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National Association of Federally-Insured Credit Unions

August 1, 2022

Comment Intake—Credit Card Late Fees
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Advance Notice of Proposed Rulemaking Regarding Credit Card Late Fees and Late Payments (Docket No. CFPB-2022-0039)

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU) I am writing in response to the advance notice of proposed rulemaking (ANPR) issued by the Consumer Financial Protection Bureau (CFPB or Bureau) regarding its efforts to evaluate credit card late fees and late payments, and card issuers' revenue and expenses. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 131 million consumers with personal and small business financial service products. Credit unions' credit card late fees are "reasonable and proportional" to the consumer behavior to which the fee relates or are well within the safe harbor limits, serve as a deterrent to consumers routinely missing their payment due dates, and help cover the collection costs to ensure consumers can make timely payments. These late fees are calculated as a business judgment to establish a deterrent effect to mitigate the risk of extending credit. The Bureau should not second-guess this business judgment or further limit fees across the board by reducing the safe harbor fee amounts. Instead, the CFPB should focus on pursuing individual enforcement actions against the truly bad actors or repeat offenders that are harming consumers by assessing exorbitant fees and making it difficult for consumers to escape from a cycle of debt. Additionally, the Bureau should consider more effective means of changing consumer behavior to have the desired effect of helping consumers escape persistent indebtedness.

In addition to targeting those institutions that clearly and consistently disadvantage consumers by charging excessive late fees, much like the recommendations in response to the CFPB's recent request for information on "junk fees,"[1] NAFCU urges the CFPB to continue to study the credit card market before taking any supervisory or regulatory action because the Bureau's own current data and analyses do not suggest an unfair or underregulated environment, ripe with predatory behavior. This analysis should include appropriate consideration for newer, less regulated markets such as fintech-based unsecured lending and Buy-Now-Pay-Later (BNPL) products which aim to serve the same or similar borrowers. The CFPB should also continue to provide educational resources and information to consumers and partner with credit card issuers to enhance

[1] *See* NAFCU Comment Letter to the CFPB, Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services (Docket No. CFPB-2022-0003), April 8, 2022, *available at* https://www.nafcu.org/system/files/files/4.8.2022%20Comment%20Letter%20to%20CFPB%20re%20RFI%20on%20Fees.pdf.

understanding of the risks associated with open-end lines of credit and how to best manage and improve one's credit and prudently manage debt.

Any action to amend regulatory limits to achieve a blanket reduction in the level of credit card late fees assessed to consumers, waged as part of the Bureau's war against so-called "junk fees," risks penalizing responsible consumers who will absorb higher costs in an environment where equitable and efficient allocation of the cost of credit is superseded by government mandate. NAFCU objects to the surprise and unexpected release of this ANPR and requests a delay in any further action in this rulemaking to provide additional time for commenters to submit more fulsome responses to the questions posed and for the Bureau to complete appropriate review of the broader market for unsecured credit.

General Comments

NAFCU and its member credit unions align with the Bureau's mission to support fair, transparent, and competitive markets for consumer financial services. Credit unions, as not-for-profit, member-owned community financial institutions, always put their members first and do not seek to maximize revenue as a result of their members' behavior or inability to remain current on credit payments. Credit unions engage in relationship banking, offering their communities, including many rural and underserved communities, access to quality, safe, and affordable financial products and services at lower rates and with higher dividends than big banks. Credit unions also ensure that their members understand the terms and costs of using certain products and services, including credit cards, by offering financial counseling and financial education.

Credit unions are also subject to extensive supervision by the National Credit Union Administration (NCUA) or their state supervisory authority. The NCUA evaluates federally chartered credit unions' credit risk management efforts to confirm safe and sound lending practices and ensures compliance with consumer financial protection laws as part of its annual supervisory activities.[2] State-chartered credit unions are examined by their state supervisory authority and are subject to similarly rigorous evaluation of their lending practices and compliance with consumer protection laws. The CFPB's examination procedures and authority to regulate unfair, deceptive, and abusive acts or practices (UDAAP) also ensures that credit unions and other financial institutions are "clearly and prominently disclos[ing] the fees, penalties, and other charges that may be imposed and the reason for the imposition."[3] However, the nonbank sponsor of a co-branded or closed loop credit card may not be subject to similar safety and soundness examinations at the federal level and supervision by the CFPB.

The current legal and regulatory landscape has worked to effectively discourage what the Bureau has previously characterized as "surprise fees." These types of fees do not exist among financial

[2] *See* NCUA Supervisory Priorities for 2022, Letter to Federally-Insured Credit Unions 22-CU-02 (Jan. 2022), *available at* https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/ncuas-2022-supervisory-priorities.
[3] CFPB Examination Procedures, UDAAP, at 15, https://files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

institutions because they are required to clearly and conspicuously disclose fee schedules, are limited in the imposition of certain fees, and are subject to pricing controls on the amounts of fees. Since the adoption of the Truth in Lending Act (TILA) and the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, credit unions have expended substantial resources on hiring additional compliance staff and building out internal systems and processes to incorporate their requirements and continue to incur ongoing costs in complying with these requirements with the aim of ensuring consumers are informed and protected, as intended by the law. Any additional regulatory burden will be borne by member-owned institutions that, as an industry, did not engage in the predatory practices these laws were designed to address.

The regulatory structure is so comprehensive and complex that credit union members often report frustration and confusion with the volume of required disclosures, despite credit unions' best efforts to educate consumers about the importance of these disclosures and the information they contain regarding the terms and fees of products and services. To this end, it is critical that the CFPB continue to be engaged in broad consumer education initiatives regarding financial disclosures. For example, providing toolkits to develop optional, just-in-time disclosures for use with mobile banking applications might serve as a practical and effective resource.

As the CFPB evaluates responses to this ANPR, NAFCU urges a holistic view of the regulatory schematic. Any changes that the Bureau may be contemplating to counteract the perceived negative effects of credit card late fees will be compounded by the actions of other regulators as well as competitive pressures from underregulated fintech companies. For example, the Board of Governors of the Federal Reserve System is expected to soon finalize modifications to Regulation II to clarify that debit card issuers must enable, and allow merchants to choose from, at least two unaffiliated networks for card-not-present transactions. NAFCU objected to a reopening or modification of Regulation II, noting the significant expense and demands for institutions of all sizes to implement this technology mandate as well as a loss of interchange revenue as merchants will inevitably choose the lowest cost network without regard for any corresponding reduction in payment security.[4] Available non-interest revenue sources are slowly being whittled away for community-based financial institutions like credit unions and this poses existential risks for the smallest institutions and significant challenges for the rest of the industry that will result in a higher cost of lending overall, negatively impacting underserved communities that need affordable access to credit.

Credit Unions' Credit Card Late Fees Comprise the Bulk of the Lowest Fees Available in the Market

As required under the CARD Act, credit unions offer credit card accounts with terms well within the limits on initial fees that may be charged during the first year after an account is opened, penalty fees (such as late fees) consumers can be charged, and increases to interest rates. These limits require that late fees be reasonable and proportional or within the safe harbor limits, and credit

[4] *See* NAFCU's Comment Letter to the Federal Reserve Board, Notice and Request for Comment on Debit Interchange Fees and Routing (RIN: 7100-AG15), Aug. 10, 2021, *available at* https://www.nafcu.org/system/files/files/8.10.21%20Letter%20to%20Federal%20Reserve%20re%20RFC%20on%20Debit%20Interchange%20Fees%20and%20Routing.pdf.

unions, as part of their member-oriented approach to banking, attempt to limit fees as much as possible while still trying to make up the difference from their net interest margin to cover operating expenses and maintain strong net worth to meet capital requirements.

The CARD Act has had a significant impact in limiting credit card fees. In fact, the CFPB's own recent report on the credit card market noted that "CARD Act pricing restrictions have resulted in a substantial decline in overall fee costs to consumers since the pre-CARD Act period."[5] Even if the limits on these fees have led to other compensating pricing changes on products and services to recover costs and pay for programs that generally operate at a loss (e.g., financial literacy programs), the fees are capped by the CARD Act, transparently disclosed, and not surprising or excessive.

NAFCU member feedback confirms the results of the CFPB's recent report on credit card late fees – most credit unions charge $25 or less in credit card late fees (although the safe harbor is set at $30), some charging only $20, others charging 5 percent of the minimum payment due up to $25. Credit unions often consider the late fees charged by other local credit unions to offer comparable or lower fees. Most respondents also indicated that their credit card late fees are fixed; in other words, they do not charge a higher fee for subsequent late payments, even though the safe harbor is set at $41 for late payments in the next six billing cycles.[6] Credit unions are passionate about helping their members achieve financial health and reduce cycles of debt, which is why there is already an incentive to maintain fees below the allowable threshold. Furthermore, some credit unions expressed limited interest in increasing late fees for subsequent late payments as this only increases a consumers' likelihood of default if the original penalty was already calibrated to achieve an optimal degree of deterrence.

However, many credit unions contract with financial services companies that act as credit card payment processors or acquirers, to support marketing, underwriting, and other card-related services. These entities set most fee limits and pass their costs onto the credit union and its members. The industry for payment processors has consolidated significantly in recent years and certain merger activity suggests that the largest processors could potentially be absorbed within the core provider market.[7] Payment processors generally operate outside direct federal supervision, unlike credit card issuers, which are typically chartered financial institutions subject to comprehensive federal consumer protection oversight and regular examination. Credit unions' bargaining power is limited due to this increased consolidation, so a credit union's ability to negotiate with the costs charged by these payment processors is diminished. Instead of focusing on the profit motive of issuers, the CFPB should evaluate the role of these payment processors in controlling the fees assessed in the credit card market as well as the bargaining capability of

[5] 2021 Consumer Credit Card Market Report, at 52 n. 94, https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

[6] CFPB (March 2022), p. 2, https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf. In the report, the Bureau notes that "Most smaller banks and credit unions charge a maximum late fee of $25 or less, but almost all of the largest credit card issuers contract at or near the higher fee amounts that are specified by regulation."

[7] Fiserv, *Fiserv to Combine with First Data Corporation to Create Global Leader in Payments and FinTech* (Jan. 16, 2019), https://newsroom.fiserv.com/news-releases/news-release-details/fiserv-combine-first-data-corporation-create-global-leader.

depository institutions, especially smaller community-based institutions like credit unions, in their contract negotiations with these payment processors.

Costs and Losses Due to Late Payments

As a preliminary matter, to conduct a true cost-based accounting of just credit card late fees, NAFCU's member credit unions need more time than the 40 days (30 days plus the 10-day extension) provided to respond to this ANPR. It is unfeasible for credit unions to divert resources away from serving their members to conduct the time-intensive, complex cost analysis necessary to understand how they are incurring costs related to late credit card payments. NAFCU and other trade associations wrote to the CFPB, in a letter dated June 24, 2022, requesting an additional 60 days to provide a meaningful response to this ANPR.[8] The 40-day comment period is inordinately short given the unexpected release of this rulemaking and the complex and comprehensive scope of analysis and coordination necessary to respond to the questions posed. The CFPB should delay any further action and provide an additional opportunity to submit comments and responses to these initial questions.

As a general matter, it is extremely difficult to quantify the costs and risks associated with late payments on a per-late payment basis. Therefore, the CFPB should not take a strict cost-based approach to late fee regulation, by requiring financial institutions to conduct a cost analysis to justify their late fee price, as this would be an extremely difficult and time-intensive exercise that also ignores the deterrent effect of these fees. NAFCU's member credit unions estimate that the actual costs of servicing members who are past due on their credit card payments exceeds both the fee assessed to the consumer and the revenue that this fee provides to the credit union. One larger credit union estimated that at least 60 to 70 percent of their aggregate credit card late fee income is immediately spent on collection efforts. Late credit card payments mean that credit unions not only experience losses in the form of missed interest for that month but also costs associated with collection efforts. There is also the opportunity cost associated with reinvestment of the payment funds. With every dollar repaid, the credit union puts that money back to work as additional loans to members of the community and investments to generate growth that will then be returned to credit union members in the form of higher dividends, lower rates on products and services, and even improved mobile and online platforms to enhance consumers' banking experience.

Credit unions must expend resources to follow up with members to ensure they are able to make payments by the contractually agreed upon due date to avoid late credit reporting. When a member is late on their monthly payment, a credit union will mail a late notice to the member, incurring printing and postage costs. Some credit unions report increasing their collections outreach around 14 days past due and at 25 days past due the consumer will have received two delinquency letters and at least one call attempt. The costs of mailing late notices and the labor expense to make calls to consumers and document the call attempts may be a proportionally more substantial expense

[8] *See* Letter from NAFCU, the American Bankers Association, Bank Policy Institute, Consumer Bankers Association, Credit Union National Association, and Independent Community Bankers Association, *available at* https://www.nafcu.org/system/files/files/Request%20for%20Extension%20of%20CFPB%20Late%20Fees%20ANPR.pdf.

for smaller credit unions. This cost must be taken into account when determining the late fee that a credit union assesses.

In addition, to conserve resources and promote efficiency, many credit unions conduct collections internally instead of working with a third-party debt collector. However, this effort still comes at a cost. The time and resources spent by credit union employees that make phone calls to members to notify them of their late payment and attempt to collect on amounts due to the institution is another factor used to determine the amount of credit card late fees.

Whether an institution conducts collections internally or externally, these costs are one of the primary considerations when setting late fees; keeping in mind that many credit unions do not price their fee on a cost-based accounting to their institution. This is especially pertinent as labor costs are increasing at record rates. Based on the latest Employment Cost Index from the Bureau of Labor Statistics, U.S. wages and salaries increased about 5.3 percent and benefits increased by 4.8 percent for the 12-month period ending in June 2022.[9] This follows record increases earlier this year, when U.S. wages and salaries increased about 4.7 percent and benefits climbed 4.1 percent in the past year.[10] These rising labor costs are a part of the persistent inflation facing the nation. Rising labor costs weigh on credit unions' margins and many have no choice but to pass part of this cost onto consumers, whether through late fees or higher costs for products and services for all members. Given rising labor costs and record inflation, the Bureau should continue to update the safe harbor fee amounts to reflect changes in the Consumer Price Index (CPI), as required in Regulation Z.

Credit Unions Offer Many Solutions to Help Consumers Avoid Late Fees

To assist consumers in avoiding late fees, credit unions offer a variety of solutions. Many credit unions offer a penalty-free grace period, some providing as many as 10 days after the due date for consumers' credit card payments to be considered on time. The majority of credit unions also offer no-cost fixed payment arrangements or payment plans and payment deferrals, and case-by-case reimbursements of late fees for consumers experiencing financial hardship. Some credit unions have policies that permit consumers to obtain as many as seven fee reimbursements in a rolling 12-month period. During the start of the COVID-19 pandemic, in the aftermath of weather-related natural disasters such as hurricanes and wildfires, and during previous government shutdowns, credit unions frequently granted reimbursements of late fees and payment deferral options to help their members. This demonstrates that the revenue from credit card late fees is never more important than the financial well-being of a credit union's members.

Some credit unions also do not charge a default interest rate if the amount owed becomes severely past due. For those institutions that do assess annual percentage rate (APR) penalty pricing, for example, on accounts over 60 days past due, their interest rate is set at no more than 18 percent,

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[9] Bureau of Labor Statistics, U.S. Department of Labor, *News Release: Employment Cost Index – June 2022* (Jul. 29, 2022), https://www.bls.gov/news.release/pdf/eci.pdf.
[10] Reade Pickert, *Employment Costs Surge Most Ever, Stoking U.S. Inflation Concern*, Bloomberg (April 29, 2022, 8:31 AM), https://www.bloomberg.com/news/articles/2022-04-29/employment-costs-in-u-s-increase-by-more-than-forecast#xj4y7vzkg.

which is the maximum interest rate that credit unions are permitted to charge under the Federal Credit Union Act. Other NAFCU members report frequently refinancing large bank credit card debt where consumers have been charged significant late fees and the penalty APR bumped up to around 29 percent. This reality is often not clear to new borrowers and those from low-income or immigrant communities. The 18 percent maximum APR is also still lower than the base interest rate charged by large banks and other large credit card issuers. Because of their cooperative nature, credit unions always seek to provide the best rates for their members – some currently offering interest rates under 9 percent on their credit cards.

Credit union members also have options to help themselves avoid late fees by setting up alerts through an institution's digital banking services or even choosing their own due date to better manage their budgets and cash flows. Some credit unions include "warning notices" on their online and mobile banking applications if the member is past due on their account. Credit unions also report conducting campaigns to auto enroll certain cardholders in particular notifications to help them avoid late fees.

Many credit unions also offer autopay options for credit card payments. Those that offer autopay also provide notifications for upcoming payment due dates, providing a simple process for members to enroll, including as part of the member onboarding process when they first open an account with the credit union. Some credit unions already have systems in place or are currently contracting with third-party vendors to offer their members convenient reminders for upcoming payment due dates via text message and email, in accordance with all opt-in requirements and other rules under the Telephone Consumer Protection Act. This is in addition to a member's monthly credit card statement, which can be mailed or sent digitally through email and uploaded to their online banking account available on the credit union's website or through their mobile app.

The CFPB Should Not Reduce the Current Safe Harbor Fee Amounts but Should Provide Additional Exemptions and Consumer Resources

NAFCU does not support an elimination or reduction of the safe harbor fee amounts as this is unlikely to have the intended result of reducing consumer indebtedness. The CFPB should also not require financial institutions to perform an annual cost assessment to set their fees. The safe harbor provides regulatory stability and clarity that allows credit unions to effectively manage their business over the long term. Conducting a cost analysis for late fees would be incredibly difficult and resource intensive and could introduce regulatory risk.

It is beneficial for both the credit union and its members to spend the time to address any late payments as early as possible so that the consumer's delinquency does not compound, but this effort requires substantial resources. As explained above, the costs that credit unions estimate in outreach to consumers to resolve late payments almost certainly exceed the fee assessed to consumers. Therefore, the safe harbor fee amounts are likely not set too high and, in fact, should continue to be adjusted annually for inflation using changes in the CPI. Nonetheless, most credit unions still try to charge lower late fee amounts to the extent practicable. Even if the safe harbor fee amounts were set too high considering the costs to institutions, these late fees do have some deterrent effect on consumers, encouraging them to make their payment as soon as possible to

avoid additional late fees, also avoiding increased collections and other costs to financial institutions if the late fee effectively dissuades repetitive short-term late payments.

The deterrent effect of credit card late fees can help members avoid potentially higher-cost outcomes, such as accrued finance charges and adverse credit reporting, loss of grace periods, and penalty APRs. Some studies have also indicated that late fees protect members' long-term interests. Specifically, the deterrent effect causes monthly fee payments to fall by 75 percent during the first four years of account life.[11] "The data reveal that learning is driven by feedback. Making a late payment – and consequently paying a fee – reduces the probability of another late payment in the subsequent month by 44 percent."[12]

Instead of reducing these fee amounts, the Bureau should be focusing on other market players that take advantage of consumers' mistakes to generate large profits from late fees through practices that trigger multiple fees and policies that do not provide consumers with a sufficient opportunity to make timely payments. Additionally, as described in further detail below, the primary issue may not be the level at which late fees are set or even the effectiveness of the mandated disclosures of these fees. Instead, addressing certain consumer behavioral and cognitive biases that contribute to misperceptions about how long it takes to amortize credit card debt may be the key to helping consumers escape a cycle of indebtedness.

If the Bureau seeks to make any changes to the safe harbor, perhaps it should consider reducing the number of billing cycles for which subsequent late fees (set at the current $41 safe harbor limit) may be assessed. This would cap fees and reduce reliance on profits from late fees for large bank credit card issuers, achieving the Bureau's desired result. The Bureau should also consider additional exemptions or an enhanced safe harbor for institutions that offer the types of consumer solutions described above – a minimum five-day grace period, upcoming payment or late payment alerts, and payment deferral options.

The Bureau should also continue to focus on its consumer-facing resources and building partnerships with credit card issuers to ensure consumers have all of the relevant information about fees to make an informed decision regarding their credit card. The Bureau currently maintains a Credit Card Agreement Database that makes available to the public most credit card agreements so consumers can review and compare the terms offered by various issuers before taking out credit.[13] This is a valuable resource that allows consumers to comparison shop among credit card issuers and evaluate each issuer's fee structure. To promote fair, transparent, and competitive markets, the Bureau should continue to update this database on a periodic basis to provide consumers with the most up to date information about issuers. Additionally, as NAFCU has previously recommended, the Bureau may wish to consider how disclosures could be improved to provide a more user-friendly format, encourage readability and greater understanding of the information included, and be more adaptable to online and mobile banking platforms. This would assist consumers in better understanding the late fee structure to serve as a deterrent and encourage

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[11] Sumit Agarwal, John C. Driscoll, Xavier Gabaix, & David Laibson, *Learning in the Credit Market* (Feb. 2008), https://www.nber.org/system/files/working_papers/w13822/w13822.pdf.
[12] *Id*.
[13] Credit Card Agreement Database, http://www.consumerfinance.gov/credit-cards/agreement.

limited credit usage and timely payments. Making disclosure delivery more flexible will allow credit unions to best meet members in their preferred channel (e.g., mobile, online, or at a physical branch).

Limiting Fees May Result in Negative Impacts to Communities

Limiting or attempting to regulate out of existence legal and properly disclosed fees may lead to unintended consequences. Generally, the revenue collected from certain account fees subsidizes other products and services that credit unions offer, like free checking accounts and rewards programs, but also competitive rates on loan products and preferred interest rates. Credit unions are also able to invest in their communities and offer scholarships, offer emergency loan programs and credit builder programs (e.g., secured credit cards), donate to charitable organizations, and support local initiatives such as financial counseling, in part, due to the fees collected from certain consumer behaviors. The majority of credit unions offer financial literacy programs to teach their members about credit and debt, focusing specifically on younger adults. If the CFPB further limits permissible fee amounts, the lost revenue from these fees may not be fully recouped, making it difficult to serve the communities that most need access to financial services.

Alternatively, this revenue may need to be recouped by assessing higher fees elsewhere. For example, some institutions may choose to charge higher flat fees for certain products and services, such as an account maintenance fee, to all consumers regardless of their behavior. Credit unions that offer no annual fees, no balance transfer fees, low foreign transaction fees, and lower than market average cash advance fees may need to consider increasing these fees in addition to cutting or eliminating rewards programs to recover the lost revenue as a result of limited credit card late fees. Interest rates for credit products would also likely increase to account for the additional risk and reduced late fee income. A flat fee and/or higher interest rates would still impact those consumers that would otherwise be paying late fees at the current rates and may have a negative impact on efforts to reach unbanked and underbanked communities and expand access to financial services.

Other unintended consequences outside of the Bureau’s control may also emerge as financial institutions look to make adjustments to account for lost revenue. For example, it would be unfortunate if some financial institutions had to make the decision to reduce the number of days permitted in their grace periods in an effort to cover some of the increased risk. Credit card late fee amounts should be measured based on the effectiveness of their deterrence, including long-term benefits to the card holder such as avoiding penalty APRs, other fees, negative credit reporting, and account closure. Credit card late fees are not simply imposed to generate revenue but are rather business decisions made to account for the total cost of consumer credit, which, in addition to the deterrent effect, includes the risk of nonpayment and its related impact on collections activity, customer service interactions, loss reserving, and other business processes that are influenced by credit card delinquency rates.

Reducing the safe harbor fee amounts would also likely contribute to further consolidation in the financial services industry. The credit union industry has experienced consolidation at an alarming rate since the passage of the Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-

Frank) Act – the number of credit unions has declined by 34 percent. Ever increasing regulations broadly, including regulation leading to reduced income, will only further exacerbate this trend. More credit unions will be forced to merge, and it will be primarily smaller credit unions, serving underserved communities, including in rural areas, that are most at risk. For example, in 2021, 88 percent of merging credit unions held less than $100 million in assets and the median asset size was just $12 million. This would eliminate many of the institutions that practice the exact type of relationship banking that the CFPB claims to prioritize and encourage as the model financial institution.

Ultimately, perhaps the most concerning likely outcome is that any effort to reduce permissible fee amounts would result in tighter credit, with more stringent lending criteria that makes it difficult for consumers with lower credit scores to obtain access to credit. For example, lower-tier borrowers with FICO credit scores of 640 or lower may have a harder time qualifying for an unsecured credit card, whereas now some credit unions are willing to offer credit cards to these borrowers to help them build their credit. This would likely lead some borrowers to turn to predatory payday lenders for their short-term funding needs, which could further worsen their financial situation, strapping them with a substantially higher interest rate loan and unmanageable longer-term debt. Preventing such an eventuality should be one of the Bureau's primary goals. Although not all payday lenders engage in unfair, deceptive, or abusive acts or practices, the Bureau continues to find "repeat offenders" in the space that violate the law and harm consumers by failing to disclose available consumer protections that allow them to avoid certain fees related to their payday loans.[14]

The CFPB Should Focus on Other Structural Issues That Promote Indebtedness and the Role of Underregulated Nonbank Entities

A recent Brookings Institution report highlighted the role that low minimum payment amounts play in revolving debt challenges faced by many Americans.[15] Although it may appear unappetizing to raise the minimum payment amount during a time of high inflation, rising interest rates pose a greater risk to these borrowers who are already living on the financial edge. Instead of the common minimum payment formula of 1 percent of the principal balance plus interest and fees, a higher minimum balance could help consumers "overcome common behavioral and cognitive biases that prolong indebtedness."[16] As the Bureau considers late fees under the CARD Act, it should evaluate the best method to minimize consumers' behavioral and cognitive biases, including the "anchoring" effect of a minimum payment amount.

Slightly higher minimum payments could go a long way in helping consumers to pay off their debt faster and pay much less in interest and fees. Some credit unions have reported trying to increase

[14] CFPB Press Release, *CFPB Sues Ace Cash Express for Concealing No-Cost Repayment Plans and Improperly Withdrawing Consumers' Funds* (July 12, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-ace-cash-express-for-concealing-no-cost-repayment-plans-and-improperly-withdrawing-consumers-funds/.
[15] Jennifer Tescher & Corey Stone, *Revolving debt's challenge to financial health and one way to help consumers pay it off*, The Brookings Institution (June 7, 2022), https://www.brookings.edu/research/revolving-debts-challenge-to-financial-health-and-one-way-to-help-consumers-pay-it-off/.
[16] *Id*.

their minimum payment amount from, for example, 3 percent to 5 percent, but had difficulty coordinating with their core processor to update the appropriate disclosure box. For one small credit union with total assets under $100 million, its core processor said that the update would come at a significant expense, essentially forcing the credit union to maintain the lower minimum payment amount, which it views as a disservice to its members. Many of the credit union's members live paycheck to paycheck, but a slightly higher minimum payment amount could help them to escape persistent debt and establish greater financial stability. The CFPB should evaluate the role of core processors in negotiating such changes to disclosures, especially considering the impacts on smaller, community financial institutions with relatively limited bargaining power.

Making it easier for credit unions to increase the minimum payment amount would be most helpful to the precise communities that the CFPB is concerned are paying more in late fees – underserved, low-income and majority-Black communities.[17] It seems that the disclosures required by the CARD Act have only had a modest effect on consumers' behaviors to encourage them to pay more than the minimum balance. The CFPB should coordinate with the NCUA and other banking regulators to issue guidance encouraging issuers to establish higher minimum payment amounts. It is the low minimum payment amount that keeps consumers in debt and allows the biggest credit card issuers to profit from consumers' revolving credit.

The CFPB should also more closely evaluate through enhanced supervision the practices of nonbank companies that provide consumer credit. Credit unions continue to face competitive pressures from fintech companies entering the credit card market and other segments of consumer lending. These nonbank lenders often operate without direct federal supervisory or prudential oversight and may not be subject to the same rigorous data safeguard requirements under the Gramm-Leach-Bliley Act that apply to credit unions and other depository institutions. Section 1024 of the Dodd-Frank Act grants the CFPB the authority to regulate a covered person who "is a larger participant of a market for other consumer financial products or services, as defined by [a] rule" issued in consultation with the Federal Trade Commission.[18]

The CFPB should utilize this authority to oversee an underregulated industry of fintech companies that offers consumers a wide array of unsecured credit products digitally. For example, the CFPB should continue to focus on BNPL providers that cleverly avoid TILA disclosure requirements by offering closed-end credit in four installments.[19] Some, if not all, of the five BNPL providers the Bureau is currently evaluating use collected consumer data to create closed loop shopping apps with partner merchants to market specific brands and products. These providers are not adequately supervised, may not have sophisticated compliance programs, and are likely not managing the privacy and data security risks at a level that is commensurate with the high expectations that apply to depository financial institutions, putting consumers at risk.

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[17] CFPB, *supra* note 5, at 3.
[18] 12 U.S.C. § 5514.
[19] *See* NAFCU's Comment Letter to the CFPB, Request for Comment regarding Inquiry into Buy-Now-Pay-Later Providers (Docket No.: CFPB-2022-0002), Mar. 25, 2022, https://www.nafcu.org/system/files/files/3.25.2022%20Letter%20to%20CFPB%20re%20Inquiry%20into%20Buy-Now-Pay-Later%20Providers.pdf.

The risks posed to consumers in terms of potential losses and violations of their rights far outweigh any perceived lack of competitive pricing pressures for credit card fees charged by depository institutions. Oversight of fintech entities for the purpose of examining credit card late fee practices may not be sufficient, by itself, to warrant exercise of the Bureau's larger participant authority. However, considerations such as data security, privacy compliance, and maintaining fair and competitive markets would justify closer supervision on a more comprehensive basis. In any case, direct supervision of these entities would permit the Bureau to monitor more closely fee-related practices that are the source of agency concern, yet difficult to detect in the absence of examination powers.

Conclusion

Credit unions already do go to great lengths to assist their members in staying current on their credit card payments and will continue to offer financial literacy services on the effects of late payments to educate consumers and help incentivize responsible credit practices. Today's economic conditions make it challenging for some consumers to stay current on payments, and the credit union industry, operating with the best interests of its member-owners, will continue to provide accommodations, including late payment grace periods, to afford consumers time to regain their financial footing.

The CFPB should continue to study the credit card market, including taking a closer look at the role of credit card payment processors and newer fintech lenders, before rushing into a rulemaking to eliminate or limit the safe harbor fee amounts. The CFPB should not require financial institutions to perform an annual cost assessment to set their fees, but instead search for ways to enhance the deterrent effect of these late fees. NAFCU recommends the CFPB adopt changes to its disclosures to make them more adaptable to online and mobile banking platforms to help financial institutions effectively deliver information about their late fee structures on the platforms consumers use most often. The CFPB should also consider structural changes to minimum payment amounts to assist consumers in escaping a cycle of credit card debt.

NAFCU appreciates the opportunity to share its members' feedback on this ANPR. If you have any questions or would like additional information, please do not hesitate to contact me at 703-842-2212 or apetros@nafcu.org.

Sincerely,

Ann C. Petros
Vice President of Regulatory Affairs