May 3, 2023

Via regulations.gov
Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Notice of Proposed Rulemaking: Credit Card Late Fees and Late Payments, Docket No. CFPB–2023-0010

The National Consumer Law Center (NCLC) (on behalf of its low-income clients), Americans for Financial Reform Education Fund, American Economic Liberties Project, Consumer Action, Consumer Federation of America, Demand Progress Education Fund, Local Initiatives Support Corporation (LISC), National Community Reinvestment Coalition, and Tzedek DC submit the following comments in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) Notice of Proposed Rulemaking (NPRM) on Credit CARD Late Fees and Late Payments. We strongly support the proposed rule. We thank the CFPB for proposing such an impactful and beneficial regulation for credit card late fees. This rule, when adopted, will save consumers billions of dollars each year in late fees, putting that hard-earned money back in their pockets.

A. Consumer Advocates Strongly Support the $8 Safe Harbor

We strongly support the CFPB's proposed safe harbor of $8 for credit card late fees. The CFPB provided ample evidence that this amount is fair, reasonable, and proportional to the costs incurred by issuers for late payments. Put simply, the CFPB "showed its math" in coming up with the amount of $8, and credit card issuers did not show their math for any alternative figure.

We support the $8 safe harbor because it is not super-compensatory, unlike the previous safe harbor amounts of $30 and $41. As we discussed in our comments to the Advanced Notice of Proposed Rulemaking,[1] super-compensatory penalty fees are harmful because they become a profit center and thus create incentives for issuers to engage in practices – often unfair or abusive – to trigger the supposedly violative conduct. Legal scholars have recognized this for centuries, which is why the English common law that undergirds much of our basic legal framework included a rule against automatic penalties for breaking a contract, so-called "liquidated damages," that were not reasonable and proportional to the cost of the breach.[2]

[1] Consumer Groups Comments to Advanced Notice of Proposed Rulemaking: Credit Card Late Fees and Late Payments, Docket No. CFPB–2022–0039, Aug 1, 2022, https://www.nclc.org/resources/consumer-group-comments-to-cfpbs-advanced-notice-of-proposed-rulemaking-on-credit-card-late-fees/ (hereinafter "NCLC ANPR Comments").

[2] *See* NCLC, Restoring the Wisdom of the Common Law: Applying the Historical Rule Against Contractual Penalty Damages to Bank Overdraft Fees, Apr. 2013, https://www.nclc.org/images/pdf/high_cost_small_loans/common-law-overdraft-fees.pdf (discussion of how penalty fees above the costs of the violation incentivize abusive practices).

Furthermore, it is important to recognize that the nature of this $8 amount, as it is called, is a safe harbor. If $8 does not adequately compensate an issuer for its costs in dealing with late payments, the issuer can charge more if they can justify the amount under Regulation Z, § 1026.52(b)(1)(i)), *i.e*., the cost analysis method. As we discuss in part F of these comments, card issuers should be required to publicly disclose the data to support any late fee amounts they impose pursuant to the cost analysis method that are greater than the safe harbor.

We also support the CFPB's decision to not consider costs after a credit card account is charged off (after it is 180 days past due). As the CFPB rightfully notes, issuers consider charged off accounts to be a loss.[3] Thus, such an account should be considered a loan loss, and loss rates are built into the price of credit, *i.e.*, interest, including any penalty interest rate.[4] Furthermore, after charge off, the issuer has likely accelerated the loan, which terminates the cardholder's duty to make periodic payments. Consequently, the issuer should not be assessing late fees for missed post-acceleration payments.[5]

B. The CFPB Should Establish a Courtesy Period Before a Late Fee Can Be Charged

In the NPRM, the CFPB asks whether it should establish a courtesy period of 15 days before an issue can impose a late fee. In addition, the CFPB asks whether, if there is such a 15-day courtesy period, whether it should be applicable only to late fees using the safe harbor amount or whether it should be applicable generally, *i.e.*, also applicable to late fees using the cost analysis method.

We support a courtesy period of 15 days and believe it should also be applicable to late fees set using the cost analysis method. As the CFPB pointed out, about half of consumers who are late payers end up making a payment in less than 10 days past the due date.[6] A consumer who makes a payment a few days late does not present a credit risk. As the CFPB notes, the credit reporting industry's standard reporting format, called Metro 2, does not even consider a payment to be late if it is made within 30 days of the due date.[7] This industry convention demonstrates that, from the perspective of risk management, payments within 30 days of a due date should really not be considered to be late at all. Thus, a courtesy period of 15 days is more than justifiable.

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[3] 88 Fed. Reg. 18,906, 18,913 (March 29, 2023).
[4] *Id*. ("As the [Federal Reserve] Board noted in its 2010 Final Rule 'it would be inconsistent with the purpose of the [CARD Act] to permit card issuers to begin recovering losses and associated costs through penalty fees rather than through upfront rates.' citing 75 Fed. Reg. 37,526, 37,538 (June 29, 2010)). *See also* NCLC, Consumer Credit Regulation § 4.8.1 (3d ed. 2020), updated at www.nclc.org/library; George J. Benston And Larry D. Wall, How Should Banks Account for Loan Losses?, Federal Reserve Bank of Atlanta Economic Review, Vol. 9, No. 4, 4th Quarter 2005, https://www.atlantafed.org/-/media/documents/research/publications/economic-review/2005/vol90no4_benston-wall.pdf ("When loans are recorded at their economic values, there should be no reduction in [present discounted value of payments] with an allowance for loan losses because the interest rate charged should be sufficient to cover expected default losses.")
[5] *See, e.g.*, Trustco Bank New York v. 37 Clark St., Inc., 157 Misc. 2d 843, 599 N.Y.S.2d 404 (Sup. Ct. 1993) (late fee did not apply to post-default balloon payment).
[6] 88 Fed. Reg. at 18,920.
[7] Consumer Data Industry Association, Credit Reporting Resource Guide 2-2, 5-14 to 5-15 (2020). *See generally*, NCLC, Fair Credit Reporting § 6.3.3.7 (10th ed. 2021), updated at www.nclc.org/library.

Another reason to require a courtesy period is that it will prevent abuses designed to trap consumers into incurring late fees. Prior to the Credit CARD Act, issuers engaged in all sorts of hair trigger tactics to trip consumers up into being a few days, or even a few hours, late. These tactics included:

- Decreasing the amount of time between the mailing of the billing statement and the payment due date, and thus increasing the chance that the consumer would send in a payment that would be received past the due date.
- Setting an early hour cut-off time, such as 9:00 or 10:00 a.m., for crediting payments received that day. Consequently, if a consumer's payment was received on the payment due date, it would be considered late because in all likelihood, the U.S. Postal Service will not have delivered the mail so early in the morning.
- Failing to post an electronic or in-person payment at a bank branch on the date the payment was made, instead posting the payment several days later.
- Treating the payment as late if not received on the prior business day when due dates fell on a weekend or holiday.
- Providing only a post office box as an acceptable payment address, effectively preventing consumers from making timely payments late in the billing cycle by using overnight and other forms of high-speed mail that will not deliver to post offices boxes.
- Changing mailing addresses, which may trigger late payments by consumers who use electronic bill payment services through their own bank. Since these programs sometimes physically mail a check, the check could be mailed to the wrong address.[8]

These tactics were targeted at consumers who simply made a mistake, where payment was received within a few days – sometimes a few hours after the cutoff time for the due date. *None of these tactics would have triggered a late fee if there had been a courtesy period.*

The Credit CARD Act's response to these abuses was to prohibit each tactic individually. However, after the Credit CARD Act, issuers engaged in new practices that triggered late fees.

For example, the CARD Act prohibits a creditor from treating a payment as late if the due date falls on a day on which the credit does not receive or accept payments by mail and the payment is received the next business day.[9] This rule leads consumers to understand that if a due date is on a Sunday, the payment will be timely if received on Monday. But at least one major credit card company took the position that a payment made by ACH transaction on Friday but not received until Monday was late, because the company had an arrangement with the post office to receive mail on Sundays.

Similarly, as discussed in part C below, companies have aggressively pushed consumers into online-only statements, where they are likely to miss the statement and thus trigger a late fee. Instead of playing whack-a-mole to prevent each individual abuse, a courtesy period would take care of issues more globally.

[8] *See* NCLC, Consumer Credit Regulation § 8.6.1 (3d ed. 2020), updated at www.nclc.org/library (recounting these historical abuses).
[9] 15 U.S.C. § 1637(o)(2).

As we noted in our comments to the ANPR, many other types of credit or payment obligations require a courtesy period before late fees can be imposed, such as rent, mortgage, and retail installment sales contracts.[10] Thus, there is ample precedent for requiring a courtesy period for payment obligations.

In fact, the Official Interpretations to Regulation Z refers to courtesy periods by issuers.[11] While the reference is to informal and voluntary practices that an issuer might adopt, the concept of a courtesy period for credit card accounts is familiar enough to have been discussed in the Official Interpretations back in 2010.

The CFPB asks whether, if there is such a 15-day courtesy period, it should be applicable only to late fees using the safe harbor amount or whether it should be applicable generally. We believe a 15-day courtesy period should be applicable generally. Late fees imposed based on the cost analysis method are likely to be higher than the safe harbor amount, and thus an even bigger incentive for issuers to engage in creative methods to trigger them.

The CFPB also asks whether a 15-day courtesy period should apply to the other penalty fees, including over-the-limit fees and returned-payment fees. We would support such a proposal. We are generally concerned that issuers will try to engage in tactics that generate more of those fees, as we discuss in part G of these comments.

C. The CFPB Should Establish Certain Conditions for Imposition of Late Fees: Autopayment Payment Options; Notifications; Paper Notice for Online Statement Recipients

The CFPB has asked whether it should establish certain requirements in order for issuers to use the safe harbor for late fees, including requiring card issuers to offer automatic payment options or to provide notification that a payment is soon due a few days prior to the due date. We support both ideas, and urge them to be applied to late fees generally. We also urge an additional requirement – that issuers be required to provide a notice by postal mail before imposing late fees on any account that only receives billing statements electronically, *i.e.*, online-only statements.

1. The vast majority of credit card accounts already offer automatic payment options

We support a requirement that issuers offer automatic payment before imposing a late fee in general. Such a requirement would not be onerous at all, because the vast majority of credit card accounts already have an automatic payment option. It appears that all of the top ten issuers,

[10] NCLC ANPR comments at 5.
[11] Official Interpretations to Regulation Z, 12 C.F.R. § 1026.7(b)(11)-1.

which hold the vast majority of credit card balances,[12] currently provide this option.[13] Credit union[14] and smaller banks[15] appear to have automatic payment options as well. Also, smaller financial institution issuing banks may be using core processors[16] similar to their use for deposit accounts, and the core processors appear to have automatic payment options.[17]

2. Notification requirements should include a postal mail requirement for online only accounts

With respect to requiring a notification before a late fee is imposed, we support such a proposal. In addition, we urge the CFPB to require issuers to provide a notice by postal mail before imposing a late fee on cardholders who only receive statements online. Such notice should include a warning that a late fee will be imposed if the cardholder does not make a payment within 7 days,[18] and should also inform cardholders of their right to receive paper statements and provide an easy way to exercise this right.

As discussed in our comments to the ANPR, the aggressive pushing of online-only statements has resulted in some consumers paying late because they have missed an email or other electronic notification that a statement is available.[19] Yet many consumers prefer paper statements for bills. A survey by Consumer Action found that "the vast majority of respondents noted that they prefer to receive all types of bills by mail—even when they opt to pay the bill online."[20]

Our ANPR comments include a couple of examples from the CFPB database that described this very scenario.[21] Issuers have aggressively pushed cardholders into online-only statements, as

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[12] Natasha Gabrielle, Credit and Debit Card Market Share by Network and Issuer, The Motley Fool, Apr. 19. 2022, at www.fool.com/the-ascent/research/credit-debit-card-market-share-network-issuer/ (The top 10 credit card issuers controlled 80.6% of the market, while other issuers made up the final 19.4%.)

[13] Jacklyn DeJon, Should You Sign Up for Credit Card Autopay? CNET.com, Oct. 27, 2022, www.cnet.com/personal-finance/credit-cards/advice/should-you-sign-up-for-credit-card-autopay/#what-is-autopay (American Express, Wells Fargo, Chase, Discover, Citi, Bank of America, Capital One, U.S. Bank). Meredith Hoffman, Credit card autopay explained, BankRate.com, May 17, 2022, www.bankrate.com/finance/credit-cards/autopay-explained (Barclays); Synchrony, FAQ, www.mysynchrony.com/faqs.html, viewed March 22, 2023 (Synchrony; see FAQ "What is Autopay?").

[14] Navy Federal Credit Union, Making Loan Payments and Other Recurring Transfers, viewed March 22, 2023 www.navyfederal.org/services/transfers/making-loan-payments.html.

[15] People's Bank and Trust, Personal Credit Card Application, viewed March 22, 2023 www.peoples.bank/sites/www.peoples.bank/files/personalcreditcardapp.pdf ($1 billion asset small bank with credit card automatic payment option).

[16] PYMNTS, Direct Credit Card Issuing Helps Small Banks, Credit Unions Compete With Larger FI Rivals, Nov. 23, 2021, www.pymnts.com, www.pymnts.com/credit-unions/2021/direct-credit-card-issuing-helps-small-banks-compete-larger-financial-institution-rivals/

[17] i2c, Autopay Credit Card Balance with a Bank Account, https://apis.i2cinc.com/apis/show/autopay-credit-card-balance-with-a-bank-account#content_k0Oe1DOY (viewed March 23, 2023).

[18] Seven days allows for 3 days for the mailed notice to reach the cardholder and 4 days for the cardholder to pay.

[19] NCLC ANPR Comments at 5-7.

[20] Ruth Susswein, Consumer Action, Paper or digital? (Jan 15, 2019), https://www.consumer-action.org/news/articles/paper-or-digital-winter-2018-2019.

[21] NCLC ANPR Comments at 5-7.

evidenced by the increase in accounts that have opted out of receiving paper statements from about 25% in 2013[22] to over half of cardholders (56%) in 2020.[23]

Consumers with online-only statements deserve the same ability to avoid a late fee as consumers who have paper statements. Paper disclosures are simply more salient for consumers than online notifications, especially when supplied via a smartphone,[24] which is the predominant means by which consumers access credit card information on the Internet.

D. Charge Cards Should Only Be Allowed to Use the Alternate 3% of Balance Formula if There is No Possibility They Can Charge Periodic Interest

We urge the CFPB to reconsider the decision not to amend the Regulation Z provision applicable to charge card accounts.[25] The CFPB should revise Regulation Z, § 1026.52(b)(1)(ii)(C), to explicitly state that it is only applicable if there is no possibility of interest being charged on a balance for the account.

Currently, this charge card provision permits charge card issuers to impose a late fee up to three percent of the balance, if the account requires payment of outstanding balances in full and payment has not been received for two or more billing cycles. Three percent of the balance is likely to greatly exceed the $8 safe harbor or the collection costs for the account.

The CFPB has stated it is not amending this charge card provision.[26] The stated rationale is that issuers do not impose interest charges on charge card accounts, and thus would not be able to use an interest rate to manage credit risk.[27] Regulation Z, § 1026.52(b)(1)(ii)(C) is intended to provide charge card issuers with more flexibility to charge higher late fees to manage credit risk when an account becomes seriously delinquent.[28]

However, it appears that there may not be any charge card products that do not charge interest at all. Apart from some closed-loop store cards, it appears only American Express (Amex) offers charge cards.[29] Yet all of Amex's charge card products are hybrid charge/credit cards

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[22] CFPB, Consumer Credit Card Market Report 134 (Dec. 3, 2015), available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf

[23] CFPB, The Consumer Credit Card Market 172 (Sept. 2021), available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

[24] *Cf.* Jeff Sovern and Nahal Heydari, Not-So-Smartphone Disclosures (August 12, 2022). St. John's Legal Studies Research Paper No. 22-0010, 2022, available at SSRN: https://ssrn.com/abstract=4188892 or http://dx.doi.org/10.2139/ssrn.4188892 (finding that consumers understood credit card disclosures significantly less well on smartphones).

[25] Regulation Z, 12 C.F.R. § 1026.52(b)(1)(ii)(C).

[26] 88 Fed. Reg. at 18,923.

[27] *Id.*

[28] *Id.*

[29] Robin Frankel Charge Card Vs. Credit Card: What's The Difference?, ForbesAdvisor, March 16, 2023, at www.forbes.com/advisor/credit-cards/charge-card-vs-credit-card ("American Express is the only major issuer that still offers cards that resemble a traditional charge card. The options currently available to consumers include:

The American Express® Green Card*

The American Express® Gold Card (Terms apply) because they can carry both balances that must be paid in full and balances that can revolve.[30] Examining the agreements for these Amex cards, it is unclear whether Amex can impose an interest rate (including a penalty rate) on a balance that must be paid in full if it is delinquent for over 60 days.

Indeed, the CFPB and FDIC have taken enforcement action against Amex for imposing late fees of 2.99% of the outstanding balance on its hybrid charge card/credit card accounts.[31] The CFPB and FDIC concluded that this amount for a late fee was not permissible, likely because of the hybrid nature of the account. Thus, Section 1026.52(b)(1)(ii)(C) should be explicitly conditioned on the issuer legally being unable to impose interest charges on the balance upon which the three percent is calculated. This provision should state that a charge card issuer may impose a few that does not exceed:

> (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 <u>*and is not legally authorize to impose any interest charges on such balance*, notwithstanding the limitation on the amount of a late payment fee in paragraph (b)(1)(ii) of this section.</u>
>
> (underlined language added by the proposed rule, underline and italicized text suggested by these comments).

Otherwise, we are concerned that issuers will start offering a "charge card balance" feature on credit cards in order to take advantage of the ability to impose late fees of three percent of the balance.

E. Limiting Late Fees to 25% of the Amount of the Minimum Payment

We strongly support the CFPB's amendment of Regulation Z, § 1026.52(b)(2)(i) to limit late fees to 25% of the minimum payment. Such a limitation will prevent excessive late fees on small balances. Such a provision would also incentivize issuers to raise minimum payments, which are currently too low.

As the CFPB has noted, the median minimum payment due is $39.[32] Based on that amount, late fees would be likely limited to $10 if the issuer is basing the late fee using the cost analysis method and not the safe harbor.

The Platinum Card® from American Express (Terms apply)").

[30] See the following a agreements in the CFPB Credit Card Database: American Express Gold Card, https://bit.ly/3LU87N0; American Express Green Card, https://bit.ly/3Z9MPOI; American Express Platinum Card, https://bit.ly/3neI6hh, all viewed March 23, 2023.

[31] Consent Order, *In re* Am. Express Centurion Bank Salt Lake City, Utah, FDIC-12-315b, 12-316k, 2012-CFPB-0002, at 3 (Oct. 1, 2012), *available at* www.consumerfinance.gov.

[32] 88 Fed. Reg. at 18,920.

Issuers may respond to the proposal to limit late fees to 25% of the minimum payment by raising the amount of the minimum payment. But increasing minimum payment amounts would be a good thing. Minimum payments are far too low, resulting in long repayment periods and substantially more in finance charges for consumers who only pay the minimum.[33]

The modern-day low minimum payment formulas for credit cards originated from a deliberate decision by card issuers to lower minimums to increase profits. Issuers lowered the minimum monthly payments from 4% to 2% or 3% in the early to mid-2000s, which sometimes was not sufficient even to avoid negative amortization. Issuers then settled on the common formula of 1% plus any interest and fees when regulators issued guidance that minimum payments could not result in negative amortization.[34] This formula still results in very long repayment periods.

To respond to tiny minimum payments, the Credit CARD Act requires periodic statements to include a mandatory warning statement about the risks of making only the minimum payment.[35] While this warning has been helpful, the prevalence of online-only statements diminishes its impact because many consumers who do not receive paper statements do not view the warning.[36] Thus, any measure that would increase the minimum payment by a modest amount, such as the proposed cap on late fees to 25% of the minimum payment, would likely benefit consumers.

Also, we suggest that, if there is a partial payment of the minimum payment, the late fee should be limited to 25% of the amount that was not paid. Both the current and the proposed rule base their late fee caps on the amount of the minimum, regardless whether any portion was paid.[37] Thus, if a minimum payment is $39, the late fee would be capped at $39 (current rule), or $10 (proposed rule) even if the consumer made a payment of $30 toward that minimum, perhaps due to a scrivener's error on their part.[38] This would seem to be inconsistent with a rule that a fee cannot exceed the amount associated with the violation (or 25% thereof under the proposed rule), as the violation in that example was failure to pay only $9, not $39. We suggest that this issue be fixed.

Finally, the CFPB has asked whether the dollar amount associated with the other penalty fees covered by § 1026.52(b) should be limited to 25% of the dollar amount associated with the violation. We support such a proposal, because we are concerned that issuers will begin to engage in tactics to increase the number of those penalty fees. We discuss this concern in more detail in part G of these comments.

F. Issuers should be required to show their math when imposing late fees based on costs

With a new safe harbor of $8, issuers may likely choose to calculate late fees using the cost analysis method in Regulation Z, § 1026.52(b)(1)(i). The CFPB has asked what revisions to §

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[33] *See* NCLC, Consumer Credit Regulation § 8.6.8.1 (3d ed. 2020), updated at www.nclc.org/library.
[34] *Id*. (history of credit card minimum payment formulas).
[35] 15 U.S.C. § 1637(b)(11).
[36] CFPB, The Consumer Credit Card Market 122 (Aug. 2019), available at www.consumerfinance.gov (citing Lauren Jones et al., Effects of informational nudges on consumer debt repayment behaviors, 51 J. of Econ. Psychol. 1, 16–33 (2015)).
[37] Official Interpretations to Regulation Z, 12 C.F.R. § 1026.52(b)(1)(1)-6§ 1026.52(b)(2)(i)-1.
[38] Official Interpretations to Regulation Z, 12 C.F.R. § 1026.52(b)(1)(1)-6§ 1026.52(b)(2)(i)-1.i, -1.ii.

1026.52(b)(1)(i) would be appropriate to ensure that late fee amounts using the cost analysis method are reasonable and proportional. One important revision would be to require the issuer to publicly disclose the data that it used to determine the amount it will be charging.

Public disclosure of this data is necessary to ensure that late fee amounts can be independently verified and reviewed to confirm they are truly based on actual costs and not a super-compensatory amount. The need for public disclosure is illustrated by the docket in this very rulemaking. As the CFPB noted, during the ANPR stage, "industry trade groups asserted that [] the current safe harbor amounts [of $30 and $41] do not cover all the costs associated with late payments and are not as effective a deterrent as higher fees would be."[39] Yet these assertions by trade groups were baldly naked conclusions unsupported by data or evidence because, as the CFPB noted "[c]ard issuers and trade group commenters, however, did not provide detailed information on the type of costs, and the dollar amount of the costs, they incur to collect late payments."[40]

In other words, issuers and their trade groups did not show their math in making their assertions. The CFPB, on the other hand, did show its math, by relying on publicly available and verifiable data in the form of the Y-14 data.

If issuers want to charge more than the proposed safe harbor of $8, they need to show their math. Furthermore, they need to show the data publicly and not just to the CFPB. While we would be confident that this current CFPB administration would carefully and critically scrutinize data submitted by issuers on collection costs, there will inevitably be changes in administration. Moreover, the CFPB has a lot of work and might not always have capacity to review every issuer's calculations. Including a requirement in Regulation Z itself that issuers must publicly disclose their cost data in order to set late fee amounts pursuant to costs will ensure that other stakeholders can scrutinize these amounts even if a future CFPB administration does not.

Finally, we suggest that the following provisions of the Official Interpretations be revised to use examples of late fees based on the cost analysis method that are closer to the $8 safe harbor. Otherwise, these provisions would appear to suggest that late fees based on the cost analysis method would reasonable if they were close in amount to the examples. Thus, we suggest the following changes to Official Interpretations to Regulation Z, 12 C.F.R. § 1026.52(b)(1)(1)-6:

Example A - Revise late fee example currently set at $26 to $6
Example B – Revise late fee example currently set at $35 to $7
Example C – Revise late fee example currently set at $37 to $8

G. The CFPB Should Set a Lower Safe Harbor for Other Penalty Fees and Impose Requirements Similar to Those Proposed for Late Fees

The CFPB has asked whether it should set the safe harbor for other penalty fees to $8, or whether it should apply of the other changes in the proposed rule to such fees. These fees could include

[39] 88 Fed. Reg. at 18,909.
[40] *Id*.

over-the-limit fees, returned-payment fees, and declined access check fees. Another option raised by the CFPB is to finalize the proposed safe harbor for late fees and eliminate the safe harbors for other penalty fees.

We would support applying the $8 safe harbor to other penalty fees, most particularly over-the-limit fees. There is a significant risk that issuers will try to push cardholders into over-the-limit transactions. While over-the-limit fees virtually disappeared because of the Credit CARD Act's requirement that issuers must obtain the consumer's consent or opt in for over-the-limit transactions,[41] that might not be a permanent condition. As can be seen from the experience for overdrafts in the early 2010s, banks are very good at overcoming the stickiness of defaults and getting consumers to opt in to a harmful product.[42]

Deposit account overdraft practices and over-the-limit practices bear some similarities, such as allowing consumers to go over a threshold when the bank could have just said no, then imposing an excessive fee for it. When the profits extracted by issuers from late fees are reduced, we may see the same aggressive (and sometimes deceptive) practices we witnessed when banks solicited opt-ins to debit cards after Regulation E started requiring them.

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Thank you for the opportunity to submit these comments. If you have questions about these comments, please contact Chi Chi Wu at cwu@nclc.org or 617-542-8010.

Respectfully submitted,

National Consumers Law Center
(on behalf of its low-income clients)

Americans for Financial Reform Education Fund
American Economic Liberties Project
Consumer Action
Consumer Federation of America
Demand Progress Education Fund
Local Initiatives Support Corporation (LISC)
National Community Reinvestment Coalition
Tzedek DC

[41] CFPB, The Consumer Credit Card Market 71 (Aug. 2019), available at www.consumerfinance.gov.
[42] CFPB, Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors 18, Dec. 2021 (finding that about 20% of bank accounts and 29% of credit union accounts opted in to debit card overdrafts under Regulation E).