National Association of Federal Credit Unions
3138 10th Street North • Arlington, Virginia • 22201-2149
(703) 522-4770 • (800) 336-4644 • Fax (703) 522-2734

Fred R. Becker, Jr.
President and CEO

September 21, 2012

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G St., NW
Washington, DC 20006

RE: Docket No. CFPB–2012–0028, regarding the definition of "finance charge"

Dear Ms. Jackson:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents federal credit unions, I write to you regarding the Consumer Financial Protection Bureau's (CFPB) proposed changes to the definition of "finance charge." NAFCU respectfully requests that the Bureau reconsider this proposal. Given the host of regulatory changes required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), the Bureau should not use its authority to require still more changes for credit unions. The cost of this proposal will be extraordinary. Those costs, not just in terms of money, but also in terms of time, are particularly difficult for lenders to bear as the industry struggles to comply with all of the Dodd-Frank Act. At the same time, the benefits are modest given that the proposal will, at best, only marginally improve a disclosure that consumers do not use. Further, the proposal would completely disregard the statutory scheme, and require a broad interpretation of the Bureau's authority under the Truth in Lending Act (TILA). Finally, the changes will be particularly problematic in light of all of the other consumer protection laws that are tied to the finance charge. The National Credit Union Administration also ties the credit union interest rate ceiling to the Regulation Z definition of a finance charge and this proposal could result in changes in that regard. For all these reasons, NAFCU does not support the proposed change at this time and is hopeful the Bureau will reconsider this aspect of the TILA/RESPA combined disclosure project.

The CFPB Should Focus on the Mandates of the Dodd-Frank Act

NAFCU believes that the CFPB's resources should be directed towards finalizing regulatory changes that are *required* by the Dodd-Frank Act. Proposing dramatic new changes to the regulatory framework that are not required by Dodd-Frank only exacerbates the already heavy burden being borne by credit unions and other small lenders. The CFPB is currently

E-mail: fbecker@nafcu.org • **Web site:** www.nafcu.org

working on promulgating at least eight different rules that will have a dramatic impact on the mortgage market.[1] Additionally, several other agencies are working on a rule on qualified residential mortgages (QRM) and there is an ongoing debate regarding the future of the government sponsored enterprises (GSEs), both of which will have a significant impact on the mortgage industry. To date, the CFPB has issued rules on six mortgage rules, totaling more than 2,300 pages. Further, most of those rules must be finalized by early January of 2013. Given the relatively short time between final rules being published and the different effective dates of the Dodd-Frank Act, credit unions will struggle to comply with the statutorily required changes. Accordingly, NAFCU opposes adding more, unnecessary regulatory changes onto an already overburdened credit union industry. Given the enormous challenges presented by the Dodd-Frank Act and the tremendous strain lenders will be under to comprehend the rules, update systems and processes, train staff, and ultimately comply, the CFPB should reconsider this proposal. There is no pressing need to make changes to the finance charge calculation and consequently, NAFCU does not support such changes at this time. Our position on this issue is part of a broader policy that the CFPB should not, at this time, add to the regulatory burden for mortgage lenders by promulgating rules that are outside the scope of the requirements of the Dodd-Frank Act.

The Benefits of the Proposal do not Justify the Costs

NAFCU also believes that the proposed changes to the finance charge would require a considerable amount of resources to implement, while providing only a negligible benefit to consumers. As the Bureau discusses in the proposed rule, the Federal Reserve Board (the Board) conducted consumer testing on the APR which revealed that the figure is not widely used by consumers and is, generally poorly understood. Specifically, the Board said,

> "A single figure such as the APR is simple to use, particularly if consumers can use it to evaluate and compare competing products, rather than having to evaluate multiple figures. This is especially true for a figure such as the APR, which has a ***forty-year history in consumer disclosures, and thus is familiar to consumers***. Nevertheless, if that single figure is not understood by consumers or does not fully represent what it purports to represent, the usefulness of that figure is undermined. Consumer testing shows that most consumers do not understand the APR, and many believe that the APR is the interest rate (emphasis added)." Truth in Lending, 74 Fed. Reg. 43,232, 43,243 (August 26, 2009).

Given that consumers still do not understand the APR and still confuse it with the interest rate, forty years after it was introduced, the value of the proposal is somewhat speculative. The costs, however, associated with reconfiguring systems to calculate the newly defined finance charge, updating processes and training staff will be considerable.

---

[1] The CFPB is required by the Dodd-Frank Act to promulgate rules on the following matters: (1) Consolidation of the disclosures required under the Real Estate Settlement Procedures Act (RESPA) and the Truth in lending Act (TILA); (2) Home Ownership Equity Protection Act (HOEPA); (3) Mortgage servicing; (4) loan originator compensation; (5) Appraisals; (6) qualified mortgages; and (7) escrow accounts. The CFPB is also working with other federal banking regulators on an eighth rule regarding appraisals for higher-risk mortgages.

The Bureau also notes that calculating the APR can be burdensome and argues that the simpler "all in" formula for the finance charge will make the APR easier to compute. Thus the proposal will ultimately provide benefits to lenders as well. NAFCU does not agree with this argument as outlined below.

First and foremost, while the APR calculation is imperfect, lenders have existing procedures and processes in place to ensure the figure is accurately disclosed. Even if the Bureau's proposed changes to the finance charge make it easier to calculate in the long term, those benefits must still be weighed against the substantial, initial set-up costs required to implement changes. Further, NAFCU questions whether there will be any real long term benefits given the added complexity this and other proposed rules would have on the lending industry. Taken together with the Bureau's proposed changes to the Homeownership Equity Protection Act (HOEPA) regulations (the "HOEPA proposal"), the changes to the finance charge would only further exacerbate the compliance process for mortgage lenders. Currently, lenders must calculate one APR for closed-end and open-end loans. Under the proposals advanced by the Bureau, lenders would be required to calculate an APR for closed-end loans for disclosure purposes and a transaction coverage rate (TCR) for closed-end loans for coverage purposes. Further, the proposed more inclusive finance charge only applies to open-end loans, which only further complicates the issue. Additionally, for HOEPA coverage purposes, lenders must also calculate the points and fees, which differ depending on whether the borrower is applying for an open-end or a closed-end loan. Replacing one rate for disclosure and coverage purpose, with two rates that are calculated differently hardly simplifies the mortgage lending process.

Second, to some extent the new finance charge still relies on an approach that includes some fees, but not other fees. More fees are included and fewer fees are excluded, however, the process is not an entirely straightforward formula that completely eliminates all of the current issues with the finance charge and the APR.

Third, even if the proposed finance charge simplifies the process of determining what fees are included, lenders still need to determine the actual amount of those fees in order to provide an accurate finance charge and APR. This process may be difficult if the APR is to include fees controlled by third parties, such as settlement agents. This proposal could result in lenders steering borrowers to third party providers with whom the lender has a relationship, so as to ensure more accurate estimates. It could also encourage lenders to provide as many services as possible through affiliates, which is advantageous for large lenders that have the means to create and operate several affiliates to provide real estate related services.

The above problems regarding determining the fees are magnified for defense credit unions providing loans to members of the Armed Services. Defense credit unions, because of their fields of membership, often work with members moving all over the world. This is true even if the credit union is relatively small and would not otherwise be involved in mortgage lending beyond its own community. The proposal; however, with its inclusion of additional third party fees would require defense credit unions to become intimately familiar with third party fees in any area of the country where its members might be stationed. The proposal also creates problems for national lenders for much the same reason. Large lenders will no longer be able to

advertise a single national APR because the third party fees included in the finance charge will likely vary by region.

The Proposed Rule Would Dramatically Alter the Existing Statutory Scheme

The Bureau has noted the need to make broad use of its "exception authority" to implement the proposed changes in this rulemaking. The proposal would discard the current statutory list of inclusions and exclusions in the finance charge. Instead, the CFPB would interpret the term "finance charge" to mean any charge "payable directly or indirectly by the consumer" and "imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 77 Fed. Reg. 51,116, 51,123 (August 23, 2012). The Bureau cites its authority under TILA § 105(a) and (f) and §§ 1031(a) and 1405(b) of the Dodd-Frank Act to make this change. NAFCU is not convinced that the CFPB has the authority to make this change.

First, NAFCU does not believe that § 105(f) is applicable in this situation as that section details the requirements to exempt a class of transactions from TILA's requirements. The Bureau's proposed changes to the finance charge do not provide an exemption from the coverage of TILA.

Second, it requires a broad reading of § 1032(a) of the Dodd-Frank Act to claim the authority the Bureau claims here. Section 1032(a), which provides the Bureau authority to draft disclosures for mortgage loans, states:

> "The Bureau may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances."

While the language here is broad, the relevant section states that the Bureau has authority to require disclosure of terms. NAFCU does not believe that this section provides the Bureau authority to override the statutory scheme approved by Congress.

Section 105(a) of TILA and § 1405(b) of Dodd-Frank are broadly written and provide the Bureau considerable authority to modify certain requirements as it sees fit. However, Congress did not give the Bureau power to modify or change relevant, and unambiguous, sections of TILA. Furthermore, the Supreme Court states that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). Here, the intent of Congress is clear: Congress specifically created a statutory list of inclusions and exclusions in the term "finance charge." Thus, NAFCU questions whether the Bureau has the authority to amend the statutory list.

Altering the Finance Charge Will Impact Several Other Laws

Altering the definition of the finance charge will have a significant impact on a number of other laws as the APR and the definition of "points and fees" are tied to the finance charge. In addition to the implications listed by the CFPB in its proposal, the changes would also impact state lending laws that use the federal definition of APR. Further, the potential problems with the proposed finance charge are compounded by the fact that a number of consumer protection laws use, as their trigger, a comparison of the APR to the average prime offer rate (APOR). Congress and the regulators have relied on this comparison because the APR and the APOR generally include roughly the same items. This proposal, however, would exacerbate differences between the APR and the APOR, which does not include third party charges. As the APR diverges from the APOR, the usefulness of using the two figures for comparison purposes diminishes. Taken together, the proposal has the potential to alter coverage for high-cost loans in two ways. First, the proposal will result in a higher APR and thus more loans qualifying for coverage. Second, the proposal, by altering the relationship between the APR and the APOR skews the entire measurement mechanism.

If the CFPB moves forward with the more inclusive definition of the finance charge, it must make corresponding amendments to HOEPA rules, and any other affected rule. The APR and the points and fees triggers must be increased sufficiently to offset the changes that would come about from the more inclusive finance charge.

NAFCU appreciates the opportunity to share our thoughts regarding this matter. If you have any questions or concerns, please feel free to contact me.

Sincerely,

Fred R. Becker, Jr.
President/CEO