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ISSUE BRIEF

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 Consumer Financial Protection (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 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. IMPLEMENTATION OF SECTION 1071

The CFPB should adopt common sense 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. In implementing the Section 1071 rule, 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. potential statutory amendments.

2. 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.

NAFCU urges the CFPB to create 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.

NAFCU encourages 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. Recent reports have indicated that the CFPB plans to 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. Additionally, the CFPB has received a letter from several Senators requesting a reinterpretation of the Electronic Fund Transfer Act (EFTA). 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.

3. "JUNK FEES" AND OVERDRAFT

The CFPB should work with credit unions to provide enhanced financial literacy services on financial products and associated fees and refrain from maligning fees that are well regulated and clearly disclosed to consumers.

On January 26, 2022, the CFPB issued a request for information (RFI) regarding fees on consumer financial products and services, or "junk fees." NAFCU objects to the CFPB's characterization of financial services fees as "junk 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. The CFPB should consider the current regulatory regime and significant body of existing data concerning consumer understanding of consumer financial products and services and recognize that fees in the consumer financial services market are subject to significant disclosure requirements intended to promote consumer choice and competition. NAFCU urges the CFPB to engage in broad consumer education initiatives regarding financial disclosures. On June 22, 2022, the CFPB issued an advance notice of

proposed rulemaking (ANPR) inviting comment on questions related to credit card late fees that financial institutions, including credit unions, collect. Credit card late fees are not surprise fees and are fully disclosed to consumers and NAFCU urges the Bureau not to eliminate or reduce the safe harbor fee amounts for credit card late fees as this could negatively affect communities by tightening credit and increasing industry consolidation while resulting in more expensive products and services to account for the lost revenue, such as increased interest rates for credit products to account for the additional risk and reduced late fee income.

On June 29, 2022, the CFPB issued an advisory opinion affirming that federal law often prohibits debt collectors from charging "pay-to-pay" or "convenience" fees, which are imposed on consumers who want to make a payment in a specific way, such as online or by phone. On February 23, 2022 NAFCU filed an amicus brief in response to the CFPB's hard line interpretation of the phrase "permitted by law" in the Fair Debt Collection Practices Act (FDCPA), in the bureau's amicus brief submitted in the Amy Thomas-Lawson, et al. v. Carrington Mortgage Services LLC. Case. NAFCU argued that the phrase should not be so narrowly construed as to include only those fees that are expressly authorized by either the mortgage instrument or a statute. NAFCU will continue to monitor FDCPA regulations and litigations and share updates with credit union members.

4. INCREASED NONBANK SUPERVISION

The CFPB should utilize its larger participant authority and nonbank supervisory authority to recognize the dangers to consumers posed by fintechs.

NAFCU urges the CFPB to ensure that lending activities performed by fintechs and BNPL providers are subject to the same fair lending requirements, disclosure rules and other regulations and supervision as depository financial institutions. Given the expanding marketplace, technology and marketing innovations, there is significant risk for consumers in engaging with organizations not subject to these comparable levels of supervision. Such organizations also weaken the overall financial system, by reducing trust and drawing resources away from regulated organizations. NAFCU is encouraged by the CFPB's decision to exercise supervisory authority of nonbank entities that pose a risk to consumers, and it supports the proposed procedural rule to provide the CFPB with a mechanism to release final orders and decisions from risk determinations. Recent notices from the CFPB have taken aim at shoddy data security practices by nonbank companies and financial technology providers and the CFPB has taken action against a fintech for engaging in deceptive acts or practices by lying to consumers, further highlighting the need for more comprehensive supervision.

The CFPB should work with the Federal Financial Institutions Examination Council to establish a coordinated approach to identify supervisory gaps and consumer compliance risks that demand legislative or regulatory attention. NAFCU continues to urge the agency to initiate a rulemaking and exercise supervisory authority over fintech companies utilizing its "larger participant" authority. As fintech and other companies have grown over time, they have become larger participants in the consumer financial services marketplace and are not subject to the supervision of a federal financial regulator, allowing them to potentially skirt important consumer protections and pose a risk to financial markets. NAFCU urges the CFPB to foster a regulatory environment that promotes competition and responsible innovation but minimizes regulatory arbitrage.

5. 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 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.

To best accommodate both modes of data exchange (company-to-company versus entirely consumer managed), NAFCU recommends the CFPB seek to preserve credit unions' ability to define the scope of third-party data privileges, as well as channels for data sharing that exist outside of formal contacts. 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 the CFPB 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.

6. 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. 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.

NAFCU encourages the CFPB to provide 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. 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. In protecting consumers from UDAAP, the CFPB should initiate a rulemaking to define the "abusiveness" standard, or, alternatively, reinstate its previous policy statement clarifying the 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