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National Association of Federally-Insured Credit Unions

May 29, 2020

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

**RE: Assistance to the Taskforce on Federal Consumer Financial Law
(Docket No. CFPB-2020-0013)**

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Bureau of Consumer Financial Protection's (Bureau or CFPB) request for information to assist the Taskforce on Federal Consumer Financial Law (Taskforce). NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 120 million consumers with personal and small business financial service products. NAFCU appreciates the Taskforce seeking comments to improve consumer products, resolve inconsistencies in existing regulations and guidance, and reduce unwarranted regulatory burdens. NAFCU asks the Taskforce to provide the recommendations included in this comment letter to alleviate regulatory burdens, improve access for consumers, and mitigate ambiguities.

More specifically, NAFCU recommends supporting a comprehensive federal data privacy and data protection law that protects consumers, as well as ensuring a level playing field between fintechs and traditional financial institutions, and amending regulations to alleviate inconsistencies and ambiguities. Above all else, NAFCU recommends that the Bureau pause all rulemakings, unless specifically related to COVID-19 relief, until the nation recovers from this pandemic and the economy begins to stabilize. Credit unions need to focus on helping their members during these uncertain times and not new regulatory requirements.

General Comments

Despite NAFCU's recommendation to pause rulemaking efforts in the short-term, we appreciate the Taskforce's review of consumer financial laws. In looking at the future of consumer financial laws, it is vital to highlight the historical impacts of consumer financial laws on the credit union industry. Since the enactment of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank) and the creation of the Bureau, over 2,000 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, which equates to one credit union per day closing its doors. A vast majority

of those credit unions could not afford the cost of complying with the tidal wave of rules promulgated by the Bureau and other federal regulators.

Today, regulatory compliance continues to be a significant challenge that credit unions face. According to NAFCU's 2019 *Federal Reserve Meeting Survey*, 57 percent of respondents rated regulatory compliance requirements a challenge anticipated over the next three years and represented a 13 percent increase from 2018. Moreover, over 82 percent of respondents reported that a healthy, appropriate regulatory environment is critical to their credit union's continued growth and success. Regulatory compliance costs have exponentially risen in the wake of Dodd-Frank. Respondents reported a 215 percent increase in expenses attributable to compliance activities since 2010.

Expanding Access

Fintechs

Fintech companies provide an opportunity to promote access and financial inclusion, and traditional financial institutions can leverage fintech technologies to assist in the expansion of products and services. NAFCU continues to advocate for a level playing field between traditional financial institutions and fintech companies. Currently, there is disparate regulatory treatment depending on the type of fintech firm. Non-bank fintechs do not undergo the same kind of regular examination that credit unions and other traditional financial institutions face. Fintechs represent a significant competitive pressure for credit unions.

According to NAFCU's 2019 *Federal Reserve Meeting Survey*, respondents reported that fintechs posed the most significant competitive pressure on credit unions, and the concern continues to grow each year as fintechs become more prevalent. Regulators should adopt a more coordinated approach for addressing the risks and opportunities that accompany fintech disruption. NAFCU has developed a report "Regulatory Approaches to Financial Technology¹," setting forth several recommendations, including the formation of a Federal Financial Institutions Examination Council (FFIEC) subcommittee on emerging technology to develop a joint approach for facilitating innovation. This FFIEC subcommittee should be responsible for developing the parameters of responsible innovation to ensure consistent examination of emerging technologies, and ways to mitigate supervisory gaps. Also, the FFIEC subcommittee should be responsible for making formal recommendations to Congress on laws to improve consumer financial laws that allow FFIEC-regulated institutions to adopt fintech technologies with ease and greater legal certainty.

The Taskforce should make recommendations that preserve consumer protections while also ensuring a level playing field between fintechs and traditional financial institutions. As technology changes rapidly, any formal rulemaking will likely lag. Thus, it is imperative that the FFIEC work together to allow financial institutions of all types to leverage technologies to better serve

¹ See *Regulatory Approaches to Financial Technology*, (July 2019), <https://www.nafcu.org/system/files/files/NAFCU-Fintech-White-Paper-Sept2019.pdf>.

consumers, to ensure that no one type of financial institution is disadvantaged, and to provide an equal playing field between traditional financial institutions and fintechs.

Short-Term, Small Dollar Loans

Consumers need access to responsible short-term, small dollar loans, and there continues to be a demand for these lending products. Credit unions offer responsible, consumer-friendly, short-term, small dollar loans. The National Credit Union Administration (NCUA) provides credit unions with a framework for a payday alternative loan (PAL) that caps the interest rate and provides other consumer protections including capped fees and a limitation on the number of outstanding loans. The NCUA finalized a second iteration of the PAL loan, offering a modest amount of flexibility for credit unions, and the agency continues to gauge the market to determine whether it warrants a third iteration.

The Bureau continues to recognize credit unions' responsible lending practices. It would be in the best interests of all consumers to expand the Bureau's payday lending rule safe harbor to encompass all future iterations of PALs. Specifically, the Bureau limited this safe harbor to those loans as defined in 12 CFR 701.21 (c)(7)(iii) – the PAL I iteration. It is possible that the Bureau did not contemplate that the NCUA would provide for future iterations of PALs. NAFCU asks the Taskforce to recommend the expansion of the safe harbor for all PAL loans, so consumers have access to more responsible short-term, small-dollar loan options.

Alternative Data

Expanding access to credit is of great importance to NAFCU members. The use of alternative data in credit underwriting can reach those credit invisible or "thin file" individuals. NAFCU has long advocated for the use of alternative data to capture creditworthy borrowers accurately and did not believe that rulemaking was the best means to encourage use. The 2019 joint agency statement on alternative data encouraged responsible use and was the correct means of guiding credit unions. The joint statement recognized the benefits of alternative data in improving the speed and accuracy of credit decisions, as well as helping evaluate the creditworthiness of consumers who may not be credit worthy according to traditional models.

Credit unions are restricted to particular fields of membership; thus, they are in a unique position to assess the use of alternative data for members. According to NAFCU's July 2019 *Economic & CU Monitor Survey*, credit unions that currently use alternative data to determine credit underwriting are utilizing cash flow information, the stability of address, and rental, utility, and telecom payment history. The Bureau's innovation policies are a method of encouraging the responsible use of alternative data. NAFCU encourages the Taskforce to monitor the use of alternative data by financial institutions to expand credit access and continue to enhance and refine the joint statement as necessary. The Taskforce should coordinate with the federal banking regulators on the joint statement, including the National Credit Union Administration (NCUA), so that examples of alternative data and best practices are the most up to date available.

Consumer Data

Sufficiency of the FCRA and Gramm-Leach-Bliley Act

The *Gramm-Leach Bliley Act* (GLBA) contains both the Financial Privacy Rule implemented by Regulation P and the Safeguards Rule implemented by financial institutions' prudential regulators or the FTC.² These rules and their implementing regulations as established by prudential regulators such as the NCUA already contain the protections for consumers sought by state privacy law proposals and advocacy groups. These include the development of privacy policies, disclosure of how consumer information will be shared and used, the ability to opt out of sharing that is not permitted by discrete exceptions, the disclosure of consumers' rights, and requirements to maintain both the integrity and the confidentiality of members' information. Similarly, the *Fair Credit Reporting Act* (FCRA) as implemented by the Bureau's Regulation V requires that credit unions maintain the accuracy and integrity of consumer's information.³

These provisions are designed to ensure that consumers have the option to control the disclosure of their personal information where that disclosure it is not necessary to provide the products or services sought by the consumer, disclosure is not required by law, or disclosure is not contractually subject to the same level of protection required of the credit union by the credit union's third party service providers. It also requires that the integrity and accuracy of information be maintained.

The GLBA and FCRA as implemented by prudential regulators are mature, developed privacy frameworks that offer consumers significant information about the use of their personal financial information and protections against its corruption, disclosure or unauthorized access. These requirements also offer flexibility based on an individual credit union's practices, sophistication, and documented risk-assessments. This flexibility is critical to ensuring that small credit unions are not overburdened with privacy management and cybersecurity obligations that are out of step with the actual risk posed by their operations. Large banks with sophisticated online offerings that share information through complex third-party relationships may need to maintain privacy personnel and back-end processes for producing meta-data related to information use and inventory activities. However, small credit unions that only collect information necessary to its offer its products and services and offer limited online access should not be expected to maintain a similar operational framework; it is unnecessary and cost-prohibitive.

The call for new privacy protections from consumers is not the result in the insufficiency of the GLBA, it is the outcome of the law's limited application to "financial institutions"⁴ and the even more limited number of financial institutions which are examined for compliance with the GLBA's requirements. Consumer's personal information is constantly flowing through the entire online environment. Without subjecting that entire environment to the same protections and disclosures,

² See, 15 U.S.C. § 6805.

³ See, 12 C.F.R. Part 1022, Appendix E.

⁴ See, 15 U.S.C. 6809(3)(A) and 12 U.S.C. 1843(k).

consumers will ultimately not be protected. Instituting further privacy protections under the GLBA or the FCRA without subjecting merchants, fintech companies and other non-financial institution organizations to the same requirements only serves to burden small and mid-sized credit unions without actually improving the outcome for consumers. Ultimately, the only solution to this problem is a single, comprehensive, federal principles-based standard that encompasses existing federal privacy standards, such as the GLBA, and allows for the examination of organizations which are currently not held accountable for their practices.

NAFCU advocates for a comprehensive federal data privacy standard that protects consumers, harmonizes existing federal data privacy laws, and preempts state privacy laws. The *California Consumer Privacy Act* (CCPA) and other proposed state privacy laws add new, parallel sets of obligations and standards for compliance, creating mounting and unnecessary compliance obligations for credit unions and confusion for consumers. The CCPA provides an exemption for GLBA-regulated information, but not GLBA-regulated entities. This leaves credit unions to establish two privacy frameworks: one for GLBA information and one for CCPA-covered information. When additional states pass laws further parallel frameworks will be necessary for each state where consumers may reside.

NAFCU opposes the application of conflicting state privacy requirements on credit unions as they are already subject to the privacy requirements of the GLBA and serve as responsible stewards of sensitive consumer data. NAFCU urges the Bureau to take the lead in mitigating the regulatory fragmentation created by states passing multiple, parallel regulatory frameworks. Shifting state privacy requirements will undoubtedly result in an undue burden for credit unions who already comply with the GLBA. Further, varying state laws will also have a chilling effect on credit union products and services. The Taskforce should support and recommend a comprehensive federal data privacy and data protection law that protects consumers, holds all entities accountable, and recognizes existing federal privacy laws that financial institutions follow.

Data Breach Requirements

NAFCU supports a comprehensive federal data protection standard, as a uniform federal standard will provide consumer protections while also providing clarity and consistency for credit unions. There has been an unprecedented amount of data security breaches exposing personal identifying information of consumers everywhere. According to NAFCU's 2019 *Federal Reserve Meeting Survey*, over 72 percent of respondents reported that maintaining a secure electronic environment was the most significant challenge anticipated over the next three years. Moreover, over 84 percent of respondents reported that a financial marketplace with appropriate safeguards against fraud and data breaches is the most critical issue to their credit union's continued growth and success.

A comprehensive federal data protection standard should include data breach requirements such as the payment of breach costs by breach entities, notifications of a breach to both consumers and financial institutions servicing accounts which have been breached, and for any negligent organization which is breached, a burden of proof that requires the establishment of a lack of fault

regarding harm associated with the breach.⁵ There is an urgent need for consistent data security standards for entities that collect and store consumers' personal and financial information which are not already subject to stringent requirements under the GLBA as implemented by prudential regulators such as the NCUA. However, the Bureau should not implement parallel or duplicative regulations for organizations such as credit unions which are already subject to requirements and regularly examined for compliance.

Credit unions are already subject to significant data breach requirements through NCUA's implementation of the GLBA's Safeguards Rule.⁶ Credit unions are examined for compliance with these requirements by NCUA in conjunction with the expectations for an incident response program established by the Federal Financial Institution Examination Council (FFIEC) IT Examination Handbook.⁷ NCUA's existing guidance on data breach response applies to all federally-insured credit unions. It contains substantial, principals-based guidance on response programs for unauthorized access to member information. It requires that a credit union's response program should, among other things, assess the nature and scope of an incident and provide as soon as possible notice to the member if misuse of the information has occurred or "is reasonably possible."

These regulatory standards are robust and well-enforced. Further, credit unions are also frequently subject to data breach notification standards at the state level in addition to NCUA's requirements and expectations. Unfortunately, other entities are not subject to the same standards. While the FTC's recent proposed updates to its Safeguards Rule regulations⁸ do strengthen protections for consumers by explicitly requiring an incident response plan, it does not include a breach notification requirement. In discussing the decision not to include notification requirement, the FTC cited its limited power to examine and enforce these requirements for organizations under its jurisdiction.⁹ For most organizations there is no comprehensive regulatory structure akin to NCUA's Part 748.

A comprehensive federal data protection standard is necessary to ensure that consumers' personal information is equally protected across the entire environment. Comprehensive protection across all entities is necessary to provide any meaningful protection to consumers. However, a standard should also avoid exposing depository institutions which are already subject to stringent requirements and cybersecurity examination to conflicting standards or duplicative and burdensome requirements and examination. Any data breach proposal by the CFPB should contain an exemption for GLBA-covered entities subject to regulations containing a data breach requirement. For credit unions already examined for cybersecurity by NCUA, the implementation of parallel requirements would only serve to create confusion and undue burden for credit unions.

⁵ See, NAFCU Letter to Committee on Banking, Housing & Urban (May 6, 2019)

<https://www.nafcu.org/system/files/files/5-6-19%20Letter%20to%20Senate%20Banking%20on%20Data%20Privacy%20Hearing.pdf> (Last accessed May 15, 2020).

⁶ 12 C.F.R. Part 748, Appendix B.

⁷ See, FFIEC IT Examination Handbook Infobase, Information Security Booklet, Section III.D. *Incident Response*.

⁸ See, 16 C.F.R. Part 314.

⁹ See, 84 Federal Register 13158, 13170, footnote 123 (April 4, 2019).

Ultimately, federal legislation establishing national data security standards for entities that collect and store consumers' personal and financial information is a necessary and critical step to ensure consistent protection for consumers across the entire environment.

Regulations

NAFCU appreciates the Taskforce reviewing the Bureau's regulations to determine whether there are gaps in consumer financial protections, whether there is inconsistency or ambiguity in the regulations, and areas where regulations overlap.

Fair Debt Collection Practices Act (FDCPA)

Credit unions are not debt collectors under the FDCPA and thus are excluded from any debt collection rulemaking. However, the Bureau's proposed rulemaking regarding the FDCPA is crafted utilizing authority both under the FDCPA and the unfair, deceptive, or abusive acts or practices (UDAAP) provision of the Dodd-Frank Act. By utilizing its UDAAP authority, the Bureau includes first-party debt collectors or creditors in a rulemaking that is tailored to address third-party debt collection practices. This creates confusion and ambiguity for credit unions as well as other creditors. NAFCU recommends the Bureau keep first and third-party rulemakings separate instead of overlapping obligations utilizing UDAAP authority. Additionally, the Bureau has indicated the possibility of a future first-party rule. NAFCU reiterates its long-standing position that credit unions should be exempted from any first-party rulemaking.

Credit unions are not the nefarious, bad actors that the Bureau intends to target with this rulemaking. Credit unions work with their members to bring delinquent accounts current, implement payment plans, loss mitigation strategies, and waive late fees. NAFCU understands that the Bureau is attempting to curb abusive and harassing debt collectors, but credit unions do not engage in these types of activities. NAFCU requests that the Taskforce recommend the Bureau utilize its exemption authority under section 1022 of Dodd-Frank to exempt credit unions from any first-party rulemaking.

Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) Integrated Disclosure (TRID) Guidance

One of the specific goals of TRID was to identify and reconcile inconsistencies between TILA and RESPA requirements and to reduce regulatory burdens. Although the rule has been in effect for some time, regulatory burdens persist. NAFCU members appreciate the additional TRID FAQs provided by the Bureau since implementation; however, additional guidance is necessary to reduce confusion. The examples provided by are vague and not applicable to the issue at hand. The Bureau should consider offering examples of real-life situations that provide needed clarity. NAFCU members are left seeking out additional compliance assistance which means they are incurring additional costs. NAFCU members report seeking outside legal or consultant services to assist with navigating compliance complexities and legal risks associated with TRID. TRID is a large,

complex rule, and technical guidance that provides examples would greatly assist credit unions. NAFCU previously commented on the Bureau's RFI regarding an assessment of TRID on January 20, 2020, and asks the Taskforce to recommend that the Bureau provide additional guidance through FAQs or sample forms with specific fact patterns, in the areas outlined below:

- Cure provisions and error corrections;
- Negative Owner's Title Premium;
- Calculating Cash to Close;
- Second Lien Loans;
- Pre-Approvals/Pre-Qualifications;
- Payoff on a Purchase Money Loan; and
- Waiver of Waiting Period Before Consummation.

Ability-to-Repay/Qualified Mortgage (ATR/QM)

NAFCU appreciates the Bureau's consideration to revise the definition of a general QM under the *Truth in Lending Act* (TILA) in light of the expiration of the Temporary Government-Sponsored Enterprises (GSE) QM loan (Temporary GSE loan or GSE Patch). According to the Bureau's ATR/QM rule, lenders must make a reasonable and good faith determination, based on verified and documented information, that a borrower can repay a mortgage before extending the loan. The ATR/QM rule created the QM category of mortgage loans, which are presumed to comply with ATR requirements and provide lenders with certain legal protections. The ATR/QM rule is an example of the "one-size-fits-all" approach to rulemaking that has caused unintended consequences in the mortgage industry.

Many of NAFCU's members have decided to extend mortgages only meeting the definition of a general QM, as they are concerned about the ability to sell to the secondary market, and legal and regulatory risks associated with non-QM loans. In addition, there is an increased financial risk associated with non-QM loans. Due to the decreased marketability of non-QM loans, credit unions must hold these loans on their balance sheets, creating interest rate risk (IRR). IRR is a concern for credit unions, and in order to mitigate this risk, they may refrain from originating non-QM loans.

An ATR analysis is an important tool for borrowers, lenders, and the mortgage industry as a whole. The current debt-to-income (DTI) threshold of 43 percent is an arbitrary indicator of a borrower's ATR, and revisions to the definition are necessary to allow credit unions to serve their members better. An ATR assessment should retain a direct measure of a consumer's personal finances as a sound underwriting practice. NAFCU asks the Taskforce to recommend a general QM category with an increased DTI threshold and the allowance of compensating factors to allow flexibility in serving low- and moderate-income members while preserving consumer protections. Further, NAFCU reiterates its position that using an Average Prime Offer Rate (APOR) approach is not a reasonable indicator of a borrower's ATR and utilizing such an approach could disenfranchise otherwise creditworthy borrowers.

Small Business Data Collection (section 1071)

Section 1071 of Dodd-Frank requires the Bureau to implement regulations for the collection of “small business loan data.” NAFCU members support the intent of section 1071 to enable communities, businesses, and other entities to better identify the needs of women-owned, minority-owned, and small businesses. Credit unions serve the needs of small businesses that may not otherwise be able to obtain a loan from another financial institution. However, the collection of small business lending data from credit unions will present challenges due to the constraints of credit union field of membership and statutory caps on member business lending. A defined field of membership means that small business lending could be limited by geographic restrictions, employer groups, or other charter-specific language defining whom a credit union can serve. Therefore, data collected will not easily translate when compared to other lenders.

Additionally, the costs of section 1071 implementation far outweigh the benefits for credit unions. Credit unions often have limited business lending staff and operations remain largely manual. NAFCU asks that the Taskforce recommend that the Bureau utilize their exemption authority under section 1022 of Dodd-Frank to exempt credit unions from any future rulemaking.

Improving Consumer Protections

Credit Card Responsibility and Disclosure Act (CARD Act)

One area of ineffective disclosures is the CARD Act. The CARD Act’s onerous credit card disclosure requirements do little to educate consumers on important aspects of the financial product they are using. The disclosures include complex information that is not displayed in the most consumer-friendly manner, reducing their effectiveness. Most consumers do not read credit card agreements. Consumers miss important information regarding their credit card products when they do not read or only selectively read the agreements and disclosures. The Bureau should encourage effective credit card disclosures that are in a simple and easy-to-read format. Improvements to the disclosures, such as a more user-friendly format, would encourage greater readership of credit card agreements and disclosures.

To be effective, credit card disclosures need to be adaptable to the way members access and view credit card information. This includes disclosures suitable for our digital environment. As mobile and online banking become more mainstream, it is important that credit unions can offer credit products through these channels without running afoul of the current rules. NAFCU recommends that the Taskforce provide recommendations that these disclosures are given flexibility for mobile banking platforms specifically for form and font size.

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

NAFCU asks the Bureau to modernize the electronic disclosure and signature related provisions of its regulations. At a time when social distancing has become paramount to the health and safety of credit union members, employees, and their families, credit unions are discovering that the E-

SIGN Act's outdated consumer consent requirements have become a burden. An outdated requirement is that consumers must "reasonably demonstrate" access to electronic information before consenting to the receipt of electronic disclosures. This delays the processing of important banking functions such as loan modifications, deferrals, and fees waivers and frustrates the member experience. Furthermore, the term "reasonably demonstrate" is not clearly defined and NAFCU members report receiving conflicting answers when seeking out legal interpretations. In addition, the E-SIGN Act lacks clarity regarding when a credit union must update a statement of the hardware and software requirements to access and retain electronic disclosures. To illustrate, if a credit union changes the hardware or software requirements after a member's initial consent is provided, the credit union will need to obtain a new electronic consent from the member if a material risk to accessing and retaining the electronic disclosure will occur.

Moreover, the E-SIGN Act and the Bureau's references to electronic delivery of disclosures do not clearly state whether a member's initial E-SIGN consent is sufficient for all subsequent transactions. NAFCU asks the Taskforce to recommend amending the E-SIGN regulations to allow credit unions to deliver electronic disclosures without having to obtain the consumer's prior consent, so long as the consumer is initiating the transaction which requires using the service. Also, NAFCU asks for clarification that a credit union that obtains presumptive consent once may rely on it in the future for all subsequent related transactions.

Overdrafts

NAFCU cautions the Bureau against any future actions that may interfere with credit unions' ability to administer responsible overdraft programs. NAFCU members appreciate the Bureau's intention of protecting consumers; however, the Bureau may unintentionally limit access to these programs that many members utilize. Consumers would be better served if the Bureau provided the financial services industry with guidance and additional flexibility so credit unions can create a diverse range of options that fit the various needs of members. NAFCU urges the Bureau to collaborate with the NCUA to support a regulatory environment that encourages credit unions to tailor programs in ways that accommodate the unique circumstances of different overdraft users. In addition, the Bureau should permit financial institutions to supplement Model Form A-9 with additional explanatory information to help consumers understand how overdraft services operate in different contexts.

Conclusion

NAFCU appreciates the opportunity to share its members' views on this matter. NAFCU appreciates the Taskforce seeking comments to improve consumer products, resolve inconsistencies in existing regulations and guidance, and reduce unwarranted regulatory burdens. NAFCU asks the Taskforce to take into consideration the recommendations made above to the Bureau's regulations to provide clarity, reduce regulatory burdens on credit unions, and minimize regulatory overlaps. In addition, NAFCU asks the Taskforce to consider changes to various disclosures as stated above to improve consumer protections. Should you have any questions or

Bureau of Consumer Financial Protection

May 29, 2020

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require additional information, please do not hesitate to contact me at (703) 842-2249 or kschafer@nafcu.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Kaley Schafer".

Kaley Schafer
Regulatory Affairs Counsel