



3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
f: 703.524.1082
nafcu@nafcu.org | nafcu.org

National Association of Federally-Insured Credit Unions

October 27, 2021

The Honorable Sherrod Brown
Chairman
Committee on Banking, Housing, and
Urban Affairs
United States Senate
Washington, DC 20510

The Honorable Pat Toomey
Ranking Member
Committee on Banking, Housing, and
Urban Affairs
United States Senate
Washington, DC 20510

Re: Tomorrow's Hearing: "New Era for Consumer Protection: The Consumer Financial Protection Bureau's Semi-Annual Report to Congress"

Dear Chairman Brown and Ranking Member Toomey:

I write today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) in conjunction with tomorrow's hearing entitled "Bringing Consumer Protection Back: A Semi-Annual Review of the Consumer Financial Protection Bureau." NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 127 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 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 the CFPB to further utilize its exemption authority under section 1022 of the Dodd-Frank Act to take into account the unique structure and characteristics of the credit union industry.

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 earlier this 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. NAFCU members estimated a seven percent increase from last year in the number of full-time equivalent staff members devoted to UDAAP compliance over the next three years, according to NAFCU’s 2020 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. Credit unions should not be unnecessarily worried about facing potential UDAAP violations during a pandemic and economic crisis due to an unclear standard and unpredictable enforcement. 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 National Credit Union Administration (NCUA) to resolve questions regarding whether certain credit union powers conferred by the FCU Act may be subject to the CFPB’s UDAAP authority.

Examinations

The CFPB should better coordinate with NCUA examiners to limit exam burden and streamline processes and procedures. NAFCU urges the CFPB to 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. These credit unions are experiencing overlapping or consecutive examinations, which poses an immense operational burden and diverts valuable resources away from credit union members. An overlapping or back-to-back examination can last well over a month and takes credit union employees away from their daily responsibilities to respond to examiner requests, impairing the credit union’s ability to serve its members and communities.

The recent 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 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* (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, fees 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.¹ 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.² 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 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 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 actions taken last week by the CFPB to look at larger fintech companies operating in the payments space were a good first step.

¹ See <https://www.consumerfinance.gov/about-us/newsroom/cfpb-rescinds-series-of-policy-statements-to-ensure-industry-complies-with-consumer-protection-laws/>.

² https://files.consumerfinance.gov/f/documents/cfpb_final-rescission_electronic-cc-discl-e-sign-consent-cons_2021-03.pdf

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 the *Electronic Fund Transfer Act* (Regulation E) has a clear error resolution mechanism that ensures that third parties are also held accountable for helping resolve the issue when a dispute arises. Credit unions shoulder unique investigative burdens when a transaction involves a mobile payment application. 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 credit unions 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. 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 last year when it released a decision in *Seila Law v. the Consumer Financial Protection Bureau* that found the firing of the single director only for “just cause” 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 is pending before the Committee.

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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 Lewis Plush, NAFCU's Associate Director of Legislative Affairs, at 703-842-2261.

Sincerely,

A handwritten signature in cursive script that reads "Brad Thaler".

Brad Thaler
Vice President of Legislative Affairs

cc: Members of the Senate Committee on Banking, Housing, and Urban Affairs