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National Association of Federally-Insured Credit Unions

August 20, 2020

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

RE: Proposed Rule on Advisory Opinions

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the CFPB's proposed procedural rule on its new Advisory Opinion (AO) Program. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 121 million consumers with personal and small business financial service products. NAFCU appreciates the Bureau's efforts to improve upon its existing efforts to provide meaningful guidance in cases of regulatory uncertainty by creating this program.

Bureau guidance and implementation support has the potential to ease the burden of the very complex regulations the Bureau oversees and facilitate resolution of regulatory questions, which is in the best interest of credit unions and their members. Regulatory clarity and certainty are essential for credit unions, which have a long history of providing responsible, compliant financial services to their members. In support of this goal, NAFCU has long advocated for the Bureau to use appropriate formal guidance and rulemakings, which provide clarity that is consistent, equally accessible, and reliable. The CFPB's proposed AO Program will provide credit unions with critical, timely guidance, enabling them to serve their members with confidence.

General Comments

NAFCU generally supports the proposed rule and the establishment of the AO Program. Authoritative guidance in the form of an AO will not only provide clarity and certainty in designing compliant processes, procedures and products, it will also provide credit unions with a helpful tool in handling disagreements with vendors or third-parties who may be operating with a different interpretation of a rule. Guidance should only clarify the application of existing rules and requirements, not to establish new regulatory burdens for credit unions. Guidance that is written, public-facing, and easily searchable reduces the compliance burden on credit unions and ensures that members will consistently receive compliant products and services from their credit union.

Credit unions appreciate the ability to submit requests through third parties like NAFCU without being identified. This allows credit unions and other financial institutions to request clarification without the chilling effect of potentially exposing the credit union to criticism. The Bureau will

get the most complete information if it allows requestors to remain unidentified, whether by submitting a request through a third party or by redacting the identity of a requestor when publishing an AO. This allows credit unions concerned about potential reputation risk to feel more comfortable asking for an AO directly from the Bureau. It also prohibits future users of AOs from reading additional facts into the AO based on knowledge of the requestor or their operations.

Similarly, providing clear rules regarding the protection of sensitive information will encourage requestors to provide the full facts, which is necessary to generate accurate interpretations. When a credit union provides sensitive personal information in order to explain the facts of a situation, the Bureau should minimize access to that information, ensure the information is maintained in a secure and confidential manner while it is stored, redact or replace the information in the body of the AO if it must be mentioned, and fully and irreversibly redact this information from the Bureau's records once the AO is published.

The Bureau does not address whether and how it will respond to requests for AOs that it declines. NAFCU asks that the Bureau provide a response that addresses the factors that contributed to the denial. It is important for the requester to know if the Bureau believes that a request for clarity has already been responded to in other available guidance or a rulemaking is ongoing on the topic. Further, a detailed explanation may prevent the same request being made multiple times.

Addressing the Risk of Unintended Consequences to Credit Unions

NAFCU urges the Bureau to exercise great care in drafting AOs and to first consult the Credit Union Advisory Council (CUAC) to ensure there are no negative, unintended consequences to credit unions because of their unique nature. As proposed, the Bureau's AO program requires a requester to describe all material facts and circumstances. However, the requester's facts and circumstances may not be universal, and their interpretation could have unanticipated consequences for other products, arrangements, or financial institutions. If an AO is not sufficiently narrowly-drawn or fails to account for these unintended consequences, subsequent interpretative fixes can be difficult and take a considerable length of time. For example, the Department of Defense (DOD) has issued multiple interpretive rules addressing unintended consequences related to a 2016 interpretive rule regarding the *Military Lending Act*.¹ The DOD released an additional interpretive rule to address these difficulties as recently as March of this year.² The Bureau's proposed procedural rule does not address how it will subsequently address potential unintended consequences.

Credit unions are unique in their governance, structure, relationship with their members, and their legal and regulatory limitations as determined by their insurer and chartering authority. It is critically important that these differences be carefully considered by the Bureau on every AO it issues to ensure that there are no negative, unintended consequences for the credit union industry. Thus, NAFCU suggests the CFPB consult the CUAC regarding any potential effects of an AO on the credit union industry before publication. The CUAC's expertise on the credit union industry is

¹ See, 81 Federal Register 58840 (August 26, 2016) and 82 Fed. Reg. 58739 (December 14, 2017).

² See, 85 Fed. Reg. 11842 (February 28, 2020).

an invaluable resource for the Bureau in ensuring that AOs do not fail to account for credit unions differences.

Availability and Format

The Bureau requests feedback on how to make AO guidance that is not incorporated into the Code of Federal Regulations available to the public in a useful format. Following its initial release, credit union compliance officers and legal counsel conducting research are the most likely users of AOs. As such, these should be available in a manner that makes research easy and fast.

It is critical that these be easily searchable online. For example, the text of the AO should not be presented in a pdf or image format. AOs should be searchable both through the Bureau's website and via external search engines such as Google. A filterable, search function for the Bureau's compliance and guidance resources that does not rely on tagging would also be helpful. Wherever possible, links to AOs should be permanent.

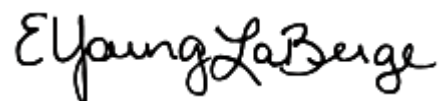
The Bureau should avoid including additional information in the *Federal Register* notice of the AO that does not appear in the published body of the AO as shown on its website. Discussion that may seem tangential to the question, such as why a topic is appropriate for an AO, may itself be useful. If this type of discussion only appears in the preamble to an AO in the *Federal Register*, those viewing the AO on the website will not be able to access its full value.

A link to any relevant AO (and potentially other compliance resources) could be housed in a drop-down under the title of each section in the Bureau's Interactive Bureau Regulations. It would be most helpful if the current version of any laws, regulations, and guidance cited in the AO at the time of its release are linked within the AO itself. In the event that AOs are rescinded or withdrawn, it would be helpful to keep the AO available for historical purposes, but clearly marked as rescinded or withdrawn and linked to any notice and explanation of the rescission or withdrawal.

Conclusion

NAFCU appreciates the ability to provide feedback on the Bureau's proposed AO Program. NAFCU encourages the Bureau to ensure credit unions' unique nature is consistently and thoroughly considered in drafting of AOs by consulting the CUAC. Further, the Bureau should consider how to make AOs easily discoverable and searchable in the context of conducting legal and regulatory research. If you have any question or concerns, please do not hesitate to contact me at (703) 842-2272 or elaberge@nafcuh.org.

Sincerely,



Elizabeth M. Young LaBerge
Senior Regulatory Counsel