



May 3, 2023

Comment Intake—2023 NPRM Credit Card Late Fees
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

*Submitted electronically
to regulations.gov*

RE: Docket No. CFPB-2023-0010 or RIN 3170-AB15; Credit Card Penalty Fees (Regulation Z)

To Whom It May Concern:

The Dakota Credit Union Association (DakCU), which represents state and federally chartered credit unions in the states of North Dakota and South Dakota, appreciates the opportunity to provide comment to the Consumer Financial Protection Bureau (CFPB) in response to its proposed rulemaking regarding credit card penalty fees (Regulation Z).

DakCU is opposed to the proposed rulemaking as it would significantly impact credit unions, including small credit unions, and their credit card programs. The proposed change, if finalized, of reducing the safe harbor for late fees could reduce credit access and/or increase the cost of credit, negatively impacting the consumer.

As stated with regard to the Advanced Notice of Proposed rulemaking the CFPB issued on the same topic, DakCU believes this proposed rulemaking is unnecessary and just an extension of the posturing the CFPB has taken concerning fees, or as the CFPB labeled it “junk fees”.

The impacted sections of this proposed rulemaking stem from the Credit Card Accountability Responsibility and Disclosure Act (CARD Act) that was signed into law on May 22, 2009, which amended Truth in Lending and Regulation Z, which implements TILA, by adding section 149. Section 149 provides, “among other things, that the amount of any penalty fee with respect to a credit card account under an open-end consumer credit plan in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee or any other penalty fee or charge, must be “reasonable and proportional” to such omission or violation.” 88 FR 18907, March 29, 2023.

Under current regulations, section 12 CFR 1026.52(b) provides, “A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured)



consumer credit plan unless the dollar amount of the fee is consistent with paragraphs (b)(1) and (b)(2) of this section.” The regulation goes on to discuss “fees based on costs” and the “safe harbors.” This proposed rulemaking does not amend language related to “fees based on cost” under 1026.52(b)(1)(i), however, it would make changes to the commentary of this section to clarify that the costs that card issuers can consider for purposes of determining the amount of a penalty fee under the cost analysis provisions in § 1026.52(b)(1)(i) do not include collection costs that are incurred after an account is charged off in accordance with loan loss provisions.

With regard to safe harbor provisions, currently § 1026.52(b)(1)(ii) provides a “safe harbor” and states that “a card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed, as applicable: (A) \$30; (B) \$41 if the card issuer previously imposed a fee pursuant to paragraph (b)(1)(ii)(A) of this section for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles; or (C) Three percent of the delinquent balance on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle if the card issuer has not received the required payment for two or more consecutive billing cycles.” These “safe harbor” amounts are currently adjusted annually by the CFPB to reflect changes in the Consumer Price Index.

Under the CFPB’s proposed rulemaking, the safe harbor amount for late payment fee in 1026.52(b)(1)(ii) would be reduced to \$8.00; DakCU is adamantly opposed to this arbitrary limit to late payments. The proposed rule would allow, “A card issuer may impose a fee for a late payment on an account if the dollar amount of the fee does not exceed \$8. Other than a fee for a late payment, a card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed, as applicable: (A) \$30; (B) \$41 if the card issuer previously imposed a fee pursuant to paragraph (b)(1)(ii)(A) of this section for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles; or three percent of the delinquent balance on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle if the card issuer has not received the required payment for two or more consecutive billing cycles, notwithstanding the limitation on the amount of a late payment fee in paragraph (b)(1)(ii) of this section.” *88 FR 18941, March 29, 2023*. As proposed, the \$8 for the late payment fee would not be adjusted annually, but the other safe harbor figure would continue to adjust.

Section 12 CFR 1026.52(b)(2)(i)(A) addresses prohibited fees. Currently, this section provides, “A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan that exceeds the dollar amount associated with the violation.” Under the proposed rule, this section would be revised to read, “A card issuer must not impose a fee for a late payment on a credit card account under an open-end (not home-secured) consumer credit plan that exceeds 25 percent of the amount of the required minimum periodic payment



due immediately prior to assessment of the late payment fee. For fees other than a fee for a late payment, a card issuer must not impose a fee for violating the terms or other requirements of a credit card account described above that exceeds the dollar amount associated with the violation.” *88 FR 18941, March 29, 2023.*

As discussed in the proposed rule, the CFPB is concerned that the safe harbor dollar amounts for late fees currently set forth in § 1026.52(b)(1)(ii) are not reasonable and proportional to the omission or violation to which the fee relates. The CFPB also noted concern with the current higher safe harbor threshold for late fees for subsequent violations of the same type in the same billing cycle or in one of the next six billing cycles is higher than is justified based on consumer conduct and to deter future violations. They conclude that additional restrictions on late fees may be needed to ensure that late fees are reasonable and proportional. *88 FR 18906, March 29, 2023.*

The Federal Reserve Board (FRB) issued a final rule on June 29, 2010. to implement the CARD Act, and specific to this proposed rulemaking, Section 149 noted above. With regard penalty fees, in developing these rules, the FRB was guided by the direction of the CARD Act, which required the FRB to consider: “(1) The cost incurred by the creditor from an omission or violation; (2) the deterrence of omissions or violations by the cardholder; (3) the conduct of the cardholder; and (4) such other factors as the Board may deem necessary or appropriate. The Credit Card Act authorizes the Board to establish “different standards for different types of fees and charges, as appropriate.” Finally, the Act authorizes the Board to “provide an amount for any penalty fee or charge * * * that is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates.” *75 FR 37526, June 29, 2010.*

As explained in the 2010 final rule, “the Board believes that, as a general matter, the safe harbor amounts in § 226.52(b)(1)(ii)(A) and (B) are reasonable and proportional to violations of the terms and other requirements of an account....these amounts are based on the statutory factors listed in new TILA Section 149(c) and on the Board’s analysis of the data and other information discussed in the proposal and submitted by commenters. Specifically, the safe harbor amount in § 226.52(b)(1)(ii)(A) is generally intended to represent a reasonable proportion of the costs incurred by most card issuers as a result of a single violation of the terms or other requirements of an account. In contrast, the higher safe harbor amount in § 226.52(b)(1)(ii)(B) is intended to represent the increased costs incurred as a result of additional violations of the same type during the next six billing cycles as well as to address the consumer conduct that leads to such violations and to deter subsequent violations.” *75 FR 37540, June 29, 2010.*

As the CFPB is well aware, credit card late fees are subject to regulatorily mandated clear and concise agreements and disclosures. Furthermore, notification of due dates for credit card payments are also mandated to be provided monthly with the due date required to be the same day of the month for each billing cycle and furthermore the amount of any late payment fee that may be imposed on the account as



a result of a late payment must also be disclosed with each periodic statement. A consumer is reminded monthly when payment is due, thus able to avoid any late payment and its consequences.

Credit unions are owned by their members and run by a board of directors that are elected from the credit union's membership. Fees are agreed upon and set by these representatives of the membership. Beyond not incurring a particular fee in the first place, if the membership did not want to pay a particular fee or the amount of the fee, change can be made through the democratic process that exists at every credit union. Credit unions and their elected board of directors are in the best position to determine what is best for its membership, including what amount fees should be set at.

Thank you for this opportunity to share our comments and concerns.

Respectfully,

A handwritten signature in black ink, appearing to read "Jeffrey Olson".

Jeffrey Olson
CEO/President

A handwritten signature in black ink, appearing to read "Amy Kleinschmit".

Amy Kleinschmit
Chief Compliance Officer