NAFCU

National Association of Federally-Insured Credit Unions

NAFCU's CFPB Priorities: Reform Opportunities for Issues Affecting Credit Unions

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 a usury ceiling, a prohibition on prepayment penalties, and a member business lending cap. The Bureau of Consumer Financial Protection (CFPB or Bureau) 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 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:

1. COVID-Related Guidance

The CFPB should provide additional COVID-19 pandemic relief, as appropriate, to allow credit unions to better assist their members facing economic challenges.

NAFCU appreciates the CFPB's efforts to provide necessary guidance during the COVID-19 pandemic. Additional guidance regarding the *Fair Credit Reporting Act* (FCRA) could greatly assist credit unions. Specifically, the CFPB should provide guidance on furnishing information to a credit reporting agency (CRA) in the case of an accommodation. As many borrowers seek accommodations to weather the pandemic, credit union lenders may face long-term implications for inadvertent errors. NAFCU asks the CFPB to adopt a "good faith" examination posture when evaluating inadvertent errors.

In addition, credit unions seek further guidance on Regulation Z's advertising rules. Credit unions have made every effort to assist members during the pandemic, and due to historically low interest rates, several institutions are offering promotional rates. NAFCU asks the CFPB to provide additional guidance under Regulation Z's advertising rules on the marketing and disclosure requirements for promotional rates.

2. Electronic Signatures in Global and National Commerce Act (E-Sign)

Simplified E-Sign compliance requirements are appropriate not only as pandemic-related relief, but also as broader regulatory reform as we transition to an increasingly digital environment.

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.

In addition, E-Sign 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.

3. 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 National Credit Union Administration (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 CFPB must make every effort to better coordinate with the NCUA to ensure that 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.

4. London Interbank Offered Rate (LIBOR) Transition

As credit unions transition away from LIBOR, the CFPB should provide more guidance and a flexible supervisory framework that recognizes good-faith efforts at compliance.

With the 2021 sunsetting of LIBOR, the CFPB should take quick action to provide for an orderly and efficient transition to alternative rate indices. Credit unions need guidance as soon as possible to begin this transition. NAFCU appreciates the CFPB's recent proposed amendments to Regulation Z to ease the transition to replacement indices, and recommends that the agency consider ways to alleviate risks to credit unions if their contracts lack flexible fallback language for switching to a new rate index. Additionally, NAFCU urges the CFPB to adopt a supervisory policy that accommodates for the reasonable, good-faith interpretations of contract language that refers to the unavailability of LIBOR. There is a range of difficulties in unwinding certain contracts that rely on LIBOR, and enforcement actions against credit unions who have made good faith efforts to comply with applicable rules should be disfavored.

5. Home Mortgage Disclosure Act (HMDA)

HMDA compliance is costly and burdensome and the CFPB should consider scaling back the collection of discretionary data points and providing higher reporting thresholds.

The CFPB should explore continued refinements to HMDA and Regulation C. NAFCU encourages formal consideration of whether to scale back the collection of discretionary data points adopted under the CFPB's discretionary authority to provide further regulatory relief. HMDA-related compliance costs far exceeded their initial estimates and

continue to limit credit unions' overall capacity to prioritize investments in member service. Credit unions support the role of HMDA in ensuring fair lending and deterring discriminatory practices; however, the current reporting practices do not necessarily achieve these goals and instead impose significant compliance and reporting burdens.

In addition, NAFCU encourages the CFPB to reconsider the sufficiency of relief afforded under HMDA's institutional and transactional coverage thresholds. NAFCU appreciates the CFPB's final rule which increased the reporting coverage thresholds for open-end and closed-end loans under Regulation C, but a higher threshold would provide more meaningful relief for credit unions. At the very least, the CFPB should consider extending, for an additional year, the temporary reporting threshold of 500 open-end lines of credit.

6. Implementation of Section 1071

The CFPB should delay the timeline for its section 1071 rulemaking and exempt credit unions from compliance with any section 1071 rules or provide alternative forms of exemptive relief.

Section 1071 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) requires financial institutions to collect and report information to the CFPB on small business loan data using similar systems and procedures to those currently used with HMDA reporting. The goal is to facilitate enforcement of fair lending laws and enable communities, businesses, and other entities to better understand the needs of women-owned and minority-owned businesses. Recently, the CFPB released the *Small Business Regulatory Enforcement Fairness Act* (SBREFA) outline of proposals under consideration and convened a SBREFA panel. NAFCU has urged the CFPB to delay any future rulemaking and continues to ask that credit unions be exempt from any section 1071 rulemaking. Given the statutory constraints imposed by the Dodd-Frank Act, the CFPB should also provide alternative forms of exemptive relief that take into consideration the unique characteristics of credit union small business lending.

Limits on small business lending imposed under the FCU Act, including field of membership and member business lending rules, will likely compound the negative effects of section 1071 implementation. Although the statutory purposes of section 1071 are well intentioned, the extensive and costly data collection efforts necessary to comply will likely have adverse effects on small businesses in terms of increased fees or rates, or the elimination of certain credit products. Moreover, this will slow the approval times for business loans. From a technical perspective, NAFCU has urged the CFPB to adopt a simplified definition of a "small business" to simplify any future reporting duties.

7. Qualified Mortgage (QM)

The GSE Patch should be further extended to alleviate market disruptions and the CFPB should adopt a viable alternative that provides the same legal protections and benefits as the GSE Patch.

NAFCU urges the CFPB to further extend the Temporary Government-Sponsored Enterprise (GSE) loan category or the "GSE Patch." The GSE Patch was previously set to expire on January 10, 2021, or upon the GSEs exiting conservatorship, whichever occurred first. NAFCU appreciates the CFPB's recent final rule extending the GSE Patch until the mandatory compliance date of the General QM rulemaking of July 1, 2021; however, this delay may not be sufficient and may cause market disruptions. The CFPB should extend the GSE Patch for at least 18-24 months after finalization of its General QM rule.

The CFPB recently finalized the General QM and Seasoned QM definitions, largely as proposed. NAFCU opposed the General QM definition's adoption of a pricing threshold, as it may disproportionately impact first-time homebuyers and low- and moderate-income borrowers. NAFCU will continue to advocate for a QM definition that provides access to credit. Additionally, although NAFCU supports a replacement for the GSE Patch, the proposed Seasoned QM definition falls short as it does not provide the same legal protections. NAFCU asks that the CFPB provide a reasonable, alternative mechanism.

8. Credit Card Accountability Responsibility and Disclosure Act (CARD Act)

The CFPB should simplify requirements for delivering CARD Act disclosures electronically and should exclude secured credit cards from ability-to-repay requirements.

NAFCU has long sought additional regulatory clarity on CARD Act disclosures to encourage more efficient practices. Under Regulation Z, most required disclosures may be provided electronically as long as the consumer's consent is obtained in compliance with E-Sign. However, E-Sign's reasonable demonstration of consent requirements do not make sense in our increasingly digital banking environment. NAFCU urges the CFPB to incorporate the temporary guidance on obtaining consent from members through oral telephone interactions for all disclosures on a permanent basis.

NAFCU also encourages the CFPB to explore a more flexible framework for applying the ability-to-pay requirements in the context of secured cards. Secured cards do not carry the same level of risk for consumers of unsecured cards, and credit unions can easily evaluate whether a member has the ability-to-pay by verifying and holding deposited funds as collateral. NAFCU again urges the CFPB to exclude secured cards from the ability-to-pay requirements of the CARD Act. In addition, the CFPB should clarify the "written application" requirements for young consumers to provide a more seamless experience.

9. 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. NAFCU's members appreciate this guidance because the attention and resources dedicated to UDAAP compliance have continued to increase over the last few years. However, despite this guidance, 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 NCUA to resolve questions regarding whether certain credit union powers conferred by the FCU Act may be subject to the CFPB's UDAAP authority.

10. Implementation of Section 1033

The CFPB should seek to preserve bilateral data sharing agreements instead of replacing them to avoid inadvertent consumer harm or systemic risk from unsupervised data aggregators.

Section 1033 of Dodd-Frank Act grants consumers the right to obtain certain information concerning financial products or services, such as transactional data. The CFPB recently published an advance notice of proposed rulemaking (ANPR) implementing section 1033. NAFCU is supportive of the CFPB's efforts to promote consumer access and reducing reliance on screen scraping, but cautions that fintech companies and data aggregators should not obtain an unfair advantage in terms of their ability to extract account information from traditional financial institutions, like credit unions. A company that requests access to consumer financial records should bear the burden of ensuring that the transfer and retention of such information is secure and conforms to a consumer's expectation of privacy. NAFCU urges the CFPB to narrow the scope of shareable information to protect consumers from inadvertent disclosure of sensitive information. In addition, NAFCU asks the CFPB to develop data security principles for situations where an entity seeks data but has no existing contractual relationship, to ensure the requesting entity safeguards the consumer's information.

11. 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 adopted as well as further guidance on Regulation E disclosures.

Credit unions continue to face error resolution challenges, particularly when a transaction involves a mobile payment application. As mobile payment applications become more prevalent, the CFPB should provide guidance regarding instances where a financial institution owns a dispute. Error resolution investigations put a strain on credit union resources and in certain situations, may not be the best party to investigate a dispute. The CFPB should set out a clear hierarchy for error resolution when a depository institution owns a dispute.

In addition, the CFPB should provide a clearer definition of an "access device" as it relates to a mobile app, such that the mobile app is considered a service provider under

Regulation E. A clear interpretation of the rule will assist credit unions with Regulation E compliance. Lastly, recent enforcement actions involving Regulation E violations have raised questions regarding the timing of disclosures and further guidance from the CFPB on disclosures would help relieve confusion and compliance burdens.

12. Increased Use of Small Entity Exemption Authority

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 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 QM and 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 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.