3138 10th Street North
Arlington, VA 22201-2149
703.842.2234 | 800.336.4644
gmesack@nafcu.org | nafcu.org

NAFCU
National Association of Federally-Insured Credit Unions

Greg Mesack
Senior Vice President, Government Affairs

March 8, 2023

The Honorable Andy Barr
Committee on Financial Services
Subcommittee on Financial Institutions
and Monetary Policy
United States House of Representatives
Washington, DC 20515

The Honorable Bill Foster
Committee on Financial Services
Subcommittee on Financial Institutions
and Monetary Policy
United States House of Representatives
Washington, DC 20515

Re: Tomorrow's Hearing, "Consumer Financial Protection Bureau: Ripe for Reform"

Dear Chairman Barr and Ranking Member Foster:

I write to you today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) in conjunction with tomorrow's hearing on potential Consumer Financial Protection Bureau (CFPB) reforms. As you know, NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 135 million consumers with personal and small business financial service products. We applaud the Subcommittee for recognizing the need for reforms and look forward to working with you to that end.

Credit unions are subject to strict field of membership and capital restrictions, as well as numerous consumer protection provisions in the Federal Credit Union Act, such as an interest rate ceiling, a prohibition on prepayment penalties, and a member business lending cap. As such, the CFPB must be cognizant of the unique characteristics of the credit union industry and the benefits credit unions provide to consumers.

The CFPB's regulations have significant impacts on the credit union industry, and many are ripe for reform. The following is a summary of the most important CFPB-related issues affecting credit unions right now and NAFCU's suggested approaches to reform:

<u>Use of Small Entity Exemption Authority</u>

NAFCU believes that the CFPB should utilize its statutory exemption authority to recognize the unique nature of and constraints faced by the credit union industry. Since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, the credit union industry has faced massive consolidation, with many institutions forced to close their doors or merge with other credit unions. The rate of consolidation has only increased since the creation of the CFPB. A majority of credit unions that have closed or merged were smaller in asset size, and as such, could not afford to comply with all the rules promulgated by the CFPB. Therefore, it is incumbent upon the CFPB to provide some degree of regulatory relief for small entities that cannot afford to comply with complex rules and would otherwise be forced to stop offering services to members.

Although the CFPB has provided past exemptions based on an entity's asset size, such as the qualified mortgage (QM) rule and Home Mortgage Disclosure Act (HMDA) rule's small entity exemption, the CFPB could do more to recognize that not all financial institutions operate the same way by tailoring its regulations to provide exemptive relief based on those differences. NAFCU encourages you to question why the CFPB has not utilized this dormant authority and to encourage the CFPB to begin relying on its exemption authority under section 1022 of the Dodd-Frank Act in its current and future rulemaking efforts to consider the unique structure and characteristics of the credit union industry.

CFPB Commission

NAFCU has long held the position that, given the broad authority and awesome responsibility vested in the CFPB, a five-person commission has distinct consumer benefits over a single director. Regardless of how qualified one person may be, including the current leadership of the agency, a commission would allow multiple perspectives and robust discussion of consumer protection issues throughout the decision-making process. Additionally, a commission helps ensure some continuity of expertise and rulemaking. The current single director structure can lead to uncertainty during the transition from one Presidential administration to another. The U.S. Supreme Court highlighted this fact when it released a decision in *Seila Law v. the Consumer Financial Protection Bureau* that found the single director, removal only for "just cause" structure of the CFPB to be unconstitutional. It is with this in mind that we urge Congressional action on legislation to transform the structure of the CFPB from a single director to a bipartisan commission.

Implementation of Section 1071

Congress should act to ensure that the CFPB adopts commonsense definitions, right-sized thresholds, and a reasonable, phased mandatory compliance schedule to ensure that credit unions' support of their small business members is not jeopardized by unnecessary section 1071 compliance burdens.

Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act (ECOA) to require that covered financial institutions collect and report certain information regarding credit applications made by women-owned, minority-owned, and small businesses. The CFPB should adopt a loan-volume threshold not lower than 500 covered loans, adopt the Small Business Administration's $1 million gross annual revenue definition for small business, establish a de minimis covered credit transaction threshold that tracks the NCUA Call Report's $50,000 threshold, exclude small business credit cards and commercial real estate loans, and provide covered financial institutions at least three years to come into compliance with any final section 1071 rulemaking. NAFCU also unequivocally opposes the CFPB's proposal to require, in certain circumstances, that covered financial institution employees make visual observations regarding a small business owner's race and ethnicity.

Electronic Fund Transfer Act (Regulation E)

A clear error resolution mechanism that ensures parties other than the credit union are accountable for resolving a dispute should be considered by Congress. Congress should act to ensure the CFPB creates a fair landscape for credit unions, fintechs, and other companies engaged in financial services, where regulations, supervision, and consumer protections apply to all actors in the marketplace. This is especially important given the increased complexity of error resolution when a credit union is asked to review a transaction involving a nonbank payment service provider. NAFCU members report countless instances in which payment service providers do little to assist in investigations where Regulation E responsibilities are shared between the provider and the credit union. This example highlights the need for fostering a fair landscape where consumer protections apply to all actors in the marketplace and the burden of Regulation E error resolution responsibilities is more equitably distributed.

Congress should require the CFPB to consider standards for ensuring that nonbank payment service providers are responsive to credit union and other financial institution requests related to Regulation E investigations. A more structured framework will incentivize coordination among all payment system participants. The CFPB has been under pressure to issue new interpretative guidance related to Regulation E that could enhance liability for credit unions and other financial institutions related to fraudulently induced transactions, even those approved by the consumer. This guidance could require credit unions to conduct more investigations of such transactions—and to compensate more consumers for their losses.

Instead of issuing new interpretations of Regulation E or its commentary, NAFCU recommends that the CFPB direct its focus to investigating technologies and solutions that can help prevent fraud before it occurs as well as considering ways to educate and protect consumers from various forms of financial fraud.

CFPB's Focus on Fees

NAFCU and our member credit unions support fair, transparent, and competitive markets for consumer financial services and are happy to work with the CFPB to improve consumers' understanding of financial products and services but caution that increasing the amount of required disclosures or mandating that contingent fees be included in a lump-sum price would only further confuse and frustrate consumers who may have varying demands for convenience. NAFCU has urged the CFPB to continue to study the markets and products listed in its previous Request for Information before taking any supervisory or regulatory action because the Bureau's current data and analyses do not suggest an unfair or underregulated environment.

NAFCU also objects to the CFPB's characterization of financial services fees as "junk fees," "excessive or exploitative fees," or "inflated or surprise fees," as these fees bear no resemblance to the type of hotel and resort fees referenced by the CFPB and, in contrast, are all subject to comprehensive federal or state laws and regulations; are not unfair, deceptive, or abusive; and consumers are well-informed of the fees. Required disclosures have made significant positive impacts on consumers' understanding of financial product pricing, provided for better comparison shopping, and improved consumer repayment behavior. To claim that fees which must be disclosed are in fact surprise or junk fees is a mischaracterization and one that undercuts the Bureau's own efforts to develop effective disclosures.

We are also extremely concerned that the CFPB did not conduct a small business review panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA) on its new credit card late fee proposal.

This is clearly a major rulemaking with a large impact on credit unions and small businesses for which little data was available – meeting the spirit of why such panels were created. It is disheartening that the CFPB would ignore the process designed to protect small businesses in such a way just to score political points. As such, the CFPB should withdraw this proposal and go back to the drawing board *after* meeting its statutory obligation for conducting a SBREFA panel on this topic and gathering appropriate data from credit unions and small businesses.

We believe that, instead of pushing the bounds of statutory authority to regulate fees in connection with consumer financial products and services, the CFPB should be more engaged in broad consumer education initiatives regarding financial disclosures. For example, providing toolkits to develop optional, just-in time disclosures for use with mobile banking applications might serve as a practical and effective resource. NAFCU encourages you to closely monitor any CFPB regulatory and supervisory activity related to fees.

Examinations

The CFPB should better coordinate with National Credit Union Administration (NCUA) examiners to limit examination burden and streamline processes and procedures. NAFCU has repeatedly requested the CFPB further enhance its coordination with the NCUA to alleviate examination burdens on credit unions that are over $10 billion and subject to examination by the both the NCUA and CFPB. The CFPB should also avoid duplication of examination functions. The recent addition of an information technology examination component in the CFPB's latest Supervision Manual suggests that such duplication may occur. The NCUA is the functional regulator charged with implementing and administering the technical safeguards provisions of the Gramm-Leach-Bliley Act (GBLA) for credit unions. The CFPB should not seek to expand its supervisory jurisdiction by performing overlapping IT-based examinations that are more capably executed by financial institutions' prudential regulators. However, the Bureau should continue to administer IT-based exams for nonbank fintech companies that are not regularly examined by a functional regulator such as the NCUA or Federal Deposit Insurance Corporation.

Use of Larger Participants Authority to Oversee Fintechs

The CFPB should use its authority under the Dodd-Frank Act to oversee a grossly under-regulated industry of fintech companies that offers consumers a wide array of products and services digitally, across state lines, ranging from mortgage servicing to mobile payments and peer-to-peer lending. The recent actions taken by the CFPB to look at larger fintech companies operating in the payments space were a good first step. Additionally, NAFCU appreciates the CFPB's announcement that it will begin exercising its section 1024 authority under the Dodd-Frank Act to designate a nonbank entity for supervision and its issuance of a proposed procedural rule seeking to make public certain parts or all of the orders designating these nonbank entities for supervision. However, a more robust level of supervision from the CFPB may be necessary to ensure compliance with consumer financial protection laws.

State-level supervision does not suffice as many fintech companies continue to grow exponentially by offering access to convenient online financial tools. The longer these companies go unchecked, the greater the risk of consumers facing a significant loss or violation of their rights. The Dodd-Frank Act grants the CFPB the authority to regulate a covered person who "is a larger participant of a market for other consumer financial products or services, as defined by [a] rule" issued in consultation with the Federal Trade Commission. This same section of the Dodd-Frank Act also grants the CFPB the authority to supervise larger participants' compliance with federal consumer financial law through periodic reports and examinations, obtain information about the activities and compliance systems used by larger participants, and detect and assess risks to consumers and to the markets for consumer financial products and services. Certain fintech companies conduct a substantial volume of transactions involving consumer financial products and services while not being subject to direct supervision by a federal financial regulator.

The CFPB should exercise its authority over larger participants in the consumer financial markets, much in the same way it did in the 2012 final rules for larger participants of the markets for consumer reporting and consumer debt collection. Should the Bureau conclude its "larger participant" authority in the Dodd-Frank Act does not authorize it to issue rulemakings and conduct examinations for fintech companies, then NAFCU would urge support for a legislative amendment to the Dodd-Frank Act to explicitly provide such authority.

Implementation of Section 1033

Congress should act to ensure the CFPB preserves bilateral data sharing agreements instead of replacing them to avoid inadvertent consumer harm or systemic risk from unsupervised data aggregators. Section 1033 of the Dodd-Frank Act grants consumers the right to obtain certain information concerning financial products or services, such as transactional data. In general, the CFPB should avoid implementing section 1033 in a way that limits credit unions' existing discretion to define the scope of data sharing arrangements to best serve their members. While enhanced data portability can support streamlined integration of financial technology, faster account opening, and automation of credit decisioning processes, it can also lead to greater security risks, particularly when consumers are not able to provide informed consent to third parties seeking data access privileges. As federally supervised and regulated financial institutions, credit unions that choose to share account or transaction data with trusted partners do so by first performing rigorous due diligence, then establishing a formal agreement to ensure each party's compliance with applicable law.

To best accommodate both modes of data exchange (company-to-company versus entirely consumer managed), credit unions should have the ability to define the scope of third-party data privileges, as well as channels for data sharing that exist outside of formal contracts. To account for the complex legal questions and risks that would arise when permitting data sharing outside of formal agreements, the CFPB must consider minimum data and privacy safeguards for entities that seek to acquire consumer information but are not subject to the supervision and oversight of a federal banking regulator. For larger participants engaged in consumer financial data aggregation, the CFPB should consider a more robust supervisory framework to ensure ongoing compliance. NAFCU also urges Congress to narrow the scope of shareable information to protect consumers from fraudulent financial apps that might exploit section 1033 privileges and to prevent competitive imbalance in a market where data has inherent value.

Unfair, Deceptive, or Abusive Acts and Practices (UDAAP)

Credit unions are devoting more resources to UDAAP compliance due to unclear standards and the unpredictability of enforcement. Congress should act to ensure that UDAAP authority is clear and certain. Since the enactment of the Dodd-Frank Act, NAFCU has asked for clear, transparent guidance from the CFPB on its expectations for credit unions under the law and its regulations. The attention and resources dedicated to UDAAP compliance have continued to increase over the last few years. According to NAFCU's 2021 Federal Reserve Meeting Survey, overall compliance burdens have increased over 75 percent in the past five years and over 94 percent of respondents expect overall compliance burdens to increase in the next five years.

On March 16, 2022, the CFPB published a revised examination procedure guide for UDAAP that indicated the agency is targeting discrimination as an "unfair" practice in connection with all financial products and services and not just credit products. This is a serious shift in the CFPB's stance on UDAAP that is likely to result in a more opaque UDAAP landscape and an increase in compliance costs.

Congress should require the CFPB to provide details on and examples of the specific factual bases for violations. This will assist credit unions in mitigating the risks of a violation. Credit unions should not be unnecessarily worried about facing potential UDAAP violations during a period of economic instability due to an unclear standard and unpredictable enforcement.

We thank you for the opportunity share our views regarding potential reforms at the CFPB and appreciate the Subcommittee examining this important topic. We look forward to working with you to pass important and commonsense legislation. Thank you again, and should you have any questions or require any additional information, please contact me or Chad Adams, NAFCU's Senior Director of Legislative Affairs, at (703) 842-2265 or cadams@nafcu.org.

Sincerely,

Greg Mesack

cc: Members of the Subcommittee on Financial Institutions and Monetary Policy