March 16, 2023

Via electronic mail

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

Re: **NPR on Credit Card Penalty Fees (Regulation Z) (Docket No. CFPB-2023-0010; RIN 3170-AB15)**

Dear Director Chopra:

The Bank Policy Institute, American Bankers Association, Consumer Bankers Association, Credit Union National Association, and the National Association of Federally-Insured Credit Unions[1] are writing with respect to the Consumer Financial Protection Bureau's notice of proposed rulemaking regarding Credit Card Penalty Fees (Regulation Z).[2] The NPR proposes sweeping changes to the provisions of Regulation Z related to credit card late fees. Among other changes, the proposal would reduce the credit card late fee safe harbor to $8 from its current levels of $30 for a first violation and $41 for a subsequent violation within the next six billing cycles. In support of that dramatic reduction and other proposed changes, the Bureau relies extensively on data from the Federal Reserve Board's Y-14M data collection and other "[i]nformation provided in response to a series of data filing orders made to several industry participants, comprised of two distinct sets" and refers repeatedly to analyses it conducted using such data.[3]

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[1] See Appendix for association descriptions.

[2] The NPR has not yet been published in the Federal Register, but was published on the CFPB's website on February 1, 2023, *available at*: [Credit Card Penalty Fees (Regulation Z) (consumerfinance.gov)](#).

[3] The NPR refers to the 2021 Annual Credit Card Report, which states that the two sets are: "a) Data requested from a broad and diverse group of issuers to address a range of topics that neither CCP nor Y-14 data can address. This report refers to these data as Mass Market Issuer (MMI) data. These data cover application and approval volumes, rates, and channels, deferred interest, digital account servicing, certain aspects of the impact of COVID-19 on consumers and issuers, and loss mitigation policies and practices, including debt collection. b) Data

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We support regulatory efforts to promote transparency, consumer choice and competition in the markets for financial products and services, and we intend to comment on the Bureau's NPR. Yet the Bureau has not released to the public the underlying data and empirical analysis on which the Bureau relies. The Associations understand that releasing the Y-14M data and other data on which the Bureau has relied may raise confidentiality concerns; accordingly, we request only that the Bureau release such data in a manner that is anonymized and/or aggregated to the extent necessary to protect confidential bank information. Without this information, it is virtually impossible to understand or replicate the analysis in any meaningful way, significantly hindering the public's ability to provide thoughtful input.

The Bureau's decision to rely on data and analysis that it has not publicly disclosed conflicts with bedrock principles of administrative law.

As the D.C. Circuit has explained, it "is the agency's *duty* to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules."[4] "An agency commits serious procedural error when," as in the NPR here, "it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."[5] After all, "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."[6]

To comply with its obligations —and to ensure that the public has a meaningful opportunity to comment on its sweeping proposal — the Bureau must "expose[]" its studies and data "to refutation" in the rulemaking proceeding.[7] It also "must explain the assumptions and methodology" it used "and, if the methodology is challenged, must provide a complete analytic defense."[8] In short, the Bureau must disclose the "most critical factual material" on which it relied and provide "further opportunity to comment."[9]

In light of the Bureau's legal obligation to provide the underlying data and analysis on which it has relied in connection with the proposed rule, we respectfully request that the CFPB publish this data and analysis, including the methodologies the CFPB has used, immediately. Further, the Bureau must extend the comment period to ensure adequate time for the public to review and meaningfully

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requested from a diverse group of specialized issuers. These summary data, which focus on basic indicators of usage and cost, in places supplement the Y-14 to allow for a broader or more detailed perspective into certain facets of the market than either the Y-14 or [the Bureau's Consumer Credit Panel] allow. Where these data supplement Y-14 data, those data are collectively called "Y-14+"". *See,* NPR at 19, note 58, citing to the Bureau's 2021 Card Report, at 17.

[4] *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) (emphasis added; citation omitted).

[5] *Id.* (citations omitted).

[6] *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

[7] *Id.* at 202.

[8] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) (citation omitted).

[9] *Chamber of Commerce v. SEC*, 443 F.3d 890, 900-01 (D.C. Cir. 2006).

comment on the proposal in light of that critical information.[10] To reiterate, we recognize that the Y-14M data or other data could raise confidentiality concerns and request only that the Bureau release such data and analysis in a manner that is anonymized and/or aggregated to the extent necessary to protect bank confidentiality. But the Bureau must either do so or refrain from relying on the data and related analysis in support of its proposed rule.

Finally, to reiterate, we intend to respond to the proposal, and our response may include other comments related to the Bureau's reliance on Y-14M and other data and its analysis of such data. However, because of the immediate need for the data and analysis on which the Bureau relied, we are first raising this issue for the Bureau's prompt attention.

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If you have any questions, please contact Paige Pidano Paridon by phone at 703-887-5229 or email at paige.paridon@bpi.com.

Respectfully submitted,

Bank Policy Institute
American Bankers Association
Consumer Bankers Association
Credit Union National Association
National Association of Federally-Insured Credit Unions

[10] The Associations previously requested an extension of the comment period to provide sufficient time to respond to the NPR. *See* Letter from ABA, et. al. to the CFPB (Feb. 28, 2023), *available at*: Request for Extension of Comment Period for Credit Card Penalty Fees (aba.com).

Appendix

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's bank-originated small business loans, and are an engine for financial innovation and economic growth.

The American Bankers Association is the voice of the nation's $23.6 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.2 trillion in deposits and extend $12.2 trillion in loans.

CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

Credit Union National Association (CUNA) is the only national association that advocates on behalf of all of America's credit unions, which are owned by 130 million consumer members. CUNA, along with its network of affiliated state credit union leagues, delivers unwavering advocacy, continuous professional growth and operational confidence to protect the best interests of all credit unions.

The National Association of Federally-Insured Credit Unions (NAFCU) advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 134 million consumers with personal and small business financial service products. The association provides members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment. NAFCU proudly represents many smaller credit unions with relatively limited operations, as well as many of the largest and most sophisticated credit unions in the Nation. NAFCU represents 78 percent of total federal credit union assets and 63 percent of all federally-insured credit union assets.