NAVY FEDERAL Credit Union

Office of the President

August 4, 2008

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

Re: RIN 3133-AD47; Unfair or Deceptive Acts or Practices.

Dear Ms. Rupp:

Navy Federal Credit Union provides comments on the National Credit Union Administration's (NCUA) joint proposal prohibiting unfair or deceptive acts or practices.

Navy Federal supports the elimination of acts and practices that are truly unfair or deceptive. Such activities only serve to harm consumers, which is completely contrary to the spirit of credit unions and their member-owners. However, we firmly oppose the sections of this proposal on overdraft services, allocating payments, and re-pricing outstanding credit balances. All activities within these broad categories simply do not rise to the standard for unfair and deceptive acts or practices set by Congress when it passed the Federal Trade Commission Act. The negative effects of these proposed broadly-construed controls on commerce and the costs of compliance drastically outweigh any perceived benefits. For cooperatively organized federal credit unions, the costs of this proposal must be passed directly to their consumer-members as higher fees or less favorable rates since credit unions are required by law to raise capital by retaining earnings. If implemented, this proposal will hurt the very consumers it purports to help. We respectfully ask the Agencies to withdraw this proposal until practices can be thoroughly and meaningfully analyzed to identify those specific unfair or deceptive acts or practices that clearly rise to the standard set by Congress.

Navy Federal appreciates the opportunity to provide comments on NCUA's proposed rules on unfair or deceptive acts or practices. Our detailed comments on proposed rule are enclosed. If you have any questions, please contact Shannon Burt, Senior Policy Analyst, at (757) 234-4073.

Sincerely,

Cutler Dawson
President

CD/sb
Enclosure

**Response to NCUA's Proposal on Unfair or Deceptive Acts or Practices**
Prepared by Navy Federal Credit Union
August 4, 2008

*General Comments*

Navy Federal strongly opposes acts and practices that are truly unfair or deceptive. Such activities only serve to harm consumers, which is completely contrary to the spirit of credit unions and their member-owners. However, many acts and practices covered by the proposal are not unfair or deceptive when measured against the standard set by Congress in the Federal Trade Commission Act (FTC Act). The Agencies should withdraw the proposal until acts and practices can be thoroughly and meaningfully analyzed to identify those specific unfair or deceptive acts or practices that clearly rise to the standard set by Congress.

The Agencies clearly fail to demonstrate that many, if not all, acts and practices covered by the proposal meet the standard set by Congress. The FTC Act states, "The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[1] The Agencies do not provide significant fact-based evidence of how the proposal meets this Congressional standard. We believe much of the proposal does not meet this standard.

Justification for the proposed rule appears to be comprised largely of someone's impressions and opinions. For example, in the Supplementary Information[2], the Agencies provide nine subsections of justifications and supporting information, each entitled "Legal Analysis." Within the entire Supplementary Information section, the term "appear" or "appears" is used 52 times – 48 times in subsections containing the Agencies' legal analyses. *Webster's II New Riverside University Dictionary* defines the word "appear" as follows: "1. To become visible. 2. To come into existence. 3. To look or seem to be. 4. To seem likely. 5. To be presented or published. 6. *Law*. To present oneself formally before a court as defendant, plaintiff, or counsel." Narrative context dictates relying on definition 3 or 4 to understand the meaning of "appear" or "appears" as used by the Agencies. The proposed public policy is too costly (particularly at a time when our financial systems are under heavy economic stress), far-reaching, and important to be based on little more than what "seems to be" or "seems likely." In view of little or no substantive justification for this proposal, we believe it directly contravenes the wishes of Congress as expressed in the FTC Act and must be withdrawn.

As we discuss in our following comments, many of the proposed changes are not feasible or would require major systems modifications and other substantial implementation efforts. If the Agencies should decide to go forward with this proposal substantially as written, we ask for at least two years for financial institutions to fully comply with the changes.

Enclosure

*Overdraft Services – Proposed Subpart D*

Navy Federal strongly urges NCUA to withdraw proposed subpart D. This subpart would require institutions to allow consumers to opt out of the payment of overdrafts. Such a requirement would have a tremendous impact on Navy Federal's members and the customers of other institutions that do not have formal overdraft protection (i.e., "courtesy pay") programs. Overdraft protection programs have received much regulatory scrutiny in recent years, and we encourage the agencies to continue ensuring that these programs are not unfair or deceptive to consumers. Institutions without such programs, however, should not be "painted with the same brush" and penalized for the actions of institutions that have established courtesy pay programs in unfair or deceptive ways.

Further, regulatory guidance offered in 2005[3] drew a distinction between institutions that promoted overdraft "products" and those that offered overdraft protection as a service to members who had made mistakes in their personal financial matters. We supported the distinction at that time and believe NCUA appropriately recognized the difference between the two practices. Proposed subpart D would negate that distinction and expand rule-making on overdrafts to all institutions, whether or not they promote an overdraft service. In addition, referring to the proposed definition of "overdraft service," the agencies write "The term covers circumstances when an institution pays an overdraft pursuant to a ***promoted*** program or service or under an ***undisclosed*** policy or practice and charges a fee for that service."[4] This makes it appear that institutions with a promoted or undisclosed fee policy are the intended targets of this rule-making; however, proposed subpart D is much broader in scope. For example, many institutions, such as Navy Federal do not have, much less promote, a formal overdraft protection program; however, there are circumstances involving our debit card under which an overdraft can occur and for which we charge a fee. We appropriately disclose this fee policy to our members but would still be covered under this rule change. We do not believe that is the intended purpose of this proposal. We strongly encourage NCUA to withdraw subpart D in its entirety. However, if NCUA is not willing to totally withdraw the proposal, then we strongly urge that the proposal be amended to exempt financial institutions from the disclosure requirements when the financial institution does not have a formal overdraft program and/or the conditions under which an overdraft fee can be charged is already fully disclosed.

To further our point, we believe it would be instructive for NCUA to better understand Navy Federal policies as they apply to actual or potential overdraft situations and how the regulations as currently proposed would adversely affect Navy Federal. First, we do not offer a promoted overdraft payment service that covers checks, ACH, debit POS, ATM and other items when there are insufficient funds on deposit. We do provide up to six free transfers per month from savings to checking to cover overdrawn or insufficient funds items. In addition, we offer an optional overdraft protection product in the form of a line of credit for which the member must be qualified. However, there are certain conditions under which a member could be charged an overdraft fee when performing a signature or "offline" debit transaction if the member fails to maintain sufficient funds in the account to cover all items written or authorized against the account. At Navy Federal, there must always be sufficient funds in the account to

authorize a POS debit. In situations where an overdraft occurs on a POS debit, Navy Federal is liable to Visa to pay the previously authorized transactions, whether or not sufficient funds are in the account at the time of transaction settlement. Accordingly since the transaction is a risk of not being funded by the member, we charge an overdraft fee. It is the member's responsibility to ensure that they maintain sufficient funds to cover POS debits and the vast majority of members do and therefore never incur these fees.

The overdraft fee is a function of how our card works, not of a formal overdraft program. We disclose how the card works in several prominent places including the card carrier, the card disclosures and in the schedule of fees. We also provide a separate letter informing members of the fee each time they overdraw their account. In our case, there is no program to opt out from. Since we have no formal overdraft service, this means that the member would have to choose to stop using their Check Card altogether. It would be an all or nothing choice for the member – take the card as is or leave it. We would have to take this convenient service away from the member. We hope that such a situation was not intended by NCUA and that the regulation be withdrawn or at minimum amended as outlined herein.

This subpart would also prohibit federal credit unions from assessing overdraft fees on consumer accounts, if the overdraft would not have occurred but for a hold placed on funds in the account in excess of the actual transaction amount. It is our understanding that VISA has amended its rules to implement near real time transaction clearing strategies by October 2008. Under these new rules, it is expected that the vast majority of transactions will clear within minutes. This will drastically reduce the instances in which consumers are subject to overdraft fees due only to holds where the authorization does not match the final amount of the transaction. Because of these card association rule changes, we see no need for the agencies to implement this proposed restriction. Further, if this restriction is implemented, financial institutions would face a massive and complex implementation effort to bring their systems into compliance. This effort would likely be labor-intensive, at least initially. The costs to implement this proposed restriction clearly outweigh the benefits. Again, we strongly encourage NCUA to withdraw proposed subpart D in its entirety.

In addition to our general opposition to subpart D in its entirety, we have many concerns with the specifics of subpart D. For example, the proposed requirement to offer consumers the ability to opt-out once in each periodic statement cycle containing an overdraft fee is especially onerous. We believe consumers should be adequately informed by a one-time notice, included with their initial account disclosures, of the option to opt-out of overdraft services. Consumers who choose to opt out will do so when they are notified the first time. We do not believe that repeated notices will persuade substantially more consumers to opt-out. Requiring repeated notices to consumers about the availability of the opt-out is burdensome for financial institutions and only marginally, if at all, beneficial to consumers.

If the Agencies do not withdraw subpart D, the proposed regulation (paragraph __.32(a)) should be clarified to clearly give financial institutions the flexibility for providing subsequent periodic notices as discussed in the Supplementary Information at the bottom of *Federal Register* page 28929 and the top of page 28930. We believe the proposed section __.32(a) is sufficient when interpreted in light of the Supplementary Information. However, the Agencies' Staff

Commentary refers to Truth in Savings section __.10 (i.e., NCUA Rules and Regulations, Part 707.10) for direction. The Federal Reserve Board withdrew this portion of its Truth in Savings regulation (12 CFR 230.10) in 2007.[5] We have previously asked NCUA to withdraw its comparable Truth in Savings regulation to provide a substantially similar regulation to that of the Federal Reserve Board as required by the Truth in Savings Act. Notwithstanding, if a final rule is issued, it should provide the option for subsequent statement notices or subsequent notices separate from the periodic statement as discussed in the Supplementary Information.

Further, this subpart would allow consumers to opt-out of ATM and point-of-sale overdrafts only (the "partial opt-out"), or to opt-out of the payment of all overdrafts. If the agencies decide to pursue finalization of subpart D, we encourage them to remove the ability for consumers to request "partial opt-outs." Implementation of such a partial opt-out will present major systems challenges to financial institutions, while providing little additional benefit to consumers. If this provision is retained in the final rule, we urge NCUA and the agencies to simply allow consumers the option of opting out of the payment of all overdrafts across all types of payment methods.

Lastly, if the agencies collectively determine that further action is needed specifically on the debit holds issue in proposed subpart D section 706.32(b), we urge them to convene an industry group aimed at determining – on a technical level – how best to mitigate consumer confusion surrounding card authorization holds.

*Allocation of Payments – Proposed Section 706.23*

This section would establish three payment allocation alternatives for creditors to follow when consumers pay more than the minimum payment on open-end credit balances. Navy Federal strongly opposes this proposed section. We do not believe that it is inherently unfair to simply allow creditors to choose their own payment allocation method. It is the creditor's choice, as a business decision, how to allocate payments the consumer chooses to make above the minimum payment. Further, we do not believe that consumers expect the allocation to happen in a particular way or even in the manner most beneficial to them. We believe that consumers realize this is the financial institution's decision. If they are unhappy with the speed with which their balances are decreasing, they have the option to transfer their balances to other financial institutions or simply pay off their existing balances each month. Mandating particular payment allocation options will also require institutions to make major programming changes, which will substantially increase the cost of compliance. The proposal simply represents a set of controls on commerce that is not justified.

We also note that such a restriction on payment allocation practices will dramatically decrease the availability of discounted balance transfer rates for consumers. Allocating payments in a manner that is most beneficial to consumers will minimize the incentives financial institutions have for offering balance transfers at discounted rates. This will unnecessarily limit consumer credit options, which is particularly troubling during this time of declining financial markets. Navy Federal strongly encourages NCUA to withdraw this portion of the proposal. If NCUA pursues finalization of this section, we encourage NCUA to at least retain Alternative 3,

which we believe is the alternative that strikes the fairest balance between institutional risk and consumer benefits.

*Applying Increased Rates to Outstanding Balances – Proposed Section 706.24*

Navy Federal strongly opposes the proposed requirement for consumers to be able to opt-out of changes in terms affecting existing line of credit balances. This requirement will make it extremely difficult for creditors to manage risk. Creditors should be allowed, with reasonable notice, to re-price credit on existing balances in accordance with ongoing and fluctuating credit risks. Just as consumers' balances and credit profiles change over time, financial institutions' costs of doing business and risk tolerances fluctuate. Prohibiting financial institutions from re-pricing existing balances hamstrings one of the key risk management tools for institutions.

Such a prohibition also will severely limit creditors' ability to offer low cost credit options to the most creditworthy consumers. Creditors will likely raise their credit prices to offset the increased risk associated with the inability to re-price existing balances. The result will be consumers paying more for credit. Some institutions may even be forced to deny credit applications from consumers with relatively poor credit who they would otherwise have approved.

Further, in June 2007 the Federal Reserve Board proposed an increase in the time period for prior notice of changes in terms for open-end credit under Regulation Z. Navy Federal supports a 30 day prior notice change in terms requirement. We firmly believe that 30 days is more than sufficient for consumers to understand any upcoming changes (in pricing or otherwise) and decide to transfer their existing balances to other institutions if they choose. A 30 day time period prior to any changes in terms will mitigate many consumer concerns about re-pricing on existing balances. For all of these reasons, we urge NCUA and the agencies to withdraw this proposed section.

*Fees for Exceeding Credit Limits Caused by Holds – Section 706.25*

This proposed section would prohibit a federal credit union from assessing a fee for exceeding the credit limit on a consumer credit card account, if the credit limit would not have been exceeded but for a hold on any portion of the available credit in excess of the actual transaction amount. Navy Federal opposes this change. As we stated previously, it is our understanding that the card associations are amending their rules to implement near real time transaction clearing strategies. Under these amended rules, it is expected that the vast majority of transactions will clear within minutes. This will drastically reduce the instances in which consumers are subject to over-limit fees due only to holds. Because of these card association rule changes, we see no need for the agencies to implement this proposed restriction. Further, if this restriction is implemented, financial institutions would face a massive implementation effort to bring their systems into compliance. This effort would likely be labor-intensive, at least initially. We strongly encourage NCUA to withdraw proposed section 706.25. The costs to implement this proposal clearly outweigh the benefits. If the agencies collectively determine that further action is needed, we urge them to convene an industry group aimed at determining – on a technical level – how best to mitigate consumer confusion surrounding card authorization holds.

*Time Period to Make Payments – Proposed Section 706.22*

Navy Federal supports the proposed safe harbor for financial institutions of 21 days from the date the periodic statements are mailed until the payment due dates. We believe this allows ample time for consumers to make timely payments and will go far in eliminating egregious creditor practices that unfairly restrict the time consumers have to make payments.

*Balance Computation; Financing Security Deposits/Fees – Proposed Sections 706.26 – 27*

Navy Federal supports the proposed prohibitions on double-cycle billing and egregious security deposits and fees. We believe these provisions are truly unfair and deceptive and applaud the agencies for working together to ban creditors from engaging in such activities.

*Firm Offers of Credit – Proposed Section 706.28*

Navy Federal supports the proposed disclosure that federal credit unions would be required to include on firm offers of credit. We believe this disclosure is appropriate and adequately informs consumers of the somewhat variable nature of these offers. However, we encourage NCUA to clarify how this disclosure statement will complement the existing risk-based pricing disclosure required in NCUA Letter to Credit Unions No. 174. Since both disclosures have similar messages, both disclosures should not be required on firm offers of credit.

*State Exemptions – Section 706.15*

This section allows state agencies to apply to NCUA if their state has a requirement or prohibition that affords a level of consumer protection substantially equivalent to, or greater than, the protection afforded by this rule. If NCUA approves the state's application, the provisions of part 706 will not be in effect for federal credit unions in that state. Navy Federal encourages NCUA to amend this section to only allow for such applications if the state has a requirement that affords a level of consumer protection *greater than* the protection afforded by part 706. Allowing applications for levels of consumer protection that are equivalent to the protections afforded by part 706 will not improve consumer protection in those states and will unduly increase the compliance burden on federal credit unions. To further ease the compliance burden on federal credit unions, we also urge NCUA to make public a list of any states' applications that have been approved.

In addition, we believe the existing language at the end of section 706.15(a)(2) about the state "administering and enforcing" their law(s) could be interpreted to afford visitorial powers to those states. Navy Federal opposes such an interpretation, and it is our understanding that NCUA would also oppose such an interpretation. We encourage NCUA to clarify that this section does not imply visitorial powers to states over federal credit unions within their physical state boundaries.

*Definitions – Section 706.11*

Although this section has not changed substantially, Navy Federal encourages NCUA to consider potential amendments to two of this section's definitions. First, the definition of "consumer" includes the term "natural person." The term "natural person" is not defined in this section. For purposes of clarity, we encourage NCUA to define "natural person" in section 706.11. Second, we believe the definition of "earnings" should be expanded to include various types of government payments to low income earners and maintenance payments like alimony or child support. These are not included in the definition, and Navy Federal believes it is appropriate to include these based on the rule's context. In addition, we encourage NCUA to combine the definitions in sections 706.11 and 706.21. We believe having a single section for definitions will make part 706 much easier to understand.

*Cosigner Practices – Section 706.13*

Although this section has not changed substantially, we nonetheless encourage NCUA to engage in consumer testing to determine whether the "Notice to Cosigner" is easily understandable to consumers. It is our belief that this notice has not been substantially amended in recent years, and it should be tested with consumers to ensure its continued effectiveness and relevance.

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[1] 15 U.S.C. 45(n)
[2] 73 FR 28905 – 28941 (May 19, 2008)
[3] Interagency Guidance on Overdraft Protection Programs (Joint Guidance), 70 FR 9127 (Feb. 24, 2005); OTS Guidance on Overdraft Protection Programs, 70 FR 8428 (Feb. 18, 2005).
[4] 73 FR 28928 (May 19, 2008).
[5] 72 FR 63477 (November 9, 2007)