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National Association of Federally-Insured Credit Unions

June 7, 2018

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

RE: Request for Information Regarding Bureau Rulemaking Processes
(Docket No. CFPB-2018-0009)

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 response to the Bureau of Consumer Financial Protection's (Bureau) request for information (RFI) regarding its rulemaking processes.

NAFCU would like to reiterate our longstanding position that regulatory burden is the top challenge facing credit unions of all sizes today. While smaller credit unions continue to disappear due to this growing burden, all credit unions find the current environment challenging. NAFCU and our members firmly believe that exempting credit unions from rulemakings intended for larger financial institutions would result in significant, immediate regulatory relief that would allow credit unions to better serve their members. Congress gave the Bureau broad authority in section 1022 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) to grant exemptions on a rule by rule basis. The Bureau can and should do more to protect the credit union industry from excessive regulations. However, NAFCU also believes that the Bureau can improve its rulemaking processes at a technical level to ensure that proposed rules fully consider the perspectives and concerns of the credit union industry.

I. General Recommendations Regarding Bureau Rulemaking Processes

A. The Bureau should expand use of its exemption authority under Section 1022 of the Dodd-Frank Act.

The request for information asks for input on all discretionary aspects of the Bureau's rulemaking processes. NAFCU believes that the most significant discretionary aspect of the Bureau's rulemaking process is the decision to propose an exemption from a rule pursuant to section 1022 of the Dodd-Frank Act. NAFCU recommends that the Bureau expand usage of its exemption authority to alleviate regulatory burden.

Since the enactment of the Dodd-Frank Act, over 1,500 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, and this rate of loss has only increased since the creation of the Bureau. A large majority of credit unions that have closed or merged were small in asset size, and as such, could not afford to comply with the Bureau's rules. Given the demonstrable burden Bureau regulations have imposed, NAFCU asks that the Bureau consider appropriate exemptions for credit unions that must sacrifice member services to comply with complex and poorly tailored rules.

Although the Bureau already provides limited exemptions based on an entity's asset size, such as the Qualified Mortgage (QM) rule's small creditor exemption, NAFCU strongly believes that the Bureau can do more, such as increase exemption thresholds, or consider exemptions based on an institution's characteristics and activities. For example, the Bureau recognizes that credit unions do not pose the same risks in the small dollar lending marketplace and has provided a safe harbor for payday alternative loans in its Final Payday Lending Rule. However, the limited exemptions the Bureau has provided to date have failed to provide meaningful relief to credit unions. More needs to be done to ensure that the Bureau's regulations are tailored to reflect credit unions' low risk, member-owned structure, and historical pattern of conduct.

NAFCU also recommends that the Bureau include a section in each notice of proposed rulemaking (NPRM) that summarizes the benefits exemptions or safe harbors might provide and how such exemptions might be appropriately tailored. NAFCU believes that including this type of cost benefit analysis as a matter of policy would facilitate greater understanding of the Bureau's priorities and encourage stakeholder input on relevant alternatives. Moreover, targeted discussion related to the applicability and scope of possible exemptions would help ensure that even when a substantial number of small entities are not impacted by a NPRM and no regulatory flexibility act analysis is required, credit unions of all sizes can address critical Bureau assumptions.

B. The Bureau should provide stakeholders with a meaningful opportunity to comment on agency research that accompanies a rule.

NAFCU encourages the Bureau to contact credit union and industry stakeholders proactively at the pre-rule stage if the agency intends to issue supplemental materials, such as research reports, along with a proposed rule. NAFCU believes that it is important for credit unions to have sufficient time to consider the Bureau's research and present alternative perspectives. The Bureau's experience with its now rescinded Arbitration Agreements Rule demonstrates the critical need for careful review of studies that draw conclusions about consumer or market behavior. Although many industry stakeholders pointed out flaws in the Bureau's arbitration study, the Bureau was not deterred from advancing a proposed rule built on the study's unsupported conclusions and incomplete data. When the Office of the Comptroller of the Currency offered its own critical analysis of the Bureau's arbitration study after the Arbitration Agreements Rule was issued, the Bureau did nothing to delay the final rule to reexamine its

economic impact on the consumer credit market.[1] Accordingly, NAFCU urges the Bureau to proactively seek stakeholder engagement and review of research before integrating findings into NPRMs.

C. The Bureau should continue to solicit industry data and feedback through existing channels for external engagement.

NAFCU believes that the Bureau should continue to utilize the Credit Union Advisory Council (CUAC) as a key resource to inform its rulemaking activities. The CUAC provides the Bureau with relevant trade and industry data that can be used to assess the impact of the proposed rule on small, community institutions. Furthermore, the feedback the Bureau collects from the CUAC and other external engagements should be assigned greater weight in future rulemakings. The Bureau should include a section in each proposed rule that describes relevant feedback received from credit unions (along with other industry segments) accompanied by a summary of the Bureau's analysis of the feedback. NAFCU also believes the Bureau should formally consider alternatives to proposed rules that are offered by the CUAC or other advisory work groups much like it considers alternatives generated by small business review panels.

D. The Bureau should enhance the accessibility of NPRMs by incorporating indexes, executive summaries, and examples where appropriate.

Several of the Bureau's most significant NPRMs have involved hundreds of pages of regulatory text—sometimes exceeding 1500 pages—which have stretched compliance resources at small credit unions. The Bureau's rules for mortgage servicing, payday lending, arbitration agreements, and prepaid accounts constituted complex, detailed rulemakings in which the Bureau appeared to craft provisions in anticipation of evasion rather than good faith compliance efforts. As a result of the length and density of the Bureau's NPRMs, credit unions have had to divert considerable resources in order to grasp the full meaning of a rule, its interaction with other provisions of federal consumer financial law, and what the full costs of compliance will be. To reduce these burdens and improve the clarity of both proposed and final rules, the Bureau should seek to enhance accessibility, summarize core provisions in plain language, and reduce emphasis on unnecessary procedural or historical information. NAFCU also recommends that the Bureau provide redlines for final rules and also for the purpose of demonstrating the evolution of proposals and piecemeal amendments.

II. Recommendations Regarding Bureau Consultation of Small Business Regulatory Enforcement Act (SBREFA) Panels

As amended by the Dodd-Frank Act, the Regulatory Flexibility Act (RFA) requires the Bureau to consult Small Business Review Panels (SBREFA panels) when it proposes rules that could

[1] *See* Office of the Comptroller of the Currency, Probable Cost to Consumers Resulting from the Consumer Finance Protection Bureau's Final Rule on Arbitration Agreements (September 20, 2017), *available at* https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/occ-arbitration-study.pdf.

have a significant economic impact on a large number of small business entities.[2] Specifically, the Bureau is required to identify individual, small entity representatives (SERs) for the purpose of obtaining advice and recommendations regarding the potential impact of such rulemakings.

Section 603 of the RFA also provides that the Bureau must conduct an initial regulatory flexibility analysis when it publishes a proposed rulemaking that will have a significant economic impact on a substantial number of small entities.[3] The initial analysis must contain, among other things, a description of projected compliance burdens and a description of any significant alternatives to the proposed rule which "accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[4] Additionally, the Bureau must specifically include significant alternatives that "minimize any increase in the cost of credit for small entities."[5]

Many credit unions are small businesses and many small business owners are members of credit unions. The median asset size for all credit unions in 2017 was approximately $30 million and 90 percent of credit unions have assets below $393 million. For context, the Small Business Administration's North American Industry Classification System establishes a small business size standard for credit unions and commercial banks at $550 million in total assets.[6] Accordingly, it is essential that the Bureau improve engagement with credit unions to ensure that Main Street communities and their financial institutions have their voices heard. In addition, the Bureau should broadly consider refinements to the SBREFA process to ensure that its cost benefit analyses for NPRMs are accurate and comprehensive.

A. The Bureau should seek small business input in advance in order to maximize the 60 day window for soliciting and compiling the SBREFA panel recommendations.

Once the Bureau convenes a SBREFA panel, the RFA requires the panel to complete its final report within 60 days. The Bureau treats the SBREFA panel as "convened" when the panel is formally established—not the date on which the panel meeting with the SERs actually occurred.[7] In addition, the Bureau generally provides SERs with 10 to 11 days to review materials before panel meetings.[8] As a result of the Bureau's policy for determining when a SBREFA panel is formally convened, along with statutory requirements imposed by the RFA, SERs face significant time constraints when they are asked to evaluate the Bureau's outline of proposals. Furthermore, discussion of alternatives to the Bureau's proposed rule may be unreasonably abbreviated.

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[2] *See* Dodd-Frank Act, § 1100G; 5 U.S.C. § 609(b).
[3] 5 U.S.C. § 603(a).
[4] 5 U.S.C. § 603(c).
[5] 5 U.S.C. §603(d)(1)(B)
[6] *See* U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, 29 (February 26, 2016), available at https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.
[7] GAO, Consumer Financial Protection Bureau: Observation from Small Business Review Panels, 14 (August 2016), available at https://www.gao.gov/assets/680/678964.pdf.
[8] *See id*.

NAFCU believes that given statutory time constraints, it is critical that the Bureau conduct preliminary outreach in advance of convening the SBREFA panel in order to collect meaningful feedback from small entities. Many of the Bureau's past rules have presented complex mechanisms for ensuring compliance with concepts such as ability-to-repay, or know-before-you-owe. While these concepts may seem straightforward when presented in outline form, SERs have consistently observed that the Bureau's proposed methods for ensuring compliance are unwieldly and costly to implement. Furthermore, to effectively consider the implications of the Bureau's proposal, many SERs must consult legal counsel to review the Bureau's outlines and discussion questions in a relatively short period of time. Oftentimes the smallest entities will not be able to afford such counsel, which limits their ability to provide fully developed commentary on a proposal.

NAFCU recommends that the Bureau find ways to give credit unions additional time to consider proposal outlines before convening a formal SBREFA panel. For example, the Bureau could present alternatives to the proposals under consideration for participants to review in advance. In addition, the Bureau should treat the SBREFA panel as convened when the SERs meet for the first time, which would give SERs more time to fully articulate their perspectives and concerns.

B. The Bureau should meaningfully integrate SBREFA panel recommendations into future rulemakings.

NAFCU recommends that the Bureau meaningfully explore opportunities for appropriate credit union exemptions in future SBREFA discussions. In the past, the Bureau has placed minimal emphasis on the "significant alternatives" prong of the RFA in previous rulemakings where SBREFA panel recommendations were solicited. For example, when the Bureau issued its final rule on Arbitration Agreements, it devoted marginal attention to the merits of adopting exceptions to the rule for small credit unions under $10 billion in assets, and often reiterated the fact that crafting such an exemption would be "complex," "difficult to apply," and result in "market distortions."[9] Unfortunately, none of these assertions were substantiated by evidence and the Bureau's dismissal of the SBREFA panel's recommendations relied upon a general appeal to the public good of achieving "deterrence." In addition, a report issued by the Government Accountability Office found that the Bureau devoted comparatively less time to discussion of alternatives than any other topic when it convened SBREFA panels to review proposals related to mortgage lending.[10] Although the Bureau appears to have contextualized dissatisfaction with the SBREFA process as a symptom of its statutory mandates, the Bureau still retains authority to provide exemptions upon consideration of the criteria in section 1022(b)(3).[11]

The Bureau has also dismissed relevant information regarding credit unions' member-owned structure when SERs proposed class-based exemptions from proposed rules. During the SBREFA review of the Bureau's Arbitration Agreements rule, the agency claimed that credit unions' ownership structure did not bear upon the issue of size to dismiss the possibility of

[9] *See* Final Rule, Arbitration Agreements, 82 Fed. Reg. 33425 (July 19, 2017), available at https://www.gpo.gov/fdsys/pkg/FR-2017-07-19/pdf/2017-14225.pdf.
[10] *See* GAO, Consumer Financial Protection Bureau: Observation from Small Business Review Panels, at 23.
[11] *See id*.

developing a credit union-specific exemption. NAFCU asks that the Bureau fully consider the merits of proposed exemptions for credit unions when they are raised in SBREFA panel discussions, and take into consideration all factors—not just size.

C. The Bureau should improve communication strategies to ensure that sensitive information is adequately protected during the SBREFA review process.

The Bureau has sometimes asked SERs to share sensitive company information in order to better understand the extent to which a proposed rule will increase compliance burdens. While such inquiries can help the Bureau better anticipate the costs of proposed rules, they present serious challenges to SBREFA participants who may be reluctant to share confidential or trade sensitive information with other SERs, many of whom may be direct competitors. To avoid unnecessary disclosure of such information, the Bureau should ensure that questions seeking confidential or proprietary information are directed to individual participants through structured information requests. NAFCU recommends that individualized responses containing sensitive information only be presented to the full panel in summary form and in a way that does not reveal the identities of participants.

Conclusion

NAFCU strongly encourages the Bureau to fully utilize section 1022 of the Dodd-Frank Act and exempt credit unions from future Bureau rules designed to address the abuses of bad actors or activities conducted by the largest and riskiest of financial institutions. In addition, we ask that the Bureau promote more meaningful discussion of tailored exemptions or alternatives for credit unions, who often experience the burden of new regulatory requirements most acutely. Lastly, NAFCU hopes that the Bureau will consider technical changes to its pre-rulemaking processes and outreach in order to ensure that stakeholders have sufficient time to fully comment on proposals, digest Bureau research, and present alternatives.

NAFCU appreciates the opportunity to provide comments on this request for information regarding the Bureau's rulemaking processes. If you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or (703) 842-2266.

Sincerely,

Andrew Morris
Regulatory Affairs Counsel