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NAFCU
National Association of Federally-Insured Credit Unions

July 1, 2019

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

RE: Overdraft Rule Review Pursuant to the Regulatory Flexibility Act
Docket No. CFPB-2019-0023

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in regard to the Bureau of Consumer Financial Protection's (Bureau) planned review of its Overdraft Rule under section 610 of the *Regulatory Flexibility Act* (RFA). NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 117 million consumers with personal and small business financial service products. NAFCU supports efforts to relieve burdens imposed by the Overdraft Rule on credit unions and urges the Bureau to fairly consider the value of overdraft services to credit union members as it conducts its review.

General Comments

As cooperative institutions, credit unions have a vested interest in informing and educating their member-owners on the terms and conditions of the financial products and services that they offer, including overdraft protection and courtesy pay programs. This commitment existed prior to the Federal Reserve's issuance of the Overdraft Rule in November 2009 and should come as no surprise given that any product or service, if improperly designed, will ultimately harm the credit union itself.

Credit unions have a strong track record of working closely with their members to resolve any disputes or concerns, particularly regarding overdraft fees. Virtually all credit unions (95%) are willing to waive overdraft fees on a case-by-case basis based on NAFCU surveys. Many do not assess fees when an account is overdrawn by a minimal amount and some place caps on the total number of non-sufficient funds (NSF) fees that can accumulate in a given period. In addition, a common practice within the credit union community is to send educational materials or notices to members who incur frequent NSF fees, and nearly all surveyed NAFCU members offer some form of financial training to their members. A significant number of credit unions surveyed shortly after the enactment of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* reported that they had removed a member from their overdraft program for excessive usage. Collectively, these practices demonstrate that credit unions are responsibly administering their overdraft programs.

Furthermore, continued member participation in overdraft or courtesy pay proves that consumers derive value from these types of services despite the Bureau's attempts to steer consumers away from all forms of overdraft protection. Respondents in a recent NAFCU survey indicated, on average, that 38 percent of their membership had opted into overdraft programs. In this context, instituting additional restrictions through the Overdraft Rule would override consumer decision making and financial choice.

Although many credit union members still use overdraft programs, the current opt-in framework for overdraft services for ATM and one-time debit card transactions, coupled with the Bureau's frequent publications related to the harms of overdraft, has negatively influenced member participation over the past decade. The Bureau has expressed minimal concern with this outcome and has often implied that consumer demand for overdraft services continues to be premised on a faulty understanding of how fees are assessed despite years of improved financial education, increased market competition and new technology developments since the Overdraft Rule was finalized. Furthermore, the Bureau has downplayed the value of overdraft, either as an alternative to cash-advance and payday products, or as a form of added convenience for members who do not want their transactions declined.

To correct previous assumptions regarding the value of overdraft and consumer preferences, the Bureau's review under the RFA should consider not just the cost of participation in overdraft programs, but also consumer benefits, including those associated with credit unions' holistic approach to their members' financial wellbeing.

Credit unions offer a range of short-term credit options for their members that serve as alternatives to overdraft, such as payday alternative loans (PALs) with capped interest rates, signature loans, secured and unsecured lines of credit, and accommodation loans that are designed to help members in the event of a sudden financial emergency. In general, consumers understand that overdraft protection is just one option that may be more or less suitable depending on their financial circumstances. For example, an individual who needs to make a time critical payment just once (e.g., refilling a prescription) may be better off utilizing a credit union's courtesy pay service than seeking a payday or cash advance loan from lenders who charge exorbitant interest rates. Credit unions are also willing to accommodate their members' unique financial situations, provide education and intervention, and offer customized assistance that large banks and payday lenders do not offer. In sum, credit union overdraft programs incorporate a level of personalized service that can help make access to short-term credit affordable relative to more costly alternatives or merchant check return fees.

The credit union difference has also been documented by the Government Accountability Office (GAO) in its January 2008 "Report on Bank Fees." The GAO report specifically stated that "on average, large banks and thrifts consistently charged the highest insufficient funds and overdraft fees, while small credit unions consistently charged the lowest." The GAO report reflects credit unions' desire to provide affordable and responsible services that place members' financial wellness above the profit motive of banks and other lenders.

The Bureau should also factor into its review credit union specific guidance regarding overdraft programs that goes beyond the requirements of the Overdraft Rule. For example, the National Credit Union Administration's (NCUA) Letter to Credit Unions 2005-03 states that a best practice for credit unions offering any type of overdraft service is to provide an election and opt-out option. Credit unions have adopted these best practices because they understand that their reputation as trusted, community-based institutions is largely dependent on a commitment to transparency.

The Bureau should facilitate consumer choice by identifying opportunities for relief.

Instead of further regulating overdraft services, the Bureau should help coordinate improvements to Regulation D that currently limit the use of linked savings accounts to minimize overdraft fees. NAFCU surveys of member credit unions indicate that nearly all provide alternatives to automated overdraft protection services. The most common alternative is linking the checking account to the consumer's savings account. Additionally, a majority of surveyed credit unions offer a line of credit that automatically transfers funds to the checking account in the event of an overdraft. Many credit unions encourage members who wish to have overdraft protection to link the checking account to their savings account in order to minimize potential fees. It is NAFCU's understanding that few, if any, credit unions charge for this type of transfer.

Currently, use of linked savings accounts provides an imperfect alternative for consumers that wish to reduce their exposure to potential overdraft fees. Under the Federal Reserve's Regulation D, a consumer may not make more than six transactions per month from his or her savings account, with some narrow exceptions. Consequently, linking the checking account to the savings account to minimize overdrafts is not an ideal solution for minimizing overdraft fees, particularly since the member may also make other withdrawals from his or her savings account that also count against the six transaction limit. Nevertheless, the option remains popular enough that consumers generally view overdraft coverage more favorably when they use a linked-savings arrangement.[1]

If the Bureau determines that linking to a savings account would help consumers reduce fees associated with overdraft protection, the agency should work with the Federal Reserve to clarify that a transfer from a savings account to cover overdrafts from accounts at the same depository institution does not count against the six transaction limit. Without addressing the limits imposed on savings accounts by Regulation D, any attempt to encourage more consumers to link savings accounts will prove inadequate.

The Bureau should not infringe on overdraft options, but should encourage development of new products and mechanisms for compliance.

As the Bureau undertakes its review of the Overdraft Rule, NAFCU would caution against any future action that might interfere with credit unions' ability to administer responsible overdraft programs. While our members appreciate the Bureau's intention of protecting consumers from bad actors, NAFCU is concerned about the harm that the Bureau might unintentionally inflict by

[1] CFPB, Consumer voices on overdraft programs, 14 (November 2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-voices-on-overdraft-programs_report_112017.pdf.

limiting access to these programs.

Rather than seeking to limit or eliminate overdraft services, NAFCU believes that consumers would be better served if the Bureau provided the financial services industry with guidance and additional flexibility so that credit unions can create a diverse range of options that fit the various needs of members, whether it be convenience or borrowing. To this end, NAFCU urges the Bureau to collaborate with the NCUA to support a regulatory environment that encourages credit unions to tailor programs in ways that accommodate the unique circumstance of different overdraft users.

In addition, the Bureau should encourage credit unions and other institutions to test improved overdraft disclosures in the Bureau's recently proposed Product Sandbox, or through its Trial Disclosure Program (TDP), rather than proposing prescriptive disclosure requirements. Potentially these programs could be used to test opt-out style disclosures, which may prove just as effective as the current rule's opt-in model. Based on test results generated from the Product Sandbox or TDP, the Bureau could then seek wider industry input before proceeding with any changes through notice and comment rulemaking. However, the Bureau should not solicit comment on new model forms outside of the formal rulemaking process and should not rely on press releases or blog posts to suggest substantive modifications to the Overdraft Rule, such as when it introduced "prototype" overdraft disclosures in 2017.

The Bureau should also consider how it might support alternatives to overdraft, such as small dollar loans under the NCUA's PAL program. Overdraft is just one form of short-term credit, and the Bureau could help expand consumer choice by adjusting its payday lending rule to better accommodate new PALs options in development at the NCUA.

The Bureau should not rely on outdated overdraft studies to inform future rulemaking efforts.

As the Bureau reviews research regarding consumer participation in overdraft programs, it should not place great emphasis on previous whitepapers that lacked credit union specific data. The Bureau's three reports related to overdraft, published between 2013 and 2017, all relied heavily on the same sample dataset, which was comprised of transaction-level information from 2011 to 2012 and collected from banks with over $10 billion in assets.[2] The Bureau's most recent "Data Point" on frequent overdrafters relies on such a minimal sample size ("several large banks") that it includes a disclaimer that "it cannot be considered fully representative of the checking account market as a whole."[3]

Given these limitations, the Bureau should not consider expansion of the Overdraft Rule based on

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[2] CFPB Study of Overdraft Programs: A White Paper of Initial Data Findings (June 2013), https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf; CFPB, "Data Point: Checking Account Overdraft," (July 2014), http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf; CFPB, "Data Point: Frequent Overdrafters," (August 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf.

[3] CFPB, "Data Point: Frequent Overdrafters," 11 (August 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf.

data that is nearly a decade old and neither reflects the experiences of the credit union industry nor current industry practices. In the years since the study data was collected, supervisory highlights,[4] agency-sponsored webinars and bulletins,[5] and various enforcement actions against banks[6] have helped inform industry operation of overdraft programs and best practices. If the Bureau intends to revisit the substantive requirements of the Overdraft Rule, it should first collect new data that recognizes credit union-specific trends and practices, which amply demonstrate a consumer friendly approach to overdraft services.

The Bureau should permit financial institutions to supplement Model Form A-9 with additional explanatory information and improve the Regulation E safe harbor.

Regulation E requires that financial institutions obtain affirmative consent (an opt-in) to their overdraft services before charging overdraft fees for ATM and non-recurring debit card transactions. However, the current model language used to provide the consent notice is inflexible and its associated safe harbor does not adequately mitigate the risk of litigation in certain circumstances. NAFCU urges the Bureau to accommodate more flexible model opt-in language and improve the safe harbor's capacity to limit liability under the *Electronic Funds Transfer Act* (EFTA).

Model Form A-9 provides standard opt-in language and includes the disclosures required under 12 CFR § 1005.17(d). In general, disclosures are limited to the type of overdraft service offered, any fees imposed in connection with the payment of overdrafts including sustained overdraft fees or negative balance fees, whether there is a maximum fee or a limit, and the existence of alternative plans for covering overdrafts. An institution may modify the Model Form's contents but only to address a few limited situations (e.g., overdraft services on checks and ACH, the consumer's right to revoke consent). As a result, the Model Form does not accommodate additional, explanatory information that might help consumers better understand how an overdraft service operates in different contexts. Furthermore, § 1005.17(d) and its accompanying commentary clearly limit the inclusion of supplementary information and state that the opt-in notice "shall be substantially similar to Model Form A-9" and "may not contain any information not specified in or otherwise permitted by this paragraph."

Credit unions are dependent on the Model Form because it grants a critical safe harbor under Regulation E. By using the Model Form, credit unions receive protection from liability under sections 916 and 917 of the EFTA "provided the [model disclosure] clauses accurately reflect the

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[4] See e.g., FDIC, Consumer Compliance Supervisory Highlights (June 2019), https://www.fdic.gov/regulations/examinations/consumercomplsupervisoryhighlights.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.

[5] Federal Reserve, Interagency Overdraft Services Consumer Compliance Discussion, (November 2016), https://www.consumercomplianceoutlook.org/assets/outlook-live/2016/110916h.pdf?la=en; CFPB, Consumer Advisory: You've got options when it comes to overdraft, (April 2015) https://files.consumerfinance.gov/f/201504_cfpb_consumer-advisory_overdraft.pdf.

[6] In re: Regions Bank, No. 2015-CFPB-0009 (April 28, 2015) (consent order), http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf; In re: Santander Bank, N.A., No. 2016-CFPB-0012 (July 14, 2016) (consent order), https://files.consumerfinance.gov/f/documents/20160714_cfpb_Consent_Order.pdf.

institution's EFT services." However, recent developments in overdraft litigation suggest that use of the Model Form will not always prevent liability when a court determines that additional, explanatory information would be necessary to inform a consumer about the terms and conditions of an institution's overdraft service. To address this concern, institutions may find it desirable to incorporate language normally found in an account agreement within the opt-in notice, as this could help communicate key features of overdraft programs in an obvious and transparent manner.

NAFCU urges the Bureau to permit *voluntary* modification of the opt-in notice to promote enhanced consumer understanding of overdraft services. In addition, we ask that the Bureau improve the existing safe harbor to affirm that reliance on the Model Form is appropriate when a financial institution uses an available balance method for determining overdraft fees.

Clarifying or improving the safe harbor would help offset the risk of overdraft litigation that is premised on alleged discrepancies between the Model Form and the method used to assess overdraft fees, notwithstanding the fact that the Model Form does not itself prescribe any particular accounting method. Although the Overdraft Rule does not expressly use the term "available balance," the method was the standard and prevailing technique for assessing overdrafts at the time the rule was promulgated and remains so today. Affirming this understanding would reduce credit unions' exposure to class action lawsuits that erroneously allege Regulation E violations and plaintiffs' attorneys that take advantage of the fact that many credit unions are small and lack legal resources. Ultimately these lawsuits hurt member service as much as they do the credit union, and the Bureau should consider whether the Overdraft Rule is serving its intended purpose by inviting disputes over foundational and well-established overdraft practices.

Conclusion

NAFCU appreciates the opportunity to comment on the Bureau's planned review of the Overdraft Rule under the RFA and requests that the Bureau focus its efforts on identifying opportunities for relief rather than occasions to impose new requirements. We also ask that the Bureau devote greater attention to the consumer-friendly practices of credit unions who continue to meet member demand for overdraft protection and recognize that these consumers fully understand the tradeoffs associated with overdraft enrollment. As member-owned not-for-profit cooperatives, credit unions have a long history of operating transparent and responsible overdraft programs, and this data—rather than a limited sampling of large banks—should inform potential actions related to the Overdraft Rule.

In general, NAFCU supports preservation of consumer choice, improvements that would facilitate greater utilization of savings-linked accounts, a flexible approach to providing opt-in language, and clarification of the Model Form's safe harbor, which should clearly provide that an institution may rely in good faith on model language when its overdraft service utilizes an available-balance method for calculating fees. Should you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or 703-842-2266.

Sincerely

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