# Credit Union Strategies in Responding to NCUA Letter 3-CU-24: “Consumer Harm Stemming from Certain Overdraft and Non-Sufficient Funds Fee Practices”

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CU*ANSWERS
A Credit Union Service Organization

## OVERVIEW

The NCUA has announced an intention to examine credit unions who offer fee-based Overdraft and NSF programs. In the Letter, the NCUA outlined the examination procedure as follows:

> ***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.*

In addition to regulatory scrutiny, credit unions also face the possibility of class action lawsuits based on their overdraft and NSF practices. While there is not necessarily a direct correlation between the NCUA’s supervisory authority and the legal theories surrounding overdraft and NSF class action lawsuits, there is enough overlap where a credit union that follows the NCUA’s guidelines should have the benefit of the reduced risk of an overdraft and/or NSF class action lawsuit.

CU*Answers has a long history of alerting credit unions to overdraft and NSF program risks and assisting credit unions with questions regarding their own

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programs. As the NCUA has provided a relatively clear list of supervisory concerns, CU*Answers can provide a detailed, “line by line” breakdown of how the credit unions in our network can use CU*BASE® and related tools to respond to a supervisory review of the overdraft programs.

As with any regulatory review, credit unions should consider how they will document and provide evidence to show adherence to NCUA supervisory guidelines and applicable regulations. In addition, credit unions should assume all documentation could be used as evidence in any potential future court proceeding related to the credit union’s overdraft and NSF program.

# EXECUTIVE SUMMARY

The NCUA has set forth the broad outlines of the compliance program credit unions should adhere to with respect to the credit union’s overdraft and NSF program:

> *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.*

Despite the enforcement actions, lawsuits, and negative press, overdraft and NSF fees are not illegal. To enforce actions and penalties against credit unions, regulators and law firms tend to rely on consumer protection laws related to Unfair, Deceptive, or Abusive Acts or Practices (“UDAAP”). NCUA Letter 3-CU-24 focuses on the assessment of ***unanticipated fees*** on members as an unfair or deceptive act or practice.

> ***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.*

Credit unions should be aware that UDAAP is broader than just unanticipated fees. To comprehensively manage compliance, credit unions should consider the following steps:

## Perform a Risk Assessment

If a credit union wishes to document the risk of the overdraft and NSF program, there are four major areas addressed in the NCUA letter:

- Address Concentration/Liquidity Risk related to reliance on fee income.
- Reputation Risk related to consumer complaints.
- Strategic and Transaction Risk related to collection and waiver of fees.
- Compliance and Legal Risk of membership disclosures.

Following is summary of some of the CU*BASE tools that can be used by credit unions to manage and document risk. *(Further details about available tools can be found in later sections of this document.)*

| RISK | THREAT | CU*BASE TOOLS |
|---|---|---|
| **Concentration/Liquidity Risk** | Credit Union has overreliance on fee income | NSF/Overdraft Protection Configuration (Tool #558) |
| | | 5300 Call Report |
| | | Analytics Booth |
| **Reputation Risk** | Credit Union is failing to manage consumer expectations | Member Trackers |
| | | Create Tracker Notes/Leads from File (Tool #312) |
| | | Print Outstanding Follow-ups (Tool #671) |
| | | Print Member Trackers (Tool #664) |
| **Strategic and Transaction Risk** | Credit Union is failing to manage its overdraft and NSF program | NSF/Overdraft Protection Configuration (Tool #558) |
| | | NSF Transactions by Day (NSFTR) Inquiry (Tool #1051) |
| | | Automated Non-Returns |
| **Compliance and Legal Risk** | Credit Union is not in compliance with laws and is not managing its membership disclosures | N/A |

## Overdraft and NSF Configuration Options

CU*BASE has many tools for credit unions to use to set up policies for how the system will assess fees to members. *(Further details about available tools can be found in later sections of this document.)*

| ITEM | OPTIONS | CU*BASE TOOLS |
|---|---|---|
| **Authorize Positive Settle Negative** | Use Current Balance versus Available Balance; use a report to review and refund potential ASPN fees charged. | NSF/Overdraft Protection Configuration (Tool #558) |
| | | CU*Answers programming change in development |
| | | Manual refunds via a best-effort report |
| **Multiple NSF Representment Fees** | Configure ACH retry fee waivers. For checks, manually control according to CU policy. | NSF/Overdraft Protection Configuration (Tool #558) |
| | | Work Member Exception File feature (Tool #986) |
| **Returned Deposited Item Fees** | Manually assessed according to CU policy. | N/A |
| **Daily Limits** | Configure fee caps. | NSF/Overdraft Protection Configuration (Tool #558) |
| **Fee Disclosures** | Accurately advertise and describe to members how fees are assessed. | N/A |
| **Transaction Ordering** | Process transactions in order received. | For debit cards: Currently coded as such; no credit union action needed.<br>For checks: Member SD/ Checking Configuration (Tool #510) |

| ITEM | OPTIONS | CU*BASE TOOLS |
|---|---|---|
| **Consumer Programs** | Offer supplements to the current overdraft and NSF fee program. | Sample Checking Account Activity (Tool #774) |
| **Notification Configuration** | Configure ANR and NSF fee notices. | Configure Laser Notices (Tool #258) |

# RISK ASSESSMENT TOOLS

Credit unions should perform a risk assessment around the implementation and effects of the overdraft and NSF program.

## Concentration/Liquidity Risk

The NCUA has expressed concern regarding credit union overreliance on fee income.

> *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.*

Before making any changes to the overdraft and NSF program, credit unions should analyze fee income and determine the institution's reliance on this income for ongoing operations and liquidity. Please note that the NCUA has not defined what percentage of overall income constitutes "overreliance." Therefore, credit unions should be prepared to answer examiner questions on how reduction or loss of overdraft and NSF fee income will affect credit union operations.

### General Ledger

Configuration of overdraft and NSF fees, and their associated General Ledger accounts, can be accomplished through the CU*BASE NSF/Overdraft Protection Configuration (Tool #558). Financial statements can then be used to analyze the credit union's fee income via these G/L accounts.

### 5300 Report

The NCUA added 2 new Account Codes to the Statement of Income and Expense section for Overdraft Fee Income (IS0048) and NSF Income (IS0049). While these line items are only required for credit unions with over $1 billion in assets, credit unions of any size may wish to use these Account Codes to track Overdraft and NSF Income. See The 5300 Call Report & CU*BASE® Tools booklet for more information.

### Analytics Booth

Credit unions subscribed to Analytics Booth can configure reports to show the percentage of fee income and total income overdraft and NSF fees represents. Analytics Booth can also be used to view trends on month-end balances of specific G/L accounts such as a fee income accounts. Contact the Asterisk Intelligence Team for more information.

## Reputation Risk (Consumer Complaints)

Credit unions should carefully manage any consumer complaints received regarding overdraft and NSF fees.

> *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;*
> *…*
> *Track and analyze related member-complaint activity;*

For example, findings in the CFPB's Consent Order of November 7, 2024 against Navy Federal Credit Union indicated that consumers were confused and complaining about the credit union's Overdraft Fee program:

> *31. Throughout the Relevant Period, [Navy Federal Credit Union] received complaints in which consumers expressed anger and confusion about Overdraft Fees charged even though their available balances were high enough to cover the transactions at the time they were authorized. During calls with [Navy Federal Credit Union's] member service representatives, many consumers disclosed that they understood "hold" to mean that funds were actually set aside to cover the authorized*

*transaction, or that they believed that the funds transfer to the merchant instantaneously, rather than through a later settlement process.*

*32. In internal documents one of [Navy Federal Credit Union's] employees referenced Authorized-Positive Overdraft Fees as a leading cause of consumer frustration, a source of consumer confusion, and "a huge pain point with members."*

### Tracker Notes

To help you track and follow up with member responses, Member Trackers, which are part of the CU*BASE CRM (customer relationship management) toolset, provide a way to record information about interactions with members, as well as to flag staff for specific follow-up actions. (The Create Tracker Notes/Leads from File feature (Tool #312) allows credit unions to generate a batch of trackers using a list of memberships in a database file.)

The Print Outstanding Follow-ups feature (Tool #671) displays any Tracker conversation notes that have been flagged as requiring follow-up. The Print Member Trackers (Tool #664) report can be used to compile all Tracker conversation notes based on date range, credit union employee, member account, or other identifying characteristics, whether or not a follow-up was required. These tools allow credit unions to document and manage member complaints. Specific complaints about the credit union's overdraft and NSF program, especially those involving member confusion about the program, should be retained. Repeated questions about the program is an indication documentation to members should be clarified and updated, with the assistance of the credit union's legal counsel.

## Strategic and Transaction Risk (Operating Processes)

Credit unions should make sure management is managing the process of assessing and waiving overdraft and NSF 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;*

### Activating Overdraft Protection/ANR Settings

The NSF/OD Transfer Configuration tool (Tool #558) is used to manage the credit union's overdraft program. In addition, there is an Automated Non-Returns (ANR) booklet on how to configure your programs in CU*BASE, include a step-by-step guide. Credit unions should consider ensuring the overdraft and NSF fee program settings are documented and updated when there are changes to the program.

### Fee Transaction Analysis Report

The NSF Transactions by Day (NSFTR) inquiry (Tool #1051) can be used to view all NSF/ANR transactions for a particular day for analysis and to evaluate fee reversals, if appropriate.

## Compliance and Legal Risk

Credit unions are required to stay up to date on regulatory changes regarding overdraft and NSF fee programs.

*If your credit union provides an overdraft program or charges NSF fees, you should:*
*…*
*Review recent regulatory developments regarding unanticipated overdraft and NSF fees;*
*…*
*Consult legal counsel regarding consumer compliance responsibilities and associated risks.*

The NCUA also adds that credit unions may need to comply with related State laws as well.

> *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.*

Once a credit union has fully documented the configuration and implementation of its overdraft and NSF program, the program and all consumer disclosures should be sent to the credit union's legal counsel for a compliance check against federal and state regulations, as well as any relevant court cases that might impact the credit union.

# UNDERSTANDING OVERDRAFT AND NSF OPTIONS

For the specific items mentioned in the NCUA Letter, there are options for credit unions to review and document as part of the overdraft and NSF program.

## Authorize Positive Settle Negative (APSN)

Authorize Positive Settle Negative (APSN) transactions are the major concern of regulatory agencies. The concern raised by lawmakers and agencies is members cannot reasonably anticipate when overdraft fees will be assessed.

> ***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. 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.*
>
> *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.*

CU*Answers provides current tools to reduce the risk of assessing APSN fees. In addition, CU*Answers is developing additional software enhancements regarding the circumstances when these fees are assessed.

### Current Balance versus Available Balance

The NSF/OD Transfer Configuration feature (Tool #558) allows credit unions to select either Available Balance or Current Balance as the basis for assessing fees. Selecting the Current Balance option reduces the heightened risk as described in the NCUA 24-CU-03 Letter.

> *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.*

### Programming Change

CU*Answers is planning software changes regarding APSN fees. The changes will allow us to make the determination as to whether a transaction was "approved positive" (meaning there were sufficient funds in the account, without dipping into allowed negative balance limits or overdraft protection funds) or "approved negative" (meaning negative balance limits and/or overdraft protection were used to approve the transaction). When that transaction posts to the member's account, if the account must be taken negative (or funds must be pulled from an overdraft protection account) due to other transactions posted since the original approval, that determination will allow us to correctly choose whether or not to charge a fee. This project will require about 900 hours of development and testing work. This is a top priority and updates on progress will be provided to clients.

### Manual Refunds via a Best-Effort Report

While work continues on the programming change, CU*Answers is releasing a special analysis report in an attempt to help credit unions identify when an APSN fee may have been assessed, to assist with manual fee refund decisions. In general, the report compiles data as follows:

- In addition to transaction records, the report relies on data in a card transaction details file called ISOCUDTA. Data in this table is retained for 30 days, and is not available in real time.
- In order to identify potential APSN fees, the report compares debit card transactions to the original card activity messages that were used during the authorization. If neither negative balance limits nor funds from overdraft protection accounts were used to authorize the transaction, then those transaction details will be included on the report for the CU to review for potential reversals.
- Starting in January 2025 the report will be run automatically for all CUs weekly on Monday mornings, covering activity from Saturday through Friday of the preceding week. This window provides a sufficient lookback, while accounting for the non-real-time nature of the data.

While this is not guaranteed to identify every potential APSN fee instance, if run and reviewed consistently this report should allow for good-faith review and refunding of fees that are likely the result of an APSN scenario.

## Multiple NSF Representment Fees

Another area that raises concern is consumers receiving fees for returned ACH transactions, as the consumer has no control when the ACH transaction is re-presented for payment.

***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.*

### ACH Re-presentment Waiver

The CU*BASE NSF/OD Transfer Configuration (Tool #558) allows credit unions to waive any fees associated with an ACH retry item by checking the box under *Waive Fee for Retry Items*.

### Check Re-presentments

The CU*BASE Work Member Exception File feature (Tool #986), where credit unions work daily check exceptions such as NSF items, includes tools that allow credit union personnel to search a member's transaction history for check numbers that have attempted to clear previously. The user can then force-post an item, if desired, *without* assessing additional NSF fees.

## Returned Deposited Item Fees

Returned deposit item fees may be considered unfair because the check depositor cannot control whether and why a check is returned.

***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.*

Information about RDIs is provided to the CU from their item processor, and any fees are posted manually by credit union back-office personnel. Credit unions should review procedures to determine how fees are being charged.

## Daily Limits

Regulators have expressed concern that members cannot return their accounts to a positive status if financial institutions have high or no daily limits on fees assessed.

> ***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.*

### Fee Caps and Thresholds

Using the CU*BASE NSF/OD Transfer Configuration feature (Tool #558), credit unions can establish:

- A maximum per-day cap for non-return (ANR) fees,
- A non-fee tolerance for items that post within $*x* of available balance, and
- A non-fee tolerance for individual transactions under $*x* that are posted to the member's account.

## Fee Disclosures

As mentioned above, credit unions are required to accurately advertise and describe to members how fees are assessed.

> ***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. 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.*

This was another area described in the CFPB's Consent Order of November 7, 2024 against Navy Federal Credit Union. Consumer confusion was again cited by the CFPB:

> *36. Prior to September 2020, funds received by [Navy Federal Credit Union]'s members via Original Credit Transaction would post on the same day only if received before 10 A.M. (Eastern). While a consumer receiving an Original Credit Transaction after that cutoff time would see their available balance increase almost immediately, the funds would not post to their account until the following business day. [Navy Federal Credit Union] never disclosed to consumers the existence of this 10 A.M. Eastern cutoff.*
>
> *37. Many consumers receiving an Original Credit Transaction after the cutoff and observing the increase in their available balance would reasonably believe the funds were available for their immediate use. If a transaction posting that day would have been covered by the Original Credit Transaction had it been available, but instead caused an overdraft because the Original Credit Transaction was received after 10 A.M. Eastern, the consumer would receive an unanticipated Overdraft Fee.*
>
> *38. [Navy Federal Credit Union] was aware as early as June 2018 that its undisclosed Original Credit Transaction cutoff time was causing consumers to be charged unexpected Overdraft Fees. In June 2018, [Navy Federal Credit Union] began investigating the issue.*

> *39. In September 2020 [Navy Federal Credit Union] implemented system changes that formally moved the Original Credit Transaction cutoff from 10 A.M. Eastern to 8 P.M. Eastern. It remained the case that Original Credit Transactions received after the 8 P.M. cutoff would not post until the following business day. [Navy Federal Credit Union] still did not disclose the new 8 P.M. Eastern cutoff.*
>
> *40. Only in December 2020 did [Navy Federal Credit Union] amend its disclosures for the first time to notify consumers of any cutoff time for Original Credit Transaction.*

Credit unions should ensure advertisements and disclosures are accurate and reviewed by the credit union's legal counsel.

## Transaction Ordering

So-called "high-to-low" transaction processing order can result in more fees being addressed by a consumer.

> ***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.*

Credit unions on the CU*BASE platform have debit card transactions processed in the order they are received. It is not possible for a credit union to modify this setting. For check (share draft) processing this setting is controlled via Member SD/Checking Configuration (Tool #510).

## Consumer Programs

Credit unions have been encouraged to offer supplements or alternatives to the overdraft and NSF fee program.

> *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.*

The Sample Checking Account Activity (Tool #774) feature gathers a list of members based on how much they paid in NSF fees for the prior month. Credit unions can use this tool to perform outreach programs to educate members on alternative, lower-cost services. CU*Answers can also assist credit unions who are looking for ways to supplement their programs.

# APPENDICES

## Appendix 1:
## Note for California Credit Unions and Credit Unions Interested in Fee Notifications

California Senate Bill 1075 (SB 1075) limits the amount of NSF and overdraft fees that state-licensed credit unions may charge. The law also mandates that credit unions provide a notification to members each time a fee is assessed. While only state-licensed credit unions in California are required to provide notification, credit unions in other jurisdictions may wish to also provide notification as part of their member services.

***California Senate Bill 1075***

***New Notification Requirement***

*Each time a fee is assessed, credit unions must provide notice meeting all of the following requirements:*

*1. Notice must be sent via the communication method designated by the member.*

*2. Notice must be sent on the same business day the fee-generating transaction occurs, or the next business day if same-day notification is not feasible.*

*3. The notice must include:*

*a. Transaction date and type*

*b. Whether the transaction was declined or processed*

*c. Overdraft amount (if applicable)*

*d. Amount needed to restore a positive balance*

*e. Timeframe to avoid potential consequences if the account remains negative.*

*f. If applicable, the amount of time the member has to return the account to a positive balance to avoid the consequences.*

*If the account has multiple accountholders, notice to one is sufficient.*

The CU*BASE Member Notices feature (Tools #258 and #653) can be used to configure and generate notices (and/or eNotices) to members for both non-return (ANR) fees as well as NSF fees for returned items. For details about this and other components of CA SB 1075, refer to Credit Union Strategies in Responding to CA SB 1075 Member Notice for NSF, Overdraft Protection, ANR/Courtesy Pay available on our website.

## Appendix 2:
## Review of Unfair, Deceptive, and Abusive Practices (UDAAP)

UDAAP is a broad consumer protection concept that can apply to inaccurate information, omissions or misinterpretations in overdraft program descriptions, disclosures, agreements, or advertising. UDAAP is not limited to overdraft programs; however, UDAAP is central to overdraft regulatory actions as well as class action litigation. Mistakes in overdraft program disclosures, even if un/intentional, are not a defense to UDAAP allegations.

## Available Balance versus Ledger (Actual) Balance

Modern banking allows debits and credits to apply to an account before funds are settled between institutions and posting the transaction to the account.

| LEDGER (ACTUAL) BALANCE | AVAILABLE BALANCE |
|---|---|
| Ledger or actual balance is the net sum of all posted credit and debit transactions against an account. | Available balance keeps track of outstanding debits that have not been settled and credits that have been posted but not cleared. |

Settlement and posting of ATM and debit card transactions can take place one or more days after a credit union authorizes the transaction, and credit unions are obligated to settle (pay the merchant's FI) all ATM and debit card transactions authorized up to the amount authorized. Credit unions are subject to overdraft class action lawsuits when the disclosures and/or account agreement is inaccurate regarding the credit union's methodology for calculating and assessing overdraft fees.

| AS DISCLOSED TO THE CONSUMER | AS ACTUALLY DETERMINED |
|---|---|
| Credit union discloses that overdraft fees will only be charged when there is not enough money in the account to cover the transaction. | Credit union ignores whether there is money in the account and instead makes an automated determination based on the internal calculation of the available balance. |

The allegation is that the use of an internal available balance to calculate overdraft fees rather than the money in the account to determine whether a transaction results in an overdraft fee violates the consumers rights if not disclosed.

## Authorize Positive Settle Negative

This claim is overdraft fees are charged on items authorized on a positive account balance.

*Example:*

- Customer initiates a $75 debit card purchase at a time when they had a $100 positive available account balance, and the institution authorizes the transaction. A $75 hold is placed on the customer's account.
- Before the transaction settles, a check for $50 posts to the customer's account, reducing the balance available to pay other items.
- When the transaction settles, the customer's account balance is no longer sufficient to cover it. The credit union pays the item and charges the customer an overdraft fee.

| EXAMPLE | PURCHASE | AVAILABLE BALANCE |
|---|---|---|
| Customer initiates a $75 debit card purchase at a time when they had a $100 positive available account balance. | | **$100** |
| The institution authorizes the transaction. A $75 hold is placed on the customer's account. | **$75** | **$25** |
| Before the transaction settles, a check for $50 posts to the customer's account, reducing the balance available to pay other items. | **$50** | **-$25** |
| When the transaction settles, the customer's account balance is no longer sufficient to cover it. The credit union pays the item and charges the customer an overdraft fee. | | **FEE** |

## High to Low Debit Card Transaction Processing

If a financial institution reorders transactions from high to low regardless of when the transactions are processed, a consumer can incur significantly more fees. In the example below, the consumer spends the exact same amount of money in the same day and by the end has the exact same negative balance. However, if the transactions are posted in order, the consumer is hit with only a single overdraft fee. If processed high to low, the consumer is subject to three overdraft fees being assessed.

| TRANSACTIONS PROCESSED IN ORDER | $120 STARTING BALANCE | TRANSACTIONS PROCESSED HIGH TO LOW | $120 STARTING BALANCE |
|---|---|---|---|
| $20 | $100 | $100 | $20 |
| $10 | $90 | $50 | ($30) |
| $50 | $40 | $20 | ($50) |
| $100 | ($60) | $10 | ($60) |

### Multiple Fees on Same Transaction

The theory is when a credit union's account agreements and fee schedules state that only one overdraft or NSF fee will be charged "per item" or "per transaction." However, the same item is eligible to incur multiple overdraft and NSF fees when that item is returned for insufficient funds and later re-presented one or more times.

*Example:*

- Credit union returns a check or ACH transaction for insufficient funds, resulting in an NSF fee.
- Merchant or third party resubmits the returned transaction which again presents against insufficient funds.
- Credit union either (a) returns the resubmitted item and changes customer a second NSF fee or (b) pays the resubmitted item and charges the customer an overdraft fee.

## Appendix 3: Summary Checklist

The following is a summary of how CU*BASE tools can assist a credit union responding to the NCUA Letter 3-CU-24. Please note that these steps are not necessarily all-inclusive or pertinent to all credit unions. Laws related to overdraft and NSF programs are in constant flux, and changes in State laws may affect credit unions operating in those jurisdictions.

In addition, credit unions should consider how their institution will document and evidence this response if asked by examiners. Finally, credit unions should assume their documentation will potentially be used in evidence should the credit union be subject to litigation related to their overdraft and NSF fee program.

### Perform a Risk Assessment

Credit unions can use CU*BASE tools to address risks related to the institution's overdraft and NSF fee programs.

**Concentration Risk**. The threat from this risk is that credit unions are over-reliant on overdraft and NSF fee income. Credit unions can evaluate the amount of income generated from these fees using CU*BASE tools:

- ✓ NSF/Overdraft Protection Configuration (Tool #558)
- ✓ The 5300 Call Report & CU*BASE® Tools
- ✓ Analytics Booth

**Reputation Risk**. Credit unions should consider how to identify and manage consumer complaints regarding the overdraft and NSF fee program. In addition, consumer complaints may be a warning sign of consumer confusion about how the programs calculate fees. Tools to assist with managing consumer complaints include:

- ✓ Member Trackers
- ✓ Create Tracker Notes/Leads from File feature (Tool #312)
- ✓ Print Outstanding Follow-ups feature (Tool #671)
- ✓ Print Member Trackers (Tool #664)

**Strategic and Transaction Risk**. Credit unions will be expected to manage its overdraft and NSF program. Tools that credit unions can use to configure and manage the program include:

- ✓ NSF/OD Transfer Configuration tool (Tool #558)
- ✓ Automated Non-Returns (ANR)
- ✓ NSF Transactions by Day (NSFTR) inquiry (Tool #1051)

**Compliance and Legal Risk**. The tools also allow the credit unions to document their overdraft and NSF programs. These can in turn be provided to the credit union's legal counsel who can advise the institution on any changes that need to be made to the program or to member disclosures.

## Specific Items Identified in the NCUA Letter

For managing the specific items mentioned by the NCUA, credit unions can address these concerns as follows.

**Authorize Positive Settle Negative (ASPN)**. Examiners are concerned that consumers cannot reasonably anticipate when these fees will be assessed.

- ✓ NSF/OD Transfer Configuration feature (Tool #558)
- ✓ Implement Programming Change
- ✓ Refunds via a Best-Effort Report

**Multiple NSF Representment Fees**. Examiners are concerned the consumer has no control when an ACH transaction is re-presented for payment.

- ✓ NSF/OD Transfer Configuration (Tool #558)
- ✓ Work Member Exception File feature (Tool #986)

**Return Deposited Item Fees**. Examiners are concerned that a check depositor cannot control whether and why a check is returned.

- ✓ This information is provided to the credit union from their item processor, and fees are posted manually.

**Daily Limits**. Examiners are concerned members cannot return their accounts to a positive balance if high or no daily limits exist on fee assessments.

- ✓ NSF/OD Transfer Configuration feature (Tool #558)

**Fee Disclosures**. Credit unions should review their fee disclosures with their legal counsel.

**Transaction Ordering**. Examiners consider high-to-low transaction processing order to be unfair.

- ✓ Debit card transactions are processed in the order received
- ✓ Check (share draft) processing is controlled via Member SD/Checking Configuration (Tool #510)

**Consumer Programs**. Credit unions are encouraged to offer supplements or alternatives to the overdraft and NSF fee program. Our teams can assist if credit unions wish to do so. CU*BASE also has tools to assist in gathering a list of members who may potentially benefit by such programs:

- ✓ Sample Checking Account Activity (Tool #774)

**Fee Notifications**. Credit unions in California can configure fee notifications in CU*BASE. Credit unions operating outside of California may still wish to configure notifications in order to manage reputation risk:

- ✓ Member Notices feature (Tools #258 and #653)