NAFCU
3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
f: 703.524.1082
nafcu@nafcu.org | nafcu.org
National Association of Federally-Insured Credit Unions

May 3, 2023

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

RE: Credit Card Penalty Fees (Regulation Z) (Docket No. CFPB-2023-0010)

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU) I am writing in response to the notice of proposed rulemaking (NPRM) issued by the Consumer Financial Protection Bureau (CFPB or Bureau) regarding amendments to Regulation Z, implementing the Truth in Lending Act (TILA) to ensure credit card late fees are "reasonable and proportional" to the violation. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 135 million consumers with personal and small business financial service products. The cumulative impact of previous Bureau actions and recent guidance, combined with the overall regulatory burden on credit unions makes this proposed rule particularly onerous. This proposed rule will not lead to the Bureau's intended outcome. Rather, it will reduce competition in the credit card market, as only the largest credit card issuers will be able to absorb the resultant losses. Consequently, this will lead to further consolidation among our nation's community-based financial institutions and reduced access to credit for consumers.

NAFCU objects to the release of this proposed rule with such an inordinately short comment deadline and maintains that its recent request to extend the comment deadline to the later of June 3, 2023, or 90 days after publication of the rule in the *Federal Register* would have provided greater opportunity for stakeholders to offer more fulsome responses to the topics and questions posed in the NPRM. NAFCU also objects to this proposed rule because of numerous procedural concerns regarding its release, including the Bureau's refusal to convene a small business review panel, in conformity with the Small Business Regulatory Enforcement Fairness Act (SBREFA), to offer feedback on this major rulemaking. The proposed rule, if finalized, would undoubtedly have profound impacts on the credit card market and force some smaller credit unions to stop offering credit cards altogether. The CFPB should withdraw this proposed rule and instead restart the rulemaking process with a small business review panel as required under the law.

Executive Summary

The following list summarizes the key recommendations and input, as explained in further detail in this letter, regarding the Bureau's NPRM on credit card late fees:

1. The current regulatory safe harbor limits and other requirements related to credit card late fees have resulted in clear disclosures to consumers, providing ample opportunity for comparison shopping. The current safe harbor fee amounts provide an appropriate level of deterrence and encourage consumers to work with their financial institution to make timely payments on their accounts. The Bureau should maintain the current safe harbor limits as well as the annual adjustments for inflation.
2. The Bureau has not adequately justified its proposed $8 safe harbor limit, and this arbitrary decrease of the safe harbor fee amounts is unlikely to have the intended result of reducing consumer indebtedness. Instead, the proposal would be most detrimental to the exact populations the CFPB aims to protect by resulting in limited access to credit and availability of products and services suited for consumers with thin credit files.
3. The Bureau should have provided a longer comment period and publicly released the data it cites in the proposed rule or refrained from relying on it. The Bureau should continue to collect more data and conduct market analysis.
4. The Bureau should withdraw this proposed rule, convene a small business review panel, and issue a new proposed rule that incorporates feedback from the small business entity representatives on the panel.
5. The Bureau should exempt credit unions or, in the alternative, exempt small financial institutions with less than $850 million in assets from this rulemaking.
6. The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) does not explicitly permit the CFPB to impose a mandatory courtesy or grace period, so NAFCU opposes such a requirement as this would only increase risk and costs for credit unions.
7. The Bureau should continue to provide educational resources and information to consumers and partner with credit card issuers to share information with consumers and help them manage their accounts.
8. The Bureau should continue to closely examine bad actors and repeat offenders, and exercise its "larger participant" authority over nonbank lenders that are not subject to rigorous federal supervision.

General Comments

NAFCU and its member credit unions support the Bureau's efforts to promote 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 attempt to maximize revenue from their members' inability to remain current on credit card 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, especially to at-risk members with thin credit files.

So-called "junk fees" or "surprise fees" do not exist in the financial services industry. Financial institutions 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 passage of the TILA and the CARD Act, credit unions have expended substantial resources on hiring additional compliance staff and building out internal systems and processes to incorporate the laws' requirements and continue to incur ongoing costs in complying with these requirements with the aim of ensuring consumers are informed and protected. The CARD Act has required transparent disclosure of such fees to eliminate any "surprise" to consumers. The CARD Act has also significantly reduced credit card fees for consumers. 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."[1] This proposed rule would only increase regulatory burden on the credit union industry, which has not engaged in the predatory practices these laws were designed to address.

Following the surprise advance notice of proposed rulemaking (ANPR) released in late spring 2022, NAFCU requested additional time to sufficiently respond to the questions posed by the Bureau. Credit unions are subject to certain statutory limitations and different requirements that make the proposed changes uniquely impactful and the collection of data regarding credit card portfolios more time-consuming. Nonetheless, it is clear that credit unions always prioritize their members and communities and have no motivation to collect unnecessary fees but merely assess fees related to credit cards as appropriate and permitted under the law to establish a deterrent effect to prevent future delinquencies and adequately recoup costs associated with servicing the accounts and collecting amounts due. Non-interest income, which includes revenue from fees, helps credit unions afford other expenses including, but not limited to, higher interchange costs, fraud costs, and the technology costs required to keep members' card and personal information safe and secure.

There is a fundamental difference between the business model of credit unions and large credit card issuers both in the attention paid to members and the ways in which non-interest income is used to offer products and services that benefit consumers. These member-focused initiatives are now all at risk as the Bureau's misguided and hasty rulemaking seeks to arbitrarily limit the safe harbor amounts to $8 per violation, remove the annual inflation adjustments (tied to the Consumer Price Index (CPI)) for the safe harbor amounts, limit late fee amounts to 25 percent of the minimum required payment, and make other changes to Regulation Z.

[1] 2021 Consumer Credit Card Market Report, at 52 n. 94, https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

Based on responses to a detailed survey to our membership and the Bureau's own data and analysis, credit unions' credit card late fees are "reasonable and proportional" to the consumer behavior to which the fee relates. The majority of credit unions assess a late fee under the safe harbor limits – at or less than $25 for the first violation and many do not increase that fee for subsequent violations. Additionally, they already offer generous grace periods for payments on credit card accounts. These fees serve an important deterrent effect, which the Bureau unfairly discounts in its proposed rule, and offset in whole or in part pre-charge-off collection costs, and help credit unions to offer products and services that members demand and need, including programs targeted toward consumers with thin credit files. The late fee amount is set by credit unions or contractually established through their credit card payment processors or acquirers as a business judgment to deter consumers from making late payments and mitigate the risk and cost of extending credit. It is not the appropriate role for the CFPB to question this business judgment, especially without clear evidence to the contrary and justification that the late fees imposed by institutions harm consumers without a countervailing emphasis on the effective and efficient operation of the credit card market.

Credit unions do not enjoy the same economies of scale as large credit card issuers. The proposed rule would have a profound impact on credit unions' ability to serve their communities, including those who are most vulnerable and in need of access to credit through credit builder products like secured credit cards and other specialized credit offerings. Although for many credit unions these fees offset community investment and financial literacy programs, even if credit card fees are not directly tied to offsetting such expenses and offering other products like free checking accounts, the fees contribute to overall non-interest income, which allows credit unions to support these products and programs in the first place.

The most troubling aspect of this proposal is that the CFPB has refused to solicit feedback from small business entity representatives, which is not only a statutory requirement under SBREFA, but also an opportunity to better understand the practices of smaller financial institutions like credit unions. Convening a small business review panel would allow the Bureau to determine the most appropriate proposal to achieve the Bureau's desired results without negatively impacting the institutions that serve and offer credit to the vulnerable communities the Bureau claims to be prioritizing with this rulemaking. The Bureau should withdraw this proposed rule, convene a SBREFA panel, and re-propose a rule only after considering the feedback received from the small business entity representatives.

Amending the safe harbor amounts as proposed, as part of the Bureau's larger attack on so-called "junk fees," risks penalizing responsible consumers who will absorb higher costs and experience reduced product and service offerings because the Bureau is arbitrarily stepping in to supersede business judgment in determining the most equitable and efficient allocation of the cost of credit. Instead of finalizing this rulemaking, the CFPB should continue to provide educational resources and information to consumers and partner with credit card issuers to disseminate information to help consumers better understand the risks associated with open-end lines of credit and how to best improve their credit and prudently manage debt.

NAFCU is opposed to this proposed reduction of the safe harbor fee amounts as this change is unlikely to have the intended result of reducing consumer indebtedness. The current safe harbor amounts provide regulatory stability and clarity and allow credit unions to effectively manage their business over the long term. Resorting to conducting a cost analysis for late fees would not only be an incredibly difficult and resource intensive exercise that could introduce regulatory risk but is also not a realistic option with the rule's proposed changes. For small credit unions, conducting a cost analysis to determine the appropriate late fee may be cost-prohibitive due to a lack of existing staff or resources to higher outside third parties, as well as insufficient information systems, processes, and procedures to conduct such a review and analysis.

Smaller credit unions rely on the safe harbor to ensure compliance with the law in an economical fashion so they can focus on serving their members. A reasonable safe harbor that provides adequate assurances to institutions based on the costs they incur in servicing past due accounts is necessary to prevent regulatory and litigation risk from impacting community financial institutions' ability to continue to offer credit cards, especially for higher risk consumers. Although the CFPB seeks to help at-risk borrowers and underserved communities, this proposed rule would have the most negative impact on those exact populations.

Procedural Concerns

Inadequate Data Collection and Rushed Rulemaking Process

The Bureau's proposed rule repeatedly discusses the lack of available data to adequately determine the full extent of the impact of this rulemaking, especially on small entities. In June 2022, NAFCU and others requested additional time to respond to the questions presented in the ANPR[2] and were disappointed that the Bureau only provided an additional 10 days near the end of the already brief 30-day comment period.[3] NAFCU urged 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 did not suggest an unfair or underregulated environment, rife with predatory behavior. NAFCU was still in the process of collecting data regarding its members' credit card products when the Bureau released this comprehensive NPRM. Based on the analysis in the proposed rule, NAFCU maintains that the Bureau has not justified a need for this rulemaking and has not provided stakeholders with sufficient time to provide input.

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[2] *See* Letter from American Bankers Association (ABA), Bank Policy Institute (BPI), Consumer Bankers Association (CBA), Credit Union National Association (CUNA), & NAFCU to CFPB, Docket No. CFPB-2022-0039 – Request for Extension of ANPR on Credit Card Late Fees and Late Payments (June 24, 2022) https://www.nafcu.org/system/files/files/Request%20for%20Extension%20of%20CFPB%20Late%20Fees%20ANPR.pdf.
[3] *See* 87 Fed. Reg. 42, 662 (July 18, 2022).

Not providing additional time for affected financial institutions to share data and the potential impacts of the proposed amendments to Regulation Z will lead to an incomplete administrative record and arbitrary action by the Bureau, putting financial institutions and consumers at risk. NAFCU and others have again requested additional time[4] to share data and other relevant information in response to the extensive NPRM that requests data and comments on numerous aspects of Regulation Z and the current functioning of credit card markets. But in order for NAFCU and other stakeholders to adequately respond to the Bureau's questions and requests for comment, it is important to have access to the relevant data and studies that underpin the Bureau's analysis and rationale for proposing the changes contemplated in this NPRM.

It is incumbent upon the CFPB to share information about the underlying data and analysis upon which it relies in proposing changes to its regulations. With this proposed rule, the CFPB has identified several data sources, including the Federal Reserve Board's Y-14M data collection and other information collected through data filing orders to industry participants. NAFCU and other trade associations have requested the Bureau release such data, which it is legally required to do, to provide commentors with an opportunity to evaluate the data and provide thoughtful input.[5] NAFCU objects to the Bureau's condensed comment deadline for this proposed rule and stresses that without access to such important data, the docket will not accurately reflect potential stakeholder feedback.

Requirement to Convene a SBREFA Panel

Under SBREFA and the Regulatory Flexibility Act (RFA), the CFPB must convene a small business review panel to determine whether a rule will have a significant economic impact on a substantial number of small entities.[6] In its RFA analysis,[7] the Bureau acknowledges that it "does not have enough data with which to precisely estimate the effect of the proposed rule on late fee revenue" and faults industry stakeholders for failing to provide enough specific data. The Bureau's inability to obtain the data it needs to evaluate its obligations under the RFA does not excuse the perfunctory analysis and conclusions contained in this rulemaking. Moreover, SBREFA does not authorize agencies to roughly guess the impact of a rulemaking in order to avoid the collection of reliable, industry-specific data—particularly when the affected industries and small entities

[4] *See* Letter from ABA, BPI, CBA, CUNA, Independent Community Bankers of America, NAFCU, & National Bankers Association, Request for Extension of Comment Period for NPRM on Credit Card Penalty Fees (Regulation Z) (Feb. 28, 2023), https://www.nafcu.org/system/files/files/Joint%20Extension%20Request%20--%20CFPB%20Credit%20Card%20Penalty%20Fees%20NPRM.pdf.
[5] *See* Letter from ABA, BPI, CBA, CUNA, & NAFCU to CFPB, NPR on Credit Card Penalty Fees (Regulation Z) (Docket No. CFPB-2023-0010; RIN 3170-AB15) (March 16, 2023), https://www.nafcu.org/system/files/files/CFPB%20CC%20Late%20Fees%20NPR-%20Data%20Publication%20%283-16-23%29%20final%20for%20transmission.pdf.
[6] *See* 5 U.S.C. § 609.
[7] *See* p. 125 of the NPRM.

are willing to provide additional data within a reasonable timeframe.[8] In the context of satisfying the initial regulatory flexibility analysis under the RFA, is doubtful Congress intended for agencies to favor artificially brief comment periods so that rough estimates prepared by agency staff using incomplete data could supplant more relevant data furnished by small entities through a SBREFA panel.

Most confounding is the Bureau's further acknowledgment that "it is possible that some small entities would experience a significant economic impact as a result of the proposed rule" yet due to insufficient data, the Bureau cannot conclude that a substantial number of small entities would be impacted.[9] Especially concerning for credit unions is that the Bureau explains that its reliance on extrapolating small bank call report data regarding the relationship between credit card revenue share and credit card asset share to estimate the credit card revenue shares at small credit unions should be treated with caution.[10]

The Bureau's extrapolation from small bank call report data is hardly an apples-to-apples comparison for the credit union industry as its own analysis shows that 44.9 percent of small credit unions have more than 1 percent of their assets in credit cards, compared to 13 percent of small banks. This substantial difference highlights a general pattern that small, community banks tend to focus much of their activity on business lending, including commercial real estate loans and other products and services, whereas small credit unions are focused on consumer products and services. Credit unions are focused on relationship banking and serving the needs of their communities. Especially in rural areas, credit unions may be the only financial institution with a physical presence, and particularly for older Americans, a physical branch and community presence facilitates a banking relationship and a "one-stop shop" for financial services. Smaller credit unions are likely to face significant direct impacts as a result of this rulemaking, namely reduced revenue, likely forcing institutions to eliminate their credit card programs altogether, limiting their ability to serve their communities – including underserved communities in rural areas.

In its comments on the proposed rule, the SBA's Office of Advocacy "recommends that the CFPB maintain the status quo for small entities until the CFPB has sufficient data to perform a more thorough analysis of the economic impact that the proposed rulemaking may have on small

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[8] *See* 5 U.S.C. § 607 ("In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not *practicable* or *reliable*.") (emphasis added); compare with p.127 of the NPRM ("To obtain a rough estimate of credit card revenue shares at small credit unions, the Bureau extrapolated using the relationship between credit card revenue share and credit card asset share in bank call report data.")
[9] *See* p. 128 of the NPRM.
[10] *See* p. 127 of the NPRM: "The Bureau notes that the fact that credit card asset shares are so much higher at credit unions than at small banks means that extrapolation from small banks should be treated with caution."

entities."[11] The Office of Advocacy echoes NAFCU's concerns that the CFPB inadequately evaluates data for small card issuers under $10 billion in assets, does not include the loss of revenue from cards that smaller entities would no longer be able to issue as a cost of the rule, and if uncertainties remain around the cost to small entities, the CFPB should convene a small business review panel. The Office of Advocacy argues that "[w]ithout a factual basis, the agency may not certify under Section 605(b) and must publish an Initial Regulatory Flexibility Analysis under Section 603 of the RFA." NAFCU applauds the SBA Office of Advocacy for its thorough review of the requirements under the RFA and reminds the CFPB that it is obligated under the law to give appropriate consideration to comments provided by the Office of Advocacy as they are the voice of America's small entities.

The CFPB should convene a SBREFA panel immediately by withdrawing this proposed rule and beginning the process to convene the panel. This rulemaking under Regulation Z regarding credit card fees has not been evaluated since its original implementation by the Federal Reserve, so for good measure, the CFPB should seek to obtain as much feedback as possible from our nation's small lenders to understand the rule's impact and what any changes would mean for the industry and the consumers these small lenders serve. As the Bureau's own analysis is inadequate and it is unclear the extent to which the Bureau consulted with the Small Business Administration in its determination, as required under the law, NAFCU urges the CFPB to begin the process anew to confirm whether, as NAFCU and other trades believe, this rulemaking would have a significant economic impact on a substantial number of small entities.

Separation of Powers and the President's Endorsement

On February 7, 2023, President Biden delivered his State of the Union Address before Congress and the justices of the Supreme Court and endorsed the CFPB's proposed rule by declaring that his administration is "…taking on junk fees, those hidden surcharges too many companies use…we're cutting credit card late fees by 75 percent, from $30 to $8…I know how unfair it feels when a company overcharges you and gets away with it. Not anymore."[12] Since the Supreme Court's decision in *Seila Law LLC v. CFPB*[13] declaring the single director, for-cause removal structure of the CFPB unconstitutional, the President wields significant control over the Director of the CFPB.

Once President Biden endorsed this proposed rule during the State of the Union address, where at least 27.3 million viewers[14] heard and likely supported the idea of lower fees, the scales were tipped in favor of the Bureau, tainting the rulemaking process required under the Administrative

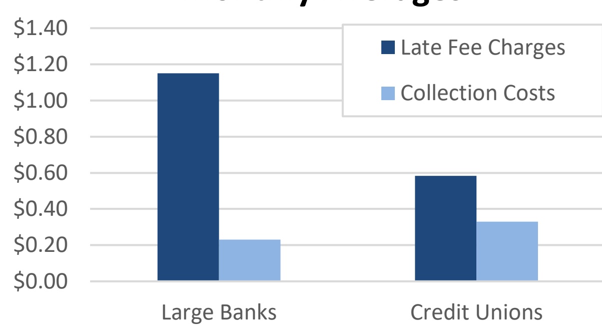
[11] SBA Office of Advocacy Letter, Credit Card Penalty Fees (Regulation Z), Docket No. CFPB-2023-0010, RIN 3170-AB15 (May 2, 2023), https://www.regulations.gov/comment/CFPB-2023-0010-0170.
[12] State of the Union Address (Feb. 7, 2023), https://www.whitehouse.gov/state-of-the-union-2023/
[13] 59` U.S. __ (2020)
[14] Helen Coster & Lisa Richwine, "About 27.3 million people watched Biden address, down from last year" (Feb. 8, 2023), Reuters, https://www.reuters.com/world/us/heres-how-many-watched-bidens-state-union-major-tv-networks-2023-02-08/.

Procedure Act, discounting the importance and usefulness of the SBREFA panel process, and compromising the independence of the CFPB by creating pressure for Director Chopra to move forward quickly to avoid any chance of executive retaliation and removal. The financial services industry was surprised by the speed with which the Bureau reviewed comments submitted in response to the ANPR and crafted a proposed rule. NAFCU believes that the review of stakeholder feedback and relevant industry data has been superficial at best, warranting a pause and reconsideration of credit card market data, a more earnest effort to collect additional data, and a small business review panel to provide feedback on the potential impacts on small entities like credit unions.

Summary of NAFCU Member Data

NAFCU's member credit unions charge minimal late fees. According to a recent NAFCU survey on credit card accounts,[15] the annual average total value of credit card late fees collected by credit union respondents per account was $7, compared to $13.80 for large banks in 2022. Relying on credit union call report data, the average credit card late fees incurred per member per year are only $2.65.[16] Annual total pre-charge-off collection costs for credit cards amounted to $0.33, which is 10 cents higher than the pre-charge-off collection costs for big banks that the CFPB notes in the proposal.

CU vs. Large Bank Credit Card Program Monthly Averages



Figures on a per account basis. Collection costs are pre-charge off. Bank figures are based on monthly averages reported by CFPB for the 12-month period ending Sep 2022.

Sources: CFPB: *Credit Card Late Fees: Revenue and Collection Costs at Large Bank Holding Companies*, NAFCU: *Economic & CU Monitor survey*

The ratio of monthly late fees to total pre-charge-off costs is 2.8, compared to 5.7 for large banks in 2022. It is unsurprising that credit unions have much lower fee-to-cost ratios than big card issuers as credit unions are not-for-profit, community focused, relationship-oriented financial institutions. Credit unions seek to minimize fees and costs to consumers at every turn. However, credit unions also face higher pre-charge-off collection costs as compared to big banks that can

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[15] NAFCU, "March 2023 Economic and CU Monitor Survey" (Mar. 2023), *available at* https://www.nafcu.org/economic-and-cu-monitor-special-topic-cc-late-fees-mar-2023-File.
[16] *Id.*

achieve economies of scale based on the number of consumers they serve and the employees on staff.

Most notably, the average of credit union responses indicates that the minimum credit card late fee they could charge and still "break even" on their credit card portfolios is $20. Based on an account-weighted average, the break-even point would be $12 and only one in four credit unions would break even with a late fee under $10. Although NAFCU maintains that the CFPB should not reduce the credit card late fee amounts at all and continue to index those amounts to inflation to account for changing economic conditions, this result indicates that the Bureau's $8 safe harbor amount is too low and would lead to significant losses on credit card portfolios for small credit card issuers – those institutions focused on relationship banking that the Bureau claims to support.

Credit Union Late Fees are "Reasonable and Proportional"

In its recent report, the Bureau notes that "[m]ost 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." In accordance with the CARD Act, credit unions offer credit card accounts with fees well within the safe harbor limits. 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 and seek to offer comparable or lower fees. One credit union reported that its late fee is the lower of the minimum payment or $25 and it does not adjust for subsequent violations. In fact, many of NAFCU's members 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. NAFCU's member 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.

Some credit unions' late fees only apply to credit card accounts with balances greater than $100 – establishing a de minimis exception for the assessment of late fees. This is yet another example highlighting that credit unions are already seeking creative means of limiting late fees. The credit union industry is dedicated to helping members achieve financial health and reduce cycles of debt. Arbitrarily limiting the safe harbor fee amounts will have the unintended consequence of making it more difficult for community financial institutions to serve their members, particularly those most in need.

Additionally, credit unions are statutorily prohibited from charging an interest rate higher than 15 percent, inclusive of all finance charges.[17] State-charted credit unions are also subject to state

[17] 12 CFR §701.21(c)(7)(i). The Federal Credit Union (FCU) Act establishes an interest rate ceiling; however, the NCUA Board establish a higher permissible interest rate ceiling for a period of up to 18 months if, after consulting

interest rate caps on credit products. These limits require that late fees be reasonable and proportional or within the safe harbor limits, and credit 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 to cover other expenses related to maintaining and servicing the accounts.

In the current rate environment, given the limitations in the Federal Credit Union Act (FCU Act), credit unions would be substantially constrained in terms of revenue from their credit card programs under various reduced safe harbor limits on late fees. NAFCU's member data[18] reveal that with a reduction in the safe harbor amount to $20 per violation, 21 percent of respondents indicated the rate ceiling would be "moderately constraining" or "severely constraining," compared to a reduction to the proposed $8 safe harbor amount where 77 percent of respondents indicated the rate ceiling would be "moderately constraining" or "severely constraining." These results highlight a unique pressure applicable to the credit union industry that the CFPB failed to acknowledge in its proposed rule. Not only are credit unions the good actors in the consumer financial services industry, but statutory limitations also make the credit union business model fundamentally different than that of the largest credit card issuers. These statutory constraints must not be ignored and the CFPB should exempt credit unions from this proposed rule on this basis alone.

Exemption for Credit Unions or Small Entities

The CFPB should exempt credit unions from its rulemaking as credit unions do not profit from any fees assessed to their consumers and the data is clear that credit unions are already assessing "reasonable and proportional" late fees on credit card accounts. Given the Bureau's preliminary analysis of credit card issuers, credit unions already offer some of the lowest fees available in the market and NAFCU's data, referenced above, confirm that. NAFCU's member data also confirm that credit unions work hard to limit the number of fees they assess on other products, including checking accounts. For example, 60 percent of credit union respondents currently never assess a service or maintenance fee, around 42 percent never assess an inactivity fee, and 70 percent never assess a minimum balance fee. Those credit unions may be forced to make difficult decisions to begin charging such fees on a periodic or ad hoc basis to offset the cost of collecting on past due credit card accounts should this proposed rule be finalized as proposed.

As NAFCU has repeatedly advocated, the Bureau should make use of its exemption authority under Section 1022 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 1022(b)(3)(a) permits the CFPB to adapt its regulations to "exempt any class"

with certain congressional committees, the United States Department of the Treasury, and other federal agencies, the NCUA Board determines 12 CFR §701.21(c)(7)(ii)(A)'s two-pronged test is satisfied. Section 701.21(c)(7)(ii)(A) requires that (1) money market rates have risen over the preceding six-month period; and (2) prevailing interest rate levels threaten the safety and soundness of individual FCUs, as evidenced by adverse trends 1 12 CFR §701.21(c)(7)(i) National Credit Union Administration January 25, 2023, Page 2 of 8 in liquidity, capital, earnings, and growth.

[18] NAFCU, *supra* note 14.

of covered entity from its rulemakings. The CFPB has refused to exercise this authority and lawmakers have even questioned the Bureau's reluctance to tailor regulations to fit the "diversity of the financial marketplace," including in a 2016 letter from a bipartisan group of 329 lawmakers[19] and a similar letter from a bipartisan group of Senators that urged the CFPB to consider the impact its rulemakings are having on community-based depository lenders and use its Section 1022 exemption authority.[20] Regulatory burden has been a growing concern for financial institutions since the passage of the Dodd-Frank Act and the credit union industry has seen immense consolidation as a result. Expanding regulations that lead to reduced income for community-based financial institutions 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. As the smallest credit unions continue to face pressures to merge with other credit unions or even close their doors altogether, especially during this challenging economic time, the CFPB is well-positioned to offer relief to these institutions.

If the CFPB is hesitant to exempt just a particular type of financial institution, NAFCU urges the CFPB to consider a broader exemption for small entities. The CFPB should exempt small entities as defined by the Small Business Administration's size standards as those below $850 million in assets. This would allow smaller entities to continue to maintain their ability to cover the costs of offering credit card accounts and remain competitive in the marketplace. Notably, of the 4,760 federally insured credit unions, as of December 31, 2022, National Credit Union Administration (NCUA) Q4 Call Report Data shows 4,271 credit unions have assets under $850 million and, of those, 2,981 credit unions have assets under $100 million.[21] There are also 2,612 credit unions with a low-income designation, meaning a majority of the members of the credit union qualify as low-income.[22] The vast majority of the credit union industry encompasses small entities within the SBA's small entity threshold and should therefore be excluded from this rule.

Recognizing that competition for product and service offerings does depend, in part, on associated fees, some of NAFCU's members have indicated that even with a carve out or exemption for credit unions, so long as large credit card issuers are subject to the types of changes outlined in the proposed rule, smaller institutions would be forced to cut their fees in order to compete. Especially important for smaller institutions is a consideration that the Bureau ignores in the proposed rule, namely the overall investment and cost associated with the platforms necessary to run a product offering like a credit card. The Bureau should be considering the fully allocated cost of running a credit card program, especially for smaller institutions that

[19] Congressional letter to CFPB Director Richard Cordray (March 14, 2016), https://www.nafcu.org/system/files/files/March-2016-letter-to-CFPB-re-community-based-financial-institutions.pdf.
[20] Senate letter to CFPB Director Richard Cordray, (July 18, 2016), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2016/08/160718-Letter-to-CFPB-on-Tailoring-Regulations.pdf.
[21] NCUA, Quarterly Credit Union Data Summary 2022 Q4, https://ncua.gov/files/publications/analysis/quarterly-data-summary-2022-Q4.pdf.
[22] *Id.*

are already disadvantaged in terms of bargaining power when negotiating with vendors for the cost of such a platform.

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. Heavy consolidation in the industry for payment processors has further limited credit unions' bargaining power with these providers regarding the costs they charge for their services. NAFCU encourages the CFPB to evaluate the role of these payment processors in controlling the fees assessed in the credit card market as well as their connection to the overall cost of operating credit card platforms. The Bureau should closely review the bargaining capability of smaller depository institutions in their contract negotiations with these payment processors.

15-Day Grace Period

Nothing in the CARD Act permits the CFPB to establish a mandatory courtesy or grace period for payment. Accordingly, NAFCU and its member credit unions oppose a mandatory courtesy or grace period. A 15-day grace period requirement should be left to the discretion of individual credit unions to decide based on their policies and risk tolerance. The majority of credit unions already offer generous grace periods. For example, some credit unions report only charging a late fee of up to $20 on a member's credit card account when the account reaches 10 days past due, 40 days past due, and 70 days past due – building a 10-day grace period into their late fee structure.

Although many credit unions already have late fee grace periods, the CFPB should not mandate a required number of days for a courtesy or grace period. Mandating an expanded grace period could have significant behavioral implications for consumers, inducing consumers to delay payments. This will lead to additional interest charges and records of late payments to card issuers. It will also cause additional expenses for credit unions to the extent members willingly delay paying until the end of a mandated grace period. The cost of sending late notices and calling members adds to credit unions' overall cost to collect on past due accounts. Thus, a mandated grace period would serve to increase collection costs for credit unions, which, if not covered by late fee revenue, will increase costs of financial products and services for consumers. The substantially diminished proposed safe harbor amount would barely cover a small fraction of those costs.

The Proposed $8 Limit Will Negatively Impact Credit Unions and Consumers

This proposal puts credit union products and services at risk and may lead to further consolidation in the industry – reducing consumer choice for credit cards. Slashing the safe harbor limits for late fees to just $8 would drastically reduce credit union fee income – some credit unions estimate the reduction to be in the neighborhood of 56 percent. This would force institutions to make difficult rate adjustments and potentially add annual fee requirements to recover lost income that is subsequently used to cover pre-charge off collection costs. In the long term, the viability and competitiveness of many credit unions' credit card programs would be undermined. Over time, many credit unions would be forced to reevaluate their card programs and some would have to exit the credit card market altogether.

In reviewing this proposed rule, credit unions are left wondering what the Bureau's intended goal is – is it to actually help members make their payments on time and manage their credit responsibly or to simply lower the cost of credit? If the goal is the latter, this proposed rule would likely have the opposite effect for many Americans as the undeniable result would be reducing the availability of credit and tightening credit criteria to the detriment of those consumers with lower credit scores and thinner credit profiles.

Moreover, those consumers who are consistently delinquent on their credit card payments will continue to be delinquent and may actually pay their bills late more frequently because the $8 late fee provides virtually no deterrent effect. Credit unions go above and beyond to ensure their members are aware of their due dates and are able to make their payment as soon as possible to avoid additional late fees and other negative consequences. For example, some credit unions allow members to set credit card due dates, schedule automatic payments, and receive email or text reminders about upcoming payments. It benefits both credit unions and their members to spend the time early on to address any late payments so that the consumer's delinquency does not compound, but this effort requires substantial resources. Much like consumers, credit unions want to avoid additional late payments because that means they will not be saddled with increased collections and other operational costs.

The deterrents proposed by the Bureau as alternatives to late fees fail to represent a more effective form of deterrence, and, in all likelihood, would have a more deleterious impact on consumers than the current late fee paradigm. Specifically, the use of penalty APRs and negative credit bureau reporting would make it more difficult for consumers to access credit and increase the cost of credit. Penalty APRs increase the interest rate on a credit card, making it more expensive for consumers to carry a balance. Negative credit bureau reporting can damage a consumer's credit score, which could make it more difficult to qualify for loans or credit in the future or result in higher interest rates. As a result, the use of these alternative deterrents would create a cycle of debt and financial insecurity for consumers, making it more difficult for them to improve their financial situations. The suggestion that these deterrents would be preferential to the current, well-disclosed, reasonable fee structure that credit unions employ reveals the single-minded shortsightedness of the Bureau's proposal.

Harm to Consumers and Their Communities

This rulemaking effort to regulate out of existence legal and properly disclosed fees may lead to unintended consequences. Generally, the revenue collected from certain account fees permits credit unions to offer other products and services and supports community investment initiatives. Credit unions prioritize their members' financial wellness and offer financial literacy programs to teach the basics of credit and debt, especially to younger adults who may be more impressionable and likely to overextend their finances with underregulated products like Buy-Now-Pay-Later (BNPL) loans. NAFCU's recent survey indicates that about 80 percent of respondents offer financial literacy resources that specifically address how to avoid credit card fees.[23] If the CFPB further limits permissible fee amounts, the lost revenue from these fees may not be fully recouped, making it difficult to offer such services and help the communities that most need access to financial services. Restricting late fee amounts will require credit unions to divert resources from these programs and consumer benefits to compensate for the increased costs of delinquency and collections.

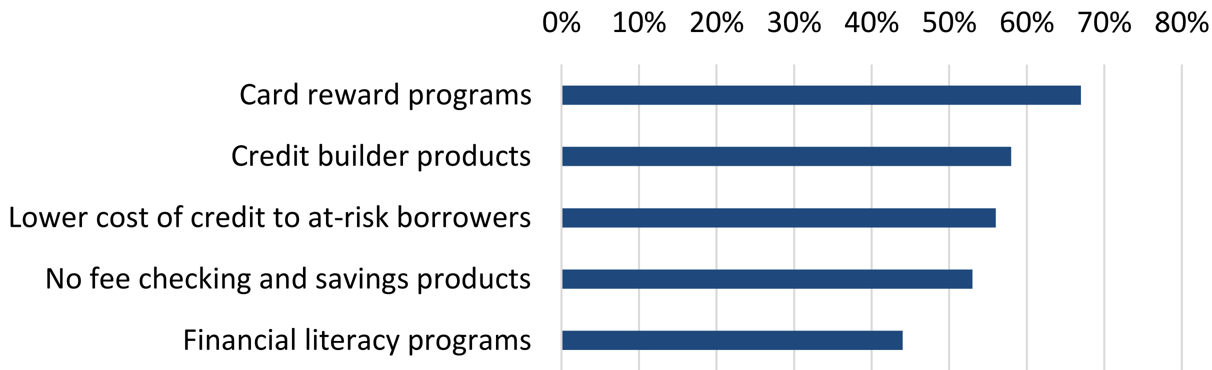
Nearly half of all respondents to NAFCU's recent survey on credit card fees indicated that the proposed $8 limit to the safe harbor amount would require them to scale back or terminate programs and products that are, at least in part, subsidized by fees.[24] Around or over one-third of respondents indicated that they would be required to scale back or terminate programs and products that are either moderately or minimally subsidized by card fees. As a result, one respondent said they would have to "drastically tighten credit standards" for higher-risk borrowers that the credit union is not able to help and they would also have to reduce their "credit builder card" risk, presumably also by tightening credit criteria. Countless other respondents indicated that they would have to reduce lending to high-risk borrowers. This means that lower-tier borrowers with, for example, FICO 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 inevitably 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.

The exact population of consumers the CFPB notes are most at risk of paying higher fees are those who will be most negatively impacted by this proposed rule, as their access to credit will quickly diminish. Late fees are vital to the healthy functioning of credit card programs, namely due to the deterrent effect of fees, but also because these fees allow credit unions to offer a variety of programs to serve underserved communities. Late accounts require notices, system program maintenance, and added monitoring that decreases the income earned on those loans. The impacts of reduced revenue on these loans would be borne by all members over time through, for example, rate adjustments (including introductory rate programs), annual fees, balance transfer fees, credit card check fees, and card re-issuance fees, and would impact credit unions' ability to give back to their communities. Specifically, 58 percent of NAFCU respondents indicated that credit builder products (e.g., secured credit cards) are directly funded by revenue from credit card fees. Similarly, 56 percent of respondents indicated that revenue from late fees subsidizes the cost of credit offered to at-risk borrowers. Revenue from fees also makes it

[23] NAFCU, *supra* note 14.
[24] NAFCU, *supra* note 14.

possible for some credit unions to offer special purpose credit programs, loans in underserved communities, no fee checking and savings products, community grants, community scholarships, green energy lending, financial literacy programs, and credit reward programs.

How is revenue generated from credit card fees used by your credit union?



Top five responses shown.

This lost revenue may need to be recouped by assessing 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 modifying rewards programs to recover this lost revenue. Interest rates for credit products may also slightly increase to account for the additional risk and reduced late fee income, but credit unions face a statutory interest rate ceiling. A flat fee and/or higher interest rates would have a negative impact on all credit union members and potential members – those who pay their accounts on time, those who are incurring late fees at the current rates, and those unbanked and underbanked communities where credit unions are seeking to expand access to financial services.

Nonetheless, the revenue from credit card late fees is never more important than the financial well-being of a credit union's members. Most 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. Additionally, some credit unions do not charge a default interest rate if the amount owed becomes severely past due. Credit unions often include "warning notices" on their online and mobile banking applications if the member is past due on their account in order to capture the borrower's attention and prompt swift repayment. Some credit unions also auto enroll certain cardholders in particular notifications to help them avoid late fees. Not to mention, most credit unions have autopay options that also provide notifications for upcoming payment due dates, and some are working to offer their members convenient reminders for upcoming payment due dates via text message and email.

The Deterrent Effect

Although the CFPB largely dismisses the deterrent effect of late fees in the proposed rule, it provides little to no analysis or support for its position that late fee amounts should be lowered to reduce the incidence of late fees. Late fees protect members' long-term interests. As the Bureau concedes, the Federal Reserve initially relied on a 2008 study by Agarwal *et al.* in support of higher late fee safe harbor amounts for the following six billing cycles because that study provides persuasive evidence that, for example, the deterrent effect of such late fee payments causes monthly fee payments to fall by 75 percent during the first four years of account life.[25] "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."[26] But the Bureau then finds issue with the methodology used in the latest 2013 version of the Agarwal study.[27] However, although the Bureau dismisses the Agarwal study, it fails to provide persuasive evidence to the contrary to prove that little or no deterrent effect exists from late fees and that reducing the late fee would not increase delinquency or default risk.

Specifically, the Bureau first cites an empirical study by Massoud, *et al*.[28] to argue that late fee payments can be avoided by small and inexpensive behavioral changes and that the deterrent effect of the current safe harbor amounts would be the same as the proposed $8 late fee amount. The Massoud study's findings do not support this conclusion though, because the authors determine that penalty fees correspond to and do, in fact, compensate lenders for higher credit card default risk.[29] Moreover, the Massoud study evaluates data on late fees from a 12-year period – from 1990 to 2002 – before the implementation of the CARD Act. This study does not account for the impact the CARD Act has had on limiting late fees and increased consumer education through mandatory disclosures. The CARD Act also requires lenders to consider a borrower's ability to pay.

Second, to support this same point, the Bureau cites a later study by Agarwal *et al.*,[30] related to the effects of aging and cognitive decline on poor financial decision-making. This study makes no mention of the deterrent effect of late fees and, in fact, the authors clearly explain that they "are

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[25] Sumit Agarwal, *et al., Learning in the Credit Market* (Feb. 2008), https://www.nber.org/system/files/working_papers/w13822/w13822.pdf.
[26] *Id.*
[27] Sumit Agarwal *et al., Learning in the Credit Card Market* (April 24, 2013), https://ssrn.com/abstract=1091623or http://dx.doi.org/10.2139/ssrn.1091623.
[28] Nadia Massoud, et al., The Cost of Being Late? The Case of Credit Card Penalty Fees, 7 Journal of Financial Stability, at 49-59 (2011).
[29] *Id.*
[30] Sumit Agarwal*, et al., The Age of Reason: Financial Decisions Over the Life Cycle and Implications for Regulation*, 2 Brookings Papers on Economic Activity, at 51-117 (2009).

agnostic about what regulatory interventions (if any) should be adopted" to address the problems associated with the economic behavior of older adults.[31] If the Bureau is concerned about the effects of late fees on older Americans, then other measures, including some of the recommendations in the Agarwal study, may be best suited to address this issue.

The deterrent effect of late fees is real and has an impact on consumers' incidence of delinquent payments. The Bureau has not proven otherwise in this proposed rule and for that reason cannot move forward with this rulemaking. The Bureau should release the data (including the Y-14 data) upon which it relies to demonstrate that the rate of further delinquencies decreases in month seven, following the last late fee. Without allowing stakeholders to fully consider this data, especially given the Bureau's other "evidence" of the lack of a deterrent effect falling flat, the Bureau is preventing an inclusive debate on the issue of the deterrent effect of late fees.

Lowering the credit card late fee safe harbor amount to $8 would change cardholder behavior. Consumers would likely elect to pay higher fee accounts first, namely their mortgage or rent payments or car loans, especially during difficult economic times. This would alter the percentage of late accounts, increasing the cost for credit unions to offer credit cards and decreasing the overall revenue-generating capacity of these programs. Over time, this would have a ripple effect, impacting credit decisions and credit unions' ability to offer programs that they offer at a loss or on which they barely break even, specifically programs for higher-risk consumers, that consumers need at costs they can afford.

The Bureau should not be reducing the safe harbor fee amounts, but rather should focus on other market players that take advantage of consumers' mistakes to generate large profits from late fees through practices. Additionally, as NAFCU has previously highlighted, 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.

Elimination of the Annual Inflation Index Adjustment is Unjustified

The CFPB proposes to eliminate the annual inflation index adjustment because it argues that such inflation adjustments are not required by statute and the Federal Reserve Board did not consider the effect such annual inflation adjustments may have on the reasonableness and proportionality of the late payment fee and did not provide data to support the adjustments as necessary. The Bureau claims it "analyzed relevant data that was not available to the Board to take into consideration the statutorily mandated reasonable and proportional standard" by looking at costs incurred due to violations. Again, the Bureau points to the Y-14 data collection, which it has not shared publicly for stakeholder evaluation, to explain that average collection costs per

[31] *Id.*

account fluctuate more than price level and, therefore, should not be subject to a mandatory annual inflation adjustment.

The Bureau should maintain the annual inflation adjustment, especially when considering that the average per account collection costs for smaller financial institutions like credit unions are higher than the average per account collection costs for large banks. While large banks may be more immune to market price increases and have the ability to achieve economies of scale, smaller credit unions must shoulder increasing costs or make difficult choices to forego offering certain products and services. Moreover, given rising labor costs and record inflation, the Bureau should continue to update the safe harbor fee amounts to reflect changes in the CPI. As discussed in further detail below, credit unions would face dire consequences as a result of this proposed rule and would be forced to cut other offerings because as it stands, with the current safe harbor amounts, many credit unions report fee revenue as insufficient to even cover the full cost of delinquency and collections. As an alternative to maintaining the annual inflation adjustment, NAFCU supports a required reevaluation of the safe harbor amounts every two years to determine whether an upward adjustment is appropriate, based on inflation.

25 Percent of Minimum Payment Amount

The proposed cap for late fees assessed using the cost analysis would result in even fewer institutions relying on this method for calculating late fees and have the effect of capping late fees at $8 in all circumstances. The proposed cap of 25 percent of the minimum payment amount would also serve to further amplify the law of demand and the incidence of late payments. This would, in turn, likely lead to lower credit scores for consumers and higher overall rates for credit.

For example, 25 percent of a $25 minimum payment is $6.25 – even lower than the proposed $8 safe harbor amount. What will likely result is that rather than a sliding scale of minimum payments between a $25 minimum payment and a $32 minimum payment, all financial institutions would likely simply increase their minimum payment amounts to $32 to charge the permissible $8 safe harbor amount. The 25 percent cap is therefore a meaningless and unrealistic alternative to the proposed safe harbor amount. Therefore, the CFPB should maintain the existing cap of 100 percent of the minimum payment amount.

As an alternative to reducing the safe harbor amounts and amending the cost analysis cap, the Bureau should consider the potential benefits to consumers from increased educational resources, other tools to facilitate disclosures of credit card terms and fees, and a focus on minimizing behavioral and cognitive biases that may trap consumers in cycles of indebtedness. The Bureau should continue to focus on its consumer-facing resources and building partnerships with credit card issuers to ensure consumers have as much information as possible about fees to make an informed decision regarding their credit card and to have the ability to comparison shop. The Bureau currently maintains a Credit Card Agreement Database that makes available to the public the credit card agreements of over 600 card issuers so consumers can review and compare the terms offered by various issuers before taking out credit.[32] Additionally, the Bureau recently issued orders to a number of financial institutions to complete a new and improved survey regarding information on the terms of their credit card plans and help consumers find products with lower rates and fees.[33] Combined, these valuable resources allows consumers to comparison shop among credit card issuers and evaluate each issuer's fee structure.

NAFCU also reiterates its recommendation that the CFPB 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 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).

The Pre-Charge-Off Collection Costs

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. There are also many costs to issuers that may not be accurately or fully accounted for in pre-charge-off collection costs, which cause the overall cost to exceed the revenue collected from late fees.

Credit unions report difficulty quantifying the costs and risks associated with late payments on a per-late payment basis. NAFCU urges the CFPB to reconsider its approach to evaluating credit card late fees so as to not rely on a strict cost-based approach to determining late fees. Forcing institutions to conduct a cost analysis to justify their late fee price would be a very challenging and time-intensive exercise that also ignores the deterrent effect of these fees. Based on their credit card portfolios, 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.

There are several aspects to the overall cost of servicing past due accounts. Credit unions incur costs when they use resources to follow up with members to ensure they are able to make

[32] Credit Card Agreement Database, http://www.consumerfinance.gov/credit-cards/agreement.
[33] Terms of credit card plans (TCCP) survey, https://www.consumerfinance.gov/data-research/credit-card-data/terms-credit-card-plans-survey/.

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. The costs of mailing late notices and the labor expense to make calls to consumers and document the call attempts comprise a more substantial expense for smaller credit unions than the largest credit card issuers. This is the case because many smaller institutions conduct these collections efforts in-house versus outsourcing to a third-party, which comes at an even higher cost and only makes economic sense above a certain threshold of credit card accounts. With rising labor costs, especially in a tight labor market, smaller credit unions already face considerable challenges in managing their credit card portfolios.

The cost associated with credit unions' outreach to consumers to resolve late payments, especially for the smallest credit unions, often exceeds the fee assessed to consumers. Certain fixed costs, including, for example, staff training and lease payments for a call center, may not be included in pre-charge-off costs, but are directly related to servicing and collecting on past due accounts. Based on NAFCU's survey, the average pre-charge-off collection cost for credit cards is $137,603, with a monthly average per account of $0.33 across all respondents.[34] The safe harbor fee amounts are not currently set too high and, in fact, should continue to be adjusted annually for inflation to account for the increased collection costs for past due accounts. Because credit unions charge late fee amounts, to the extent practicable, well within the safe harbor limits does not mean that their costs associated with servicing the accounts are low and that their membership as a whole is not benefitting from those fees.

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 greater innovation to, for example, offer improved mobile and online platforms that enhance consumers' banking experience.

The CFPB Should Closely Scrutinize Nonbank Credit Issuers

As NAFCU has previously requested, the CFPB should exercise its supervision authority to monitor and evaluate the practices of nonbank companies that provide consumer credit. Fintech companies entering the credit card market and other segments of consumer lending pose competitive pressures for credit unions, particularly smaller institutions. 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

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[34] NAFCU, *supra* note 14.

consumer financial products or services, as defined by [a] rule" issued in consultation with the Federal Trade Commission.[35]

NAFCU urges the CFPB use its larger participant authority to oversee an underregulated industry of fintech companies that offers consumers a wide array of unsecured credit products digitally. In particular, the CFPB should continue to focus on BNPL providers that cleverly avoid TILA disclosure requirements by offering closed-end credit in four installments.[36] BNPL providers collect an immense amount of consumer data while evading consumer protection laws and many do 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. These combined factors and a lack of adequate federal supervision puts consumers at risk. The potential risk of consumer losses and violations of their rights far outweigh any perceived lack of competitive pricing pressures for credit card fees charged by depository institutions. Direct supervision of these nonbank credit issuers would permit the Bureau to monitor more closely fee-related practices that are the source of consumer harm.

Conclusion

Credit unions prioritize the financial well-being of their members. They work hard to inform their members of ways to avoid credit card late fees and notify them of upcoming payment due dates. Reducing the safe harbor fee amount to $8 would have a significant economic impact on credit unions and a substantial number of small entities. Therefore, the CFPB should immediately withdraw this proposed rule and convene a SBREFA panel to form a more complete understanding of the credit union business model and the impacts this proposed rule would have on smaller credit unions and their members.

The current safe harbor amounts are set at a reasonable level and should continue to be adjusted annually for inflation. The proposed changes would not meaningfully reduce consumer indebtedness. Rather, it will harm smaller, community-based financial institutions like credit unions and their members who will experience tighter credit standards and reduced access to products and services. The proposal may also lead to increased consolidation among the nation's smallest financial institutions, which will find it increasingly difficult to compete with big banks. The Bureau should instead further study the market, including taking a closer look at the role of credit card payment processors and newer fintech lenders, before continuing to rush through this rulemaking process.

[35] 12 U.S.C. § 5514.
[36] *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.

NAFCU appreciates the opportunity to share its members' feedback on this proposed rule. 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