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National Association of Federally-Insured Credit Unions

December 13, 2022

The Honorable Maxine Waters
Chairwoman
Committee on Financial Services
United States House of Representatives
Washington, DC 20515

The Honorable Patrick McHenry
Ranking Member
Committee on Financial Services
United States House of Representatives
Washington, DC 20515

Re: Tomorrow's Hearing: "Consumers First: Semi-Annual Report of the Consumer Financial Protection Bureau"

Dear Chairwoman Waters and Ranking Member McHenry:

I write today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) in conjunction with tomorrow's hearing, "Consumers First: Semi-Annual Report of the Consumer Financial Protection Bureau." NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 134 million consumers with personal and small business financial service products. NAFCU appreciates the Committee's ongoing oversight of the Consumer Financial Protection Bureau (CFPB or Bureau) and efforts to promote financial inclusion and consumer protection. We welcome this opportunity to share our thoughts on some current issues pertinent to the CFPB.

Use of Small Entity Exemption Authority

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 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 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) and Home Mortgage Disclosure Act (HMDA) rules' small entity exemptions, 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 rulemaking efforts to consider the unique structure and characteristics of the credit union industry.

NAFCU Urges Interagency Coordination to Implement Section 1033 of the Dodd-Frank Act

The CFPB is currently in the rulemaking process to implement Section 1033 of the Dodd-Frank Act governing consumer access to financial records. Section 1033(e) requires the CFPB to consult with the federal banking agencies and the Federal Trade Commission when prescribing any future rule to "take into account conditions under which covered persons do business both in the United States and in other countries."[1] NAFCU has urged both the CFPB and the National Credit Union Administration (NCUA) to assess how implementation of Section 1033 will impact the availability of credit union services, competitive impact on small credit unions, and the security of member account data.

The CFPB has already published an outline of proposals under consideration that does not reference input provided by other federal banking agencies.[2] Shortly before this outline was released, the Director of the CFPB delivered a speech in which he predicted that "[O]nce data holding companies must share authorized consumer data with authorized third parties […] this will lead to more shopping by consumers because they have the leverage to walk away and because they will have access to more tailored products and services."[3] Such an assertion disregards the healthy competition that exists within the financial sector landscape and downplays the serious privacy risks that would follow from any rule that grants third parties—potentially operating outside of the United States—the ability to extract financial data from American consumers at the push of a button. Accordingly, we urge you to ensure that the CFPB conducts the appropriate consultation with the NCUA so that the implementation of Section 1033 not only addresses privacy and security risks but also preserves the role of smaller community financial institutions. Credit unions are at risk of being displaced by large technology companies that stand to benefit from permissive data sharing rules. Commodification of consumer data coupled with expansive regulation that requires credit unions to maintain third party access portals will only drive further consolidation within the financial sector—an outcome that is at odds with the CFPB's desire to promote competition.

NAFCU supports efforts to empower consumers with modern financial tools; however, the CFPB should not seek to compel unvetted, third-party information sharing. Credit unions already provide account information directly to members through statements and other online tools.

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[1] 12 U.S.C. § 5533(e)(2).

[2] *See* CFPB, Outline of Proposals and Alternatives Under Consideration for the Personal Financial Data Rights Rulemaking (October 27, 2022), *available at* https://files.consumerfinance.gov/f/documents/cfpb_data-rights-rulemaking-1033-SBREFA_outline_2022-10.pdf.

[3] Director Chopra's Prepared Remarks at Money 20/20 (October 25, 2022), *available at* https://www.consumerfinance.gov/about-us/newsroom/director-chopra-prepared-remarks-at-money-20-20/ (comparing future CFPB rules to facilitate "open banking" to those that shaped the current telecommunication markets).

New rules that might compel the use of third-party APIs for data extraction would tilt the playing field to benefit companies that are not in the business of relationship banking but are eager to obtain all the data associated with a credit union's long-term relationship with a member. Detailed transactional information held by credit unions represents data earned through trust and substantial investments in customer service. Any proposal that risks eroding the value of such trust and investment should be carefully considered by all federal banking agencies—not just the CFPB.

The CFPB must ensure that access to consumer financial records is predicated upon a fair distribution of costs and data security and privacy responsibilities that does not overburden credit unions that already face competitive pressure and reduced bargaining power when interacting with larger technology companies. NAFCU urges your oversight so that the NCUA, the CFPB, and other federal banking regulators can appropriately coordinate on the implementation of Section 1033.

CFPB's Focus on Fees

Credit unions put their members first, not their bottom lines, and follow the law by clearly disclosing their fees for products and services to consumers. 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 we 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 January 26, 2022, Request for Information (RFI) on fees before taking any supervisory or regulatory action because the Bureau's current data and analyses do not suggest an unfair or underregulated environment.

Unfortunately, on October 26, 2022, the CFPB issued guidance regarding "illegal junk fees." The CFPB addresses two types of fees that it may consider as "junk." The first fee is a surprise overdraft fee, including "overdraft fees charged when consumers [have] enough money in their account to cover a debit charge at the time the [financial institution] authorizes it." The next fee is a surprise depositor fee. This type of fee occurs when a person cashes a check and the check bounces. NAFCU cautions that efforts to eliminate or limit overdraft protection programs would likely result in significant negative impacts on borrowers and credit unions. The CFPB should not rely on scare tactics and legally non-binding guidance to delineate the bounds of its regulatory and supervisory authority. NAFCU recommends that you closely scrutinize the Bureau's alleged authority to make changes to its regulatory framework to limit the fees described in the RFI and issued guidance.

On a fundamental level, NAFCU also objects to the CFPB's characterization in the RFI and issued guidance 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

in the RFI and issued guidance 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 consumers' repayment behavior. To claim that fees that 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.

Still, NAFCU's credit union members often report that their members are frustrated and confused by the volume of required disclosures, despite their best efforts to educate consumers about the importance of these disclosures and the information they contain regarding the terms and fees of products and services. To this end, instead of pushing the bounds of its statutory authority to regulate fees in connection with consumer financial products and services, the CFPB should be 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.

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, so the CFPB should issue a rulemaking to clarify its UDAAP authority. 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. In January 2020, the CFPB issued a policy statement providing a framework for how the Bureau applies the "abusive" standard in UDAAP supervision and enforcement matters; however, the CFPB quickly rescinded this guidance last year. NAFCU's members appreciated this guidance because the attention and resources dedicated to UDAAP compliance have continued to increase over the last few years. Between 2018 to 2022, NAFCU members estimated a 9 percent increase in the number of full-time equivalent staff members devoted to UDAAP compliance over the next three years, according to NAFCU's 2022 Federal Reserve Meeting Survey.

NAFCU encourages the CFPB to continue to provide more clarity on the specific factual bases for violations. Details on and examples of the specific factual bases for violations will assist credit unions in mitigating the risks of a violation. This clarity and certainty are especially critical to providing relief at a time when credit unions are making every effort to assist their members facing difficult economic situations. The CFPB should consider a UDAAP rulemaking to enhance transparency and accountability and provide the financial services industry with some predictability regarding this amorphous standard. Additionally, NAFCU asks that the CFPB work closely with the NCUA to resolve questions regarding whether certain credit union powers conferred by the Federal Credit Union (FCU) Act may be subject to the CFPB's UDAAP authority.

Under Director Chopra, certain guidance has been issued that has the potential to massively expand the scope of prohibited acts and practices. On March 16, 2022, the CFPB published a revised examination procedure guide for UDAAP that indicated the Bureau 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 expand the reach of the Bureau's antidiscrimination enforcement beyond the scope of the Equal Credit Opportunity Act (ECOA). Under ECOA, creditors are prohibited from discriminating against a consumer on the basis of race, color, religion, national origin, sex, marital status, or age. Discrimination does not need to be intentional in order to constitute a violation under ECOA. The Bureau has yet to explicitly discuss what types of discrimination are covered under its new stance and should engage in formal rulemaking efforts to solicit public input on its legal intentions. Credit unions support strong anti-discrimination laws and fair lending policy. However, it is counterproductive for the Bureau to articulate new legal standards through press releases or open-ended expansion of UDAAP. Credit unions are committed to complying with all federal anti-discrimination laws, but agency interpretations that are neither formalized in written guidance nor aligned with prevailing interpretations of statutory authority will present difficulties.

Separately, the Bureau has also sought to leverage its UDAAP-related enforcement authority to promulgate data security expectations for supervised institutions that have traditionally followed the guidance of their primary functional regulator. For example, under the Gramm-Leach-Bliley Act (GLBA), the NCUA is responsible for administering and implementing technical safeguard requirements for federally-insured credit unions. NCUA rules require credit unions to develop robust information security programs that comprehensively address risks to both credit union IT systems and member data. The CFPB's decision to adopt its own set of data security principles tied to UDAAP risks creating confusion and potentially conflicting supervisory expectations. The CFPB should not seek to introduce its own interpretations around data security best practices to exert additional supervisory influence or expand the scope of its regulatory reach beyond the limits of consumer financial law.

Section 1071 Small Business Data Collection Proposed Rule

While NAFCU and our members appreciate the CFPB's dedication to ensuring small businesses are adequately protected under ECOA and Section 1071 of the Dodd-Frank Act, we have a number of concerns about the Proposed Rule for Section 1071. The Proposed Rule's complexity and significant one-time and ongoing compliance costs will weigh disproportionately on credit unions and hurt their ability to help small businesses. The likely net effect of the Proposed Rule's expansive coverage and intensive data collection and reporting requirements is that credit unions will quickly become uncompetitive and may be forced out of small business lending altogether. This not only harms credit unions, but it also reduces the credit available to small businesses at a time when they are trying to rebound from the COVID pandemic.

NAFCU has urged the CFPB to adopt 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. NAFCU also recommended that the CFPB delay any further Section 1071 rulemaking until it is clear the COVID-19 pandemic has ended.

Some of the major concerns we have with the Proposed Rule include:

- *Definition of Covered Financial Institution.* The proposed 25-loan threshold is far too low and would unjustifiably impact many smaller lenders. If the CFPB is not going to use its authority under Section 1022 to exempt credit unions from this rule, a practical and workable higher threshold of at least 500 loans must be established.
- *Definition of Small Business.* The Proposed Rule would define a small business as any business with prior-year gross annual revenue of $5 million or less. At this level, financial institutions would have to collect Section 1071 data related to businesses that are not truly small. The CFPB should adopt a lower revenue threshold of $1 million for the definition of a small business.
- *Covered Credit Transactions.* While we support the CFPB defining covered credit transactions in the Proposed Rule, we believe the CFPB should also exempt loans under the de minimis definition of member business loan (MBL) found in the FCU Act. Subjecting credit unions' non-MBL loans to Section 1071 coverage could potentially affect the availability of these smaller size loans due to the increased costs associated with Section 1071 regulatory compliance. We recommended the CFPB establish an exemption for loans under the de minimis amount for MBLs established in the FCU Act from the definition of covered credit transactions.
- *Compliance Deadline.* The Proposed Rule's uniform 18-month mandatory compliance deadline is aggressive even for the largest financial institutions and is extremely difficult for credit unions. Furthermore, we hear from our member credit unions that their previous experience with IT vendors in adapting their products to comply with major rulemakings has shown that timeframe to be unworkable. NAFCU believes that any compliance deadline should be no earlier than 36 months after the final rule is issued.

Examinations

The CFPB should better coordinate with NCUA examiners to limit exam 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 in assets and subject to examination by the both the NCUA and CFPB. These credit unions are experiencing overlapping or consecutive examinations, which poses an immense operational burden and diverts valuable resources away from credit union members. The memorandum of understanding (MOU) between the CFPB and NCUA is an initial step, and we encourage the CFPB

to make every effort to better coordinate with the NCUA to ensure examiners from both institutions are not examining a credit union simultaneously or consecutively. There should be a reasonable amount of time in between CFPB and NCUA examinations so that credit unions can quickly get back to the important business of serving their members.

The CFPB should also avoid duplication of examination functions. The recent addition of an IT 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 GLBA 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.

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

NAFCU urges the CFPB to adopt more flexible rules for the acceptance and delivery of electronic signatures and disclosures. Considering the impacts of the COVID-19 pandemic, modernizing E-SIGN would assist credit union members and alleviate compliance burdens for institutions. The current requirement for consumers to "reasonably demonstrate" access to electronic information before consenting to the receipt of electronic disclosures is cumbersome and antiquated. This delays the administrative processing of loan modifications, deferrals, fee waivers, or other service changes that, when disclosed electronically, must comply with E-SIGN.

While credit unions appreciated pandemic-related E-SIGN relief, the CFPB's statement authorizing more flexible E-SIGN procedures in June 2020 has since expired.[4] The now-rescinded supervisory statement allowed for a credit card issuer, under Regulation Z, to obtain a consumer's oral consent to electronic delivery of written disclosures through an oral affirmation of his or her ability to access and review the electronic written disclosures.[5] Credit unions were able to use this additional authority to more efficiently address the credit needs of their members. Furthermore, the Bureau has provided no indication that the use of these more flexible E-SIGN procedures increased the risk of consumer harm.

E-SIGN itself also lacks clarity regarding when a credit union must update a statement of the hardware and software requirements to access and retain electronic disclosures. Lastly, E-SIGN does not clearly state whether a member's initial E-SIGN consent is sufficient for all subsequent transactions between the credit union and the member. NAFCU urges the CFPB to allow for the

[4] https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-series-of-policy-statements-to-ensure-industry-complies-with-consumer-protection-laws/.
[5] https://files.consumerfinance.gov/f/documents/cfpb_final-rescission_electronic-cc-discl-e-sign-consent-cons_2021-03.pdf.

delivery of electronic disclosures without having to obtain prior consent, so long as the consumer is initiating the transaction using an online service. In addition, the CFPB should clarify that a financial institution that obtains presumptive consent once may rely on it in the future for all subsequent related transactions.

Use of Larger Participant Authority to Oversee Fintechs

The CFPB should use its authority under the Dodd-Frank Act to oversee a grossly underregulated industry of fintech companies that offers consumers a wide array of products and services digitally, across state lines, that ranges 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 nonbank entities for supervision and the 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.

Regulation E

We also believe that Congress or the CFPB should ensure that error resolution responsibilities under the Electronic Fund Transfer Act (Regulation E) are fairly balanced for credit unions and

third-party payment system operators. When a dispute primarily implicates a third party's payment service, the third party should be primarily responsible for resolving the dispute. Credit unions shoulder unique investigative burdens when a transaction involves a mobile payment application, and users can fund these transactions with a combination of debit card funds and preexisting wallet funds that may have been acquired entirely in-network. As mobile payment applications become more prevalent, there should be more clarity or guidance regarding the responsibilities of mobile payment platform providers to resolve disputes, especially with respect to instances of fraud. Error resolution investigations put a strain on credit union resources and in certain situations the credit union may not be the best party to investigate a dispute. We believe Congress and the CFPB should examine what protections are needed to combat app-based fraud.

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 structure. Regardless of how qualified one person may be, including the current leadership of the Bureau, 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, such as H.R. 4773, the Consumer Financial Protection Commission Act, which was introduced in July 2021.

We appreciate your leadership and ongoing focus on issues important to credit unions, and we look forward to continuing to work with the Committee and the CFPB on these topics. Should you have any questions or require any additional information, please do not hesitate to contact me or Jake Plevelich, NAFCU's Associate Director of Legislative Affairs, at jplevelich@nafcu.org.

Sincerely,

Brad Thaler

Brad Thaler
Vice President of Legislative Affairs

cc: Members of the House Financial Services Committee