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National Association of Federally-Insured Credit Unions

May 14, 2018

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

RE: Request for Information Regarding Bureau Enforcement Processes (Docket No. CFPB-2018-0003)

Dear Ms. Jackson:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing in regard to the Bureau of Consumer Financial Protection's (Bureau) Request for Information (RFI) on its enforcement processes. NAFCU commends the Bureau for conducting this review to assess the efficiency and effectiveness of its enforcement processes and is happy to suggest areas for improvement. Above all else, NAFCU maintains that federally-insured credit unions should not be subject to the Bureau's enforcement authority. Additionally, consistent with Acting Director Mulvaney's opposition to "regulation through enforcement," NAFCU and its member credit unions urge the Bureau to completely change its approach to enforcement to focus on pursuing bad actors in the marketplace and providing the industry with guidance, particularly with respect to its unfair, deceptive, and abusive acts and practices (UDAAP) authority. NAFCU also requests that the Bureau (1) make its Notice and Opportunity to Respond and Advise (NORA) process mandatory; (2) permit parties the opportunity to have an in-person meeting with Bureau staff prior to the initiation of a legal proceeding; and (3) rethink its process for press releases related to enforcement actions.

General Comments

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) authorizes the Bureau to investigate whether any person or entity is or has been engaged in any conduct that is a violation of federal consumer financial law. The Bureau may investigate credit unions with over $10 billion in assets for such violations. Through this investigation, the Bureau may require witnesses to give oral testimony. The Dodd-Frank Act also authorizes the Bureau to commence legal proceedings for alleged violations, through either administrative or adjudicative proceedings in civil actions in federal district court. In these actions and proceedings, the Bureau may seek appropriate legal and equitable relief, including civil money penalties.

The Dodd-Frank Act provides broad definitions of prohibited behavior under its UDAAP provision, which the Bureau has repeatedly used as the basis for its enforcement actions. Under the Dodd-Frank Act, an act or practice is unfair when "(1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or competition." The Bureau has said that a "substantial injury" may be a monetary harm or even an emotional harm, depending on the facts and circumstances of the particular case. The Bureau does not provide further detail or any examples specific to this definition. *See* Bureau Bulletin 2013-07, "Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts," (July 10, 2013). The Bureau has also defined an act or practice as deceptive when "(1) the act or practice misleads or is likely to mislead the consumer; (2) the consumer's interpretation is reasonable under the circumstances; and (3) the misleading act or practice is material." This standard is largely based on the Federal Trade Commission's standard for "deceptive" acts or practices. Finally, under the Dodd-Frank Act, conduct constitutes an abusive act or practice when it "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of – (A) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service; (B) a consumer's inability to protect his or her interests in selecting or using a consumer financial product or service; or (C) a consumer's reasonable reliance on a covered person to act in his or her interests."

The Bureau issued this RFI to find ways to reduce the burden and improve the efficiency of its enforcement processes to meet its statutory objective of enforcing federal consumer financial law while ensuring a fair and transparent process for parties subject to its authority. This RFI is the third in a series of twelve formal actions taken by Acting Director Mulvaney to review and consider potential revision of existing Bureau rules and processes. NAFCU has always maintained that federally-insured credit unions should not be subject to the Bureau's examination and enforcement authority. As the National Credit Union Administration's (NCUA) Chairman Mark McWatters noted in a letter to former Bureau Director Richard Cordray, dated July 6, 2017, federally-insured credit unions should be exempt from the Bureau 's enforcement authority because "the direct impact of aggressive punitive fines...on the consumer/member owners of not-for-profit [federally-insured credit unions] is particularly inequitable when compared to the impact such fines have on investor-owned, for-profit financial institutions." Accordingly, NAFCU supports the Bureau's review of its processes and encourages the Bureau to exempt federally-insured credit unions from its enforcement authority under Section 1025 of the Consumer Financial Protection Act of 2010 (CFPA). NAFCU also encourages the Bureau to conduct a comprehensive evaluation of its entire approach to enforcement so that the industry is no longer left figuring out the rules of the road after being subject to an enforcement action.

This evaluation should start with providing clearly articulated rules for the types of acts and practices that constitute a UDAAP. The Bureau should also provide clear rules for the industry after an enforcement action is resolved, so that the specific acts or practices at issue are memorialized for the rest of the industry to use in their compliance efforts. NAFCU and its member credit unions certainly agree that enforcement is an important governmental process; however, enforcement is only necessary when there has been harm to consumers. Once this

condition is met and the Bureau has resolved its enforcement action, the resultant consent order or guidance should not constitute official regulation regarding the acts or practices at issue. Credit unions and other financial institutions should not be left sifting through a consent order to try to understand how the Bureau may possibly approach making determinations about their policies and practices. Instead, to provide greater clarity after enforcement actions, the Bureau should pursue an official rulemaking process to outline the rules governing such activities or practices. Bureau policies following an enforcement action, just like any other rule, should be vetted and approved by relevant stakeholders through formal rulemaking processes, as prescribed under the *Administrative Procedure Act*.

The Bureau Should Further Define UDAAP

Since the creation of the Bureau, the industry has remained mystified as to what qualifies as a UDAAP violation, yet many enforcement actions have resulted from an alleged UDAAP violation. The Bureau has pursued such enforcement proceedings despite never having provided specific guidance on prohibited policies and practices. The review process initiated by this RFI provides an ideal opportunity for the Bureau to initiate a rulemaking to define the scope of its UDAAP authority. Such a rulemaking is long overdue because although ignorance of the law does not provide a valid legal defense, when no law or guidance exists in the first place, enforcement of a law created ex post is completely unwarranted and unfair. Thus, NAFCU urges the Bureau to initiate a rulemaking on the scope of its UDAAP authority with respect to enforcement actions.

In particular, NAFCU urges the Bureau to provide further guidance on what it means to treat consumers fairly as well as the definition of "abusive" under UDAAP. Credit unions take their regulatory compliance requirements very seriously and make every effort to understand exactly what is expected of their institutions so that they do not put their members at risk of a lapse in or loss of the products and services they value so much. Credit unions, as not-for-profit, member-owned community financial institutions, serve the best interests of their members. Their ability to do so is hampered by the lack of clarity regarding the extent of acts or practices that may be deemed "unfair" or "abusive."

Despite certain flagrant violations of consumers' rights that are well-deserving of large fines, it is woefully unclear what actually constitutes an "unfair" act or practice. More specifically, the Bureau should delineate the types of emotional impacts and other subjective injuries that likely amount to the level of "substantial injury" necessary to meet the "unfair" standard envisioned in the Dodd-Frank Act. Aside from the example of "unreasonable debt collection harassment," the Bureau has not specified the type of emotional impact that may lead to a determination that the act or practice was "unfair." *See* Bureau Supervision and Examination Manual at 1519. As for, the "abusive" standard, the Bureau has not provided even a single example. That begs the question of how financial institutions are supposed to know the bounds of acceptable acts and practices until it is too late and they are faced with an enforcement action. NAFCU and its member credit unions strongly encourage the Bureau to end the "we'll know it when we see it" approach that it has employed since its creation and provide concrete rules for the financial services industry. That is the most consumer-friendly action the Bureau could possibly take.

NAFCU also strongly supports the Bureau working more closely with the NCUA to resolve questions related to UDAAP-based enforcement actions. Currently, there is substantial uncertainty regarding whether certain credit union powers conferred by the *Federal Credit Union Act* (FCU Act) may be subject to the Bureau's UDAAP authority. For example, under Section 107(11) of the FCU Act and Section 701.39 of the NCUA's Rules and Regulations, federal credit unions have the authority to impose a statutory lien. Although other federal or state laws may supersede this authority, the Bureau's refusal to issue regulations or directives defining the scope of its UDAAP authority has effectively curbed, without notice or an opportunity for public comment, the powers granted to federal credit unions by the FCU Act. The Bureau should not be reserving the right to define a critical aspect of its authority so that it may continually expand its reach and "push the envelope" with respect to enforcement. The Bureau should also coordinate more with the NCUA to ensure that the agencies' regulations do not conflict, cause uncertainty, or create duplicative requirements, which only serves to further amplify the already immense regulatory burden credit unions face.

NAFCU and its member credit unions agree that UDAAP violations can cause extensive injury to consumers, erode consumer confidence, and undermine the financial marketplace; however, the institutions subject to the Bureau's enforcement authority must have a clear understanding of the rules and prohibited behaviors from the start. NAFCU strongly supports additional guidance, clearly articulating the Bureau's supervisory expectations, so that credit unions have all the necessary information easily accessible to confirm that their operations are safe, sound, and reflective of the spirit and letter of the law.

The NORA Process Should Be Mandatory

The Bureau's NORA process should be mandatory and provide entities subject to the Bureau's enforcement authority with an adequate amount of time to submit a written response. Parties to an action deserve the ability to present their positions to the Bureau before a determination is made on the enforcement action. Making this process mandatory would substantially increase transparency, protect essential due process interests and avoid the appearance of uninformed, one-sided decision-making. Moreover, a phone call is alarmingly insufficient to relay news that the Bureau is considering pursuing legal action. Although a phone call may be recorded, it does not serve as a reasonable substitute for a written notice that provides parties with the opportunity to respond.

NAFCU agrees that in certain exigent circumstances, this notification and opportunity to respond may not be possible and should be avoided in order to act swiftly and preserve evidence in the investigation. Aside from such situations, the Bureau cannot continue to justify the discretionary nature of its NORA process. NAFCU encourages the Bureau to carefully evaluate its discretionary NORA process through the lens of fairness, considering this is one of the primary expectations the Bureau has for customer interactions by the entities which it supervises.

The Right to Make Presentations Prior to Legal Proceedings

Not only should parties be entitled to submit a written response, but the Bureau should also, ideally, permit entities to attend a preliminary hearing before it reaches a decision regarding the enforcement action. This would allow parties to meet face-to-face with Bureau enforcement officials to better understand the allegations against them and lead to a more informed process overall. The process of informing parties about a potential enforcement action should not vary as greatly as it currently does. Every party should have the opportunity to experience the same process, namely, an in-person meeting with Bureau personnel prior to the initiation of a legal proceeding.

NAFCU requests the Bureau conduct a cost benefit analysis with respect to this question because the likelihood is high that the social benefits of conducting such hearings outweigh the marginal cost of holding hearings. Additionally, if the Bureau is truly moving toward an end to its practice of "regulation through enforcement" and focusing on pursuing enforcement actions only when "quantifiable and unavoidable harm to the consumer" is present, as indicated by Acting Director Mulvaney in a recent internal Bureau memorandum, then the previous rate of legal proceedings likely will not be maintained. The resources that would have been directed toward those proceedings can now be redirected to conduct these hearings for parties prior to any legal action so that the Bureau really does "work for the people," which includes financial institutions like credit unions as well as consumers.

Press Releases Should Use Less Inflammatory Language and Focus on Facts

NAFCU and its member credit unions have consistently been concerned about the length and language the Bureau uses to describe the initiation of an enforcement action or settlement agreement with a party. The Bureau has chosen to issue press releases that use provocative language that is meant to prey on consumers' emotions and evoke negative reactions toward the subject of the enforcement action. This is especially troublesome in cases where the subject of the enforcement action has not admitted fault or has denied the allegations. These press releases get picked up by other media sources, which then perpetuate the inflammatory language, often times without paying much attention to the underlying facts of the settlement agreement.

NAFCU is not contending that the Bureau stop issuing press releases of its enforcement actions, but rather change its approach to focus on a more neutral announcement of the facts of the proceeding. After the initiation of an enforcement action, parties typically cooperate with the Bureau to resolve the alleged violations, remediate harmed consumers, and restore consumer trust in their products and services as part of the settlement agreement or consent order with the Bureau. Accordingly, the Bureau's subsequent press release should not use such harsh language to describe the agreement. Moreover, other federal financial regulators follow a more facts-based, concise approach to press releases regarding legal proceedings. NAFCU urges the Bureau to adopt a similar approach to its enforcement action announcements and press releases regarding consent orders or settlement agreements.

Conclusion

NAFCU appreciates the opportunity to provide comments on this RFI regarding the Bureau's enforcement processes. If you have any questions or concerns, please do not hesitate to contact me at akossachev@nafcu.org or (703) 842-2212.

Sincerely,

Ann Kossachev
Regulatory Affairs Counsel