

LEGAL UPDATES AND NEWS

NCUA Issues Guidance Outlining Compliance Risks Associated With Overdraft and NSF Fee Practices

On December 10, 2024 the National Credit Union Administration (the “NCUA” or the “Agency”) issued to all federally insured credit unions (herein, “CUs”) [Letter 24-CU-03](#) entitled “Consumer Harm Stemming from Certain Overdraft and Non-Sufficient Funds Fee Practices” (the “Letter”). The Letter describes certain fee practices that the Agency believes are likely considered “unfair” or “deceptive” practices under federal law, exposing CUs to the risk of an enforcement action. The Letter also sets out a series of risk management principles for CUs that charge these fees. The Letter suggests the NCUA will examine CUs for these practices and pursue enforcement actions against those institutions that continue to rely on fee income generated by these practices.

Summary

As described in the Letter, the NCUA conducted examinations of CUs in 2023 and 2024 focusing on overdraft programs and non-sufficient funds (“NSF”) fee practices. In addition to assessing the risks for potential consumer harm from these fee practices, the NCUA noted that its examinations sought to identify CUs exhibiting an overreliance on fee revenue, resulting in concentration risk and a negative impact to the financial health of the institutions.

The Letter outlines a series of specific fees and practices that the NCUA deems to be likely unfair or deceptive under federal law. The core theme that the Letter highlights regarding these practices is the inability of members to anticipate that the fees would be assessed, or to understand the CUs’ practices around transaction processing order.

Fees

- Authorize Positive, Settle Negative Overdraft Fees: fees charged on debit card transactions that authorize when an account has a sufficient available balance, but due to intervening transactions, has an insufficient balance to cover the transaction at the time it settles.
- Multiple NSF Representment Fees: fees charged when a check or ACH transaction item is presented for payment multiple times while an account has insufficient funds and is returned.
- Returned Deposited Item Fees: fees charged when a check cannot be processed against the originator’s account for a variety of reasons, such as an intervening stop payment order, closure of the originating account, or erroneous or missing information on the check.

Practices

- High or no daily limit on the number of fees assessed.
- Insufficient or inaccurate disclosures around fee practices or internal procedures.
- Ordering transactions to maximize fees.

In addition to the above fees and practices, the Letter also notes that third-party, consumer compliance, and reputation risks are posed by core processing systems that are unable to identify and/or track these fees, even if they are described by a CU's disclosures.

The Letter outlines a series of risk management steps to address these risks:

- Closely analyze all aspects of the institution's overdraft and NSF fee practices, including opt-in disclosures, website advertising, and other disclosures;
- Review recent regulatory developments regarding unanticipated overdraft and NSF fees;
- Consider member impact;
- Track and analyze related complaint activity;
- Monitor and take appropriate action to mitigate reputation, consumer compliance, third-party, and legal risks;
- Consult legal counsel regarding consumer compliance responsibilities and associated risks; and
- Implement policies and procedures designed to manage these risks.

Takeaways

- The NCUA is following the lead of the CFPB, and to a lesser extent, the federal banking agencies, in declaring overdraft and NSF practices unfair or deceptive under federal law. The Letter may be a response to public criticism regarding the strength of NCUA's compliance supervision.
- CUs should promptly assess their fee practices to get ahead of an NCUA examination. The area of fees will continue to be a supervisory priority of NCUA examiners, and any new leadership of the Agency under the Trump administration would need to affirmatively de-emphasize this area. Even if the NCUA changes tack, the guidance applies to any credit union that is federally-insured, which may give an opening to state credit union regulators to utilize the guidance in their examinations.
- The Letter sets out the NCUA's clear expectation that CUs will discontinue all policies and practices to charge these fees if members cannot reasonably anticipate and avoid them, which include the fees specified in the Letter, but could capture other related fees.
- Going hand-in-hand with discontinuing the fees, the NCUA expects CUs to self-identify and then reimburse affected customers from prior practices. The NCUA will expect the methodology to be robust and that documentation will be maintained evidencing completion of the reimbursement.
- Failure to stop these practices, or proactively self-identify and remediate customers, will likely lead to enforcement actions, which could include cease-and-desist orders and civil money penalties. The Letter states that examiners will "generally" not cite, and the NCUA "generally" will not pursue, enforcement actions for violations that are self-identified and fully corrected.
- The robustness of a CU's compliance management and risk management will be considered in any potential enforcement action.
- The NCUA recently praised enforcement actions taken by the CFPB against credit unions, suggesting the Agency is ready to be more active on the enforcement front.

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Luse Gorman routinely advises credit unions on compliance issues, regulatory questions, and enforcement actions, and counsels those institutions on the impacts of new developments at the federal and state level. If you have any questions related to this Client Alert, please reach out to Jeffrey Cardone at (202) 274-2033 or by email at jcardone@luselaw.com, Michael Brown at (202) 274-2003 or by email at mbrown@luselaw.com, or Brendan Clegg at (202) 274-2034 or by email at bclegg@luselaw.com. To learn more [about our firm](#) and [services, please visit our website](#).

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