issuer must not impose a fee for violating the terms or other requirements of a credit card account, such as a late payment, exceeding the credit limit, or returned payments, unless the issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the issuer for that type of violation as set forth in § 1026.52(b)(1)(i) or complies with the safe harbor provisions set forth in

[18] 88 at 18939.

§ 1026.52(b)(1)(ii). This would imply that a small depository institution could simply determine a reasonable rate for a late fee, if the institution believes that the safe harbor amount is inadequate. Indeed, the CFPB makes that assumption:

> "Smaller issuers may have pre-charge-off collection costs that are higher on average than those of the issuers represented in the Y–14 data, which could mean that smaller issuers are more likely to set late fees using the cost analysis provisions in § 1026.52(b)(1)(i) rather than the safe harbor amount."[19]

Determining a reasonable rate may not be that simple for a small institution. Small institutions may not have ready access to professional staff or consultants to develop a late fee that meets the reasonableness test. They also may not have the information system to provide the necessary support. For that reason, smaller institutions may rely on safe harbors to be certain that they are complying with the law. As such, an adequate safe harbor that reflects the costs that small entities incur in processing late payments is necessary to prevent small institutions from incurring additional legal fees.

D. The Rulemaking May Be Harmful to Consumers that Rely on Small Depository Institutions for Their Banking Needs.

Consumers, including small businesses, may choose to obtain their credit cards from small depository institutions that offer credit cards for a variety of reasons. The consumer may like the customer service that is provided by a small depository institution. Since small institutions have a different business model, a consumer with a low credit score may still be able to obtain a credit card that otherwise may be unavailable from a smaller bank. A consumer may simply want to have all of its financial activities at one place. However, if the safe harbor amount does not cover the costs of providing the service, small depository institutions may decide to stop issuing credit cards. That decision may be detrimental to small issuers and their customers.

E. The CFPB Should Maintain the Status Quo for Small Entities Until It Has Sufficient Data to Ascertain the Economic Impact of the Regulation on Small Entities

Imposing the requirements of this proposal on small depository institutions without fully understanding the consequences could be problematic for the small depository institutions and the consumers that rely on them. As noted above, the reasonableness standard may not be an option for small institutions. There is also no way of knowing if the safe harbor will even cover the costs associated with processing late fees at a small institution. If it does not cover the costs, it is possible that small depositories may no longer offer the product to their customers. This would be unfortunate for the small institutions and consumers. Until the CFPB has sufficient data to truly ascertain the economic impact of this proposed regulation on small entities, Advocacy recommends that the CFPB maintain the status quo as it relates to small entities.

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[19] 88 at 18939.

II. Conclusion

Advocacy is concerned about this rule's deficiencies under the RFA and the CFPB's reliance on data that represent the activities of large institutions. For the foregoing reasons, Advocacy recommends that the CFPB maintain the status quo for small entities until the CFPB has sufficient data to perform a more thorough analysis of the economic impact that the proposed rulemaking may have on small entities.

Thank you for the opportunity to comment on this important proposal. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Jennifer A. Smith at (202) 205-6943 or by email at Jennifer.Smith@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
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/s/

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