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Via regulations.gov
Comment Intake
Consumer Financial Protection Bureau
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.

The National Consumer is pleased to submit these comments in response to the Consumer Financial Protection Bureau (CFPB)’s notice for Docket No. 2020-0027, issued August 28, 2020. The first part of the CFPB’s notice requests comment on the Bureau’s review, pursuant to Section 610 the Regulatory Flexibility Act (RFA), of the rules in Regulation Z that implement the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009. The second part of the notice requests comment for the purposes of the CFPB’s biannual review of the credit card market, as required by section 502(a) of the Credit CARD Act.

Part I of these comments addresses the Bureau’s review of the credit card rules under the RFA. An analysis of the factors set forth in Section 610 of the RFA strongly supports retention of these rules without change. If anything, the RFA factors support adopting similar provisions for credit cards issued to small businesses.

Part II of these comments discuss the state of the credit card market for purposes of the CFPB’s biannual review under section 502(a) of the Credit CARD Act. We focus on topics that we have discussed frequently in response to the CFPB’s previous RFIs for its biannual review, such as deferred interest promotions, subprime specialty credit cards, and requirements for electronic disclosures. As we have repeatedly shown, the Credit CARD Act rules should be strengthened with respect to deferred interest and subprime specialist cards, and consumers’ right to paper disclosures and billing statements should be preserved.

Part I. Regulatory Flexibility Act Review

A. Summary of RFA Analysis

The RFA sets forth five factors to consider in a review under Section 610 of that Act. Consideration of these factors clearly demonstrates that any effort to weaken the Credit CARD Act rules would be unwarranted and is not even requested by small credit card issuers, except in limited instances.

The RFA factors and their applicability to the Credit CARD Act rules are as follows:

(i) **The continued need for the rule.** The Credit CARD Act was passed to rein in a host of abuses by credit card issuers that caused great harm to consumers. The Act did so successfully, benefiting consumers and saving them billions of dollars. Any weakening of its protections would allow abuses to re-appear to the detriment of consumers. This factor is discussed in detail in Section I.B.

(ii). **The nature of public complaints or comments on the rule.** Four rounds of public comments as part of the CFPB’s biannual review of the credit card market under section 502(a) of the Credit CARD Act show that small issuers have limited complaints about the rules. Several of these complaints involve issues that are not addressed by the Credit CARD Act rules per se, such as the cost of data breaches and the desire to more easily impose electronic disclosures on consumers (an issue discussed in Section II.D below). Meanwhile, small business owners who rely on personal credit cards to fund their businesses have benefitted from the CARD Act, as discussed in Subsection I.C.2 below.

(iii). **The complexity of the rule.** While the Regulation Z provisions implementing the Credit CARD Act are complex, this complexity is due to the Act itself and the complicated nature of regulating credit, especially open-end credit. Open-end credit does not have a fixed term or fixed payment amounts, and the balance can fluctuate with prior transactions being paid down while new transactions are made. As the CPB itself notes, “[c]redit card pricing is fairly complex and involves different components, such as interest rates and fees. The cost to the consumer also depends on a number of consumer-dependent factors, such as the cardholder’s creditworthiness, usage of features and rewards, and repayment behavior.” 85 Fed. Reg. at 53,302. Thus, complexity cannot be avoided in credit card regulation. But once systems are in place to comply with the regulation, compliance is not difficult.

(iv). **The extent to which the rule overlaps, duplicates, or conflicts with other laws or rules.** The CFPB has already noted that “The Bureau’s experience suggests there is little overlap, duplication, or conflict between the CARD Act Rules and Federal, State, or other rules.” 85 Fed. Reg. at 53,305. We agree with this statement.

(v). **The time since the rule was evaluated or the degree to which technology, market conditions, or other factors have changed.** The market conditions that exist at this time are massive job losses and economic upheaval for low-wage workers caused by the COVID-19 pandemic. As such, this is exactly the wrong time to weaken any consumer protections.

Millions of consumers face loss of income, potential eviction, and other financial distress. If anything, they need more consumer protection, not less.

The following discussion analyzes the first two factors in depth. It shows how the CARD Act rules are necessary and should be continued without weakening. The discussion in Section II.B shows that the rules should be strengthened with respect to deferred interest and subprime specialist cards.

B. The Continued Need for Strong Credit Card Protections as Shown by Life Before and After the Credit CARD Act

In order to understand the continued need for the Credit CARD Act and the importance of its protections for consumers, one must understand the history of credit cards and how abuses spiraled out of control before the Act. A historical framework is necessary to understand the consequences of any deregulation under the CARD Act and how it would lead to the re-introduction of practices both devastating to consumers and universally reviled.

General purpose credit cards were first introduced in the 1950s, but they become more prevalent – and lucrative - after the Supreme Court’s decision in 1978 in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.* 439 U.S. 299 (1978). *Marquette* removed the application of state law usury caps from credit card lending. After the *Marquette* decision, credit card debt increased from \$50 billion in 1978¹ to \$378 billion in 1995² - a six-fold increase.

In 1996, the Supreme Court paved the way for credit card banks to increase their profits even more in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). *Smiley* removed state law limits on fees such as late payment, over-the-limit, cash advance, returned check, annual fees, and membership fees. As a result, banks imposed higher and more types of fees. And in the early 2000s, federal banking regulators expanded the scope of federal preemption to allow credit card lenders greater ability to ignore state consumer protection laws and exploit consumers.³

As a result, by the time of the Great Recession, there was little regulation of credit card practices due to the sweeping expansion of these preemption doctrines. Banks took advantage of this leeway to develop all sorts of tricks and traps to impose higher interest rates and hefty fees on cardholders, such as:⁴

- retroactively imposing rate increases, sometimes doubling the APR, on already accrued balances;
- creating tripwires around due dates in order to maximize the possibility that a consumer

¹ Diane Ellis, FDIC—Division of Insurance, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and in the Personal Bankruptcy Rate*, Bank Trends, 98-05 (Mar. 1998).

² See Federal Reserve Board, Statistical Release, Consumer Credit Historical Data (Revolving), available at www.federalreserve.gov.

³ See National Consumer Law Center, Consumer Credit Regulation § 3.2 (2d ed. 2015), updated at www.nclc.org/library.

⁴ *Id* at ch. 8.

paid late, which result in both extremely large late fees and imposition of high penalty rates if the consumer was even a day or even an hour late;

- allowing consumers to exceed their credit card limits, then imposing high over-the-limit fees, instead of simply denying transactions without charge;
- developing complicated and opaque tactics to extract profits from unsuspecting consumers, such as allocating payments to low interest rate balances (“payment allocation”) and double cycle billing; and
- aggressively soliciting consumers to apply for new cards and recklessly granting approvals without regard to ability to pay. In 2007, there were more than 5.2 billion credit card solicitations mailed, or 36 for every household. Issuers often granted new credit cards to borrowers who were already overextended, simply based on credit scores alone.

The cumulative effect of deregulation and exploitative practices was to fuel an explosion of credit card debt that placed an enormous burden on millions of American consumers. Credit card debt rose from an average of \$630 in 1970 to over \$4,000 in 2001, and to \$7,300 in 2007.⁵ In the Great Recession, approximately 6.6% of credit cards were thirty or more days past due—the highest delinquency rate in eighteen years.⁶ Credit card debt also contributed to the foreclosure crisis. For example, a 2005 study found that 40% of low- and middle-income homeowners surveyed had refinanced or gotten a second mortgage during the past three years, and half of those homeowners had used the proceeds from the new home-secured loan to pay down credit card debt.⁷

The tricks and traps made possible by deregulation generated huge levels of public anger. There were years of public outcry, legislative hearings, numerous media articles, and even a documentary about the abuses of credit card companies.⁸ When the Federal Reserve Board, along with the bank regulators, issued a proposed rule under its FTC Act authority to address some of the credit cards abuses, it received a whopping 60,000 comments in response – the vast majority from outraged consumers.⁹

Banks also were harmed by the lack of regulation. Banks that refrained from lucrative but

⁵ Brian K. Bucks, Arthur B. Kennickell, Traci L. Mach & Kevin B. Moore, *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, 95 Fed. Reserve Bull. A40, A46 (Feb. 12, 2009).

⁶ Government Accountability Office, *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology*, GAO-09-748 (Sept. 2009), available at <https://www.gao.gov/assets/300/295588.pdf>.

⁷ José Garcíá & Tamara Draut, *The Plastic Safety Net: How Households Are Coping in a Fragile Economy: Findings from a 2008 National Household Survey of Credit Card Debt Among Low- and Middle-Income Households* (2009), available at http://www.demos.org/sites/default/files/publications/PlasticSafetyNet_Demos.pdf.

⁸ *Maxed Out: Hard Times, Easy Credit and the Era of Predatory Lender* (2006).

⁹ 74 Fed. Reg. 5498, 5501 (Jan. 9, 2009) (“The Board received more than 60,000 comments on the May 2008 Proposal, more than for any other regulatory proposal in its history. OTS received approximately 5,200 comments. NCUA received approximately 1,000 comments. The overwhelming majority of these comments came from individual consumers. A substantial majority of individual consumers expressed support for the proposed rules, and many urged the Agencies to go further in protecting consumers.”).

exploitative practices were at an unfair competitive disadvantage compared to competitors who could increase interest or fee income in hidden ways that were not apparent to consumers when they shopped for credit.

Congress responded to this host of abuses and outrage by passing the Credit CARD Act in 2009. Pub. L. No. 111-24 (May 22, 2009). The Federal Reserve Board adopted rules in 2009-2010 to implement the Credit CARD Act, which were codified in Regulation Z.

The Credit CARD Act and its implementing rules in Regulation Z resulted in enormous benefits for consumers: interest rate hikes were dramatically curtailed, late fees were substantially reduced, and over-the-limit fees virtually disappeared.¹⁰ Consumers saved \$16 billion in late and over-the-limit fees from 2011 to 2014.¹¹ They also save \$2.1 billion in interest rate reductions in the first few years after the Act's passage.¹²

The CFPB has estimated that, for cardholders who carry a balance, the total cost of credit fell 150 basis points from the end of 2008 to the end of 2012, due in large part to the reductions in fees caused by the Credit CARD Act.¹³ By 2015, the total cost of credit card had fallen another 40 basis points.¹⁴ In general, the Act created a market “in which the costs incurred by consumers are driven more by APR and annual fees and less by back-end penalty fees and APR repricing.”¹⁵

The CARD Act also had a positive racial justice effect. A study by the NAACP and Demos found that African Americans carrying credit card debt in 2012 owed less than they did in 2008, carrying an average balance of \$5,784 in 2012 compared to \$6,671 in their 2008 survey.¹⁶ After passage of the CARD Act, 25 percent of African American households experienced a drop in the interest charges on their credit cards.¹⁷

It is against this backdrop of a history of abuses, and how they were successfully curtailed by the protections of the Credit CARD Act and its implementing rules, that we should examine whether “such rules should be continued without change” and “[t]he continued need for the rule.” The unequivocal answer should be “yes”: the rules should be continued without change and “yes”

¹⁰ Jennifer Faulkner, Office of the Comptroller of Currency, *The CARD Act—One Year Later: Impact on Pricing and Fees* (Feb. 22, 2011).

¹¹ See Consumer Financial Protection Bureau, *Consumer Credit Card Market Report 10* (Dec. 3, 2015), available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf (hereinafter “CFPB 2015 CARD Act Report”).

¹² Consumer Fin. Prot. Bureau, *CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market 72* (Oct. 1, 2013), available at https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf (hereinafter “CFPB 2013 CARD Act Report”).

¹³ *Id.* at 33.

¹⁴ CFPB 2015 CARD Act Report at 77.

¹⁵ *Id.* at 37.

¹⁶ Catherine Ruetschlin and Dedrick Asante-Muhammad, *Dēmos and NAACP, The Challenge of Credit Card Debt for the African American Middle Class*, Dec. 2013, at 1, www.demos.org/sites/default/files/publications/CreditCardDebt-Demos_NAACP_0.pdf

¹⁷ *Id.* at 6.

there is still a need for these rules. Without them, we would be naïve to expect that credit card issuers would not return to the exploitative, deceptive, and unfair practices they developed over the course of the late 1990s and 2000s. If anything, the rules should be strengthened around the issues listed in Part II of these comments: deferred interest and subprime specialist (or “fee harvester”) cards.

C. Comments and complaints on the Credit CARD Act rules

The second factor under Section 610 of the RFA considers the nature of public complaints or comments on the rule. There have been four rounds of public comments as part of the CFPB’s biannual review of the credit card market under section 502(a) of the CARD Act. Analysis of comments by small issuers show that the complaints about credit card regulation generally are limited, and some do not actually involve CARD Act rules or Regulation Z, but other statutes such as the E-Sign Act or the Gramm-Leach-Bliley Act.

Small issuers are not the only small entities affected by the Credit CARD Act rules. Many small businesses, especially sole proprietors and “mom & pop” businesses, are established or funded by business cards or the personal credit cards of their owners, and public comments have also discussed the need for credit card protections for these entities. Businesses that depend on consumer spending also benefit if consumers are able to keep more funds in their pockets and have credit card debt levels they can afford to repay.

Finally, while only a handful of consumers have submitted comments in response to the four CFPB CARD Act RFIs, they have submitted over 84,000 complaints about credit card issues to the Bureau over the years. The Bureau must consider those complaints in order to have a full picture of the state of the credit card market and the need for the rules.

1. Comments from small entity credit card issuers

In analyzing the comments from small entities that are credit cards issuers, we focus on the comments from credit unions to the four CFPB CARD Act review RFIs.¹⁸ Credit unions appear to constitute the vast majority of small issuers. The CFPB notes that, as of 2019, there were 3,437 credit card issuers that were considered small entities.¹⁹ There are about 3,200 credit unions that issue credit cards.²⁰ Even subtracting the 574 credit unions that exceed \$500 million

¹⁸ The Bureau’s discussion of prior comments also notes there were comments on credit card issues responding to its 2018 RFI on Inherited Regulations, as part of the Call for Evidence Initiative. Review of those comments from credit unions, however, reveals very limited discussion of credit card issues. For example, CUNA’s comments only mention credit cards in the context of the Prepaid Card Rule. Credit Union National Association, CUNA’s Common-Sense Reforms to Bureau of Consumer Financial Protection Rules and Procedures, Summer 2018.

¹⁹ 85 Fed. Reg. at 53,302.

²⁰ NCUA reports there were 5,281 credit unions as of September 2019. National Credit Union Administration, Quarterly Credit Union Data Summary: 2019 Q3, www.ncua.gov/files/publications/analysis/quarterly-data-summary-2019-Q3.pdf. According to CUNA, about 60% of credit unions offer credit cards – which is about 3,200. Credit Union National Association, CUNA Comments in Response to 2019 CFPB Credit CARD Act RFI, May 1, 2019.

in asset size,²¹ that is about 2,600. Thus over 75% of small entities that issue credit cards are credit unions.

Examining the comments of CUs, we find that the common complaints and themes appear to be:

Data breaches²²

Several of the more recent comments from credit unions noted the cost and burden that data breaches impose on small issuers like credit unions. One of the solutions advocated for by NAFCU is more stringent security standards for retailers. This issue is outside the scope of the Credit CARD Act, and indeed of the CFPB. The FTC currently has an open rulemaking to strengthen its Safeguards Rule issued pursuant to the Gramm-Leach-Bliley Act,²³ and the Bureau could advocate that the FTC finalize those rules as proposed or strengthen them.

Simplifying disclosures and innovation

A number of credit union representatives advocate for simplifying certain credit card disclosures, particularly card agreements, or issuing new ones for rewards.²⁴ Some comments also advocate for flexibility in making disclosures via mobile devices.²⁵

Other credit union representatives did not favor any changes to current credit card disclosures. As one state credit union league stated “Credit unions would like to note to the CFPB that each time a credit card disclosure has to be updated there is a cost to the credit union.”²⁶ Another credit union league advocated that “Further changes to the disclosures are unnecessary. Each change imposes legal fees, compliance and operational costs on card issuers.”²⁷ A small credit union believed that “[t]he current disclosures adequately cover product features/benefits, costs and payment terms related to consumers. No further improvements are necessary.”²⁸

²¹ National Credit Union Administration, Quarterly Credit Union Data Summary: 2019 Q3, www.ncua.gov/files/publications/analysis/quarterly-data-summary-2019-Q3.pdf.

²² See, e.g., Credit Union National Association, CUNA Comments in Response to 2019 CFPB Credit CARD Act RFI, May 1, 2019; Ohio Credit Union League Comments in Response to 2019 CFPB Credit CARD Act RFI, May 1, 2019; National Association of Federally-Insured Credit Unions Comments in Response to 2017 CFPB Credit CARD Act RFI, June 7, 2017.

²³ 84 Fed. Reg. 15,138 (April 4, 2019).

²⁴ See, e.g., Credit Union National Association, CUNA Comments in Response to 2019 CFPB Credit CARD Act RFI, May 1, 2019; National Association of Federally-Insured Credit Unions Comments in Response to 2019 CFPB Credit CARD Act RFI, April 30, 2019; Missouri Credit Union League, Comments in Response to 2015 CFPB Credit CARD Act RFI, May 18, 2015.

²⁵ National Association of Federally-Insured Credit Unions Comments in Response to 2019 CFPB Credit CARD Act RFI, April 30, 2019.

²⁶ Georgia Credit Union League, Comments in Response to 2015 CFPB Credit CARD Act RFI, May 14, 2015.

²⁷ Illinois Credit Union League, Comments in Response to 2015 CFPB Credit CARD Act RFI, May 18, 2015.

²⁸ SAFE Credit Union Comments in Response to 2015 CFPB Credit CARD Act RFI, June 15, 2015.

Ability to pay requirements

Several credit union commenters ask for changes to the ability-to-pay rules,²⁹ especially for younger consumers under 21 years old.³⁰ They also asked the CFPB to relax the independent income requirement for over 21-year-old consumers because they argued it harmed stay-at-home spouses.³¹ The Bureau made that change in 2013.³²

NAFCU asks that secured credit cards be excluded from the ability-to-pay requirement.³³ A credit union serving college students asks that secured cards be excluded from the ability-to-pay requirement for younger consumers.³⁴ We address why the ability-to-pay rules should not be weakened in Section II.C below.

Pressures and unfair tactics from competitors

A few credit union commentors note the questionable tactics or competitive pressures from banks, fintechs, and other competitors.³⁵ They ask the CFPB to ensure a level playing field. This actually supports continued need for the Credit CARD Act's substantive protections, to prevent less scrupulous competitors from gaining an advantage against more honest businesses by using unfair tactics. As one credit union's discussion of this topic notes, "All too often in the credit card market, the focus shifts from the consumer to profit maximization which may ultimately lead to abusive and deceptive practices."³⁶ Strong Credit CARD Act rules protect both consumers and honest competitors against these abusive and deceptive practices.

Electronic versus paper disclosures

Several credit unions (as well as many larger entities such as banks) request that the CFPB relax the E-Sign Act requirements for electronic disclosures.³⁷ This has been an

²⁹ Credit Union National Association, CUNA Comments in Response to 2012 CFPB Credit CARD Act RFI, Feb. 19, 2013. In 2013, a number of credit unions and state leagues submitted comments that were similar in substance to CUNA's comments. These comments generally complained about the burden of the ability-to-pay rules and that they have restricted access to credit for members with subprime scores, an issue discussed in Section II.C.2 below.

³⁰ Georgia Credit Union League, Comments in Response to 2015 CFPB Credit CARD Act RFI, May 14, 2015; Credit Union National Association, CUNA Comments in Response to 2012 CFPB Credit CARD Act RFI, Feb. 19, 2013.

³¹ Credit Union National Association, CUNA Comments in Response to 2012 CFPB Credit CARD Act RFI, Feb. 19, 2013. Other comments that were similar to CUNA's comments raised this issue.

³² 78 Fed. Reg. 25,818 (May 3, 2013).

³³ National Association of Federally-Insured Credit Unions Comments in Response to 2019 CFPB Credit CARD Act RFI, April 30, 2019.

³⁴ Cal Poly Federal Credit Union Comments in Response to 2015 CFPB Credit CARD Act RFI, April 2, 2015.

³⁵ See, e.g., National Association of Federally-Insured Credit Unions Comments in Response to 2019 CFPB Credit CARD Act RFI, April 30, 2019; Randolph-Brooks Federal Credit Union Comments in Response to 2019 CFPB Credit CARD Act RFI, May 1, 2019.

³⁶ Randolph-Brooks Federal Credit Union Comments in Response to 2019 CFPB Credit CARD Act RFI, May 1, 2019.

³⁷ See, e.g., Credit Union National Association, CUNA Comments in Response to 2019 CFPB Credit CARD Act RFI, May 1, 2019; Randolph-Brooks Federal Credit Union Comments in Response to 2019 CFPB Credit CARD Act RFI, May 1, 2019.

ongoing battle for several years, and as the CFPB knows, consumer advocates believe strongly that consumers' rights to receive paper disclosures, most particularly mailed paper periodic statements, must be preserved and strengthened. This issue is discussed further in Section II.D below.

Credit unions raised other issues regarding electronic disclosures or interfaces that do not involve E-Sign consent. For example, NAFCU notes that some credit unions are facing difficulties with efficiently connecting current legacy lending systems to online and mobile applications.³⁸ The Ohio Credit Union League asks for clarification on when an electronic disclosure is considered "delivered."³⁹

Credit union commenters did not appear to ask for weakening of the rules implementing the price restrictions of the Credit CARD Act, such as the limitations on retroactive rate increases or requirements for penalty fees to be reasonable and proportional. And when they did criticize a provision that the CFPB agreed should be amended (independent income requirement of the ability-to-pay rule), the Bureau did so quickly, without the need to wait 10 years for an RFA review. This history and relative limited scope of complaint supports continuing the CARD Act rules without change.

Finally, credit union commenters supported or at least do not contradict our continued call for the CFPB to eliminate deferred interest promotions. Only a few credit union comments addressed deferred interest and they note:

"credit unions do not typically market add-on products to their card users, nor do they offer deferred interest promotions. Credit unions do not offer fee harvester cards"⁴⁰

Deferred interest promotions "usually end up costing the more vulnerable or unsophisticated consumers among us more money and it is generally clear that these consumers fail to fully consider the risks involved or how they are impacted interest is retroactively assessed."⁴¹

Thus, eliminating deferred interest promotions will not harm credit union small issuers and might help them by preventing their larger competitors from unfairly abusing consumers.

2. Impact on small business card holders

Small credit card issuers are not the only small businesses whose interests should be considered in the CFPB's review of the CARD Act under the RFA. Many small and micro-business owners

³⁸ National Association of Federally-Insured Credit Unions Comments in Response to 2017 CFPB Credit CARD Act RFI, June 7, 2017.

³⁹ Ohio Credit Union League, Comments in Response to 2019 CFPB Credit CARD Act RFI, May 1, 2019.

⁴⁰ Georgia Credit Union League, Comments in Response to 2015 CFPB Credit CARD Act RFI, May 14, 2015.

⁴¹ League of Southeastern Credit Unions & Affiliates Comments in Response to 2015 CFPB Credit CARD Act RFI, May 19, 2015.

turn to personal and business credit cards to finance their businesses. The CARD Act's protections, as implemented by Regulation Z, have benefitted small business owners who use their personal credit cards as well. This argues for the continuation of the rule without amendment.

The role of credit cards in financing small businesses was noted in comments to the CFPB's 2017 credit card market review. Four organizations noted in joint comments that credit cards play an outsized role in this respect:

Woodstock Institute released two reports in 2017 that found that access to traditional credit by small businesses is disproportionately limited in low- and moderate-income communities and in communities of color.¹ As access to traditional, affordable bank loans remains disproportionately limited, owners are turning to credit cards and to largely unregulated, online, high-cost fintech lenders. California Reinvestment Coalition analysis of one of the largest US Banks found that 90 to 95% of its small business lending in California is through credit cards, and that the majority of all "small business loans" in the state may consist of credit cards, all presumably without any CARD Act protections for the small business owners.⁴²

As these commenters note, to the extent the CARD Act does not apply to business credit cards, small business owners who use those cards are left unprotected. The joint comments go on to advocate for the CFPB to use its consumer protection, unfair and deceptive acts and practices, and fair lending authority to protect small and micro business owners who obtain business credit cards.

Protecting small business owners when they finance their business by credit cards has a racial justice aspect, because entrepreneurs of color are disproportionately affected. A study by the NAACP and Demos found that: "Nearly all of the African Americans in our survey who incurred expenses from starting a new business charged those expenses to a credit card and have not been able to pay it off: 99 percent of African American households still carry that expense on their credit card bill compared to 80 percent of whites."⁴³

In this time of the COVID-19 pandemic, it is even more important to protect small business owners who carry credit card debt from financing their businesses. As the CFPB probably knows, the financial impacts of the pandemic have most harmed small businesses, especially restaurants, entertainment venues, dry cleaners, and other businesses that relying on spending from higher income consumers. According to data from Equifax, small business owners have

⁴² Comments of California Reinvestment Coalition, Main Street Alliance, Peoples Action Institute, and Woodstock Institute in Response to 2017 CFPB Credit CARD Act RFI, June 8, 2017.

⁴³ Catherine Ruetschlin and Dedrick Asante-Muhammad, Dēmos and NAACP, The Challenge of Credit Card Debt for the African American Middle Class, Dec. 2013, at 1-2, www.demos.org/sites/default/files/publications/CreditCardDebt-Demos_NAACP_0.pdf.

higher delinquent credit card balances than the total consumer population and the gap has widened recently.⁴⁴

Finally, the issue of electronic versus paper disclosures is another one where the interests of small business owners and consumers are aligned. Small business owners are likely to find it far easier to maintain their records and files, as well as pay bills in a timely and organized manner, if they are provided with paper statements by mail on a monthly basis, as opposed to being emailed a link telling them when their electronic statements are available. The less friction or administrative burden, and the less chance for a bill to be lost in a flood of email, the better for small business owners.

⁴⁴ Equifax, Market Pulse: Return to Opportunity in Mainstreet America and Beyond Webinar, Sept. 2, 2020, at Slide 31 (“Business Owners Have Higher Delinquent Balances than Total Consumer Population – The Gap Has Widened Post COVID-19”).

Part II: Comments Regarding the CFPB Biannual Review of the Credit Card Market

A. Introduction

As we noted in our 2019 comments, many of the most critical issues and problems in the credit card market have remained the same since the CFPB's prior studies, such as deferred interest promotions and subprime specialist products. Given that fact, we incorporate by reference our previous Comments to the four RFIs for the Bureau's biannual credit card market review, plus two reports directly relevant to the issues below. These documents are publicly available at the following links embedded in the titles:

1. [Comments of NCLC in response to CFPB Request for Information Regarding the Credit Card Market, May 2019](#) (“NCLC Comments to 2019 CFPB Credit CARD Act RFI”)
2. [Comments of NCLC in response to CFPB Request for Information Regarding the Credit Card Market, June 8, 2017](#) (“NCLC Comments to 2017 CFPB Credit CARD Act RFI”)
3. [First Set and Second Set of Comments of NCLC in response to CFPB Request for Information Regarding the Credit Card Market, May 18, 2015](#) (“NCLC Comments to 2015 CFPB Credit CARD Act RFI”)
4. [Comments to the Consumer Financial Protection Bureau regarding the Credit CARD Act of 2009, Feb. 19, 2013](#) (“NCLC Comments to 2013 CFPB Credit CARD Act RFI”)
5. [Deceptive Bargain: The Hidden Trap of Deferred Interest Credit Cards, Dec. 2015](#)
6. [Report: Paper Statements: An Important Consumer Protection, March 2016](#)

The discussion below provides additional information and updates on the following topics:

- Deferred interest remains a significant abuse, which the CFPB should ban.
- The CFPB should re-issue the rule requiring pre-account opening fees to be included in the calculation of fees for purposes of the 25% cap, as these fees appear to be slowly spreading and undermining the cap.
- The Credit CARD Act protections, including pricing restrictions and requiring issuers to assess ability-to-pay, have tremendously benefitted consumers. To the extent subprime consumers have less credit than prime consumers, it is due to the elimination of harmful credit such as abusive fee-harvester cards. To the extent younger consumers have less credit than they did before, Congress specifically intended that consequence when it adopted the more stringent the ability-to-repay requirements for consumers under 21 years old.

B. Specific Card Practices and Products

Responding to “c. How are the terms of, and practices related to, major supplementary credit card features (such as credit card rewards, deferred interest promotions, balance transfers, and cash advances) evolving?”

“a. What unfair, deceptive, or abusive acts and practices exist in the credit card market? How prevalent are these acts and practices and what effect do they have? How might any such conduct be prevented and at what cost?”

B. Specific Card Products

1. Deferred Interest

We urge the CFPB, as we have many times before, to ban deferred interest. We do so for the same reasons as we have stated in prior comments to the Bureau’s Credit CARD Act RFIs and in our *Deceptive Bargain* report:

Inherent deception. Many consumers do not understand that they can be charged interest retroactively for the entire deferred interest period if they do not pay off the balance by the end of the period. The complexity of these plans makes it almost impossible to formulate a short, simple disclosure necessary to prevent consumers from being deceived. The CFPB has noted that “there are significant indications that the lack of transparency in this market contributes to avoidable consumer costs.”⁴⁵ The Bureau has also characterized deferred interest plans as “the most glaring exception to the general post-CARD Act trend towards upfront credit card pricing.”⁴⁶

Harming the most vulnerable. Even if they understood deferred interest, many consumers later find themselves unable to pay off their balances in time and are harmed by sudden, large retroactive interest charges. The CFPB has found that deferred interest plans are especially harmful to vulnerable subprime consumers. The Bureau’s 2017 CARD Act report found that over half of cardholders with subprime scores failed to pay off the balance by the end of the deferred interest period but nearly 90% of “superprime” consumers avoid getting hit with deferred interest.⁴⁷ Subprime consumers only make up 12% of deferred interest purchase volume, but pay 30% of the interest charges.⁴⁸ Thus, better-off consumers get the benefit of interest-free financing, while credit card lenders profit disproportionately from harmful retroactive charges imposed on financially constrained consumers

Minimum payments don’t pay off the balance. Issuers generally set the minimum payment as less than the amount that would pay off the balance during the deferred interest period. Thus, consumers who make only the minimum payment – often thinking they are doing what they need to do to avoid interest – will inevitably be hit with retroactively assessed interest at the end of the deferred interest period.

⁴⁵ CFPB 2015 CARD Act Report at 10.

⁴⁶ *Id.*

⁴⁷ Consumer Financial Protection Bureau, The Consumer Credit Card Market 108 and Fig. 30 (December 2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf (“CFPB 2017 CARD Act Report”).

⁴⁸ *Id.* at 110.

Difficulty allocating payments to successfully avoid retroactive interest. If a consumer makes additional purchases that either do not have deferred interest or have different promotional periods, problems can arise with allocating payments to ensure that the deferred interest balance is paid off. Payment allocation is extremely complex and fraught with pitfalls, and it can be nearly impossible to pay off a deferred interest balance while minimizing interest charges.

The CFPB has inquired how market trends and issuer practices are evolving, presumably since the Bureau's 2019 Credit CARD Act report. As far as we can observe, deferred interest products are still being aggressively marketed. The latest survey by WalletHub, dated November 6, 2019, found that about one-third (22 out of 72) of the largest retailers offered deferred interest plans,⁴⁹ which is about the same as in 2015.⁵⁰ Deferred interest costs appear to be growing, as the Bureau itself noted that \$2 billion was paid in deferred interest in 2016, a 10% increase from 2015.⁵¹

WalletHub's 2019 report also includes a survey of consumers. It found that 82% of respondents did not know how deferred interest works while 65% thought it should be illegal.⁵² Similarly, the fintech lender Affirm submitted a comment to the CFPB's 2017 CARD Act RFI describing how it conducted a survey of its own customers to gauge their understanding of deferred interest. When asked what it means when a company charges retroactive interest, roughly 45 percent selected, "I am not sure." Only 39 percent (459 customers) selected that it means the consumer is charged interest on balances from previous months after the end of a promotional period.⁵³

Based on complaints to the CFPB itself, deferred interest products appear to be still causing harm to consumers. For example, the CFPB complaints database shows 131 complaints between January 1, 2019 and October 19, 2020 involving credit cards and using the exact phrase "deferred interest." This likely severely underestimates the number of complaints about deferred interest, since many consumers would not be sophisticated enough to use that term in their complaint narratives.

One new and disturbing development is increased marketing of deferred interest promotions for healthcare. The CFPB has noted that while superprime consumers "tend to concentrate their deferred interest spending at home improvement merchants," subprime consumers "tend to make more of their deferred interest purchases on healthcare."⁵⁴ Thus, the most vulnerable consumers who pay the most in deferred interest charges are doing so for a deeply troubling expense - healthcare costs, a leading cause of financial distress and bankruptcy.

⁴⁹ Alina Comoreanu, 2019 Deferred Interest Study: Which Retailers Use It?, Nov. 6, 2019, *available at* <https://wallethub.com/edu/cc/deferred-interest-study/25707>.

⁵⁰ Alina Comoreanu, 2016 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Nov. 1, 2016; Alina Comoreanu, 2015 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Cardhub.com, on file with author.

⁵¹ CFPB 2017 CARD Act Report at 109.

⁵² Alina Comoreanu, 2019 Deferred Interest Study: Which Retailers Use It?, Nov. 6, 2019, *available at* <https://wallethub.com/edu/cc/deferred-interest-study/25707>.

⁵³ Affirm Comments in Response to 2017 CFPB Credit CARD Act RFI, June 8, 2017.

⁵⁴ CFPB 2017 CARD Act Report at 104.

The most prominent issuer of deferred interest promotions appears to be exploiting this vulnerability by increasing its marketing for healthcare. Synchrony Bank has announced its partnership with several large, well-known hospital or healthcare providers. In a July 21, 2020 conference call, Synchrony Chief Financial Officer Brian Wenzel announced that:

the other thing I'd add in the CareCredit platform, we have exciting announcement of AdventHealth. So, when you look at the health systems component, not only do we have now Kaiser Permanente, Cleveland Clinic, Advent, the ability to get into the path there and to really help our consumers as they manage their medical bills in this point in time is terrific and we're building a -- really a different type of network in that business and working closely with them in order to get that up and running with a handful of other really good health systems across the country.⁵⁵

CareCredit is Synchrony's healthcare credit card, while AdventHealth is one of the largest non-profit health systems in the nation with "nearly 50 hospital campuses and hundreds of care sites."⁵⁶ Kaiser Permanente describes itself as "the nation's leading not-for-profit health plan" and "we proudly serve 11+ million members from 600+ locations in 8 states and D.C."⁵⁷ The Cleveland Clinic is "one of the largest and most respected hospitals in the country" and includes "eight regional hospitals, 16 family health centers, a children's hospital for rehabilitation and one affiliate hospital."⁵⁸ The fact that some of the nation's leading healthcare/hospital providers are now in partnership to offer this abusive and harmful financial product is very disturbing.

2. Subprime Specialist Cards

As we did in our comments to the 2015 Credit CARD Act RFI, we urge the Bureau to re-issue the rule requiring pre-account opening fees to be included in the calculation of fees for purposes of the 25% cap. While the original rule was struck down by a district court in *First Premier Bank v. United States Consumer Fin. Prot. Bureau*, 819 F.Supp.2d 906 (D.S.D. 2011), that decision involved promulgation using the Federal Reserve's somewhat more restricted rulemaking authority under the Truth in Lending Act (TILA). As we explained in our comments to the 2015 Credit CARD Act study RFI, the Dodd-Frank Act expanded the CFPB's rulemaking authority under TILA by allowing the Bureau to adopt "additional requirements." 15 U.S.C. § 1604(a), *as amended by* Section 1100A(4) of Dodd-Frank. Also, if necessary, the CFPB could use its UDAAP authority to adopt the pre-account opening rule.

In 2015, we had pointed out that at least one issuer in addition to First Premier was charging pre-account opening fees – Mid America Bank & Trust Co. (now Bank of Missouri), was charging an \$89 pre-account opening "processing" fee.⁵⁹ In 2017, we noted that Merrick Bank had joined

⁵⁵ Synchrony Financial (SYF) Q2 2020 Earnings Call Transcript, July 21, 2020, <https://www.fool.com/earnings/call-transcripts/2020/07/21/synchrony-financial-syf-q2-2020-earnings-call-tran.aspx>.

⁵⁶ AdventHealth, Who We Are, <https://www.adventhealth.com/who-we-are>.

⁵⁷ Kaiser Permanente LinkedIn profile, <https://www.linkedin.com/company/kaiser-permanente/>.

⁵⁸ Cleveland Clinic, <https://www.linkedin.com/company/cleveland-clinic/>.

⁵⁹ [NCLC Comments to 2015 CFPB CARD Act RFI](#), at 4.

their ranks with a pre-account opening “set up” fee of up to \$75.⁶⁰ For this round, we find that two other issuers have joined the ranks of fee-harvester cards that charge pre-account opening fees: Synovus Bank (\$95 one-time program fee in addition to \$75 annual fee for \$300 credit line)⁶¹ and Applied Bank (\$89 processing fee charged before account opening in addition to \$75 annual fee for \$300 credit line).⁶² This makes a total of five banks that charge pre-account opening fees in addition to annual fees that already consume 25% of a very limited amount of credit (usually \$300). Consumers could find themselves \$170 behind before making a single charge.

Thus, the plague of pre-accounting opening fees appears to be spreading. The CFPB should put a stop to this spread, by requiring that pre-account opening fees be included in the calculation of fees for the 25% cap.

In addition to pre-account opening fees, there are other questionable practices by subprime specialist cards. For example, the Today Card is issued by Elevate, a high cost online lender, and Capital Community Bank of Utah. It has an annual fee of \$120 and an APR of 32%. Elevate promotes the fact that a consumer can receive a credit limit up to \$3,500,⁶³ which makes the \$120 fee seem reasonable. However, the real range of credit limits is \$500 to \$3500⁶⁴ – a \$500 limit is core subprime territory and makes the \$120 seem high. Indeed, any Today Card for which the credit limit is \$500 should have the special subprime “available credit” disclosure required by Reg Z, 12 C.F.R. § 1026. 60(b)(14), since the \$120 fee exceeds the 15% threshold which triggers that disclosure. Yet the Today Card applications disclosure does not seem to include that disclosure.

C. Access to Credit: The Consequences were Intended

Responding to b. How, if at all, are the characteristics of consumers with lower credit scores changing? How are groups of consumers in different score tiers faring in the market? How do other factors relating to consumer demographics or financial lives affect consumers’ ability to successfully obtain and use card credit?

The CFPB question above suggests that the Bureau is soliciting feedback as to whether there has been reduced access to credit because of the Credit CARD Act. In fact, the Bureau notes in the RFI: “Overall, the scholarship review suggests that the CARD Act’s effect on consumer welfare

⁶⁰ [NCLC Comments to 2017 CFPB CARD Act RFI](#), at 6.

⁶¹ First Digital NextGen Mastercard® Credit Card: Summary of Terms https://www.firstdigitalcard.com/lib/pdf/first_digital_cardholder_agreement_nextgen.pdf, visited October 19, 2020.

⁶² Applied Bank, Agreements, <https://www.consumerfinance.gov/credit-cards/agreements/issuer/applied-bank/> (unsecured card), visited October 19, 2020.

⁶³ Press Release, Elevate, Elevate Launches Prime Credit Card for Non-Prime Consumers, July 19, 2018, www.businesswire.com/news/home/20180719005160/en/Elevate-Launches-Prime-Credit-Card-for-Non-Prime-Consumers.

⁶⁴ Schedule 1.1 (Credit Card Guidelines) to Fifth Amended and Restated Financing Agreement Between Rise SPV, LLC, Today Card, LLC, and Elevate Credit Intl Ltd., Feb. 7, 2019.

is mixed, with some scholarship suggesting the CARD Act may have had unintended consequences.”⁶⁵

However, the Bureau should not equate consumer success with access to credit cards or the size of their credit card limits. Any supposed reduction in credit was actually an *intended* consequence, in that Congress specifically sought to restrict access in specific instances. Thus, to the extent subprime consumers have less credit, it is the elimination of harmful credit such as abusive fee-harvester cards. To the extent younger consumers have less credit, Congress specifically intended that consequence when it adopted the more stringent the ability-to-repay requirements for consumers under 21 years old. Not all credit is good credit; access to credit is harmful if it is high priced or unaffordable credit.

1. Overall access to credit

Prior to the Credit CARD Act, the card industry defended its questionable practices by arguing that lack of regulation benefited consumers because it resulted in fewer annual fees, lower interest rates, and rich reward programs.⁶⁶ The industry predicted that re-regulating rates and fees would raise costs and limit access to credit for the majority of consumers in order to help financially distressed borrowers.⁶⁷

These arguments proved to be hollow immediately after the passage of the Credit CARD Act. Lenders raised annual fees by only a modest amount,⁶⁸ and credit card solicitations were no less favorable⁶⁹ or abundant than before the Credit CARD Act.⁷⁰ Both the CFPB and other researchers found the Credit CARD Act did not result in any reduction to access to credit. The CFPB’s 2015 CARD Act report noted that Americans had access to nearly \$3.5 trillion in credit card lines as of early 2015, a 10% increase since 2012, and even deep subprime consumers had a 4% increase.⁷¹ One of the most notable non-CFPB studies about the impact of the CARD Act stated: “we estimate that the CARD Act had a precise zero effect on credit limits and ADB

⁶⁵ 85 Fed. Reg. at 53,303.

⁶⁶ Jonathan Orszag & Susan Manning, COMPASS, An Economic Assessment of Regulating Credit Card Fees and Interest Rates 14–15 (Sept. 2007). This report was commissioned by the American Bankers Association.

⁶⁷ *Id.* at 5.

⁶⁸ CFPB 2013 CARD Act Report at 23 (annual fees increased by less than \$2 and increased in incidence by a modest 0.75%); Nick Bourke & Ardie Hollifield, Pew Health Group, Two Steps Forward: After the Credit CARD Act, Credit Cards are Safer and More Transparent—But Challenges Remain (July 2010), available at www.pewtrusts.org. See also CFPB 2015 CARD Act Report at 70 (percentage of accounts assessed an annual fee was below pre-CARD Act levels in 2015).

⁶⁹ Andrea McKenna, Increased Competition, Less Fallout from CARD Act Than Expected, Mintel Says, PaymentsSource.com (Aug. 4, 2010), available at www.paymentsource.com.

⁷⁰ Josh Frank, Center for Responsible Lending, Credit Card Clarity: CARD Act Reform Works (Feb. 16, 2011), available at www.responsiblelending.org.

⁷¹ CFPB 2015 CARD Act Report at 108.

[average daily balances]. We also estimate a zero effect on the number of new accounts.”⁷² One of the researchers for this study told the New York Times:

‘I went into the project with this sort of conventional wisdom that well-intentioned regulators would force down fees and that other fees and charges would increase in response,’ But his expectation was wrong. The study came to a conclusion that surprised Mr. Mahoney and his colleagues: The regulation worked. It cut down the costs of credit cards, particularly for borrowers with poor credit. And, the researchers concluded, ‘we find no evidence of an increase in interest charges or a reduction to access to credit.’⁷³

The Credit CARD Act also proved popular with American consumers. The majority of consumers familiar with the Act reported that it had been good for them, and 60% of consumers in general believe that their monthly statements have been clearer and easier to read.⁷⁴

2. Subprime Consumers

Several studies, including some cited in the CFPB’s 2019 CARD Act report, argue that the CARD Act had the unintended consequence of decreasing access to credit for subprime consumers, which they assert is a negative.⁷⁵ This decreased availability could be due to the CARD Act’s ability-to-pay requirements or its pricing restrictions or both. And this result is very much a consequence that Congress intended – that credit not be given to consumers if it is harmful, high-priced credit or if they do not have the ability to repay it.

It is much worse to give a struggling consumer unaffordable credit than no credit at all. Access to credit is only positive when it is affordable credit. An examination of charge-off rates for subprime specialist cards provides support for this proposition. For example, a recent news article suggests that Capital One’s charge-off rate is 10-15% by the second year of an account.⁷⁶ This is significantly higher than the 3.8% rate overall for the top 100 issuers – three to four times

⁷² Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, Regulating Consumer Financial Products: Evidence from Credit Cards, 130 *The Quarterly Journal of Economics* 1, 15 (2015).

⁷³ Floyd Norris, Card Act Cleared Up Credit Cards’ Hidden Costs, *New York Times*, Nov. 7, 2013, <https://www.nytimes.com/2013/11/08/business/economy/a-credit-card-rule-that-worked-for-consumers.html>

⁷⁴ CFPB 2013 CARD Act Report at 21–28; Synovate, Consumer Perceptions and Reactions to the CARD Act (Feb. 22, 2011).

⁷⁵ Gregory Elliehausen & Simona M. Hannon, The Credit Card Act and consumer finance company lending, 34 *J. of Fin. Intermediation*, 1, 109-119, (2018); Song Han et al., Unsecured Credit Supply, Credit Cycles, and Regulation, 31 *The Rev. of Fin. Stud.* 3, at 1184-1217 (2018); Yiwei Dou et al., Does Price Regulation Affect Competition? Evidence from Credit Card Solicitations, (Fed. Res. Board, FEDS Working Paper No. 2019-018 (2019)).

⁷⁶ Elena Botella, I Worked at Capital One for Five Years. This Is How We Justified Piling Debt on Poor Customers, *New Republic*, Oct. 2, 2019, <https://newrepublic.com/article/155212/worked-capital-one-five-years-justified-piling-debt-poor-customers> (“Your slide would feature a bunch of colored lines: one showing that ten in 100 people who opened this type of credit card failed to repay their debt within the first year; the next illustrating how the same thing happened to 15 in 100 people the following year”)

higher.⁷⁷ Other subprime specialist cards have even higher rates – subprime specialist card Continental Finance had a whopping 41.7% charge-off rate in 2016.⁷⁸

As the CFPB knows, charge-offs are extremely harmful for consumers' credit records, potentially costing them hundreds of points on their credit score. If the consumer obtained a subprime specialist card because they were “credit invisible” and sought to build their credit record, a charge-off puts them in the much worse position, because now they owe hundreds to the credit card bank and have a terrible credit score. The charge-off may harm their prospects for employment, rental housing, or insurance, unlike having no credit record. They may be sued and have their wages garnished for the outstanding debt.

If the charge-off rates for subprime specialist cards are this high with the protections of the Credit CARD Act, one can imagine how much worse they would be without the protections. In fact, the CFPB's own research found that, for every credit score range, accounts not subject to the ability-to-repay rules (e.g., business-purpose credit cards) showed higher delinquency rates after nine months.⁷⁹

Thus, the decreased credit availability due to the CARD Act's pricing restrictions and its ability-to-pay requirements was both intended and positive. While low- and moderate-income consumers do want access to credit, it's often because they don't have enough income. Giving them unaffordable credit instead of fixing the issues underlying their financial distress, such as inadequate wages and high housing/childcare/healthcare costs, is worse than doing nothing – it's actively harmful.

As for pricing restrictions, there have been studies that argue they are harmful because they have resulted in higher initial APRs for credit cards. But moving higher pricing from the back end (in the form of retroactive rate increases) to the front end was another intended consequence of the CARD Act. Moving high prices to the front end – to the extent upfront charges actually did increase - makes them more transparent, predictable and honest. As one study found, while subprime borrowers may have faced higher front-end pricing after the CARD Act, that was offset by protections against higher pricing in future.⁸⁰

3. Younger consumers

One of the problems that compelled Congress to pass the Credit CARD Act was the harmful amount of credit card debt held by college students. One study found that 70% of undergraduates had one credit card, and 90% of these students carried a balance.⁸¹ In 2008, the

⁷⁷ Federal Reserve Board, Charge-Off Rates: 100 Largest Banks, SA,

<https://www.federalreserve.gov/releases/chargeoff/chgtop100sa.htm>, visited Oct 19, 2020

⁷⁸ Tim Zawacki, Below-prime card loans back small ABS deal, S&P Global Market Intelligence, Mov. 30, 2016, <https://www.spglobal.com/marketintelligence/en/news-insights/trending/9zibyixlwayde9ppskyuea2>.

⁷⁹ CFPB 2015 CARD Act Report at 105.

⁸⁰ Scott Nelson, Private Information and Price Regulation in the US Credit Card Market, (MIT Working Paper, 2018).

⁸¹ Marty Ludlum, et al., Financial Literacy and Credit Cards: A Multi Campus Survey, 3 Intl J. of Bus.

average college senior had credit card debt of \$4,100.⁸² This credit card debt caused great distress for some students, including driving students to suicide in a handful of shocking cases.⁸³ Congress responded by adopting a specific and more stringent ability-to-pay requirement for consumers under 21 years of age.

This ability-to-repay requirement has resulted in less credit granted to consumers under 21 years of age (“younger consumers”). The CFPB’s 2013 CARD Act report found that the number of new cards for younger consumers declined to just 43.5% of 2007 levels.⁸⁴ But as the Bureau noted in this 2013 report, “this reduction in accounts among the student and young adult population may be viewed as consistent with congressional intent for the CARD Act.” The most recent CFPB report finds that the further contraction of the market for credit cards targeting college students.⁸⁵

Some critics, including researchers from the Boston Federal Reserve,⁸⁶ have argued that the CARD Act’s stricter ability-to-repay requirement for younger consumers resulted in more consumers failing to build a credit record or being “credit invisible.” They further argue this increased credit invisibility has dampened consumption and impacted greater economic growth, seeming to argue for the Act’s repeal.

However, this argument is subject to a few critiques. First, it is unclear why delaying giving consumers their first credit card after the age of 21 translates into more consumers being credit invisible. Why does giving credit cards to consumers three years earlier prevent the same problem? After all, everyone starts off credit invisible. Second, it seems a bit perverse to give credit cards to young consumers simply so they can get a credit file, even though they don’t have the means to repay the debt. There is a great risk they could end up with both a bad credit record and a financially crippling liability.

Furthermore, the underlying data in the Boston Fed study actually shows some positive effects from the ability-to-repay requirement for younger consumers. For instance, the data indicated that there were “[l]ower delinquency rates for 27-year-olds in 2018 relative to 2006.” This seems like a positive development. However, the authors conclude that this statistic “point[s] to a more qualified (likely more affluent) pool of young borrowers” and imply the finding is negative.

and *Social Science* 25, 27–28 (2012).

⁸² Sandra Block, *Credit Card Reform Swipes Easy Plastic from College Students*, USA Today, May 26, 2009 (citing Sallie Mae statistics).

⁸³ *Maxed Out: Hard Times, Easy Credit and the Era of Predatory Lender* (2006).

⁸⁴ CFPB 2013 CARD Act Report at 43. The CFPB’s 2019 CARD Act report noted that other researchers have found significant declines. Consumer Financial Protection Bureau, *The Consumer Credit Card Market 115* (August 2019) www.consumerfinance.gov/data-research/research-reports/the-consumer-credit-market-2019/ (“CFPB 2019 CARD Act Report”) (citing Peter Debbaut at al., *The CARD Act and Young Borrowers: The Effects and the Affected*, 48 *J. of Money, Credit and Banking* 1, at 1495-1513 (2016)).

⁸⁵ CFPB, *College credit card agreements: Annual report to Congress*, October 2020.

⁸⁶ Daniel H. Cooper, Olga Gorbachev, and María José Luengo-Prado, *Consumption, Credit, and the Missing Young*, Research Department Working Paper 19–10.

Even though the data showed that 27-year olds in 2018 did not have lower credit scores than those in 2006, the Boston Fed study posits “a more pessimistic interpretation would conclude that young individuals who would have had lower credit scores to begin with were excluded from traditional credit channels following the enactment of the CARD Act and do not appear in credit bureau records (a compositional change).” In other words, the researchers believed that 27-year old consumers who would have had poor credit scores without the CARD Act protections are instead credit invisible, even though the limits on cards for young consumers end when they turn 21. There is no basis for this assumption. Moreover, to the extent that these consumers were and continue to be excluded from the credit card market because they could not satisfy ability-to-pay rules, we strongly disagree that this is a negative outcome, for the reasons stated in the prior section.

Indeed, what the Boston Fed researchers observe may not be a reflection of the stricter ability-to-repay requirements for younger consumers, but rather the tightening of underwriting criteria overall, as a result of both the CARD Act protections and the financial crisis. It could also be a result of a decline in fee-harvester cards due to those restrictions. For the reasons stated in the prior section, all these results were both intended and positive.

D. Electronic vs. Paper Disclosures and Statements: Protecting Consumer Choice

Responding to c. How well are current credit card disclosure rules and practices adapted to the digital environment? What adaptations to credit card disclosure regimes in the digital environment would better serve consumers or reduce industry compliance burden?

As we have in our 2015, 2017 and 2019 comments, we again urge the CFPB to protect the right and ability of consumers who want to keep receiving paper disclosures and billing statements by mail. Credit card issuers and other banks have aggressively pushed consumers to receive these important documents via electronic delivery but, as documented in our report *Paper Statements: An Important Consumer Protection*, these efforts can be harmful to consumers. Paper disclosures are critical because:

Most consumers prefer them. In a survey by Consumer Action, 61% of consumers expressed that they still prefer credit card statements to be mailed to them in paper form.⁸⁷ Even computer-literate consumers often prefer paper bills to help them keep track of expenses and deadlines.⁸⁸

The Digital Divide. Millions of Americans -- particularly those who are lower-income, less educated, older, and households of color -- are on the other side of the “digital divide,” lacking home broadband Internet access or a home computer.⁸⁹ A smartphone is NOT adequate for

⁸⁷ Alegra Howard, Consumer Action survey: Given the choice, consumers prefer a paper trail, Consumer Action News, Winter 2018-2019, <https://www.consumer-action.org/downloads/english/CANews-paperless-2019.pdf>.

⁸⁸ [Report: Paper Statements: An Important Consumer Protection](#), March 2016.

⁸⁹ Emily A. Vogels, Pew Research Center, 59% of U.S. parents with lower incomes say their child may face digital obstacles in schoolwork, Sept. 10, 2020, <https://www.pewresearch.org/fact-tank/2020/09/10/59-of-u-s-parents-with-lower-incomes-say-their-child-may-face-digital-obstacles-in->

keeping track of bills or keeping records. Statements and the disclosures on statements are also rarely specifically tailored for mobile devices with smaller size and formatting. Even with mobile specific formats, smartphones lack an important feature – the ability to store and retain records.

Friction and Late Fees. Electronic statements create barriers for consumers to access vital information because it takes effort to remember the task, find the free time, go to the correct webpage, remember their password, and download the document – as opposed to simply opening an envelope. This friction can cause consumers to forget to make a payment, triggering late fees and adverse credit reporting consequences. The CFPB complaints reproduced below are examples of this problem.

Missing critical information. When consumers access their account history electronically, they miss the important disclosures required to be on periodic statements. As the CFPB’s 2015 study documented, over half of consumers who opted for electronic credit card statements are not opening or reviewing these statements.⁹⁰ This has important consequences. One study, which was noted in 2019 Credit CARD Act report, estimated that consumers “plausibly more exposed to the new disclosures by virtue of paper bill pay—became 6.5 percentage points more likely to pay their credit card bill in full relative to those who use online bill pay.”⁹¹

The following are some examples of complaints in the CFPB database using the search term “electronic statements”:

I have a CITI VISA which was issued through my XXXX membership. I had always had paper statements sent to me monthly and always paid my bill in full on time. My wife and I have credit scores in the 800 's. CITI unilaterally changed my billing statements to electronic statements and cancelled my paper statements. My wife and I do not use any electronic statements or payment options with any account that we have. As a result of this change initiated by CITI we did not receive our statements for 2 months and did not make any payments during that time period. If we did receive anything electronically from XXXX we would have assumed it was spam or it went into our spam filter. We have demanded that CITI put our account back to paper statements and send us the past 2 months paper statements. And, we have requested that they cancel any late charges and finance charges since we always have paid our bill in full in a timely manner. We have not yet received the paper statements but CITI is asking us to pay the past due balances without any statements.
CFPB Complaint No. 3086885, submitted Nov. 29, 2018

I acquired a XXXX credit card at the store during a purchase to gain a discount on the purchase. A week or two later I received the actual credit card in the mail. I went online and activated my account. I selected the choice for " electronic statements ". I assumed I

schoolwork/ (43% of lower-income students need to do their schoolwork on a cell phone; 40% need to use public WiFi; 36% do not have computer at home).

⁹⁰ CFPB 2015 Credit CARD Act study at 134.

⁹¹ CFPB 2019 CARD Act Report at 122 (citing Lauren Jones et al., Effects of informational nudges on consumer debt repayment behaviors, 51 J. of Econ. Psychol. 1, at 16-33 (2015)).

would either receive my statements electronically each month, or notification that my statement was ready on-line. This is what happens with all other credit cards I have. That is not what XXXX does. XXXX makes no notification to the consumer, at all. It is incumbent upon the consumer to remember to regularly check their on-line access to their account to get their statements and pay their bills. So, I forgot about the account and went months without paying my bill, not realizing I owed anything. In the meantime XXXX kept assessing late fees and penalties. Then they reported it to the credit agencies and my credit score went from the high 700 's to the low 600 's. Now it's an issue because I applied for a mortgage loan for a new house ... I ended up having to pay {\$98.00} for a total of purchase that were less than {\$25.00}.

CFPB Complaint No. 3181122, submitted March 15, 2019

On XX/XX/2018, I made a large purchase at XXXXXXXXX in XXXX, Texas for over {\$6000.00} with a promise of interest-free financing for 24 months. After making a down payment, I navigated to the website for my XXXX card to set up recurring payments at the calculated amount to pay off the balance before the 24 months expired. These payments were automatically withdrawn from my account on time each month for two years. At some point during this time, I was encouraged by Comenity to receive paperless statements, and no longer received them in the mail. Instead, each month I received an e-mail with the amount due and the due date. The automatic payments continued and I was excited to have reached the end of the two years of payments only to discover that I had been charged more than {\$1400.00} in deferred interest because the credit card auto-payment date was 8 calendar days after the terms ended. Had I not been persuaded by Comenity at numerous occasions (online, over the phone, and in statements) to elect for paperless billing, I would have been informed of the pending end of my terms and adjusted my final payment. Instead, at every opportunity, Comenity, urged me to stop receiving paper statements. Once I elected from electronic statements, I received an e-mail each month with the amount due and the due date for my upcoming auto payment. In none of these e-mails was there a warning of the upcoming ending to the terms of my interest period.

CFPB Complaint No. 3548200, submitted Feb. 28, 2020

I received a Verizon Visa credit card offer thru Synchrony Bank, signed up for the offer and was approved. The offer promised to save me {\$10.00} a month on my Verizon bill, but I never received a discount and instead was given a {\$28.00} fee. My Verizon bill was already set up for autopay but Synchrony Bank never sent me a paper bill. Three months later I received a letter from Synchrony Bank stating : When you were approved for your Verizon Visa signature card account, you agreed to go paperless with your statements. We have noticed you have not registered or have not completed registering at Verizonvisacard.syf.com to use online account services and have removed you from the electronic statement process. We will now only send you paper statements. Please register or complete the registration process at Verizonvisacard.SYF.com and re-enroll to receive electronic statements. You may have a payment due. Please register and view the status of your account I registered online per the instructions in the letter to discover in the online information provided that I was not saving {\$10.00} a month as promised

and instead was assessed a {\$28.00} late fee. I was not sent any paper statements so I was completely unaware of the overdue bill
CFPB Complaint No. 3843747 submitted Sept. 13, 2020

E. Card Issuers Must Do Better for Consumers Needing Assistance Due to COVID-19 Related Hardship

Responding to d. How have issuers changed their practices related to deferment, forbearance, or other forms of debt relief or assistance offered to consumers?

In terms of forbearance or assistance offered to consumers, the biggest current issue is what type of assistance or “accommodation” issuers are offering to consumers financially impacted by the COVID-19 pandemic. Such accommodations help relieve the hardship of COVID-19 related economic distress, and also protect the credit records of consumers under Section 4021 of the CARES Act.

Unfortunately, the credit card industry appears to be one of the least generous with accommodations. According to recently released Equifax data, the credit card industry has the second lowest rate of accommodations as shown on credit files – at the peak of accommodations in June, under 3% of credit card accounts indicated they had an accommodation versus nearly 8% for auto loans and over 9% for first mortgages.⁹²

As seen in the American Banker’s listing of COVID-19 hardship policies of different banks,⁹³ there are vast differences in the availability and types of accommodations from individual banks. Part of this is due to the lack of mandatory accommodations required for credit cards, as opposed mortgages and student loans. Furthermore, we are concerned that these accommodations are only being made available to those consumers who are sophisticated enough to ask for them and that accommodations may be at the discretion of the individual customer service representative. The CFPB should review whether such discretionary decisionmaking results in disparate racial impacts on protected classes.

F. New Forms of Debt Settlement

Responding to g. How are the practices of for-profit debt settlement companies changing and what trends are occurring in the debt settlement industry? How are creditors and non-profit credit counseling agencies responding to these changes and trends?

⁹² Equifax, Market Pulse: Gain Confidence with Deeper Insights, Oct. 8, 2020, at Slide 31 (“Loans in Possible Accommodation”). The lowest rate of accommodations was for consumer finance, which is a far smaller category of lending.

⁹³ American Bankers Association, The Industry Responds to the Coronavirus, <https://www.aba.com/about-us/press-room/industry-response-coronavirus> (visited Oct. 19, 2020).

One new development is debt settlement companies affiliated with debt collectors. For example TrueAccord Engage⁹⁴ (“Engage”) invites consumers to contact creditors using its platform and charges at least some consumers for services.⁹⁵ It denies being a debt settlement company or other regulated entity.⁹⁶ This is troubling because the company lists in its Service Terms several problematic conditions consumers must agree to in order to use its services.⁹⁷ For example, consumers must agree that Engage is authorized to share consumer contact information, obtain information about the alleged debt (including from credit reports) and share information with affiliated entities.⁹⁸ While Engage claims that it is a totally separate entity from the debt collection company, True Accord Corp.,⁹⁹ the Terms of Service allow it to share data with “any One True Holdings Company including subsidiaries and affiliates.”¹⁰⁰ Thus, Engage’s terms of service allow it to share data from consumers with the debt collector entity., which could use such data against consumers to collect on accounts.

* * *

Thank you for the opportunity to submit these comments and for your excellent prior and forthcoming research on credit card issues. If you have questions about these comments, please contact Chi Chi Wu at cwu@nclc.org or 617-542-8010.

Respectfully submitted,

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

⁹⁴ <https://www.trueaccordengage.com/>

⁹⁵ <https://support.trueaccordengage.com/hc/en-us/articles/360033120992-Pricing-Collectors-Creditors> (“Engage makes money by charging consumers a small monthly subscription fee for our premium plan. Consumers can add and manage debts for free, but some actions are part of the premium plan and require this subscription.”).

⁹⁶ <https://support.trueaccordengage.com/hc/en-us/articles/360033119212-Is-TrueAccord-Engage-a-debt-settlement-company-or-a-credit-counseling-company-> (“TrueAccord Engage is not a debt settlement company, debt consolidator or credit counselor. Engage does not represent consumers, and disputes, offers to pay, and stop calls requests are solely generated by consumers.”). *See also* <https://www.trueaccordengage.com/tos> (“We are not a credit repair service as defined by the Fair Credit Reporting Act, Credit Repair Organizations Act, or various state law equivalents, We are not a debt collector as defined by the Fair Debt Collection Practices Act (FDCPA) or various state law equivalents”).

⁹⁷ <https://www.trueaccordengage.com/tos> (“You acknowledge that requesting additional documentation from a creditor or debt collection agency after the expiration of the FDCPA validation period is ineffective and will result in further collection activity, Any referrals to a third party are not an endorsement of that service and requires you to do your own due diligence”).

⁹⁸ *Id.* (“Further, by providing your contact information, you give TrueAccord consent to retrieve additional information regarding your outstanding debts from third parties including, but not limited to, collection agencies, creditors, and credit reporting bureaus” . . . “When you provide a channel for us to communicate with you, such as a telephone number, email address, direct messenger, etc., you consent to be contacted by TrueAccord and any third party that TrueAccord has a relationship with to the extent permitted under applicable law”).

⁹⁹ <https://support.trueaccordengage.com/hc/en-us/articles/360033119232-Isn-t-TrueAccord-a-debt-collection-agency->