Dirty Dozen: CFPB Issues Affecting Credit Unions

Not only are credit unions subject to strict field of membership and capital restrictions, they are also subject to the numerous consumer protection provisions in the Federal Credit Union Act, including the usury ceiling, the prohibition on prepayment penalties, and the member business lending cap. The CFPB should be cognizant of NCUA's role as primary regulator for credit unions and recognize the positive role that credit unions serve in the financial services industry. In doing so, they should be aware of not only the detrimental impact their rules can have, but also focus on the unique benefits that credit unions consistently provide to consumers.

The CFPB has recently finalized, and is currently working on, a number of regulations that have significant impact on the credit union industry. While NAFCU has a number of concerns with all the Bureau's rules, the following is a summary of the most important CFPB-related issues.

Unfair, Deceptive, or Abusive Acts and Practices

Since the enactment of the Dodd-Frank Act, and particularly throughout the past year, NAFCU has worked to seek clear, transparent guidance from the CFPB on its expectations for credit unions under the law. Of special concern are those areas of the law, such as a call for a focus on unfair, deceptive, or abusive acts and practices (UDAAP), that provide few or no specific directives for implementation and for which neither the CFPB nor NCUA has provided any specific guidance. Meanwhile, the CFPB continues to regulate through enforcement action in this area. NAFCU believes that additional Dodd-Frank guidance—articulating clear supervisory expectations—is necessary to ensure credit unions have the information they need to confirm their operations are safe, sound, and reflective of the spirit and letter of the law governing them.

Further, UDAAP-based enforcement actions have created uncertainty regarding the operation of powers explicitly conferred on credit unions by the *Federal Credit Union Act* (FCU Act). These include federal credit unions' statutory lien authority, a power explicitly granted to federal credit unions by Congress in Section 107(11) of the FCU Act and Section 701.39 of NCUA's Rules and Regulations, and federal credit unions' right to limit or suspend services, as explicitly permitted by NCUA's model bylaws. Although the statutory lien, in particular, may be superseded by other federal or state law, the CFPB has not issued regulations or directives implementing its UDAAP authority, effectively curbing the powers granted to federal credit unions by the FCU Act and as implemented by NCUA, without any scope or notice. Essentially, the CFPB has reserved the right to determine that operation of these powers in compliance with NCUA's regulations may still be considered unfair, deceptive or abusive according to the judgment of the CFPB.

Debt Collection

In July 2016, the CFPB released its Outline of Proposals under Consideration and Alternatives Considered on third-party debt collection practices. NAFCU is concerned that the ideas proposed in the outline would have an indirect effect on credit unions, forcing them to update their data systems to properly transfer the necessary information that third-party debt collectors will need to comply. Furthermore, NAFCU believes that the CFPB should not promulgate regulations under its *Fair Debt Collection Practices Act* (FDCPA) authority that would apply to credit unions or other financial institutions that are not currently subject to the FDCPA requirements because the FDCPA stemmed from Congress' concerns about the impersonal, profit-driven, and unaccountable actions of third-party debt collectors. NAFCU sent a comment letter to the Bureau on September 23, 2016, highlighting these concerns.

Further, when the CFPB issued its 2013 Advanced Notice of Proposed Rulemaking, it sought information about first-party debt collection as well. The Bureau is expected to convene a second SBREFA panel in 2017 to address first-party debt collection issues. It is unclear whether the ultimate proposal on debt collection rulemaking will include both third and first-party debt collection practices or will be split to address third- and first-party debt collection practices, respectively. NAFCU remains concerned that rulemakings by the CFPB regarding first-party debt collection will be burdensome and onerous for credit unions. In the past, the CFPB has failed to account for unique aspects of federal credit unions, including the rights granted by the FCU Act to both credit unions and their members. For example, unlike bank customers, credit union members have procedural rights regarding expulsion under Section 118 of the FCU Act. Furthermore, federal credit unions are granted the power to impress and enforce the statutory lien when a member is delinquent on a loan. These rights are conferred by Congress and should be carefully considered when drafting any debt collection regulation applicable to credit unions.

Qualified Mortgages

The CFPB has issued a final rule that imposes requirements on credit unions to assess and verify a borrower's ability to repay a mortgage loan before extending the loan. In that same rule, the CFPB defined "qualified mortgage" and extended safe harbor legal protections to mortgages that meet the definition. Many of NAFCU's members have decided to extend only mortgages that meet the definition of safe harbor "qualified mortgage" as they are concerned that they will not be able to sell non-qualified mortgages and are worried about the legal and regulatory risks associated with extending non-qualified mortgages. Due to the hesitance of lenders to extend non-qualified mortgages, NAFCU is concerned that many otherwise qualified borrowers will not be able to obtain mortgages.

NAFCU believes the definition of qualified mortgage must be revised in a number of ways to reduce the enormous negative impact the rule will undoubtedly have on credit unions and their members, in particular the debt-to-income (DTI) threshold (43% of the total loan) and the inclusion of affiliate fees in the calculation of points and fees. The CFPB proposed a cure for unintentional points and fees overages. Even though NAFCU supported such a cure, it still believes a legislative change is necessary to clarify points and fees calculations.

Mortgage Servicing

The CFPB's mortgage servicing rule has unnecessarily complicated mortgage servicing, greatly increased the cost of servicing and jeopardized credit unions' established practices that center on relationships with members. NAFCU's concerns with the rule include the cost and burden related to the host of new or greatly revised periodic statement, policies, procedures and notices it requires, as well as the timing and inflexible procedural requirements related to how a credit union must deal with delinquent borrowers and take loss mitigation actions. Although the rule does exempt credit unions that service 5,000 or fewer mortgages, along with affiliates, from some of the requirements, mortgage servicing costs have nevertheless greatly increased for all credit unions.

Reputation Risk

The CFPB continues to encourage consumers to utilize its public Consumer Complaint Database to disclose consumer complaints and narratives that the CFPB receives on most financial products, such as credit cards, mortgages, bank accounts and services, private student loans, other consumer loans, credit reporting, money transfers and debt collection.

NAFCU believes that the CFPB Consumer Complaint Database presents a very specific reputational risk concern for financial institutions. These complaints follow a pattern of unverified information that is given credibility by the mere fact that the CFPB is posting it on their website. There is no mechanism to ensure the complaints are fully vetted. Credit unions have unique relationships with their members and NAFCU supports resolution and investigation of valid and verified member complaints by the credit unions, but the reputation risk brought on by unverified complaints is significant and not easily mitigated.

Remittances

In July 2014, the CFPB finalized amendments to its Remittance Rule. Prior to these amendments, the Bureau released a series of final rules concerning remittances, all of which became effective on October 28, 2013. The regulatory burden that the Remittance Rule places on credit unions has led to a significant reduction in consumers' access to remittance transfer services. NAFCU has heard from a number of its members that, because of the rule's compliance burden, they have been forced to discontinue, or will be forced to discontinue, their remittance programs. NAFCU members have also indicated that the compliance costs associated with the rule have had an impact on their ability to offer other services to their members. Accordingly, NAFCU continues to encourage the CFPB to expand the threshold for the safe harbor from the definition of "remittance transfer provider" in order to ensure that a meaningful safe harbor is established.

Home Mortgage Disclosure Act Requirements

The CFPB finalized amendments to Regulation C in October 2015 that made several substantive changes to the reporting requirements under the Home Mortgage Disclosure Act (HMDA). The final rule, among other things, expanded the data financial institutions are required to collect and report under Regulation C. Some of the expanded data collection and reporting is driven by Dodd-Frank, which amended HMDA to require collection of certain new data points. However, the CFPB also appears to have taken this opportunity to collect significantly more data than Dodd-Frank expressly requires. In addition to expanded data collection, the final rule changed the scope of Regulation C's coverage to include most closed-end loans, open-end lines of credit and reverse mortgages secured by dwellings. Under this expansion, reporting is required on all HELOCs.

NAFCU believes that the Bureau should limit the changes to the HMDA dataset to those mandated by Dodd-Frank. Although credit unions support HMDA requirements that further the goal of ensuring fair lending and anti-discriminatory practices, NAFCU is concerned that some of the additional reporting requirements do not achieve these goals and only serve to impose significant additional compliance and reporting burdens.

Privacy

The Gramm-Leach-Bliley Act (GLBA) and its implementing regulation, Regulation P, require credit unions to provide members with annual privacy notices throughout the course of the member relationship. In late 2015, the *Fixing America's Surface Transportation Act* (FAST Act) became law, which included a section that amended the GLBA to require that consumers receive privacy notices after opening a new account and after their providers' privacy policies change. NAFCU supported this regulatory relief because it allowed credit unions to avoid unnecessary expenses and resources in the dissemination of redundant annual notices. Such a change was likely to reduce consumer confusion and provide a more efficient means of informing consumers about the privacy of their personal information.

In July 2016, the CFPB issued a proposed rule to implement the new statutory amendment. NAFCU and its members support the CFPB's efforts to implement the changes to the GLBA, but remain concerned about the CFPB's proposal to eliminate the alternative delivery method for providing annual notices, and the requirement for a 60-day notification period. NAFCU and our members believe that this time frame is too short and should be extended to at least 90 days. One of our members in the Midwest region has voiced a concern that this 60-day requirement would be too burdensome because it would almost guarantee that an additional mailing would have to be sent within that particular quarter.

Overdraft

For the past several years, the CFPB has consistently placed overdraft on its rulemaking agenda. However, the timeframe for the release of a proposal continues to be delayed due to the Bureau's tenuous statutory authority in this area coupled with consumers' continued support of overdraft programs. In the meantime, the CFPB has released two studies of overdraft markets and conducted several high profile information collections. Most notably, the CFPB issued an order in November 2014 to several financial services core processors that required they provide the Bureau with anonymized data related to overdraft services. In September 2015, the Bureau requested approval from the Office of Management and Budget (OMB) to conduct "a national web survey of 8,000 individuals as part of its study of ATM/debit card overdraft disclosure forms." All of these efforts indicate the Bureau is continuing to progress toward a rulemaking on overdraft.

NAFCU believes the CFPB's continued pursuit of data on overdraft programs constitutes extraordinary regulatory overreach. Credit unions are focused on providing value to their members by offering responsible overdraft protection. In fact, NAFCU's June 2015 *Economic & CU Monitor* survey found that every respondent offered an alternative to overdraft or courtesy pay programs, with overdraft lines of credit and linked savings or money market accounts being the most popular (84.4% each).

Payday Lending

In July 2016, the CFPB issued a proposed rule to impose sweeping and complex new requirements on payday, vehicle title, and similar loans. The proposal would serve as a comprehensive overhaul of the short-term, small-dollar lending space, potentially reaching a number of other products not traditionally associated with "payday lending." For covered loans, the proposal would require the lender to undertake enhanced ability-to-repay requirements and limit the number of allowable subsequent loans. In addition, the CFPB proposal would impose further limitations on a federal credit union's ability to offer Payday

Alternative Loans (PAL loans) under NCUA's rule, such as restricting the use of the statutory lien authorized by the FCU Act. Several provisions in the proposed rule would encroach upon NCUA's authority and could impair prudential regulations related to safety and soundness. NAFCU is advocating for an exemption for credit unions from the entirety of the rule.

For many small credit unions, the proposed rule would necessitate an end for most, if not all, covered loan products. For larger credit unions, the restrictions would impose substantial barriers to access to credit, which might drive members to predatory lenders in times of financial emergency.

NAFCU believes the Bureau should exercise its exemption authority granted by Congress to preserve the ability of credit unions to accommodate members with consumer friendly, short-term, small dollar loans. A complete exemption for credit unions is the only way to avoid the overwhelming burden imposed by the proposal's novel and complex compliance regime, and to allow credit unions to continue to serve the needs of their financially distressed members.

NAFCU is also appreciative of the fact that NCUA reached out to CFPB to recommend a blanket exemption for credit unions loans made under, and consistent with, NCUA's PAL loan regulation.

Arbitration

In the Dodd-Frank Act, Congress directed the CFPB to study pre-dispute arbitration agreements for consumer financial products and services. The Dodd-Frank Act also authorized the CFPB to, after the completion of its study, issue regulations restricting or prohibiting the use of arbitration agreements if the study revealed that such rules would be in the public interest and for the protection of consumers. On May 24, 2016, the CFPB's proposed arbitration rule was published in the *Federal Register*. The proposal restricts pre-dispute arbitration clauses from blocking consumer class actions, requires providers to alter their contracts to reflect this rule, and establishes certain monitoring requirements for arbitration claims and awards.

NAFCU submitted its comment letter on the proposed rule on August 22, 2016, arguing that the CFPB's final arbitration study reaches unsubstantiated conclusions to support its rulemaking and that the rule may have harmful effects on credit unions and their members. Of particular concern is the CFPB's proposal to publish the arbitration data it collects, considering such publication would present system-wide reputational risk and significant privacy issues as well as run afoul of the confidentiality aspect of the arbitration process.

Increased Use of Small Entity Exemption

Since the enactment of the Dodd-Frank Act, over 1,500 federally-insured credit unions have been forced to close their doors or merge with other credit unions. That amount represents over 20 percent of the industry, and this rate of loss has only increased since the creation of the CFPB. A large majority of those credit unions that have closed or merged were small 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 Bureau already provides for some exemptions based on an entity's asset size, such as the QM rule, NAFCU strongly believes that the Bureau needs to do more. For example, the Bureau's proposed rule on arbitration, and its related reporting requirements, provides no exemption for small entities, despite the fact that arbitration is often the least expensive way to settle disputes. Small credit unions do not have the deep pockets of a large bank, and cannot afford to pursue expensive and lengthy litigation.

Finally, NAFCU believes that the Bureau's payday rule should have contemplated a full exemption for small entities, such as those below $1 billion in assets, or for entities that originate an insignificant number of small-dollar loans. In most cases, credit unions extend these loans to members in emergency situations. These loans are intended to serve as emergency sources of credit, and often create a loss or break-even scenario for credit unions.

NAFCU remains opposed to the CFPB's authority over credit unions, given that credit unions were not responsible for the financial crisis and, despite that, credit unions are more highly regulated than any other financial depository institution.