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National Association of Federally-Insured Credit Unions

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

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

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

Dear Chairman McHenry and Ranking Member Waters:

I write to you today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) in conjunction with tomorrow's Consumer Financial Protection Bureau's (CFPB) Semi-Annual Report to Congress hearing. As you know, NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 135 million consumers with personal and small business financial service products. We appreciate the Committee's attention to oversight and look forward to working with you to ensure that the CFPB's actions endure appropriate congressional scrutiny.

Credit unions chartered under the Federal Credit Union Act are subject to strict field of membership and capital restrictions, as well as numerous consumer protection provisions, such as a usury ceiling, a prohibition on prepayment penalties, and a member business lending cap. State chartered credit unions are typically subject to similar restrictions and consumer protections. The CFPB must be cognizant of the unique characteristics of the credit union industry and the benefits they provide to consumers.

The CFPB's regulations have significant impacts on the credit union industry, and NAFCU urges this Committee to ensure that rules are properly tailored to consider the unique composition of credit unions. The following is a summary of the most important CFPB-related issues affecting credit unions today.

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

Implementation of Section 1033

Congress should ensure the CFPB preserves credit unions' ability to negotiate the terms of data sharing agreements 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 establish a formal agreement to ensure each party's compliance with applicable law.

It is unlikely that Congress intended to grant the CFPB sweeping authority to promote fintech data access privileges when it passed the Dodd-Frank Act. On its face, the purpose of section 1033 is to provide consumers with convenient access to what is theirs—information about their use of financial products and services. Credit unions already provide their members much of the information described in section 1033 through account statements that can be accessed physically or electronically. While the Dodd-Frank Act calls upon the CFPB to promote fair and competitive markets, the plain text of section 1033 does not reflect an intention to reengineer data sharing mechanisms to alter financial sector competition. In the long run, commoditization of financial data driven by the CFPB's goal of "reducing switching costs" could have the opposite of its intended effect: rewarding the largest, most technologically sophisticated companies at the expense of credit unions and other community institutions focused on relationship banking.

To account for the complex legal questions and risks that would arise when granting third parties data access privileges 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.

CFPB's Focus on Fees

On a fundamental level, NAFCU objects to the CFPB's continued characterization of a number of financial services fees as "junk fees," "excessive or exploitative fees," or "inflated or surprise fees," as these fees 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 have particular concerns with the CFPB's recent efforts relating to credit card late fees. The current regulatory safe harbor limits and other requirements related to credit card late fees have resulted in clear disclosures to consumers, providing ample opportunity for comparison shopping. The current safe harbor fee amounts provide an appropriate level of deterrence and encourage consumers to work with their financial institution to make timely payments on their accounts. The CFPB should maintain the current safe harbor limits as well as the annual adjustments for inflation.

The CFPB has not adequately justified its proposed $8 safe harbor limit, and this arbitrary decrease of the safe harbor fee amounts is unlikely to have the intended result of reducing consumer indebtedness. Instead, the proposal would be most detrimental to the exact populations the CFPB aims to protect by resulting in limited access to credit and availability of products and services suited for consumers with thin credit files.

Additionally, the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) does not explicitly permit the CFPB to impose a mandatory courtesy or grace period, so NAFCU opposes such a requirement as this would only increase risk and costs for credit unions. The CFPB should continue to provide educational resources and information to consumers and partner with credit card issuers to share information with consumers that helps them manage their accounts. The Bureau should continue to closely examine bad actors and repeat offenders and exercise its "larger participant" authority over nonbank lenders that are not subject to rigorous federal supervision.

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. NAFCU has consistently shared concerns about how quickly the Bureau has moved through this rulemaking process, skipping important required steps such as convening a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel to fully understand how reducing the safe harbor will impact the industry. NAFCU emphasized that the proposal may force some credit unions to reevaluate their credit card offerings and lead to smaller credit unions exiting the credit card market altogether. NAFCU urges the Committee to closely scrutinize the Bureau's rulemakings and recommends the CFPB withdraw its proposed rule, convene a small business review panel, and issue a new proposed rule that incorporates its feedback.

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 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 result in a more opaque UDAAP landscape and an increase in compliance costs. On April 3, 2023, the CFPB released its Statement of Policy Regarding Prohibition on Abusive Acts or Practices (2023 Policy Statement), which sets forth guidance on the types of acts or practices that constitute abusive conduct. Although guidance such as this 2023 Policy Statement is welcome for its ability to narrow the scope of an expansive prohibition, the policy statement fails to provide the level of clarity that covered entities require to comply with any degree of certainty. NAFCU urges the Bureau to establish clear rules of the road by issuing formal guidance or additional policy statements that include specific examples, case studies, or objective criteria for each aspect of the abusiveness prong and, ultimately, to more clearly define this provision through an official rulemaking process.

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.

Examinations

The CFPB should better coordinate with National Credit Union Administration (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 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 information technology (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 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 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 1071

Congress should 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. As such, we support H.J.Res. 66, a resolution to overturn the final section 1071 rulemaking under the Congressional Review Act.

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 failed to address NAFCU's concerns that it 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 businesses, establish a *de minimis* covered credit transaction threshold that tracks the NCUA Call Report's $50,000 threshold, and exclude small business credit cards and commercial real estate loans in its final section 1071 rulemaking. As such, it will add significant compliance costs and burdens to business lending, forcing many small credit unions to stop making these loans altogether.

Electronic Fund Transfer Act (Regulation E)

A clear error resolution mechanism that ensures nonbank parties other than the credit union are accountable for resolving a dispute should be considered by Congress. Congress should ensure the CFPB creates a fair landscape between 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 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. Reports have indicated that the CFPB may issue new interpretative guidance related to Regulation E that could place liability for fraudulently induced transactions, even those approved by the consumer, on financial institutions. 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.

We thank you for the opportunity to address our concerns with the CFPB while the Committee exercises its oversight authority. 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 Committee on Financial Services