January 20, 2023

Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

BY ELECTRONIC MAIL

Re: RIN 3170-AB15; Credit Card Penalty Fees Rulemaking and Obligations under the Small Business Regulatory Enforcement Fairness Act of 1996

Dear Director Chopra:

The American Bankers Association (ABA), Credit Union National Association (CUNA), Independent Community Bankers of America (ICBA), National Bankers Association (NBA), and National Association of Federally-Insured Credit Unions (NAFCU) (collectively, the Associations) write regarding the Consumer Financial Protection Bureau's (CFPB) planned rulemaking activity concerning credit card penalty fees.

ABA, CUNA, ICBA, and NAFCU provided comment on the CFPB's Advance Notice of Proposed Rulemaking (ANPR) regarding credit card late fees and late payments.[1] As stated in the Credit Card Late Fees ANPR Comment Letter, any reduction in, or elimination of, the late fee safe harbor would have a significant adverse impact on a substantial number of community banks and credit unions, with assets below $850 million. As such, if the CFPB intends to proceed with a rulemaking, it must comply with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[2] as a "covered agency" designated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[3]

In light of this obligation, we were surprised to see that the CFPB is at the Proposed Rule stage and, according to the CFPB's own submission to the Unified Agenda of Regulatory and Deregulatory Action (Unified Agenda), that the CFPB plans to issue a Notice of Proposed

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[1]ABA *et al.* Comment Letter in response to Advance Notice of Proposed Rulemaking on Credit Card Late Fees and Late Payments (Aug. 1, 2022), *available at* https://www.regulations.gov/comment/CFPB-2022-0039-0043 (hereinafter Credit Card Late Fees ANPR Comment Letter), ABA *et al.* Comment Letter in response to Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services, *available at* https://www.regulations.gov/comment/CFPB-2022-0003-2512.

[2] *See* 5 U.S.C. § 603.

[3] *See* 5 U.S.C. § 609(d), as amended by Pub. L. No. 111–203, § 1100G(a), 124 Stat. 1376, 2112 (2010).

Rulemaking in January 2023.[4] The Associations want to reiterate comments made in the Credit Card Late Fees ANPR Comment Letter, which demonstrated that any reduction in, or elimination of, the late fee safe harbor would have a significant adverse impact on a substantial number of financial institutions with less than $750 million in assets (the threshold subsequently was raised to $850 million).[5] Accordingly, if the CFPB proceeds with rulemaking, as is suggested in the Unified Agenda, it must comply with its statutory obligations under SBREFA.

SBREFA Requires that the CFPB Seek Input from Community Banks and Credit Unions before Proposing a Rule

Under SBREFA, the CFPB must convene and chair a Small Business Review Panel (Panel) if it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities.[6] As the CFPB is aware, including for purposes of its Section 1033 rulemaking, the SBREFA consultation process provides a mechanism for the CFPB to obtain input from small entities early in the rulemaking process. Specifically, the Panel is required to collect advice and recommendations from small entities or their representatives (referred to as small entity representatives, or SERs) that are likely to be subject to the regulation that the CFPB is considering proposing.[7] SERs provide the Panel with important and unique perspective on the potential economic impacts of complying with the regulations under consideration and alternatives to minimize these impacts. In addition, SBREFA requires the CFPB to collect the advice and recommendations of SERs concerning whether the proposals under consideration might increase the cost of credit for small businesses and whether alternatives exist that might accomplish the stated objectives of applicable statutes and that minimize any such increase.[8] Again, this process has been used by the CFPB and other covered agencies to inform rulewriting and policymaking and to understand the impact on our nation's small businesses.

Similar to what was noted in the Credit Card Late Fees ANPR Comment Letter, of the approximately 805 credit card-issuing banks, more than half (451) have assets less than $850 million, and of the 3,127 credit card-issuing credit unions, 85 percent (2,670) have assets less than $850 million.[9] As previously communicated, reducing the amount issuers may charge for late payments would potentially have a significant adverse impact on all issuers and cause them to alter their business models. The impact on small depository institutions would be greater.

[4] *See* Off. of Mgmt. & Budget, Off. of Info. & Regul. Aff., Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, Consumer Fin. Prot. Bureau, *available at* https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=202210&agencyCode=&showStage=active&agencyCd=3170; *see also* Off. of Mgmt. & Budget, Off. of Info. & Regul. Aff., Credit Card Penalty Fees, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=3170-AB15.

[5] The inflation-adjusted assets-based size standard for commercial banks, credit unions, savings institutions and other depository credit intermediation, and credit card issuing was raised by the U.S. Small Business Administration from $750 million to $850 million. *See* 87 Fed. Reg. 69,118, 69,128 (Nov. 17, 2022).

[6] 5 U.S.C. § 609(b).

[7] 5 U.S.C. § 609(b)(4).

[8] 5 U.S.C. § 609(d)(1).

[9] The number of card-issuing depository institutions is based on an analysis of bank, credit union, and thrift balance sheets. Those with non-zero credit card loan balances were included as card issuers.

Some have indicated they may have to consider exiting the market altogether. And, as also described in the Credit Card Late Fees ANPR Comment Letter, reducing the amount issuers may charge for late payments could increase the cost of, and reduce access to, credit by small businesses, many of which use personal credit cards for business purchases. Indeed, any regulatory change to late fees would ultimately impact the entire card market and bring with it the potential to change the competitive position of small depository institutions in ways that must be explored through the SBREFA process. Due to the potential significant impact on a substantial number of small institutions of the rulemaking announced in the Unified Agenda, the CFPB must convene a SBREFA Panel to consider the effect of any proposed amendments on small entities.

We would be pleased to discuss these issues with you at your convenience.

Sincerely,

AMERICAN BANKERS ASSOCIATION

CREDIT UNION NATIONAL ASSOCIATION

INDEPENDENT COMMUNITY BANKERS OF AMERICA

NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS

NATIONAL BANKERS ASSOCIATION

cc: Jennifer Smith, SBA Office of Advocacy
Alex Goodenough, Office of Information and Regulatory Affairs