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National Association of Federally-Insured Credit Unions

April 25, 2022

The Honorable Sherrod Brown
Chairman
Committee on Banking, Housing, and
Urban Affairs
United States Senate
Washington, DC 20510

The Honorable Pat Toomey
Ranking Member
Committee on Banking, Housing, and
Urban Affairs
United States Senate
Washington, DC 20510

Re: Tomorrow's Hearing: "The Consumer Financial Protection Bureau's Semi-Annual Report to Congress"

Dear Chairman Brown and Ranking Member Toomey:

I write today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) in conjunction with tomorrow's hearing entitled "The Consumer Financial Protection Bureau's Semi-Annual Report to Congress." NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 130 million consumers with personal and small business financial service products. NAFCU appreciates the Committee's ongoing oversight of the Consumer Financial Protection Bureau (CFPB or Bureau) and efforts to promote financial inclusion and consumer protection. We welcome this opportunity to share our thoughts on some current issues pertinent to the CFPB.

Use of Small Entity Exemption Authority

NAFCU believes that the CFPB should utilize its statutory exemption authority to recognize the unique nature of and constraints faced by the credit union industry. Since enactment of the *Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act*, the credit union industry has faced massive consolidation, with many institutions forced to close their doors or merge with other credit unions. The rate of consolidation has only increased since creation of the CFPB. A majority of credit unions that have closed or merged were smaller in asset size, and as such, could not afford to comply with all the rules promulgated by the CFPB. Therefore, it is incumbent upon the CFPB to provide some degree of regulatory relief for small entities that cannot afford to comply with complex rules and would otherwise be forced to stop offering services to members.

Although the CFPB has provided past exemptions based on an entity's asset size, such as the qualified mortgage (QM) and *Home Mortgage Disclosure Act (HMDA)* rules' small entity exemption, the CFPB could do more to recognize that not all financial institutions operate the same way by tailoring its regulations to provide exemptive relief based on those differences. NAFCU encourages you to question why the CFPB has not utilized this dormant authority and to

encourage the CFPB to begin relying on its exemption authority under section 1022 of the Dodd-Frank Act in its rulemaking efforts to consider the unique structure and characteristics of the credit union industry.

CFPB's New Focus on Fees

NAFCU and our member credit unions support fair, transparent, and competitive markets for consumer financial services and are happy to work with the CFPB to improve consumers' understanding of financial products and services but caution that increasing the amount of required disclosures or mandating that contingent fees be included in a lump-sum price would only further confuse and frustrate consumers that may have varying demands for convenience. NAFCU has urged the CFPB to continue to study the markets and products listed in its recent Request for Information (RFI) on fees before taking any supervisory or regulatory action because the Bureau's current data and analyses do not suggest an unfair or underregulated environment. NAFCU now recommends that you closely scrutinize the Bureau's alleged authority to make changes to its regulatory framework to limit the fees described in the RFI.

On a fundamental level, NAFCU also objects to the CFPB's characterization in the RFI of financial services fees as "junk fees," "excessive or exploitative fees," or "inflated or surprise fees," as these fees bear no resemblance to the type of hotel and resort fees referenced in the RFI and, in contrast, are all subject to comprehensive federal or state laws and regulations; are not unfair, deceptive, or abusive; and consumers are well-informed of the fees. Required disclosures have made significant positive impacts on consumers' understanding of financial product pricing, provided for better comparison shopping, and improved consumer repayment behavior. To claim that fees that must be disclosed are in fact surprise or junk fees is a mischaracterization and one that undercuts the Bureau's own efforts to develop effective disclosures.

Still, NAFCU's credit union members often report that their members are frustrated and confused by the volume of required disclosures, despite their best efforts to educate consumers about the importance of these disclosures and the information they contain regarding the terms and fees of products and services. To this end, instead of pushing the bounds of statutory authority to regulate fees in connection with consumer financial products and services, the CFPB should be engaged in broad consumer education initiatives regarding financial disclosures. For example, providing toolkits to develop optional, just-in time disclosures for use with mobile banking applications might serve as a practical and effective resource. NAFCU encourages you to closely monitor any CFPB regulatory and supervisory activity related to fees.

Unfair, Deceptive, or Abusive Acts and Practices (UDAAP)

Credit unions are devoting more resources to UDAAP compliance due to unclear standards and the unpredictability of enforcement, so the CFPB should issue a rulemaking to clarify its UDAAP authority.

Since the enactment of the Dodd-Frank Act, NAFCU has asked for clear, transparent guidance from the CFPB on its expectations for credit unions under the law and its regulations. In January 2020, the CFPB issued a policy statement providing a framework for how the Bureau applies the “abusive” standard in UDAAP supervision and enforcement matters; however, the CFPB quickly rescinded this guidance last year. NAFCU’s members appreciated this guidance because the attention and resources dedicated to UDAAP compliance have continued to increase over the last few years. NAFCU members estimated a 7 percent increase from 2020 in the number of full-time equivalent staff members devoted to UDAAP compliance over the next three years, according to NAFCU’s 2020 Federal Reserve Meeting Survey.

NAFCU encourages the CFPB to continue to provide more clarity on the specific factual bases for violations. Details on and examples of the specific factual bases for violations will assist credit unions in mitigating the risks of a violation. This clarity and certainty are especially critical to providing relief at a time when credit unions are making every effort to assist their members facing difficult economic situations. Credit unions should not be unnecessarily worried about facing potential UDAAP violations during a pandemic and economic crisis due to an unclear standard and unpredictable enforcement. The CFPB should consider a UDAAP rulemaking to enhance transparency and accountability and provide the financial services industry with some predictability regarding this amorphous standard. Additionally, NAFCU asks that the CFPB work closely with the National Credit Union Administration (NCUA) to resolve questions regarding whether certain credit union powers conferred by the *Federal Credit Union (FCU) Act* may be subject to the CFPB’s UDAAP authority.

Under Director Chopra, certain guidance has been issued that has the potential to massively expand the scope of prohibited acts and practices. On March 16, 2022, the Bureau published a revised examination procedure guide for UDAAP that indicated the agency is targeting discrimination as an “unfair” practice in connection with all financial products and services and not just credit products. This is a serious shift in the CFPB’s stance on UDAAP that is likely to expand the reach of the Bureau’s antidiscrimination enforcement beyond the scope of the *Equal Credit Opportunity Act* (ECOA). Under ECOA, creditors are prohibited from discriminating against a consumer on the basis of race, color, religion, national origin, sex, marital status, or age. Discrimination does not need to be intentional in order to constitute a violation under ECOA. While the Bureau has yet to explicitly discuss what types of discrimination are covered under the CFPB’s new stance, it appears that the Bureau may begin engaging in disparate impact enforcements.

Congress should enforce common sense limits on the scope of disparate impact liability, particularly in domains of consumer financial law where the relevant statutory authority does not expressly recognize this form of liability. Reasonable limits make sense because disparate impact liability is intended to target the unintended consequence of facially neutral policy, and Congress has taken care to scrutinize neutral conduct only in select instances where the

consequences of discrimination are greatest—for example, employment, housing, and education. In other words, not all regulated activities are subject to disparate impact liability and Congress should ensure that federal agencies are not exceeding the limits of their authority by offering an alternative interpretation.

Before proceeding with a significant expansion of the scope of the “unfair” prong of the UDAAP standard to test all activities, big or small, for disparate impact, the Bureau should engage in formal rulemaking efforts to solicit public input on its legal intentions. Credit unions support strong anti-discrimination laws and fair lending policy. However, it is counterproductive for the Bureau to articulate new legal standards through press releases or open-ended expansion of UDAAP. Credit unions are committed to complying with all federal anti-discrimination laws, but agency interpretations that are neither formalized in written guidance nor aligned with prevailing interpretations of statutory authority will present difficulties.

Section 1071 Small Business Data Collection Proposed Rule

While NAFCU and our members appreciate the CFPB’s dedication to ensuring small businesses are adequately protected under ECOA and Section 1071 of the Dodd-Frank Act, we have a number of concerns about the Proposed Rule for Section 1071. The Proposed Rule’s complexity and significant one-time and ongoing compliance costs will weigh disproportionately on credit unions and hurt their ability to help small businesses. The likely net effect of the Proposed Rule’s expansive coverage and intensive data collection and reporting requirements is that credit unions will quickly become uncompetitive and may be forced out of small business lending altogether. This not only harms credit unions, but it also reduces the credit available to small businesses at a time when they are trying to rebound from the COVID pandemic.

NAFCU has urged the CFPB to adopt common sense definitions, right-sized thresholds, and a reasonable, phased mandatory compliance schedule to ensure that credit unions’ support of their small business members is not jeopardized by unnecessary Section 1071 compliance burdens. NAFCU also recommended that the CFPB delay any further Section 1071 rulemaking until it is clear the COVID-19 pandemic has ended.

Some of the major concerns we have with the Proposed Rule include:

- *Definition of Covered Financial Institution.* The proposed 25-loan threshold is far too low and would unjustifiably impact many smaller lenders. If the CFPB is not going to use its authority under Section 1022 to exempt credit unions from this rule, a practical and workable higher threshold of at least 500 loans must be established.
- *Definition of Small Business.* The Proposed Rule would define a small business as any business with prior-year gross annual revenue of \$5 million or less. At this level, financial institutions would have to collect Section 1071 data related to

businesses that are not truly small. The CFPB should adopt a lower revenue threshold of \$1 million for the definition of a small business.

- *Covered Credit Transactions.* While we support the CFPB defining covered credit transactions in the Proposed Rule, we believe the CFPB should also exempt loans under the de minimis definition of member business loan (MBL) found in the FCU Act. Subjecting credit unions' non-MBL loans to Section 1071 coverage could potentially affect the availability of these smaller size loans due to the increased costs associated with Section 1071 regulatory compliance. We recommended the CFPB establish an exemption for loans under the de minimis amount for MBLs established in the FCU Act from the definition of covered credit transactions.
- *Compliance Deadline.* The Proposed Rule's uniform 18-month mandatory compliance deadline is aggressive even for the largest financial institutions and is extremely difficult for credit unions. Furthermore, we hear from our member credit unions that their previous experience with information technology (IT) vendors in adapting their products to comply with major rulemakings has shown that timeframe to be unworkable. NAFCU believes that any compliance deadline should be no earlier than 36 months after the final rule is issued.

Examinations

The CFPB should better coordinate with NCUA examiners to limit exam burden and streamline processes and procedures. NAFCU has repeatedly requested the CFPB further enhance its coordination with the NCUA to alleviate examination burdens on credit unions that are over \$10 billion and subject to examination by the both the NCUA and CFPB. These credit unions are experiencing overlapping or consecutive examinations, which poses an immense operational burden and diverts valuable resources away from credit union members. The memorandum of understanding (MOU) between the CFPB and NCUA is an initial step, and we encourage the CFPB to make every effort to better coordinate with the NCUA to ensure examiners from both institutions are not examining a credit union simultaneously or consecutively. There should be a reasonable amount of time in between CFPB and NCUA examinations so that credit unions can quickly get back to the important business of serving their members.

The CFPB should also avoid duplication of examination functions. The recent addition of an IT examination component in the CFPB's latest Supervision Manual suggests that such duplication may occur. The NCUA is the functional regulator charged with implementing and administering the technical safeguards provisions of the *Gramm-Leach Bliley Act* (GBLA) for credit unions. The CFPB should not seek to expand its supervisory jurisdiction by performing overlapping, IT-based examinations that are more capably executed by financial institutions' prudential regulators. However, the Bureau should continue to administer IT-based exams for nonbank fintech companies that are not regularly examined by a functional regulator such as the NCUA or Federal Deposit Insurance Corporation.

Electronic Signatures in Global and National Commerce Act (E-SIGN)

NAFCU urges the CFPB to adopt more flexible rules for the acceptance and delivery of electronic signatures and disclosures. Considering the impacts of the COVID-19 pandemic, modernizing E-SIGN would assist credit union members and alleviate compliance burdens for institutions. The current requirement for consumers to “reasonably demonstrate” access to electronic information before consenting to the receipt of electronic disclosures is cumbersome and antiquated. This delays the administrative processing of loan modifications, deferrals, fees waivers, or other service changes that, when disclosed electronically, must comply with E-SIGN.

While credit unions appreciated pandemic-related E-SIGN relief, the CFPB’s statement authorizing more flexible E-SIGN procedures in June 2020 has since expired.¹ The now-rescinded supervisory statement allowed for a credit card issuer, under Regulation Z, to obtain a consumer’s oral consent to electronic delivery of written disclosures through an oral affirmation of his or her ability to access and review the electronic written disclosures.² Credit unions were able to use this additional authority to more efficiently address the credit needs of their members. Furthermore, the Bureau has provided no indication that the use of these more flexible E-SIGN procedures increased the risk of consumer harm.

E-SIGN itself also lacks clarity regarding when a credit union must update a statement of the hardware and software requirements to access and retain electronic disclosures. Lastly, E-SIGN does not clearly state whether a member’s initial E-SIGN consent is sufficient for all subsequent transactions between the credit union and the member. NAFCU urges the CFPB to allow for the delivery of electronic disclosures without having to obtain prior consent, so long as the consumer is initiating the transaction using an online service. In addition, the CFPB should clarify that a financial institution that obtains presumptive consent once may rely on it in the future for all subsequent related transactions.

Use of Larger Participants Authority to Oversee Fintechs

The CFPB should use its authority under the Dodd-Frank Act to oversee a grossly under-regulated industry of fintech companies that offer consumers a wide array of products and services digitally, across state lines, ranging from mortgage servicing to mobile payments and peer-to-peer lending. The recent actions taken by the CFPB to look at larger fintech companies operating in the payments space were a good first step. Additionally, NAFCU appreciates the CFPB’s announcement that it will begin exercising its Section 1024 authority under the Dodd-Frank Act to designate a nonbank entity for supervision and issued a proposed procedural rule seeking to make public certain parts or all of the orders designating these nonbank entities for supervision.

¹ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-series-of-policy-statements-to-ensure-industry-complies-with-consumer-protection-laws/>.

² https://files.consumerfinance.gov/f/documents/cfpb_final-rescission_electronic-cc-discl-e-sign-consent-cons_2021-03.pdf.

However, a more robust level of supervision from the CFPB may be necessary to ensure compliance with consumer financial protection laws.

State-level supervision does not suffice as many fintech companies continue to grow exponentially by offering access to convenient online financial tools. The longer these companies go unchecked, the greater the risk of consumers facing a significant loss or violation of their rights. The Dodd-Frank Act grants the CFPB the authority to regulate a covered person who “is a larger participant of a market for other consumer financial products or services, as defined by [a] rule” issued in consultation with the Federal Trade Commission. This same section of the Dodd-Frank Act also grants the CFPB the authority to supervise larger participants’ compliance with federal consumer financial law through periodic reports and examinations, obtain information about the activities and compliance systems used by larger participants, and detect and assess risks to consumers and to the markets for consumer financial products and services. Certain fintech companies conduct a substantial volume of transactions involving consumer financial products and services while not being subject to direct supervision by a federal financial regulator.

The CFPB should exercise its authority over larger participants in the consumer financial markets, much in the same way it did in the 2012 final rules for larger participants of the markets for consumer reporting and consumer debt collection. Should the Bureau conclude its “larger participant” authority in the Dodd-Frank Act does not authorize it to issue rulemakings and conduct examinations for fintech companies, then NAFCU would urge support for a legislative amendment to the Dodd-Frank Act to explicitly provide such authority.

Regulation E

We also believe that Congress or the CFPB should ensure that error resolution responsibilities under the *Electronic Fund Transfer Act* (Regulation E) are fairly balanced for credit unions and third-party payment system operators. When a dispute primarily implicates a third party’s payment service, the third party should be primarily responsible for resolving the dispute. Credit unions shoulder unique investigative burdens when a transaction involves a mobile payment application, and users can fund these transactions with a combination of debit card funds and preexisting wallet funds that may have been acquired entirely in-network. As mobile payment applications become more prevalent, there should be more clarity or guidance regarding the responsibilities of mobile payment platform providers to resolve disputes, especially with respect to instances of fraud. Error resolution investigations put a strain on credit union resources and in certain situations the credit union may not be the best party to investigate a dispute. We believe Congress and the CFPB should examine what protections are needed to combat app-based fraud.

CFPB Commission

NAFCU has long held the position that, given the broad authority and awesome responsibility vested in the CFPB, a five-person commission has distinct consumer benefits over a single

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director structure. Regardless of how qualified one person may be, including the current leadership of the Bureau, a commission would allow multiple perspectives and robust discussion of consumer protection issues throughout the decision-making process. Additionally, a commission helps ensure some continuity of expertise and rulemaking. The current single director structure can lead to uncertainty during the transition from one presidential administration to another. The U.S. Supreme Court highlighted this fact when it released a decision in *Seila Law v. the Consumer Financial Protection Bureau* that found the single director, removal only for “just cause” structure of the CFPB to be unconstitutional. It is with this in mind that we urge Congressional action on legislation to transform the structure of the CFPB from a single director to a bipartisan commission, such as H.R. 4773, the *Consumer Financial Protection Commission Act*, which has been introduced in the House.

We appreciate your leadership and ongoing focus on issues important to credit unions, and we look forward to continuing to work with the Committee and the CFPB on these topics. Should you have any questions or require any additional information, please do not hesitate to contact me or Lewis Plush, NAFCU’s Associate Director of Legislative Affairs, at 703-842-2261.

Sincerely,

A handwritten signature in cursive script that reads "Brad Thaler".

Brad Thaler
Vice President of Legislative Affairs

cc: Members of the Senate Committee on Banking, Housing, and Urban Affairs