**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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Consumer Financial Protection Bureau,

Plaintiff,

vs.

TCF National Bank,

Defendant.

Case No. 17-cv-0166-RHK-KMM

**BRIEF AMICUS CURIAE OF STATE BANKERS ASSOCIATIONS IN SUPPORT OF THE DEFENDANT**

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The undersigned group of state bankers associations (SBAs)[1] is pleased to provide this brief in support of TCF National Bank (TCF) and its Motion to Dismiss in Case No. 17-cv-0166-RHK-KMM. The Minnesota Bankers Association is the lead *amicus*, and it is joined by 13 additional SBAs.[2] This lawsuit could have a significant impact on TCF, but

[1] The SBAs have written and are filing this brief on behalf of their member banks. No counsel for any party to this case authored this brief in whole or in part, and neither a party nor its counsel, or any other party contributed money that was intended to fund preparing or submitting the brief.

[2] In addition to the Minnesota Bankers Association, the group of SBAs includes: Colorado Bankers Association, Florida Bankers Association, Illinois Bankers Association, Kansas Bankers Association, Maryland Bankers Association, Michigan Bankers Association, Missouri Bankers Association, North Dakota Bankers Association, Oklahoma Bankers Association, Oregon Bankers Association, South Dakota Bankers Association, Tennessee Bankers Association and Wisconsin Bankers Association.

the precedent it sets could also have serious implications for the entire banking industry. The SBAs appreciate the opportunity to share our perspectives with the Court.

Combined, the SBAs represent roughly 2,490 member banks. The SBAs' member banks are a diverse mix of banks, and therefore are a good representation of our country's banking industry. The SBAs represent small community banks, regional banks and the largest banks in the country, and they operate in urban areas, the suburbs and rural communities. While the SBAs' member banks have different profiles, the issues underlying this lawsuit impact each of them.

TCF's Memorandum of Law in Support of its Motion to Dismiss the First Amended Complaint has detailed its position with respect to this case. We agree with TCF's legal conclusions. Rather than restating all the legal arguments and the precedent stated in that Memorandum, the SBAs will use this brief to note the significant impact this lawsuit could have on the banking industry as a whole.

## I. Introductory Remarks Regarding Banking Regulations and Supervision

The banking industry is one of the most heavily regulated industries. Banks are subject to a significant number of complex, extremely detailed federal banking laws and regulations. Every bank must comply with tens of thousands of pages of laws and regulations, governing both consumer protection and bank safety and soundness. And, equally as important, the bank regulatory agencies strictly enforce all those laws and regulations through regular bank examinations. Bankers must accept that compliance

with all the banking laws and regulations is an integral component of every bank's overall operations.

A. Consumer Protection Laws Rely Heavily Upon Written Disclosures

Since the mid-1970s, Congress has passed a series of banking consumer protection laws. These consumer protection laws are all built around a common principle: Congress believes that clear, written disclosures will help protect consumers. In fact, it can be argued that the delivery of written disclosures is a key, foundational requirement of many of the banking consumer protection laws.[3]

For example, Congress passed the Truth in Lending Act to help consumers better understand the loan transactions into which they enter, and mandatory, written disclosures are the foundation of the law.[4] Regulation Z, which implements this important law, is a lengthy, detailed regulation that mandates different written disclosures for different types of loan transactions.[5] For example, the disclosures for credit cards and other open-end credit are different from the disclosures for car loans and other closed-end

[3] Providing written disclosures is a key requirement of the following consumer protection laws: Truth in Savings Act, 12 USC 4301 et seq., the Electronic Fund Transfers Act, 15 USC 1693, et seq., the Truth in Lending Act, 15 USC 1601, et seq., the Real Estate Settlement Procedures Act, 12 USC 2601, et seq., and the Expedited Funds Availability Act, 12 USC 4001, et seq.

[4] See, the Truth in Lending Act, 15 USC 1601 (a) Informed use of credit, "The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."

[5] Regulation Z, 12 CFR 1026, et seq. On the Government Printing Office's website, (https://www.gpo.gov/fdsys/pkg/CFR-2012-title12-vol8/pdf/CFR-2012-title12-vol8-part1026.pdf), Regulation Z, plus its Appendices and its Official Commentary are 480 pages long.

credit.[6] To help ensure banks provide appropriate written disclosures, Regulation Z's Appendix G includes 49 different Open-End Model Forms and Clauses, and Appendix H includes 73 different Closed-End Model Forms and Clauses. The Truth in Lending Act and its implementing Regulation Z illustrate that written disclosures are the foundation of the consumer protection regulatory structure.

B. Bankers Follow the Precise Language in the Regulations

The consumer protection regulations are extremely detailed. To comply with a given regulation, bankers must know and understand the rules. They also must apply these detailed rules to their specific products and services because different contractual terms may require different treatment under the regulations.

The Regulation E Opt-in rules, which are the subject of this lawsuit, are a good example of just how precisely the consumer protection regulations are written. Regulation E precisely states the information banks must include in their written Opt-in disclosures.[7] The regulation precisely states the form in which banks must present the required information.[8] Regulation E further describes the exact means by which banks can obtain a customer's affirmative consent to Opt-in.[9] Finally, the regulation requires

[6] See, the basic Regulation Z disclosure rules for open-end credit in 12 CFR 1026.5 through 1026.16, and see the basic Regulation Z disclosure rules for closed-end credit in 12 CFR 1026.17 through 1026.24.
[7] Regulation E, 12 CFR 1005.17(b)(1) contains the general disclosure requirement, and 12 CFR 1005.17(d) lists all the required disclosures.
[8] Regulation E, 12 CFR 1005.17(b)(1)(i) states that the disclosure must be in writing, segregated from all other information.
[9] Regulation E, 12 CFR 1005.17(b)(1)(iii) states the requirement to obtain the consumer's affirmative consent, and the Official Commentary to that section lists the ways banks are allowed to obtain that consent.

banks to follow up with a precisely worded, written confirmation of a customer's affirmative consent to Opt-in.[10]

To ensure compliance with the kind of detailed regulatory requirements found in the Regulation E Opt-in rules, bankers follow the regulation *exactly*. Regulation E leaves no room for interpretation or individual bank variance. Bankers follow the precise language of Regulation E, and all the other banking regulations, to the letter.

## II. Preserve Two Basic Cornerstones of Regulatory Enforcement

We do not want to restate all the legal conclusions and precedent contained in TCF's papers. However, a couple matters impact the banking industry as a whole and are so important to bank regulatory policy that they merit inclusion in this brief. We urge the Court to closely review these matters.

First, the regulatory agencies must respect the appropriate statutes of limitations included in the banking laws and regulations. In many of the banking consumer protection laws, Congress included a statute of limitations that establishes the timeframe by which the regulatory agencies must take regulatory action.[11] TCF, in its papers, asserts that some of the matters in this lawsuit should be barred by the applicable law's statute of

[10] Regulation E, 12 CFR 1005.17(b)(1)(iv) requires that banks send a confirmation notice to customers so that they know that they have given their affirmative consent. That notice must also tell the customers that they have the right to revoke that consent.
[11] See, for example, the Electronic Fund Transfers Act, 15 USC 1693m(g) and the Fair Housing Act, 42 USC 3610.

limitations.[12] The banking industry must know that all the bank regulatory agencies will respect these Congressional limits.

Second, unless Congress expressly gives them the authority to do so, the regulatory agencies must not apply new banking laws or regulations retroactively. Banks work very hard to comply with all applicable *existing* law and regulations. Retroactive application of new laws and regulations by regulatory agencies is unfair and inappropriate. TCF argues in its papers that at least some of the allegedly "abusive" conduct that is the subject of this lawsuit happened before the federal law defining and prohibiting "abusive" practices became effective.[13] The banking industry must know that the regulatory agencies will not inappropriately enforce compliance with the banking laws and regulations retroactively.

## III. The Banking Industry's Most Significant Concern: The Implications of the CFPB's Statement that "Consumers Rarely Read" Written Regulatory Disclosures

In its First Amended Complaint against TCF, the CFPB states its belief that "consumers rarely read" written regulatory disclosures. First Amended Compl. ¶ 76. That assertion by the CFPB is an incredibly powerful, game-changing conclusion. That statement is not only very important to this lawsuit, but it also significantly impacts the enforcement of all the consumer protection laws and regulations, for all banks.

[12] See, for example, TCF's Memorandum in Support of its Motion to Dismiss the First Amended Complaint, pages 39-41.
[13] See, for example, TCF's Memorandum in Support of its Motion to Dismiss the First Amended Complaint, pages 28-32.

A. This CFPB Statement Challenges the Basic Structure of the Consumer Protection Laws

Congress uses written disclosures as the foundation for essentially all the consumer protection laws. Thousands of pages of banking regulations are based on the assumption that written disclosures help consumers better understand their banking transactions. These laws and regulations have decades of history. The CFPB's statement that "consumers rarely read" these written disclosures seriously challenges the fundamental structure of the consumer protection laws. If the CFPB can use that statement to justify varying the requirements of a federal regulation, financial institutions will be subject to incredible uncertainty and significant potential liability.

If the CFPB really believes that "consumers rarely read" written disclosures, it should work with Congress to develop new banking consumer protection laws that do not rely so heavily upon the delivery of written disclosures. That project would be a huge undertaking, but the CFPB and Congress could theoretically repeal dozens of banking laws, and then replace those laws with new ones that create a whole new consumer protection framework. If the CFPB and Congress chose that path, the CFPB could, going forward, rightfully enforce that new framework against the banking industry.

Until such time as that happens, in its role as a regulator, the CFPB should enforce the laws and regulations as they are written.

B. CFPB Seeks to Retroactively Impose New Regulatory Requirements

The Regulation E Opt-in rules are the subject matter of this lawsuit. Importantly, the CFPB's First Amended Complaint does NOT claim that TCF failed to provide all the

required Regulation E Opt-in written disclosures to its customers. Instead, the CFPB uses its new conclusion that "consumers rarely read" the required written disclosures to justify reviewing the verbal disclosures that some TCF customers may have received. The CFPB then alleges that TCF violated the prohibition on unfair, deceptive or abusive acts and practices because some customers may have received "cursory," "uninformative," and "one-sided" verbal explanations of the written disclosures.[14] First Amended Compl. ¶ 3, 105-118.

Through this lawsuit, what is the new standard that the CFPB has set for TCF? If "cursory," "uninformative" and "one-sided" statements are unacceptable, does the CFPB expect "comprehensive," "fully-informative" verbal explanations of all the written disclosures? If that is the new standard, it is unbelievable that the CFPB would announce this new, mandatory enforcement position in a lawsuit against an individual institution. The CFPB has rulemaking authority for Regulation E and many other consumer protection regulations. If the CFPB wants to add that type of new, significant regulatory requirement, it should do so through the full rulemaking process, by issuing a proposed regulation with proper notice and comment period. The CFPB should not use the adjudication process to announce new regulatory standards.

The CFPB not only announces this new regulatory standard in this lawsuit, the CFPB takes the additional step of *retroactively* applying the new standard to TCF's past actions. In this lawsuit, the CFPB looks back in time, as far back as seven years ago, and

[14] The prohibition on unfair, deceptive or abusive acts and practices is found in 12 USC 5536 (a).

then determines that TCF's past actions violated this newly created, previously unwritten standard. The CFPB's decision to retroactively apply this newly announced enforcement standard puts TCF in an extremely difficult regulatory position.

C. Negative Implications for All Banks If the CFPB Prevails in This Lawsuit

If the CFPB prevails in this lawsuit, the entire banking industry could be in serious regulatory trouble. That outcome would expose the banking industry to both considerable uncertainty and significant new liability, depending on how far the CFPB would be willing to take its new enforcement position. Would the CFPB apply this new standard retroactively in other Regulation E cases against other banks?

An even bigger question is whether the CFPB would retroactively apply this new regulatory standard when enforcing all the other banking consumer protection regulations. Regulation X, which implements the Real Estate Settlement Procedures Act, and Regulation Z, which implements the Truth in Lending Act, require lenders to provide written disclosures for mortgage loan transactions.[15] The SBAs identified at least 12 different written disclosures that could be required by Regulation X and Regulation Z in a mortgage loan transaction, depending upon the specific terms of the loan.[16] Some of these

[15] Regulation X, 12 CFR 1024, et seq., and Regulation Z, 12 CFR 1026, et seq.
[16] Regulation X and Regulation Z require multiple disclosures at different stages of the mortgage loan process. There are pre-application disclosures, application disclosures, disclosures delivered within three days after the application, disclosures given before closing, disclosures given at closing, and change in term notices given after closing.

written disclosures are lengthy, with multiple pages of precise, required disclosure language.[17]

In no case does either Regulation X or Regulation Z require a lender to provide a verbal description of a required written disclosure. If it prevails in this lawsuit, will the CFPB require that banks give "comprehensive," "fully-informative" verbal descriptions of all the written Regulation X and Regulation Z mortgage loan disclosures? If so, this new CFPB requirement would be a monumental regulatory development for the mortgage lending industry. If the CFPB could *retroactively* apply that new standard against mortgage lenders, virtually every mortgage lender would be at risk.

That situation simply cannot stand. The CFPB cannot be allowed to retroactively enforce this newly created regulatory position against TCF or any other banking institutions.

## CONCLUSION

For all the forgoing reasons, the SBAs urge the Court to grant TCF's Motion to Dismiss.

[17] For example, Regulation X, 12 CFR 1024.6, requires lenders to provide a "special information booklet" to mortgage loan applicants, within three days of receiving the application. The current version of this required disclosure booklet is 25 pages long.

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Respectfully submitted,

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