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President & Chief Executive Officer

**National Association of Federally-Insured Credit Unions**

March 15, 2023

The Honorable Todd M. Harper, Chairman  
National Credit Union Administration  
1775 Duke Street  
Alexandria VA, 22314

**Re: Electronic Fund Transfer Act and Regulation E Compliance**

Dear Chairman Harper:

On behalf of the National Association of Federally-Insured Credit Unions, I am writing today in response to a recent letter addressed to the heads of federal banking agencies (the Letter), including the National Credit Union Administration (NCUA), where several misleading claims were made suggesting that depository institutions were evading their legal responsibilities under the Electronic Fund Transfer Act (EFTA).<sup>1</sup> NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 135 million consumers with personal and small business financial service products.

I would like to set the record straight: credit unions comply with the EFTA and Regulation E. A financial institution's decision to recognize legally distinct terminology to determine whether an electronic fund transfer is, in fact, authorized is not an evasion of responsibility. No reasonable interpretation of the EFTA can conclude that a financial institution must reimburse a consumer for a transaction the consumer authorized.<sup>2</sup>

The Letter follows a previous request made by some of these same members of Congress to Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra to disregard the plain meaning of the EFTA and interpret the statute to assign liability to financial institutions for fraudulently induced but consumer authorized transactions.<sup>3</sup> The CFPB, perhaps aware that such an interpretation is legally untenable, has not yet taken any action to revise Regulation E. The CFPB may also recognize that recklessly interpreting the EFTA to force credit unions to absorb an even greater share of fraud related losses would have broad systemic effects that could undermine confidence in consumer payment systems and the health of financial institutions. In this regard, it is noteworthy that the Letter identifies safety and soundness as a key concern while

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<sup>1</sup> See [https://www.reed.senate.gov/imo/media/doc/reed\\_letter\\_to\\_banking\\_agencies\\_on\\_zelle\\_3223.pdf](https://www.reed.senate.gov/imo/media/doc/reed_letter_to_banking_agencies_on_zelle_3223.pdf)

<sup>2</sup> See 12 U.S.C. § 1693a(12).

<sup>3</sup> See [https://www.reed.senate.gov/imo/media/doc/letter\\_to\\_cfpb\\_re\\_instant\\_payment\\_services\\_07-20-2022.pdf](https://www.reed.senate.gov/imo/media/doc/letter_to_cfpb_re_instant_payment_services_07-20-2022.pdf)

simultaneously advocating for unsafe and unsound interpretations of the EFTA that would embolden criminals and facilitate fraud.

Proposals to expand financial institution liability under Regulation E overlook the high costs credit unions are already incurring to absorb fraud and make modern payment options available to their members. In an October 2022 NAFCU survey, 79 percent of respondents said they would need to limit certain payment options and 63 percent said they would need to charge additional fees to cover additional fraud exposure created by a new liability standard described in the Letter.<sup>4</sup>

Credit unions are already spending more money to prevent fraud. In 2022, 89 percent of NAFCU surveyed members said that their credit union had increased investment in fraud mitigation tools and technologies in the past 1-2 years.<sup>5</sup> Yet the Letter does not draw attention to industry efforts to combat fraud and is silent on the need for additional prosecutorial resources to prevent and deter financial crime. Instead, the Letter meekly proposes that credit unions simply accept a greater share of fraud related losses—a sacrifice that the individual member owners of credit unions will ultimately bear. Shifting liability in this way would not only magnify the risk of friendly fraud, which is already on the rise, but could also pose significant risks to the health of the Share Insurance Fund.

NAFCU also understands that Zelle is currently in the process of adopting changes to its network rules as part of ongoing efforts to develop fraud countermeasures to protect users against the most recent fraudulent schemes.<sup>6</sup> Furthermore, as a service provider under the Bank Service Company Act and a non-controlling investment of national banks, Zelle is already subject to the examination authority of the Office of the Comptroller of the Currency and CFPB.<sup>7</sup> Accordingly, the urgency conveyed in the Letter around closing supervisory gaps is misplaced. Zelle has been and will remain a part of federal banking agency reviews of third-party payment systems.<sup>8</sup> Further, all financial institutions that participate on the Zelle Network are subject to prudential oversight by one or more of the NCUA, OCC, FDIC or FRB.

As the NCUA is likely aware, Zelle does not hold consumer accounts and does not transfer or settle funds.<sup>9</sup> Financial institution users of Zelle comply with Bank Secrecy Act (BSA) and anti-money laundering (AML) requirements and whether a credit union chooses to use the service

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<sup>4</sup> NAFCU, *Economic & CU Monitor* (October 2022).

<sup>5</sup> *See id.*

<sup>6</sup> *See* Banking Exchange, “Rule Change Presents Challenge for Zelle,” (November 30, 2022), *available at* <https://m.bankingexchange.com/news-feed/item/9495-rule-change-presents-challenge-for-zelle>.

<sup>7</sup> *See* 12 U.S.C. § 5515(d); 12 U.S.C. § 1867, and 12 C.F.R. § 5.36.

<sup>8</sup> *See e.g.*, OCC, *Payment Systems – Comptroller’s Handbook*, 36 (October 2021), *available at* <https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/payment-sys-funds-transfer-activities/pub-ch-payment-systems.pdf>.

<sup>9</sup> *See* <https://www.zellepay.com/legal/user-service-agreement> (“Zelle® provides no deposit account or other financial services. You may not establish a financial account with Zelle® of any kind. Zelle® does not transfer the money. All money will be transferred by a Network Financial Institution.”)

does not change regulatory expectations related to customer identification programs, filing suspicious activity reports (SARs), or other BSA/AML obligations. Moreover, the NCUA has already announced that it will be using a specialized management questionnaire to assess fraud red flags as part of its 2023 Supervisory Priorities. Given this focus, there is no need to amend the NCUA's current processes for evaluating credit union risk management to focus on a single payment service for which the share of fraudulent transactions is exceedingly small relative to total payment volume.<sup>10</sup>

NAFCU appreciates the NCUA's attention to this matter and asks that the agency continue to adhere to legally sound interpretations of the EFTA. To effectively combat fraud while providing members with convenient and affordable payment options, credit unions must have confidence that longstanding law will not suddenly change on a whim in response to political pressure. NAFCU appreciates the opportunity to share its perspectives on this issue. If you have any questions or would like additional information, please do not hesitate to contact me or Andrew Morris, Senior Counsel for Research and Policy, at 703-842-2266 or [amorris@nafcu.org](mailto:amorris@nafcu.org).

Sincerely,

A handwritten signature in black ink, appearing to read "B. Dan Berger". The signature is fluid and cursive, with a large initial "B" and "D".

B. Dan Berger  
President and CEO

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<sup>10</sup> See <https://www.zellepay.com/press-releases/zeller-reaches-five-year-milestone-more-five-billion-safe-secure-transactions> ("More than 99.9% of payments are sent without any report of fraud or scams.").