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National Association of Federally-Insured Credit Unions

October 27, 2020

Comment Intake

CARD Act Rules RFA Review and Credit Card Market Review
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

RE: CARD Act Rules Review Pursuant to the Regulatory Flexibility Act; Request for Information Regarding Consumer Credit Card Market (Docket No. CFPB-2020-0027)

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing to share our comments regarding the Consumer Financial Protection Bureau's (CFPB or Bureau) combined *Credit Card Accountability Responsibility and Disclosure Act of 2009* (CARD Act) review and request for information (RFI) regarding the consumer credit card market. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 122 million consumers with personal and small business financial service products. NAFCU appreciates this opportunity to share our members' feedback on aspects of the consumer credit card market as well as the longer term impact of the CARD Act on overall compliance costs and credit terms.

Consistent with recommendations NAFCU has shared in prior years, we recommend that the Bureau provide additional regulatory clarity to encourage more efficient disclosure practices, including granting credit unions flexibility when providing required disclosures via online and mobile banking platforms. We also recommend several more specific changes. These include extending existing flexibility that addresses consumers' consent to receive disclosures electronically, clarifying rules surrounding telephone applications for credit cards, updating ability-to-pay rules to better reflect the actual risk of secured credit cards, and granting consumers additional control over how excess payments are allocated. In the broadest sense, we continue to believe that new rules regarding credit cards are not warranted, unless they replace more stringent rules currently in place, given the industry's effective self-regulation and the cumulative cost of existing compliance burdens.

General Comments

Section 502(a) of the CARD Act requires the Bureau to conduct a review of the consumer credit card market every two years. Separately, section 610 of the Regulatory Flexibility Act (RFA) requires the Bureau to consider the effect of the CARD Act on small entities, including credit unions. A critical component of the RFA review is consideration of whether the rules adopted pursuant to the CARD Act should be continued without change, amended, or rescinded, in order to minimize any significant economic impact of the rules upon a substantial number of such small entities.

On the issue of regulatory burden, there is some thematic overlap between the section 610 review and the section 502(a) RFI. For example, the 502(a) RFI asks about the cost and availability of consumer credit cards—a question that has often elicited responses from credit unions highlighting a rapid increase in compliance costs following the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act). Likewise, the RFI asks about the effectiveness of consumer credit card disclosures, and evidence presented in prior years has suggested that the disclosures embedded within credit card agreements do little to improve consumer understanding, a finding that suggests extending the CARD Act rules beyond their current scope is neither useful nor warranted.¹ Even the Bureau’s assessment of research surrounding the efficacy of CARD Act disclosures characterizes the findings as “conflicted” and highlights potentially worse outcomes for consumers.²

Although the separate reviews included in the Bureau’s notice could easily yield similar responses, NAFCU has structured its comments such that our specific recommendations for alleviating regulatory burdens are offered in connection with the section 610 review of the CARD Act. Our observations regarding broader trends within the credit union industry are shared in response to the Section 502 RFI. However, both sets of comments should be read together as supporting similar objectives and reforms: ensuring credit union members receive clear and effective disclosures, and granting credit unions the necessary flexibility to efficiently serve their communities with affordable credit products.

Now more than ever, the Bureau must be willing to consider critical reforms as the nation faces unprecedented economic uncertainty due to the pandemic. An inflexible regime of disclosure-based regulations will not save needy families from financial hardship, but allowing credit unions to focus on expanding access to credit, providing relief, and developing innovative credit products will go a long way in helping the nation mount a strong recovery.

Comments Regarding the CARD Act Rules Review

To help credit unions develop new and innovative credit products, better serve “credit thin” or “credit invisible” consumers, and adapt effectively to a rapidly evolving (and increasingly competitive) technological landscape, NAFCU asks that the Bureau consider several amendments to the CARD Act rules. We believe the proposed amendments described below will ultimately benefit consumers while also alleviating unnecessary and arbitrary burdens placed on credit unions, small and large alike.

E-Sign Flexibility for Disclosures.

NAFCU has long advocated for flexible rules related to the acceptance of electronic signatures and delivery of electronic disclosures. Within the Bureau’s regulations, cross-references to the

¹ <https://www.creditcards.com/credit-card-news/unreadable-card-agreements-study/>

² The Bureau’s Credit Card Market Report cites one study, Hershfield & Roese (2014), which found that “one feature of the CARD Act’s new disclosures—in particular the disclosure of the 36-month payment amount—leads some consumers to repay more slowly than they otherwise would.” See Consumer Financial Protection Bureau, 2019 Consumer Credit Card Market Report, 123-125 (August 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2019.pdf.

Electronic Signatures in Global and National Commerce Act (E-Sign) have often stood in the way of a more seamless digital experience for consumers. In the context of the pandemic, such flexibility has become paramount, and the Bureau has acknowledged in a supervisory statement that “E-Sign requirements may make it harder for consumers to obtain relief quickly where the Bureau’s rules require written disclosures so long as the pandemic is leading to unusually high call volumes at issuers and constraining their staff capacity.”³ Even before the pandemic, financial institutions were diverting valuable staff and other resources to ensure compliance with E-Sign’s unwieldy consent process, which was conceived of twenty years ago at a time when overwhelming smartphone adoption, mobile banking, and near ubiquitous internet access were developments far on the horizon. Advances in both technology and consumers’ financial habits since E-Sign was enacted should prompt the Bureau to consider additional flexibility related to delivery of electronic disclosures.

Currently, Regulation Z provides that most required disclosures may be provided electronically as long as consumer consent is obtained in compliance with E-Sign requirements. On June 3, 2020, the CFPB issued temporary guidance providing creditors flexibility in terms of obtaining consent from consumers in the context of oral telephone interactions. NAFCU recommends incorporating this guidance into Regulation Z for all required disclosures on a permanent basis. Specifically, we envision a framework where disclosures may be provided electronically when the following is obtained: (1) the consumer’s oral consent to the electronic delivery of written disclosures, and (2) an oral affirmation of the consumer’s ability to access and review the electronic written disclosures. NAFCU believes the Bureau can facilitate an immediate transition to such a framework under existing authorities. Pursuant to section 7004(d) of the E-Sign Act, the Bureau may “exempt without condition a specified category or type of record from the requirements relating to consent in section 7001(c).”

Incorporating this flexibility into Regulation Z will give credit unions—both large and small—the incentive to invest in updates to systems, processes, and procedures to obtain E-Sign consent orally. NAFCU anticipates that these investments will ultimately benefit consumers, who increasingly demand seamless engagement with their financial institution rather than fragmented interactions in service of E-Sign’s outdated electronic consent process.

Definition of “Written Application” Under Young Consumer Rules

NAFCU proposes that the Bureau clarifies that Regulation Z’s written application requirement for young consumers may be met by documenting information a young consumer provides orally during a telephone call, provided the information collected is retained in a retrievable form. Official interpretations of Regulation B support this clarification of “written application” for certain dwelling-secured credit.⁴

³ CFPB, Statement on Supervisory and Enforcement Practices Regarding Electronic Credit Card Disclosures in Light of the COVID-19 Pandemic, 3 (June 3, 2020).

⁴ See 12 CFR §1026.4(c), Supp I, comments 1, 2, and 3; §1002.13(b), Supp I, comment 2.

It is not clear from the plain reading of the CARD Act or Regulation Z whether an application received by telephone would satisfy the “written application” requirement even if the creditor retains a recording of the application. .

NAFCU has heard from its members that many credit unions currently do not accept applications from under 21 applicants by telephone to avoid violating this “written application” rule. Instead, these applicants must submit their applications electronically by mail, or by visiting a branch, all of which could be inconvenient and delay access to credit. As a result, credit unions may not easily assist young consumers who wish to apply by telephone, which would afford them the opportunity to ask questions and receive assistance as they complete their application. Additionally, paper applications generally are manually reviewed, decisioned, and stored – factors that increase operational and regulatory burdens for all credit unions.

Therefore, we ask that the CFPB revise Regulation Z, Section 1026.51(b), to clarify that a “written application” may be an application taken over the telephone.

Payment Allocation

NAFCU recommends that the Bureau update its payment allocation rules to accommodate more flexible repayment options for consumers. Currently, Regulation Z requires that credit card payments in excess of the required minimum payment be allocated to balances with high APRs before balances with low APRs. However, there are exceptions that allow consumers to direct excess payments to secured credit card balances or credit card balances under deferred interest programs, regardless of whether the APR is high or low. In its 2019 Consumer Credit Market Report, the Bureau acknowledged that an array of innovative, flexible payment options has emerged which “may provide consumers with greater flexibility and control in paying down different purchases at different costs and speeds.”⁵ At the same time, the Bureau acknowledged that these innovative features require card issuers to navigate a “complex regulatory landscape” that includes, among other things, limitations on APR and fee increases, payment allocation rules, and ability-to-pay requirements.

To sustain continued card payment innovation and expand consumer choice, NAFCU asks that the Bureau create a new exception to payment allocation rules for balances that are under “flexible repayment options” and other promotional rate programs.

Whether large or small credit unions can offer innovative flexible repayment options to their low income members depends, in part, on whether the payment allocation exceptions in Regulation Z are expanded to permit consumers to direct excess payments to balances under a flexible repayment option. Under current rules, consumers generally must pay higher minimum monthly payments to enjoy the lower finance charges and budgeting benefits associated with these repayment options. As a result, low income consumers who would benefit most from the reduced finance charges associated with these flexible repayment options are least likely to qualify for them.

⁵ Consumer Financial Protection Bureau, 2019 Consumer Credit Card Market Report, 177-179 (August 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2019.pdf.

Additionally, the fact that consumers cannot currently direct excess payments to low rate promotional balances prior to the expiration of their promotional periods is reportedly a pain point for consumers. This is because they often have to pay off their entire account balance in order to pay off their low rate promotional balance before the period's expiration.

Expanding the exceptions under which consumers can direct excess payments to balances irrespective of the "high to low" rule would benefit card issuers and consumers alike.

Timing of disclosures – Change in Terms

NAFCU asks that the Bureau align the timing requirement for disclosures under 12 CFR 1026.9(c)(2)(i)(B) to the "as soon as reasonably practicable" standard afforded under 1026.9(c)(2)(v)(B)(1) for temporary rate or fee reductions offered by telephone.⁶ Currently, 1026.9(c)(2)(i)(B) permits certain change in terms disclosures, such as those related to additional security, to be mailed or delivered "as late as the effective date of the change." The more restrictive timing standard has created regulatory uncertainty and, as result, impacted consumers' timely access to additional credit.

For example, when a consumer applies for and receives a line increase on a secured card over the telephone, the card issuer may place an immediate hold on additional funds that serve as collateral. This immediate hold enables card issuers to quickly approve the line increase request during the telephone call, in part because the increased security requirement can be fulfilled right away. While the hold is placed the same-day the line increase is approved, delivering or mailing a written change in terms notice the same day (i.e., the effective date of the change) may be impractical depending on the time of day the agreement took place. In these cases, a consumer's access to the additional credit line might be delayed until the written disclosure can be mailed or delivered the same day the additional hold on collateral is placed.

NAFCU requests the timing requirements for disclosures be amended to permit written disclosures to be delivered or mailed "as soon as reasonably practical" after a telephone call. This will reduce regulatory uncertainty that might contribute to delays when processing certain consumer requests.

Secured Credit Cards

Currently, the CARD Act requires a creditor to evaluate an applicant's ability to pay for a share-secured credit card. In prior comments, NAFCU has asked the CFPB to exclude secured cards from the ability-to-pay requirements of the CARD Act because they do not carry the same level of risk for consumers as unsecured cards, and applicants' creditworthiness can generally be determined in a more streamlined manner by evaluating the borrower's capacity to pledge funds as collateral. An independent ability-to-pay analysis for secured credit cards is just one more regulatory obstacle that has made it harder for credit unions to serve members who seek out secured cards to build or repair their credit histories.

Regulation Z's ability-to-pay requirement provides that card issuers must have reasonable policies and procedures that consider a member's ability to pay before opening a new credit card account

⁶ See 12 CFR 1026.9(c)(2)(v)(B)(1), Supp. I comment 5.

or increasing an existing credit card account's line. To be reasonable, the policies and procedures must consider a member's current income or assets, and current debt obligations, even if the card's line is secured.

A credit union can easily evaluate whether a member has the ability to repay a secured card line by verifying and holding funds deposited by the member as collateral. Credit unions understand, based on data and past experience, that members who are able to set aside funds as collateral for a security interest have a strong likelihood of making monthly payments. This is an insight that the formal ability-to-pay analysis does not easily accommodate in the context of "reasonable policies and procedures." Performing a strict review of the member's current income or assets, and current debt obligations is an unreasonably high bar for lower income borrowers in particular when the security interest itself serves as a strong proxy for an overall creditworthiness. Whether or not the member's other current monthly debt obligations would interfere with the member's ability to pay the monthly minimum payment is less relevant in the context of secured credit cards when a credit union has data that correlates the amount of pledged collateral with the ability to repay.

Consumers with low disposable income may find it difficult to qualify for unsecured credit, so secured credit cards serve to bridge gaps in credit access. Imposing a strict ability-to-pay assessment for a secured card defeats this purpose and does not substantially reduce risk. Unnecessary and inflexible ability-to-pay requirements also frustrate credit unions' ability to help an estimated 26 million consumers who may not qualify for unsecured credit because they are regarded as "credit thin" or "credit invisible."⁷

In general, NAFCU believes that secured credit cards should be excluded from the ability-to-pay requirements of the CARD Act. Such an exemption would facilitate ongoing development of innovative secured card programs aimed at reaching a broad population of otherwise creditworthy borrowers who may lack credit histories or requisite income levels. As an alternative to this general exclusion, NAFCU strongly urges the Bureau to consider a more flexible articulation of what constitutes "reasonable policies and procedures" under 12 CFR 1026.51(a)(1)(ii) to better accommodate secured card programs that are designed to help struggling members. Specifically, the Bureau should adopt a framework where consideration of the collateral pledged as a security interest may serve as the predominant consideration in a reasonable ability to repay analysis. NAFCU believes that such flexibility is essential so that credit unions can better serve their members, particularly those that would not otherwise qualify for unsecured credit.

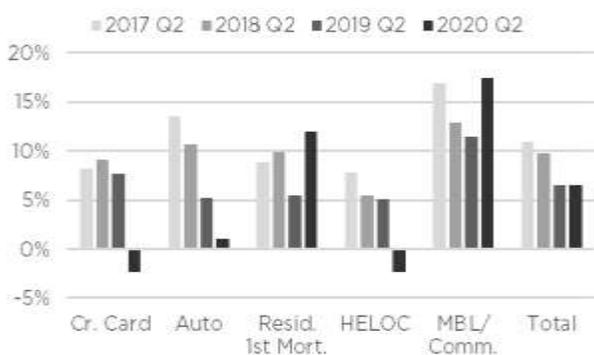
Comments Regarding the Consumer Credit Card Market

NAFCU members support providing fair and transparent credit products and services. Credit unions are not-for-profit, cooperative financial institutions focused on providing exceptional member service, not capitalizing profits for shareholders. Credit unions have changed their credit card practices as technology and laws have evolved. Despite growing pressure from fintech competitors and the ongoing cost of cumulative regulatory burdens, credit unions continue to put their members first, offering high quality credit card products with lower than average interest rates and member-friendly fee structures.

⁷ CFPB, Financial Literacy Annual Report, 31 (December 2019).

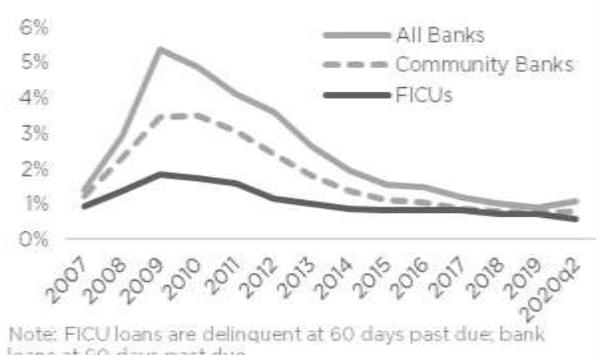
Consumer credit cards play an important role in credit union members' daily lives. At the beginning of 2020, total U.S. credit card debt hit a record high of over \$1 trillion, easily surpassing the peak of prerecession credit card debt. In addition, average balances on credit cards increased to almost \$6,200. However, growth in credit card usage and balances has mainly reflected sustained improvements in the job market and improving household finances heading into 2020. Delinquencies have also remained low for several years, and have actually fallen despite the economic shock of COVID-19, likely as the result of government stimulus directed to both individuals and businesses.

Chart 1.5: Loan Growth (y/y) by Type



Source: NCUA

Chart 1.6: Delinquency Rates



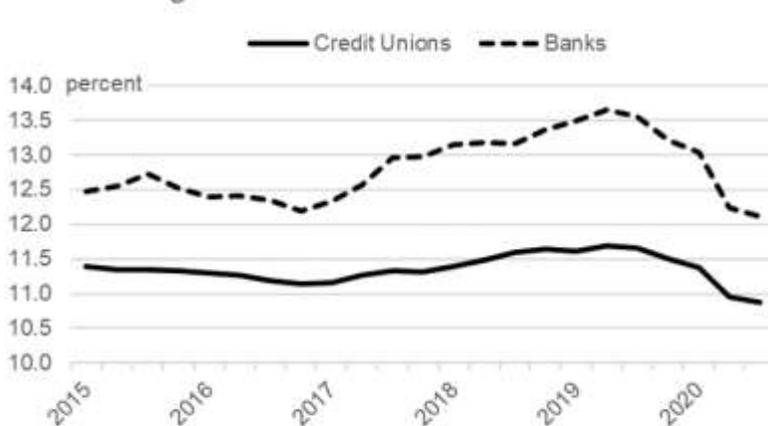
Note: FICU loans are delinquent at 60 days past due; bank loans at 90 days past due
Sources: NCUA, FDIC

Credit unions are keenly aware of the financial stresses created by the pandemic. Consistent with the industry's cooperative structure and mission, credit unions continue to provide access to affordable credit card products, including special payment accommodations, at lower interest rates than banks. However, overall consumer demand for credit has decreased significantly in 2020. According to the NCUA's June 2020 Call Report data, total credit card balances decreased by 2.4 percent from one year earlier. More recent NAFCU surveys show that this weakened demand has persisted.

Despite the financial hardships which have followed from business closures, layoffs, and other pandemic-related disruption, current delinquencies on credit cards have fallen. According to the NCUA's June 2020 Call Report data, the credit card delinquency rate fell to 101 basis points from 122 basis points one year earlier.

Given the extent of depressed credit demand and stable delinquency conditions, the Bureau should explore opportunities to make it easier for

Average Rate on Classic Credit Card Loans



Sources: NAFCU, Datatrac

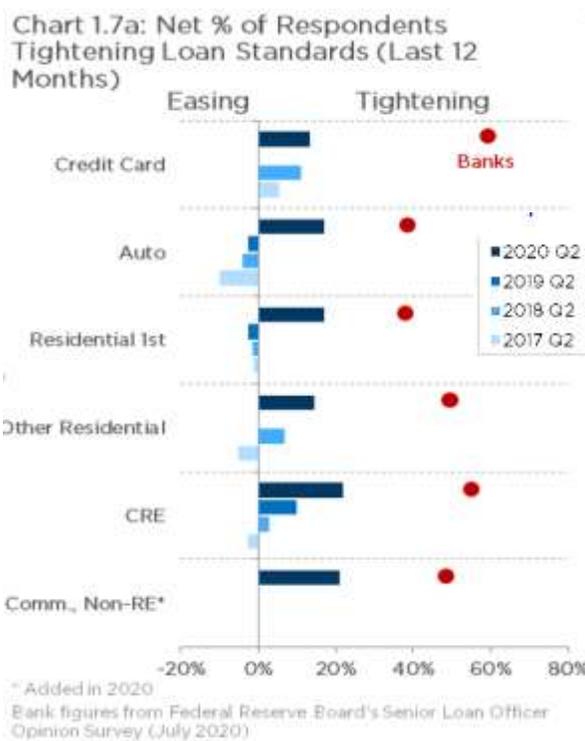
financial institutions to market credit opportunities to facilitate a strong economic recovery. More importantly, the Bureau should entertain changes to the regulations carrying out the CARD Act as the consumer credit card market evolves.

Cost and availability of consumer credit cards.

According to NAFCU’s 2020 *Federal Reserve Meeting Survey*, demand for unsecured credit cards has weakened considerably since the onset of the pandemic. At the same time, NAFCU members have reported delinquency rates remaining relatively unchanged since 2014. Decreased costs, in terms of delinquency and charge off rates, are in part due to credit unions remaining diligent and effectively mitigating risks. Lower costs may also be the consequence of a gradual tightening of lending standards.

NAFCU’s annual *Federal Reserve Meeting Survey* includes a set of questions on lending standards which reveals a trend of gradual tightening that started in 2018.⁸

A comparison between the results of the 2020 survey with those from prior years shows that, on net, respondents tightened standards more than in prior years across all credit products, with 13.3 percent of respondents tightening standards for credit cards. As compared with bank results in the Federal Reserve’s *Senior Loan Officer Opinion Survey*, credit unions are tightening loan standards far less than banks. This divergence is similar to what happened during and after the Great Recession, when banks reduced credit provision to households and small businesses, while credit unions were relatively more active lenders. The fact that credit union asset quality is so high during normal times allows them to maintain more steady lending standards during and after an economic downturn.



Credit unions continue to meet the demands for vital consumer credit card products, and continue to act as responsible lenders—decreasing costs in terms of interest, delinquency, and charge-off rates. In this context, we again ask that the Bureau consider easing CARD Act rules that require ability-to-pay analysis for secured credit cards. Credit unions have ample capacity to serve the credit needs of consumers who might not qualify for unsecured credit products, provided the Bureau is able to ease regulatory burdens.

⁸ We measure the net share tightening loan standards as the percent of respondents tightening minus the percent easing.

Credit Card Innovation

Excessive regulation and significant compliance overhead has made it challenging for credit unions to compete effectively in markets where fintech companies may be enjoying less direct supervisory pressure. Innovative credit products are expensive to develop, test and audit for compliance purposes, and the current regulatory environment has not made this process easier for credit unions despite mounting pressure from non-traditional financial entities.

Although non-bank lenders are subject to the enforcement and rulemaking authority of the Bureau, they are not always supervised in the same manner as credit unions or banks. NAFCU supports robust competition in the marketplace, and recognizes that fintech can produce real benefits to consumers, however innovation should not be prioritized in a way that undermines financial stability and competitive equality. NAFCU asks the Bureau to ensure a level playing field exists between fintech companies and financial institutions in terms of supervision and enforcement. A level playing field should serve as the foundation for any framework that promotes responsible innovation.

Post-Dodd Frank regulatory costs have also steadily grown over the past ten years, making innovation harder to sustain. A NAFCU's survey conducted in 2018 revealed that the number of full time equivalent (FTE) staff members devoted to "total compliance activities" has increased 127 percent since 2010. In NAFCU's 2020 Federal Reserve Meeting Survey, respondents reported that, on average, 24 percent of their staff's time was devoted to regulatory compliance, with four out of five respondents expecting to add staff in the next three years to better manage current and anticipated compliance burdens.

Smaller credit unions often have limited resources, allocating staff time and budgets to satisfy ongoing compliance versus investing in more tangible, member-facing improvements, such as innovative product development. Accordingly, NAFCU encourages the Bureau to evaluate the economic impact of the CARD Act by taking into consideration the broader context of cumulative regulatory burden, rather than presenting the costs of CARD Act rules in isolation, which might understate the extent of their impact.

Effectiveness of Disclosures and Digital Advertising

According to a 2016 survey, 24 percent of Americans never read credit card agreements, 22 percent hardly read credit card agreements, 27 percent sometimes read credit card agreements, and 26 percent regularly read credit card agreements.⁹ Consumers miss important information regarding their credit card products when they do not read or only selectively read the agreements and disclosures. Accordingly, the Bureau should encourage effective credit card disclosures that are in a simple and easy-to-read format. Improvements to the disclosures, such as a more user-friendly format, could help direct greater attention to credit card agreements and disclosures.

One way the Bureau can facilitate both innovation and improved disclosure efficacy is by exploring additional flexibility for digital advertisements. Current credit card disclosure rules may not be suitable for today's digital environment, which is often space-constrained due to application

⁹ <https://www.creditcards.com/credit-card-news/unreadable-card-agreements-poll.php>

design. With mobile and online banking becoming the mainstream, it is important that credit unions are able to offer credit products through these channels without running afoul of Regulation Z's disclosure rules. For instance, if a member applies for a credit card via a credit union mobile app and is provided with the required credit card disclosures that are compliant with the rules, the font and format may be difficult to read. NAFCU recommends that the Bureau ensure that credit unions are given flexibility in providing the required disclosures via mobile and digital platforms especially for form and font size. The Bureau should also consider whether there are opportunities to elaborate upon the one-click away framework for disclosing certain trigger terms that reflects how consumers currently engage with popular websites and social media platforms.¹⁰ Many websites and social media platforms will update their interfaces and user experience design on a periodic basis. As a result, credit unions would benefit from greater latitude to design ads that are responsive to these changing formats or user expectations. Improved flexibility around digital ads might help credit unions target underserved populations more effectively while at the same time ensuring that required disclosures are provided in the most relevant context.

Safety and Soundness Issues

Data breaches pose a threat to the safety and soundness of the financial services industry, and financial institutions across the board have had to manage the collateral damage caused by numerous high-profile data breaches in recent years. Unfortunately, data breaches are a growing concern for the credit union industry, and are one of the top impediments to industry growth.

According to NAFCU's 2020 Federal Survey, 88 percent of credit union respondents were very or somewhat concerned about cybersecurity risk rising from merchants – an increase of 32 percent over last year. In addition, credit unions estimated that regulatory burden related to IT compliance has expanded 72 percent since 2016.

The consequences of merchant data breaches are not limited to financial loss for credit unions, but can cause reputational harm if members grow frustrated with the process of reissuing credit cards. Credit unions continue to strengthen safeguards against data breaches, but as criminal tactics evolve and more information about consumers is exposed through cumulative breaches, fraudsters have been able to launch more creative attacks, which have only accelerated with the onset of the pandemic. Accordingly, NAFCU continues to advocate for more stringent data security standard for retailers similar to the requirements imposed on financial institutions by the *Gramm-Leach-Bliley Act*. It is essential that the Bureau recognize the importance of a national data security standard and support such a legislative change as it would drastically improve the health of the credit card market by reducing the fraud related costs borne by credit unions and their members.

¹⁰ See CFPB, Supervisory Highlights, Issue 19 (Summer 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf. While the Bureau has highlighted a limited set of practices that run afoul of the one-click away rule, the commentary to Regulation Z does not suggest that there are specific rules about what satisfies the clear and conspicuous standard with respect to the additional disclosures required by sections 1026.16(b)(1)(i) through (iii). See, 12 CFR Part 1026, Supp. I, Comment 16-1.

Consumer Financial Protection Bureau

October 27, 2020

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Conclusion

NAFCU appreciates the opportunity to share comments in response to both the CARD Act Review under Section 610 of the RFA and the Bureau's RFI on the consumer credit card market. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2266 or amorris@nafcu.org.

Sincerely,

A handwritten signature in black ink that reads "Andrew Morris". The signature is written in a cursive, flowing style.

Andrew Morris
Senior Counsel for Research and Policy