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August 4, 2008

Ms. Jennifer Johnson
Secretary of the
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Ms. Mary Rupp
Secretary of the
National Credit Union Administration Board
1775 Duke Street
Alexandria, VA 22314-3428

Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attn: OTS-2008-0004

Re: Unfair or Deceptive Acts or Practices, Federal Reserve Docket No. R-1314; NCUA No. RIN 3133-AD47; and OTS No. OTS-2008-0004.

Dear Ms. Johnson, Ms. Rupp, and Mr. Bowman:

On behalf of the Credit Union National Association, I appreciate the opportunity to submit the association's comments on the proposed rule issued jointly by the Federal Reserve Board, the National Credit Union Administration, and the Office of Thrift Supervision to address unfair or deceptive credit card practices under the Federal Trade Commission Act and overdraft protection plans. By way of background, CUNA is the nation's largest credit union advocacy organization, representing approximately 90% of the 8,300 state and federal credit unions and their more than 90 million members as well as state credit union leagues.

Because the regulators will coordinate in developing the final rule which, under the Act, must be consistent for the different types of institutions under its scope, CUNA is filing this letter with all three agencies to help ensure credit unions' perspectives are fully considered in the deliberations and that their concerns are reflected in the final regulation that applies to them.

CUNA's comments reflect broad input from the credit union system and were developed under the auspices of our Federal Credit Union Subcommittee, chaired by Mr. Marc Schafer, President of Truliant Federal Credit Union. CUNA's Community Credit Union Committee, Small Credit Union Committee, Examination and Supervision Subcommittee, Consumer Protection Subcommittee and Lending Council members also provided their views on the proposed rule.

Discussion of CUNA's Views

The proposal was issued under the FTC Act, which empowers certain federal financial regulators to regulate unfair and deceptive practices. If adopted, it would prohibit or limit seven practices relating to credit card practices and two practices regarding overdraft protection plans. The proposal supplements other rules and guidance that the regulators have issued to deal with concerns regarding credit card practices and overdraft protection plans.

As the only consumer owned cooperatives in the financial marketplace, credit unions have a strong tradition of protecting consumer interests. Consistent with credit unions' history and because credit unions do not generally engage in a number of the practices addressed by the proposal, CUNA is generally supportive of the proposed rulemaking.

CUNA is a strong proponent of fair lending practices and proper consumer disclosures. In 2004, CUNA developed its policy on overdraft protection programs, which supports laws or regulations that recognize "the need to allow member to decline participation in the program if they so choose." Our policy also supports laws or regulations that prohibit the manipulation of debits and credits with the intent of imposing fees as well as clear and conspicuous disclosures of all costs associated with overdraft programs. We have expressed similar views on issues relating to abusive credit card practices.

We believe regulatory action on these issues is necessary and appropriate because some in the financial marketplace have been subjecting consumers to predatory practices. We commend the regulators for developing the proposal. We also commend the leaders of the House Financial Services Committee for their advocacy in this area. The comments we file today are consistent with the letter CUNA President Dan Mica sent to Rep. Carolyn Maloney, Chairwoman of the House Financial Services Subcommittee on Financial Institutions and Consumer Credit, on July 29, 2008. A copy of that letter is attached.

Even so, we have operational and practical concerns about how some of the provisions will be implemented and whether they will result in unintended, negative consequences for credit unions and their members. Our comments below reflect those issues and provide our responses to the various questions raised by the regulators in the proposal.

We are also concerned about the ever-increasing regulatory burden on credit unions. While credit unions don't engage in certain practices, they will still need to make disclosure changes and other revisions to meet all the requirements of the proposal. While the burden of the proposal does not outweigh its necessity, we encourage the regulators to work with Congress on a modified "Pay-go" approach to regulation. That is, there should be a requirement that whenever a new regulatory burden is imposed, it must be paired with an existing requirement that the regulators may eliminate or that Congress will review for removal. Consumers deserve protection; there is no doubt about that. At the same time, most credit unions have no compliance officers and but limited resources to meet regulatory requirements. We feel it is reasonable for Congress and the regulators to consider how best to shield consumers but without continually adding new requirements that fail to recognize the existing level of regulatory burden.

Overdraft Protection Plans

The provisions on overdraft protection plans, which address opt-out rights, disclosures and overdrafts due to debit holds, received the most comments from our members.

Before turning to the provisions in the proposal on overdraft plans, we would like to address two consumer-oriented practices that a number of credit unions engage it, which we do not believe should be covered by all of the provisions of the proposal. These are overdraft accommodations and opt-in protection plans.

A significant number of credit unions at present will honor a member's overdraft on an infrequent, case-by-case basis and for a reasonable fee, even if they do not have a systematic program for overdraft protection.

After carefully reviewing the proposed rule, we do not believe the proposal in its entirety should apply to these arrangements. Rather, members should have an informal mechanism for letting the credit union know they do not want such an accommodation but beyond that, the proposal should not cover individual accommodations. Credit unions believe that the ability to provide such treatment benefits the affected member and that they honor the overdrafts without subjecting the member to abusive practices or exorbitant fees. If this practice is covered by the proposal's full notice and disclosure requirements, which were designed to prevent consumer abuses that do not exist with these accommodations, it will likely be discontinued, in which case credit union members will be disadvantaged.

In contrast, a number of credit unions offer opt-in overdraft protection plans. We also believe that this approach to overdraft protection should not be subject to the opt-out notice requirements. That is because, under opt-in, the member must take action to contact the credit union and inform the credit union of her decision to enroll in the overdraft protection plan and be subjected to the fees and other conditions that apply. We believe it would be superfluous for credit unions to provide these individuals with opt-out notices for a program they freely chose to participate in.

Opt-out Right

Under the proposal, creditors will be required to provide consumers with a notice and a reasonable opportunity to "opt-out" of an overdraft plan before they can charge a fee for overdraft protection. This will apply to transactions that overdraw the account, including checks, automated clearinghouse (ACH) transactions, ATM withdrawals, recurring payments, or point-of-sale (POS) debit card purchases. Consumers would also be permitted to limit the opt-out to ATM and POS debit card transactions, since consumers would not be subject to merchant fees or other adverse consequences if the overdraft is not paid for these transactions.

The opt-out notice must be provided both before a fee is charged for the first time and during each periodic statement cycle in which a fee is assessed, if the consumer does not choose to opt-out.

CUNA does not oppose having requirements that lenders must inform consumers of their right to opt-out of a universally applied overdraft protection plan. However, we do not agree with the analysis that consumers will benefit from the periodic statement disclosures. Because creditors are concerned that it will be problematic to include the disclosures only on the periodic statement for those who receive overdraft protection, creditors may decide that to avoid costs and problems with flagging certain accounts, it may be simpler (though more costly) to add the disclosure to all periodic statements. Once the notice becomes routinely added on all statements, it may be ignored by consumers and lose its value.

Rather than the periodic statement requirements, we believe an annual requirement to provide the notice is preferable and will better achieve the regulators' goal of sufficient and appropriate disclosures to consumers without requiring creditors to undergo needless additional costs.

The regulators have asked whether the right for the consumer to opt-out should only be required for certain overdrafts, such as those caused by ATM withdrawals and POS debit card transactions. We are concerned that this approach may create more problems than it solves and could even be confusing for consumers.

Also, some institutions may not be able to determine the consumer's account balance in "real-time" and may not know if a certain transaction creates an overdraft. We agree that exceptions should be provided and, with proper disclosure to consumers, a fee for an overdraft under those circumstances could be charged, even if the consumer has chosen to opt-out. For example, if the consumer would like to make an ATM withdrawal, a disclosure on the screen could notify the consumer that his account balance may not be available at this time and alert the consumer that a fee may be charged should an overdraft occur due to the insufficiency of funds in the account.

Under the proposal, creditors will be prohibited from assessing a fee for debit card transaction overdrafts if the overdraft results solely from a hold placed on funds that exceed the actual purchase amount of the transaction. We do not generally oppose prohibiting overdraft fees in these situations but note as others have done that creditors do not have control over when a merchant's authorization request will be transmitted.

The agencies are also considering a requirement that creditors pay smaller dollar items before larger dollar items when received on the same day for purposes of assessing overdraft fees. Under this approach, creditors could use an alternative clearing order, as long as this alternative is disclosed and the consumer agrees to this approach. We believe the order of processing should be left to the institution to decide but that consumers should be able to request information on the order in which items will be paid. If an institution chooses to do so, it could agree with the consumer about the order of items to be paid so that, for example, larger dollar items, such as a mortgage payment could be paid first.

Effective Date of the Rule

We agree that institutions should have at least one year before the final rule becomes effective. We also urge the regulators to meet with financial institutions and consumer groups to discuss contemplated changes to the proposal before they are implemented. Also, while new regulations are generally prospective in their application, we believe it would be beneficial for the final rule to state that it only cover acts and practices beginning with the rule's effective date.

Preemption of State Rules

The proposal asks whether individual States should be permitted to seek an exemption from the final rule if the State law provides greater or a substantially similar level of protection. While CUNA supports the ability of States to act, particularly if the federal government has not, we note that under the Federal Credit Union Act, state laws as they apply to rates, terms of repayment and other conditions of federal credit union loans and lines of credit are preempted.

Late Payments

The proposal would prohibit creditors from considering a payment for a credit card as late, unless the consumer is provided with reasonable time to make the payments. Under the proposal, there should be at least 21 days between the time the statement is mailed and the payment due date. Creditors with "reasonable procedures" to ensure statements are delivered within a certain amount of days from the closing date of the billing cycle will be able to add that number of days to the 21-day period for purposes of determining the payment due date on the periodic statement.

We agree that while a number of consumers receive or can view their statements electronically, a significant number receive their statements through the mail. We believe that ensuring consumers have reasonably sufficient time to make payments before such payments are considered late is an important consumer safeguard and that 21 days seems to be appropriate. The regulators ask if they should adopt a rule to prohibit the treating of a payment as late if received within a certain number of days after the due date. We do not think that this is necessary since we believe the proposed changes will be sufficient to help ensure consumers have enough time to make their payments. We also do not think the rule should determine the number of days that the consumer has to mail the payment and for the creditor to receive the payment. We believe that allowing the 21-day safe harbor is preferable to setting specific deadlines in the regulation.

The regulators also ask if the rule should require, at the request of the consumer, that the creditor reverse a fee for a payment treated as late if it was mailed before the due date, regardless of when it was received. We do not believe such a step is necessary. It is our understanding that credit unions generally would reverse the fee if the consumer can show that the payment was timely mailed. There are many new requirements for creditors to digest in this proposal. Rather than adding new ones, we recommend that the regulators implement the proposal without such a requirement but monitor developments in this area and determine at a later time whether such a requirement is necessary.

Allocation of Payments

For a credit card that includes balances subject to different interest rates, creditors will be required to allocate the amount in excess of the minimum payment under one of the three following methods or in another manner no less beneficial:

- Apply the amount first to the balance with the highest interest rate and then apply any remaining amounts to the other balances in order from the highest rate to the lowest rate.
- Divide the amount equally among the balances.
- Divide the amount in a pro-rata manner among the balances. This would allocate the amount among the balances based on the percentage of that balance as compared to the total of all the balances.

We generally support the objective of the provisions regarding allocation of payments above the minimum on multi-rate accounts. The regulators requested comments on several issues, such as whether other methods of allocation that are as beneficial to the consumer as the ones proposed should be listed in the rule, and we agree they should. Also, we agree that creditors be permitted to first apply payments over the minimum to outstanding balances in which the rate cannot be increased, as these could be older balances. While allowing consumers the option of determining how payments should be allocated sounds like a good idea, we are concerned that it would result in processing issues and higher costs for institutions as well as higher rates for consumers.

Increasing the Interest Rate on an Outstanding Balance

These provisions generated considerable comments from our members. Under the proposal, creditors will not be able to increase the interest rate on an outstanding balance, unless: 1) it is a variable rate that rises due to a change in the underlying index, as long as the creditor does not change the method used to determine the indexed rate; 2) it is a promotional rate that expired or otherwise no longer applies according to the terms of the account agreement, as long as the rate is not increased to a penalty rate; and 3) the minimum payment was not received within thirty days after the due date. Creditors will also not be permitted to assess any fee or charge based solely on the outstanding balance.

Our members do not want to raise interest rates to gouge their members. However, concerns have been raised regarding asset liability management issues, particularly at a time when examiners are focusing increased attention on ALM. These issues merit the agencies' consideration. Also as a result of the prohibition, consumers may experience an increase in the costs of credit.

Assessing Fees if the Credit Limit is Exceeded

The proposal will prohibit creditors from assessing a fee if the consumer exceeds the credit limit solely because a hold is placed on the available credit, such as when the hold placed by the merchant exceeds the amount the consumer is obligated to pay. The fee may be imposed if the actual amount of the transaction exceeded the credit limit.

Creditors will also not be able to impose a fee when the hold on the transaction causes a subsequent transaction to exceed the credit limit. These provisions will not prohibit the use of credit holds, just the imposition of a fee under these specific circumstances.

The regulators requested comment on specific questions in connection with the provisions that prohibit over-the-limit fees caused by credit holds. Generally, credit unions that responded to us indicated they charge one fee per billing cycle. The fee is not varied and the fee is assessed for every cycle that the limit is exceeded. We do not oppose the prohibition on fees when the credit limit is exceeded solely because of a merchant's hold or similar occurrence. However, as stated in our comments regarding debit card transactions, we are concerned about manual processing issues and potentially greater costs of credit, since creditors do not have control over the merchants' authorizations.

Prohibition of "Double-Cycle Billing"

Creditors will generally be prohibited from calculating interest charges based on balances in a billing cycle that precede the most recent cycle. This is commonly referred to as "double-cycle billing."

These provisions seek to address an egregious practice, one which we are not aware any credit union engages in. We strongly support this prohibition.

Security Deposits and Fees for Issuing Credit

The proposal will prohibit creditors from charging fees or security deposits for the issuance of credit within the first year after the account is opened if these charges exceed the majority of the available credit. Fees or deposits that are more than 25% but less than

50% of the available credit must be spread out over one year. This will only apply to deposits and fees charged to the account and not to deposits and fees paid from separate funds. Fees will be defined as any annual or periodic fee, a fee based on account activity or inactivity, and any non-periodic fee that relates to opening the account. CUNA does not oppose these provisions.

Offers of Credit that Advertise Multiple Interest Rates or Multiple Credit Limits

Creditors that advertise multiple interest rates or multiple credit limits in firm offers of credit will be required to disclose the factors for qualifying for the lowest interest rate or the highest credit limit if those factors depend on creditworthiness, as opposed to being based on the features of the card. CUNA does not oppose these provisions and agrees with the model language that the agencies have proposed.

Thank you for the opportunity to express our views on the proposal.

Sincerely,

Mary Mitchell Dunn

Mary Mitchell Dunn

CUNA Senior Vice President
and Deputy General Counsel