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National Association of Federally-Insured Credit Unions

August 17, 2022

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Regulation E Guidance

Dear Director Chopra:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to a recent report that the Consumer Financial Protection Bureau (CFPB) plans to issue new interpretative guidance related to Regulation E and the letter sent by Senators Reed, Menendez, Warren, Brown, Cortez Masto and Warnock requesting a reinterpretation of the Electronic Fund Transfer Act (EFTA).¹ NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 131 million consumers with personal and small business financial service products.

Credit unions invest significantly in both security and compliance management systems to prevent unauthorized electronic fund transfers (EFTs) and support faster, innovative payment options for their members. The credit union industry's commitment to relationship banking also gives members confidence that if they have a problem with a particular payment, they can count on their credit union to make every effort to resolve the issue. This emphasis on high touch service means that members will often seek and receive the help of their credit union even when a transaction primarily implicates the services of a third party with which the credit union has no formal, direct relationship.

Member interaction with such services, particularly nonbank payment platforms, can complicate error resolution procedures, place strains on a credit union's compliance resources, and magnify exposure to fraud. Yet these relationships are also important and necessary because credit unions are committed to supporting consumer payment choice. Credit unions provide their members with peer-to-peer (P2P) payment services as a value-added service for which their members incur no additional cost and to adapt to changing consumer financial habits. As the Bureau has observed, the "combination of technological change and the consumer behavioral changes driven by the COVID-19 pandemic has altered the financial services space, creating new products and services that can increase convenience and reduce friction for consumer."² Credit unions are eager to

¹ See Ackerman, Andrew, "Consumer Bureau to Push Banks to Refund More Victims of Scams on Zelle, Other Services," The Wall Street Journal (July 19, 2022).

² CFPB, "The Convergence of Payments and Commerce: Implications for Consumers," 8 (August 2022).

embrace seamless payment technologies, but to compete effectively against larger banks and nonbank financial giants with similar service offerings requires a fair regulatory environment.

The CFPB is aware that the costs borne by credit unions stemming from payments related fraud cannot be sustained without limit. Credit unions are significantly smaller than banks and are particularly sensitive to new regulatory expectations that alter financial institution liability under Regulation E. Accordingly, reports which suggest the CFPB may expand liability under Regulation E to further encompass fraudulently induced transfers initiated by a consumer are deeply concerning for NAFCU and its members. Such an interpretation would not only stretch the statutory language of the EFTA past its plain meaning, but also have severe negative consequences for consumers. As NAFCU has noted in prior letters submitted to the CFPB, the balance of P2P-related error resolution of responsibilities already places a disproportionate burden on credit unions in the context of pass-through transactions involving non-partner payment platforms, particularly in instances where a member prefers contacting their credit unions instead of the P2P provider.³

As innovative payment systems continue to emphasize speed, convenience, and frictionless user experiences, credit unions will likely face additional fraud-related challenges even under the CFPB's existing interpretations of Regulation E. Further expansion of credit union liability under new guidance would magnify this risk beyond reasonable limits and have far reaching consequences.

In the near term, credit unions and their member-owners would suffer greater exposure to fraud-related losses, which would hurt low-income and minority communities that rely primarily on credit unions. At the end of 2021, 53.2 percent of all federally-insured credit unions had within their membership a majority of low income members.⁴ By the end of 2021, 509 federally insured credit unions had self-certified as minority depository institutions, collectively serving 4.5 million members.⁵ A longer-term consequence could be impairment of the quality or affordability of payment services made available by credit unions, which would be more vulnerable than ever to criminals who exploit CFPB guidance to facilitate fraudulent schemes or perpetuate first party fraud. Over time, mounting fraud losses could curtail investments designed to help reach underserved communities, such as investments in brick-and-mortar branches. Credit unions have made strides improving underserved and rural branch access, growing branch presence by 2.4 percent between 2012 and 2021, but these gains could be reversed if budgetary resources are reallocated to cover new forms of fraud enabled by novel regulatory interpretations.

The EFTA was enacted in 1978 during a period when many modern payment mechanisms—such as ATMs, direct deposits via ACH, telephone bill payments, and point-of-sale debit transfers—were still new. Today's innovations of real-time payments and P2P transfers were never even considered.⁶ These innovations grant consumers greater control over their money and payments, but also correspond with unique and unanticipated risks. For example, the finality and

³ See NAFCU, Letter to CFPB re: Agency Information Collection Activities: Comment Request (Regulation E), Docket No. CFPB-2021-0021 (February 14, 2022).

⁴ NCUA, Annual Report, 22 (2021).

⁵ *Id.* at 23.

⁶ See Board of Governors of the Federal Reserve System, "Report to the Congress on the Application of the Electronic Fund Transfer Act to Electronic Stored-Value Products," 45 (March 1997).

irrevocability of settlement on certain faster payments platforms could increase the likelihood that stolen funds will not be recovered.⁷ While the EFTA shields consumers from the risk of having their money stolen through hacking, theft or account takeover, its original design was never intended to insulate consumers from every negative externality or entirely replace consumers' own care for their financial security with a promise of legally mandated recompense. To interpret the bounds of the EFTA to cover fraudulently induced transfers initiated by a consumer would not only disregard prudent limits established by Congress, but also the CFPB's own guidance related to issuing advisory opinions.⁸

Instead of issuing new interpretations of Regulation E or its commentary, NAFCU recommends the CFPB redirect its focus to investigating technologies and solutions that can help prevent fraud before it occurs. Likewise, a complementary study considering ways to educate and protect consumers from various forms of financial fraud, such as social engineering scams, would contribute to a safer payments ecosystem. The development of tools and resources to mitigate fraud would achieve a more meaningful impact than adopting new regulatory interpretations in response to every new fraudulent scheme that probes the boundaries of legal liability. Technical and educational resources would also ensure that efforts to support real time payments, such as FedNow, are not abandoned out of fear that financial institution liability under Regulation E liability might exceed manageable limits.

Credit unions are committed to providing safe, affordable, and fast payments to all their members, while also ensuring compliance with Regulation E. However, such a commitment depends on a fair and stable regulatory environment where the plain language of the EFTA does not expand beyond what was originally envisioned by Congress. NAFCU urges the CFPB to refrain from upsetting this balance and asks that the agency instead find ways to support continued payments innovation through tech sprints or studies aimed at addressing the root cause of fraud on P2P platforms.

Should you have any questions or require any additional information, please contact me or Andrew Morris, Senior Counsel for Research and Policy at amorris@nafcub.org or 703-842-2266.

Sincerely,



B. Dan Berger

⁷ See Board of Governors of the Federal Reserve System, Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire, 87 Fed. Reg. 34350, 34353 (June 6, 2022) (“The Board recognizes that the irrevocable, real-time nature of instant payments can pose a challenge to the industry as a whole in detecting and preventing fraud.”).

⁸ See CFPB, Advisory Opinions Policy, 85 Fed. Reg. 77987, 77989 (December 2020) (“[t]he Bureau does not intend to issue an advisory opinion that would change regulation text or commentary.... [s]imilarly, if a regulation or statute establishes a general standard that can only be applied through highly fact-intensive analysis, the Bureau does not intend to replace that analysis with a bright-line standard that eliminates all of the required analysis.”).