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VIA Electronic Filing

May 14, 2018

Monica Jackson  
Office of the Executive Secretary  
Bureau of Consumer Financial Protection  
1700 G Street NW  
Washington, DC 20552

Re: Request for Information Regarding Bureau Enforcement Processes,  
Docket No. CFPB-2018-0003

Dear Ms. Jackson:

On behalf of America's credit unions, I am writing in response to the Bureau of Consumer Financial Protection's (Bureau) Request for Information (RFI) Regarding Bureau Enforcement Processes. The Credit Union National Association (CUNA) represents America's credit unions and their 110 million members.

The Bureau is seeking comments and information from stakeholders to assist it in assessing the overall efficiency and effectiveness of its processes related to the enforcement of Federal consumer financial law, and considering whether any changes to these processes would be appropriate. Specifically, the Bureau is seeking public input on how best to achieve meaningful burden reduction or other improvements to the processes it uses to enforce Federal consumer financial laws while continuing to meet its statutory objectives and ensuring a fair and transparent process for parties subject to its enforcement authority.

## **I. Executive Summary**

The Bureau's Division of Supervision, Enforcement & Fair Lending (SEFL) executes the Bureau's supervision and enforcement duties, as mandated by the Consumer Financial Protection Act (CFPA).<sup>1</sup> In its enforcement work, the Bureau may investigate whether any person is or has been engaged in any conduct that is a violation of Federal consumer financial law.<sup>2</sup>

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<sup>1</sup> CFPA § 1021 (c)(4); 12 U.S.C. § 5511(c)(4).

<sup>2</sup> 12 U.S.C. §§ 5561-6656.

CUNA and its membership have observed, since the Bureau's inception in 2011, that its enforcement processes have room for improvement. CUNA's letter discusses the following list of improvements that the Bureau can make to its enforcement processes that would benefit credit unions, the financial services industry, and consumers.

- The Bureau should delegate to the National Credit Union Administration (NCUA) primary examination and enforcement of consumer protection laws for credit unions with over \$10 billion in assets.
- If the Bureau retains examination and enforcement over credit unions with over \$10 billion in assets, then it must work together with the NCUA as a partner throughout the examination and enforcement process.
- The Bureau must not impose enforcement actions that are not supported by prescriptive laws, regulations, or guidance under its jurisdiction.
- If the Bureau continues primary examination and enforcement over the largest credit unions, then its processes must be more transparent and directed at resolving any violations, with enforcement actions serving as a last resort.
- The Bureau should establish for the financial services industry a matrix for how it determines civil money penalties. This matrix should be published for notice and comment.

## **II. Credit Unions' Roles in the Industry**

CUNA appreciates the opportunity to comment on this RFI Regarding Bureau Enforcement Processes. CUNA is the largest trade association in the United States serving America's credit unions. With its network of affiliated state credit union associations, CUNA serves over 5,550 credit unions, which are owned by 110 million members collectively.

Credit unions, which may be federally chartered or state chartered, are not-for-profit, tax-exempt organizations owned and operated by their members for the benefit of their members. Credit unions operate in every state and territory in the United States, and were established "for the purpose of promoting thrift among [their] members and creating a source of credit for provident and productive purposes."<sup>3</sup> In contrast, banks and savings associations are for-profit financial institutions that are either investor owned or mutually owned by their customers.

Credit unions only operate to benefit their members and are not beholden to shareholders or profits. As such, credit unions often provide lower rates on loans and fees for services, higher returns on deposits, and more communication with members. Because member service is the primary emphasis and purpose of a credit union, consumers can rely on fair, transparent, and equitable treatment. Consumers understand the difference between a credit union and a bank or other financial services provider. As illustrated by Consumer Reports, credit unions were among the highest rated services it ever evaluated, "with 93

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<sup>3</sup> NCUA, *A Brief History of Credit Unions*, available at <https://www.ncua.gov/About/Pages/history.aspx>.

percent of ... customers highly satisfied, on average, vs. 69 percent for the four biggest banks.”<sup>4</sup> Credit unions’ inherent consumer focus demonstrates why they require less oversight for consumer protection requirements compared to banks and other for-profit financial institutions.

The Bureau currently has the authority to write consumer financial protection regulations and issue guidance that will affect credit unions, and has primary examination and enforcement authority over consumer financial protection regulations for institutions with over \$10 billion in assets.<sup>5</sup> As the vast majority of credit unions have asset sizes under \$10 billion, the Bureau only has examination and enforcement authority for currently seven credit unions.<sup>6</sup> The remaining credit unions throughout the country, with fewer than \$10 billion in assets, are subject to the NCUA’s examination, supervision, and enforcement of consumer financial protection laws and regulation.

CUNA understands the Bureau’s role in regulating the financial services industry and ensuring bad actors and irresponsible lending practices are controlled so this country does not repeat the mistakes of the 2008 financial crisis. Indeed, avoiding these mistakes was why the Bureau was created. Rather than impulsively reject the creation of the Bureau, credit unions acknowledged that consumers may need additional protections from Wall Street banks and abusers of consumers, when Congress considered legislation that would become the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (Dodd-Frank Act).

However, as the Bureau has acknowledged, credit unions were not responsible for the 2008 financial crisis, and were instead the trusted institutions that consumers looked to for safe and competitively priced financial products and services.<sup>7</sup> Therefore, CUNA strongly believes the Bureau’s efforts and resources must focus on the problem actors in the industry, not credit unions.

We are encouraged by the Bureau’s series of RFIs aimed at transforming the Bureau into a better and more efficient agency. We believe the changes articulated in this letter are ones the Bureau can implement to better focus its time, effort, and resources on the problem actors in the industry, upholding the intent of the Dodd-Frank Act.

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<sup>4</sup> Jeff Blyskal, *Choose the Best Bank for You*, Consumer Reports, available at <http://www.consumerreports.org/banks-credit-unions/choose-the-best-bank-for-you/> (Dec. 4, 2015) (“That satisfaction is driven by good customer service, not surprising when you consider that credit unions are owned and managed by their members.”).

<sup>5</sup> 12 U.S.C. § 1551.

<sup>6</sup> The NCUA Office of National Examinations and Supervision (with the relevant state supervisory authority for state-chartered credit unions) supervises credit unions for safety and soundness if they have assets over \$10 billion.

<sup>7</sup> See Feb. 28, 2018 Remarks by Mick Mulvaney, Bureau Acting Director, at CUNA Governmental Affairs Conference (stating, “We recognize the fact that you all did not cause the financial crisis . . . and that you should not be regulated like the folks who might have done those things.”).

### III. CUNA Recommendations

#### A. The Bureau Should Transfer Examination and Enforcement of the Largest Credit Unions to the NCUA

The Bureau has exclusive examination and primary enforcement authority over credit unions with assets over \$10 billion for compliance with consumer financial laws, as authorized by section 1025 of the Consumer Financial Protection Act of 2010 (CFPA).<sup>8</sup> Currently, only seven of nearly 5,700 federally insured credit unions (FICUs) are above the \$10 billion threshold and thus subject to Bureau examination and enforcement. Because of the different structure and business model of credit unions, primary examination and enforcement over all credit unions—including the largest seven—should be under the control of the NCUA.

CUNA supports a change by the Bureau to transfer primary examination and enforcement authority of all FICUs for compliance with consumer protection laws and regulations to the NCUA. This change would include delegating the Bureau's examination and enforcement authority over credit unions with over \$10 billion in assets to the NCUA. CUNA supports this change as it will enable the Bureau to fully focus its examination and enforcement efforts on Wall Street banks and other abusers of consumers, while ensuring credit unions continue to be adequately supervised by the federal agency most proficient with its structure and operation. In addition, this change would streamline the examination and enforcement efforts for these largest credit unions, which are subject to dual examination or even triple examination for a federally insured state chartered credit union.

##### 1. The Bureau Has the Authority to Delegate Responsibilities to the NCUA

The Bureau can delegate its examination and enforcement over the seven largest credit unions to the NCUA, by exempting these credit unions from section 1025 of the CFPA.<sup>9</sup> This delegation can be provided to the NCUA based on the Bureau's authority under section 1022(b)(3)(A), which states that the Bureau:

*[M]ay conditionally or unconditionally exempt any class of covered persons . . . from any provision of this title [X], or from any rule issued under this title [X], as the Bureau determines necessary or appropriate to carry out the purposes and objectives of this title, taking into consideration the [following] factors [as appropriate]: (i) the total assets of the class of covered persons; (ii) the volume of transactions involving consumer financial products or services in which the class of covered persons engages; and (iii) existing provisions of law which are*

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<sup>8</sup> 12 U.S.C. § 1551.

<sup>9</sup> See Letter from NCUA Chairman McWatters to then-Bureau Director Cordray, July 6, 2017.

*applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections.*<sup>10</sup>

CUNA believes this provision allows the Bureau to delegate to the NCUA primary enforcement authority over credit unions with over \$10 billion in assets, considering the three statutory factors. First, credit unions' total combined assets are far less than the total assets of banks subject to the Bureau's enforcement authority, and are minor compared to the portfolio of financial institutions under the Bureau's jurisdiction. Second, while the transaction volume of these top credit unions is high, this factor is not comparable to banks, as credit unions are owned by the members they serve, who therefore have greater control over the institutions' operations. Third, the Bureau would not cede control over credit unions with this delegation to the NCUA, as it would retain rulewriting authority over all credit unions, and could participate in examination and enforcement decisions should it deem such involvement necessary.

The NCUA examines and enforces consumer financial protection laws for 99 percent of the 5,700 FICUs and examines the FICUs under the Bureau's authority for safety and soundness. In addition, the NCUA examined and enforced these top FICUs for consumer protection regulations prior to the Bureau obtaining authority to do so. NCUA's thorough understanding of credit unions and examination duties as a prudential regulator makes it the most effective and efficient regulator for all FICU activities. The Bureau should use its authority to make this change.

## **2. NCUA Chairman McWatters Supports CUNA's Position**

NCUA Chairman McWatters wrote to then-Bureau Director Cordray on July 6, 2017, requesting that FICUs be exempt from the examination and enforcement provisions of section 1025<sup>11</sup> of the CFPA.<sup>12</sup>

In this letter, Chairman McWatters stated that:

*As not-for-profit, consumer-owned and -controlled financial institutions, FICUs serve a unique, positive role for consumers in today's financial services marketplace. . . . That role can and should be distinguished from the role played by for-profit, investor-owned and -controlled financial institutions. Subjecting FICUs and their consumer/member owners to the dual examination—and, in the case of federal insured, state-chartered credit unions, triple examination—regime mandated under section 1025 of the CFPA imposes unnecessarily burdensome costs on FICUs, particularly given their positive, consumer-focused role.*

CUNA strongly supports Chairman McWatters' position and urges the Bureau to accept his guidance.

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<sup>10</sup> 12 U.S.C. § 5512(b)(3).

<sup>11</sup> 12 U.S.C. § 1551 (Requires the Bureau have exclusive examination and enforcement authority over credit unions with over \$10 billion in assets).

<sup>12</sup> Letter from NCUA Chairman McWatters to then-Bureau Director Cordray, July 6, 2017.

### 3. Bureau Enforcement Actions Against Credit Unions Harms Consumers

The Bureau has historically imposed aggressive punitive fines on financial institutions as its primary method of enforcement. While such fines may be appropriate to acquire the attention of financial institution executives who prioritize profits and shareholder support over consumer service, this approach is not effective or useful for credit unions that are owned by the members they serve.

Chairman McWatters expressed this position in his June 2017 letter to the Bureau, stating that the Bureau's imposition of punitive fines was inequitable for credit unions. Chairman McWatters stated that he made this point:

*[N]ot to imply that the protection of credit unions' consumer owners is unimportant, but rather to suggest that the imposition of aggressive punitive fines on the very FICU consumers the Bureau is tasked with protecting . . . is tantamount to imposing a 'the beatings will continue until morale improves' approach to consumer protection enforcement.<sup>13</sup>*

Credit unions exist to serve consumers, and federal agency enforcement should encourage this mission. The imposition of harsh penalties and fines only harms credit union members.<sup>14</sup> The NCUA, given its current extensive examination and enforcement authority over credit unions, is better equipped to correct compliance issues that may occur in a credit union, and guide the institution in the direction of proper compliance in the future without the imposition of punitive actions that hurt its members.

Furthermore, this change will enable the Bureau to more efficiently focus its time, money, and resources on bad actors in the industry, which more often includes large banks and non-depository institutions. Consumer protection and the Bureau's resources are maximized if focused on industries and organizations most likely to have a track record of harming consumers. Recent large fines by the Bureau demonstrate there are bad actors that deserve full Bureau scrutiny.

Moreover, the CFPA explicitly requires that the Bureau coordinate its supervisory activities with those conducted by prudential regulators.<sup>15</sup> Delegation of its supervisory authority to NCUA is consistent with the Bureau's statutory mandate.

CUNA understands that any organization can make mistakes or run afoul of inconsistent guidance and interpretation of requirements; however, the difference between a mistake and business practices that knowingly harm consumers is clear. The Bureau should correct errors and ensure that institutions comply with regulation; however, the Bureau

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<sup>13</sup> *Id.*

<sup>14</sup> See Feb. 28, 2018 Remarks by Mick Mulvaney, Bureau Acting Director, at CUNA Governmental Affairs Conference (stating that “[credit unions] are owned by your members . . . and every single time we put a new cost on [credit unions], it comes out of their pockets.”).

<sup>15</sup> 12 U.S.C. § 5515(b)(2).

should focus its efforts primarily on those with a history of noncompliance or those in businesses that are inherently consumer unfriendly.

Finally, the Bureau's examiners and enforcement staff are more familiar with banks since they are the bulk of the financial institutions that fall under the Bureau's section 1025 authority. This experience could lead the Bureau to fail to recognize the unique structure of credit unions that distinguishes them from banks.

#### **4. The Bureau Can Consult or Assist the NCUA, If Necessary**

If the Bureau delegates examination and enforcement authority over credit unions with over \$10 billion in assets to the NCUA, the NCUA will consult with the Bureau to ensure its mission is preserved. As Chairman McWatters has stated, the NCUA's Office of Consumer Financial Protection coordinates and works with the Bureau.<sup>16</sup> Both agencies are members of the Federal Financial Institutions Enforcement Council (FFIEC), which is tasked with promoting consistency in the supervision of financial institutions, and encouraging uniform examination standards among its member agencies.<sup>17</sup> This interagency coordination provides the mechanism for communication about financial institution practices, and would allow the Bureau to provide feedback on the NCUA's examination and enforcement of the largest credit unions.

#### **5. The Bureau Has Regulatory Authority Over Consumer Financial Services**

If the Bureau determined there were practices in the financial services marketplace that warranted further regulation and government oversight, it could address these practices through regulations for financial institutions, including all credit unions. In the past seven years, the Bureau has imposed many new regulatory requirements on all credit unions, including those under \$10 billion in asset size. These regulations included additional requirements for credit union mortgage loans, small dollar loans, remittance transfers, as well as credit union reporting requirements. We expect the Bureau to continue to monitor practices in the industry and impose regulatory requirements when they can justify a need. This Bureau authority would not change if examination and enforcement authority over the seven credit unions with more than \$10 billion in assets was delegated to the NCUA.

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<sup>16</sup> *See id.*

<sup>17</sup> The FFIEC was established on Mar. 10, 1979, pursuant to Title X of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRA), Public Law 95-630. Federal agency members include the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the NCUA, the Office of the Comptroller of the Currency (OCC), and the Bureau.

## B. The Bureau Should Not Regulate by Enforcement

Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive, or abusive act or practice (UDAAP). The Bureau had rulemaking and enforcement authority for UDAAP. We remain concerned that the Bureau will continue to use UDAAP without any rules or guidance in place to help entities, such as credit unions, comply.

One need look no further than the Bureau's 2016 Consent Order against Dwolla, an online payment provider.<sup>18</sup> The Bureau alleged that Dwolla falsely claimed its data security practices exceeded or surpassed industry security practices and falsely claimed the consumer information it held was securely encrypted and stored.<sup>19</sup> The alleged conduct took place from 2011 to 2014.<sup>20</sup> Dwolla agreed to pay a civil penalty of \$100,000, even though the Bureau had no regulation or guidance in place addressing this issue.<sup>21</sup> This is the very definition of regulation by enforcement.

If the Bureau wishes to make changes to policy, it should engage in the appropriate notice and comment process so the due process rights of stakeholders are not violated. UDAAP should not be used as a "catch-all" for the Bureau to enforce policies not required by laws or regulations. As such, CUNA urges the Bureau to issue a regulation or formal guidance to define the terms of UDAAP so credit unions are aware of how to comply with the Bureau's expected standards. Enforcement actions should not be used to guide industry standards, as these actions are based on a set of facts and circumstances specific to the individual parties. Enforcement actions should be based on regulations or guidance, not vice versa.

In addition, the Bureau should not engage in enforcement actions based on a loose interpretation of regulations or guidance.<sup>22</sup> For example, in *PHH Corp. v. CFPB*, the Bureau's interpretation of the requirements under the Real Estate Settlement Procedures Act (RESPA) conflicted with the actual legal requirements, as found by both federal district and appellate courts.<sup>23</sup> Enforcement actions should only be imposed on financial institutions for clear and unmistakable violations of law. And, the Bureau must enforce only the regulations that are under its jurisdiction, and not create additional legal requirements that have not been subject to the notice and comment process.

Furthermore, we urge the Bureau to issue a bulletin clarifying that previous enforcement actions or consent orders that conflict with statutory or judicial precedent create no new expectations for compliance. This clarification would provide more transparency and due

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<sup>18</sup> Dwolla, Inc. Bureau No. 2016-Bureau-0007 \*1 (Mar. 2, 2016).

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

<sup>22</sup> *See PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc ruling) (vacating a \$100+ million fine by the Bureau against PHH Corp.).

<sup>23</sup> *See id.*

process to credit unions and consumers. This is particularly important for actions the Bureau has taken that conflict with NCUA precedent.

Bureau Acting Director Mulvaney has stated that as the Bureau engages in future enforcement moving forward, “we are not going to regulate by enforcement.”<sup>24</sup> CUNA is encouraged by this statement and hopeful to see our recommendations incorporated.

### **C. The Bureau Should Work with the NCUA on Enforcement Actions**

If the Bureau does not use its exemption authority under CFPA 1022(b)(3) to provide the NCUA with primary examination and enforcement of consumer protection regulations for credit unions with over \$10 billion in assets, we urge it to work closely with the NCUA in its examination and enforcement of credit unions. At a minimum, NCUA should be a partner throughout the process, and examinations of the largest credit unions should be conducted jointly with the NCUA. NCUA should also be a partner in any enforcement actions brought against a credit union. As the prudential regulator for FICUs, their active participation and guidance on these matters is critical.

### **D. If the Bureau Keeps Examination and Enforcement Authority Over the Largest Credit Unions, then Processes Must Be Changed**

If the Bureau does not delegate primary examination and enforcement authority of credit unions over \$10 billion in assets to the NCUA, we urge it to make changes to its current processes. The Bureau should have a common sense approach to enforcement which focuses on effective communication between it and the financial institution, a mutual desire to quickly address and remedy weaknesses, a desire to correct any problems without the use of a formal enforcement action, and the application of a formal enforcement action only in the instances where it is absolutely necessary, such as if the financial institution fails to cooperate or correct any issues, or if such enforcement is expressly required by statute.

An ideal sequence of events would include the following actions:

(1) An initial finding or mistake identified during the financial institution’s examination, which is then quickly communicated to management. Communication with the financial institution would be frequent, substantive, and clear. The financial institution would have a thorough understanding of the problem and the Bureau’s concern.

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<sup>24</sup> Statement by Acting Bureau Director Mulvaney at CUNA Government Affairs Conference, Feb. 28, 2018.

(2) Financial institution management would be provided the opportunity to accept or rebut the findings within 30 days, or another appropriate timeframe.

(3) Financial institution management would commit in writing, as documented in examination reports, to correct the weakness within a defined period.

And,

(4) The Bureau would complete a follow-up review to evaluate management's committed action plan. In the instance that little or no progress is made by the financial institution to remedy the problems or issues, the Bureau can move to an enforcement action. For FICUs, the NCUA would be a partner with the Bureau during every step in the process. The above structure would promote clear communications and allow financial institutions to correct deficiencies in a timely manner while also mitigating reputational risk.

In the instance that civil money penalties are imposed on a financial institution, the Bureau should calculate these penalties based on a civil money penalty matrix that it establishes and proposes for notice and comment.

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CUNA and credit unions respect and support the Bureau's goals of protecting all consumers in the financial marketplace. This goal is the foundation for all credit unions and the reason consumers consider credit unions the safest and most trustworthy financial institutions. Indeed, the founders of the American credit union system believed that "the people's welfare can best be secured by institutions organized by the people themselves."<sup>25</sup> Because our goals are united with the Bureau's, we hope to work together as the Bureau moves forward with its structural, functional, and operational changes. As part of that collaboration, CUNA respectfully urges the Bureau to address the issues identified in this letter.

On behalf of America's credit unions and their 110 million members, thank you for your consideration.

Respectfully submitted,

Elizabeth A. Eurgubian  
Deputy Chief Advocacy Officer & Senior Counsel

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<sup>25</sup> Alphonse Desjardins, *The Cooperative People's Bank: La Caisse Populaire*, Russell Sage Foundation: N.Y., 3.