

Consumer Harm Stemming from Certain Overdraft and Non-Sufficient Funds Fee Practices

NCUA LETTER TO CREDIT UNIONS

**NATIONAL CREDIT UNION ADMINISTRATION
1775 Duke Street, Alexandria, VA 22314**

DATE: December 2024 **LETTER NO:** 24-CU-03
TO: All Federally Insured Credit Unions
SUBJ: Consumer Harm Stemming from Certain Overdraft and Non-Sufficient Funds Fee Practices

Dear Boards of Directors and Chief Executive Officers:

If your credit union assesses overdraft or non-sufficient funds (NSF) fees that your members cannot reasonably anticipate or avoid, your credit union may be exposing itself to heightened reputational, consumer compliance, third-party, and litigation risk.

Unanticipated fees can cause substantial harm to credit union members. While there may be situations with unique facts or circumstances, the assessment of unanticipated fees on credit union members generally represents an unfair or deceptive act or practice under Section 5 of the Federal Trade Commission Act (FTC Act) and Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010 (CFPA).¹

The NCUA is issuing this letter to highlight the risks associated with certain overdraft and NSF fee practices and outline practices that may assist credit unions in managing and mitigating these risks. Further, the NCUA is describing its supervisory approach to such fees and outlining its expectations that credit unions appropriately act to mitigate the associated risks. This guidance is consistent with the NCUA's efforts to achieve the credit union system's statutory mission to meet the credit and savings needs of members, especially those of modest means.²

Background

Overdraft and NSF programs can serve legitimate purposes, such as inducing sound account management and honoring transactions when members unintentionally overdraw their accounts. Many credit unions offer these programs responsibly, supported by

appropriate risk-management practices. However, some credit unions operate these programs with certain practices or features that may result in consumer harm and heightened risk exposure for the credit union. In addition to potential heightened consumer financial protection risks, the NCUA is concerned that an overreliance on any one revenue stream — including overdraft and NSF fees — can result in concentration risk and impact the financial health of a credit union, its members, and the system as a whole.³

The NCUA issued interagency guidance about overdraft programs in 2005.⁴ The interagency guidance described best practices for overdraft programs and recommended financial institutions monitor applicable laws and regulations, including laws on unfair or deceptive acts or practices, to ensure their overdraft programs remain compliant.

In 2007, the NCUA issued a letter to credit unions that addressed risk measurement, monitoring, and control of third-party relationships, such as core processing systems that impact many federal credit unions' overdraft and NSF fee practices.⁵

In 2022, NCUA examiners requested information about federal credit unions' policies and procedures governing overdraft programs, monitoring and auditing tools, and member communications. In 2023 and 2024, NCUA examiners expanded the review of federal credit unions' overdraft programs and evaluated adjustments credit unions made to their overdraft programs to address risk and potential member harm from unanticipated overdraft fees.⁶

Examinations of federal credit unions conducted in 2023 and 2024 identified the presence of certain overdraft and NSF fee practices that may create heightened risk exposure. These practices include charging overdraft or NSF fees stemming from circumstances where a member cannot reasonably anticipate the fee and, therefore, prevent the fee from being charged. Such overdraft program practices may violate the prohibition against unfair or deceptive practices under both the FTC Act and the CFPA.⁷

Unanticipated Overdraft Fees

Unanticipated overdraft fees occur when a credit union assesses overdraft fees on transactions that a member would not reasonably expect would give rise to such fees. Though credit unions are required to provide disclosures related to their transaction processing and overdraft fee policies, these processes and policies can be complex. Research published by the Consumer Financial Protection Bureau suggests that, despite such disclosures, customers and members of depository institutions, including credit unions, face uncertainty about when transactions will be posted to their account and whether they will incur overdraft fees.⁸

Authorize Positive, Settle Negative Overdraft Fees

Policies that assess overdraft fees on debit card transactions that authorize when a member's account has a sufficient available balance to cover a debit card transaction but,

due to one or more intervening transactions, has an insufficient balance to cover the transaction at the time it settles, are commonly referred to as authorize positive, settle negative (APSN) transactions.⁹ In addition to charging an overdraft fee on the APSN transaction, members may also be assessed an overdraft fee on intervening transactions that exceed the member's available balance.

Charging APSN overdraft fees when members would not reasonably anticipate them because they had a sufficient balance at the time the credit union authorized the payment is likely unfair under both the FTC Act and the CFPA.¹⁰

Also, credit unions with core processing systems unable to identify APSN transactions that result in a fee, even though such fees may have been disclosed to the member in advance, have heightened third-party and reputation risk.

Multiple NSF Representment Fees

Some members are charged an NSF fee when a check or automated clearing house (ACH) transaction item is presented for payment from a member's deposit account which has insufficient funds to pay the check or ACH transaction. If the same check or ACH transaction is represented to the credit union when the member's account still has insufficient funds, some credit unions return the transaction unpaid again and assess an additional unanticipated NSF fee. Credit union members typically have no control over when a returned ACH transaction or check will be presented again and are unable to control whether an intervening deposit will be sufficient to cover the transaction and related fees.

Credit unions that assess additional fees on representment transactions, including where the disclosure does not fully or clearly describe the credit union's representment practice, have heightened consumer compliance and reputation risk. Credit unions may also have heightened third-party and reputation risk due to core processing system settings related to multiple NSF fees, such as identifying and tracking represented items and maintaining data on such transactions.

Inaccurate disclosures have the potential to mislead reasonable customers and are considered deceptive under the FTC Act and the CFPA. **Even when member disclosures outline representment practices, a policy of assessing fees on each representment is likely unfair under the FTC Act and the CFPA if the member is unable to reasonably avoid fees from represented transactions.¹¹**

Returned Deposited Item Fees

A Returned Deposited Item (RDI) is a check that a member deposits into their checking account that is returned to the member because the check could not be processed against the check originator's account. Some reasons for RDI fees include, but are not limited to:

- The check originator may not have sufficient funds in their account to pay the amount stated on the check;
- The check originator may have directed the issuing financial institution to stop payment;
- The account referenced on the check may be closed or located in a foreign country; or
- There may be questionable, erroneous, or missing information on the check, including signature, date, account number, or payee name information.

While certain entities, such as lenders and landlords, may be able to recoup fees from the check originator for RDI fees, credit union members generally cannot. In many circumstances, the check depositor has no control over whether, and no reason to anticipate that, the deposited check would be returned. Nor can the check depositor verify with the check originator's financial institution prior to depositing a check whether there are sufficient funds in the issuer's account for the check to clear.

Blanket policies of charging a fee to the check depositor for every RDI, irrespective of the circumstances of the transaction or patterns of behavior on the account, **are unfair under both the FTC Act and the CFPA. These practices also heighten consumer compliance and reputation risk.**

Other Overdraft or NSF Practices

Additional fee practices that may present heightened risk include but are not limited to:

- **High or no daily limits on the number of fees assessed.** Charging overdraft or NSF fees with a high limit, or without limit, for multiple transactions in a single day result in high costs for members and difficulty in bringing accounts positive. Such practices increase consumer compliance and reputation risk and are likely unfair under both the FTC Act and the CFPA.
- **Insufficient or inaccurate fee disclosures.** Overdraft program website advertising must accurately disclose fees and comply with the requirements under Part 707 of the NCUA Rules and Regulations, which implements the Truth in Savings Act of 1991.¹² Failure to disclose and comply also increases consumer compliance and reputation risk. Inaccurate disclosures have the potential to mislead customers and are considered deceptive under both the FTC Act and the CFPA. Failure to disclose processing cutoff times for the posting of payments credited to a member's account through third-party peer-to-peer payment applications is likely an unfair practice because it may mislead consumers to falsely believe they have sufficient funds to cover additional transactions posted the same day.
- **Ordering transactions to maximize fees.** Structuring the transaction processing order so the largest debit item processes first can result in the account being overdrawn quicker leading to more overdraft fees assessed against the credit union

member. Such practices result in higher costs to the member with no countervailing benefit and are likely unfair under both the FTC Act and the CFPA.

Risk Management Principles

Prudent credit unions maintain awareness of the complex market and regulatory requirements that govern overdraft and NSF programs. Consumers have brought class action lawsuits against financial institutions, including credit unions, involving overdraft practices and disclosures. Some of these lawsuits have resulted in substantial settlements, including restitution and legal fees.

If your credit union provides an overdraft program or charges NSF fees, you should:

- Closely analyze all aspects of your overdraft and NSF fee practices, including but not limited to opt-in disclosures, website advertising, and other materials that inform members about these practices;
- Review recent regulatory developments regarding unanticipated overdraft and NSF fees;¹³
- Consider member impact;
- Track and analyze related member-complaint activity;
- Monitor and take appropriate action to mitigate reputation, consumer compliance, third-party, and legal risk; and
- Consult legal counsel regarding consumer compliance responsibilities and associated risks.

An effective compliance management system should include policies and procedures designed to manage consumer compliance and reputation risk, ensure compliance with applicable laws and regulations, and prevent consumer harm. Mitigation strategies should include discontinuing policies related to charging overdraft, NSF, and other related fees that your members cannot reasonably anticipate and avoid. Your analysis should self-identify and reimburse members who have been negatively impacted by any assessment of these fees.

In addition, your credit union may consider offering members the following features as part of your overdraft program: linked savings accounts; affordable lines of credit or short-term, small-dollar loans; and making educational resources available to members enrolled in overdraft programs, such as those available on the NCUA's consumer website, [MyCreditUnion.gov](https://mycreditunion.gov).

NCUA's Supervisory Approach

The NCUA does not expect credit unions to cease offering overdraft programs designed to assist their members in managing their cash flow needs. However, the NCUA will continue to review overdraft programs to ensure credit unions are effectively managing the

heightened risk of certain fee practices and will expect credit unions to properly mitigate such risks, including by ceasing unanticipated fee practices.

If examiners identify violations of laws or regulations due to unanticipated fee practices, the NCUA will evaluate appropriate supervisory or enforcement actions, including restitution to harmed members.

The NCUA will also recognize your credit union's proactive efforts to self-identify and correct violations. Examiners will generally not cite and the NCUA will generally not pursue enforcement action under the FTC Act nor the CFPA for violations that have been self-identified and fully corrected prior to the start of an examination. In addition, in determining the scope of any restitution, the NCUA will consider the likelihood of substantial consumer harm as well as a credit union's risk-management processes to identify and correct violations.

The NCUA encourages credit unions to review their overdraft and NSF program practices to ensure compliance with Section 5 of the FTC Act, Sections 1031 and 1036 of the CFPA, and other applicable laws and regulations.

If you have any questions, please contact your NCUA examiner or regional office.

Sincerely,

/s/

Todd M. Harper
Chairman

¹ The Consumer Financial Protection Bureau is the principal federal regulator responsible for administering the federal consumer financial laws, see [12 U.S.C. § 5511](#), including the CFPA's prohibition on unfair, deceptive, and abusive acts or practices. However, enforcement responsibility for these laws is spread among a large set of state and federal government agencies. See [Consumer Financial Protection Circular 2022-01](#). The principles of "unfair" and "deceptive" practices in the CFPA are similar to those in the FTC Act. An *unfair* act or practice (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition. A three-part test is used to determine whether an act or practice is *deceptive*: (1) there must be a representation, omission, or practice that misleads or is likely to mislead the consumer, (2) the act or practice must be considered from the perspective of the reasonable consumer, and (3) the representation, omission, or practice must be material. For more information, refer to the unfair, deceptive, or abusive acts or practices section of the [NCUA Federal Consumer Financial Protection Guide](#); see also Section 5 of the FTC Act, [15 U.S.C. § 45\(a\)\(1\) \(unfair or deceptive acts or practices\)](#); Section 1031, 1036 of the CFPA, [12 U.S.C. §§ 5531 and 5536 \(unfair, deceptive, or abusive acts or practices\)](#).

² Pub. L. 105–219, § 2, Aug. 7, 1998, 112 Stat. 913.

³ [Beginning with the March 31, 2024, Call Report cycle, credit unions with over \\$1 billion in assets reported the amount of income received from overdraft and NSF fees.](#) This information provides NCUA, credit union members, and the public greater transparency into the amount of overdraft and NSF fees that the nation’s largest credit unions collect from their members.

⁴ [Letter to Credit Unions 05-CU-03.](#)

⁵ [Letter to Credit Unions 07-CU-13.](#)

⁶ In 2023, overdraft reviews were performed on federal credit unions with total assets greater than \$500 million. In 2024, overdraft reviews are being performed on federal credit unions with total assets between \$100 million to \$500 million, and federal credit unions with total assets greater than \$500 million that were not examined in 2023.

⁷ To the extent that the practices of federal credit unions violate federal law, including the prohibitions against unfair or deceptive practices under the FTC Act or the CFPA, such practices may also violate State law. Although “State laws regulating [certain] activities are not applicable to federal credit unions,” those activities are limited to conduct that is “consistent with ... other federal law.” [12 C.F.R. § 701.35\(c\)](#). Hence, the Federal Credit Union Act does not preempt State laws that apply to practices of federal credit unions that violate other federal laws, such as the FTC Act or the CFPA.

⁸ See, for example, the Consumer Financial Protection Bureau (CFPB), [Consumer voices on overdraft programs](#) (Nov. 2017).

⁹ “Intervening transaction” means a transaction that a credit union authorizes for payment or that settles against a member’s account after the debit card transaction is authorized but before it posts to the member’s account. See Table 1 in [CFPB Circular 2022-06](#).

¹⁰ Credit unions’ processing systems generally use either a ledger-balance method or an available-balance method. A ledger-balance method factors in only settled transactions in calculating an account’s balance; an available-balance method calculates an account’s balance based on electronic transactions that the institutions have authorized (and therefore are obligated to pay) but not yet settled, along with settled transactions. Risks of unfairness may be present in both available-balance and ledger-balance methods of assessing overdraft fees. These risks may be more pronounced in situations where institutions use an available-balance method.

¹¹ [Part 707 of the NCUA Rules and Regulations](#) implements the Truth in Savings Act of 1991 and sets forth additional disclosure requirements for overdraft protection practices. Part 707 disclosure requirements are not impacted by and do not conflict with this guidance.

¹² 12 CFR 707.11

¹³ Multiple federal financial regulatory agencies have issued public statements addressing the risks of unfair or deceptive acts or practices, including the Office of the Comptroller of the Currency, [Overdraft Protection Programs: Risk Management Practices](#) (April 2023); the CFPB, [Supervisory Highlights, Issue 29](#) (March 2023), [Consumer Financial Protection Circular 2022-06](#) and [Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices](#) (October 2022), the Federal Deposit Insurance Corporation, [Consumer Compliance Supervisory Highlights](#) (March 2022), [Supervisory Guidance on Multiple Representment NSF Fees](#) (August 2022), and [Supervisory Guidance on Charging Overdraft Fees for APSN Transactions](#) (April 2023), and the Federal Reserve Board, [Compliance Spotlight - Supervisory Observations on Representment Fees](#) (Second/Third Issue 2023), and [Consumer Compliance Supervision Bulletin](#) (July 2018).

Last modified on 12/10/24