



# *CUNA Issue Summary*

## **OVERDRAFT PROTECTION**

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**ISSUE:** Credit unions and other financial institutions have long been involved in providing some form of overdraft or bounced check protection for their members and customers. For credit unions, this is fully consistent with their philosophy and mission to serve members' financial needs and to help them resolve short-term financial problems. Initially, many credit unions simply provided members with courtesy transfers from their savings accounts to cover any checks that exceeded the balance in their checking accounts. However, as members' savings declined and the complexity of electronic banking increased both the number and dollar amounts of overdrafts, it became imperative to find new and innovative approaches to better address this member need.

Today, many credit unions continue to offer their members overdraft protection by providing a set number of automatic transfers from regular savings or money market accounts. Others also provide special lines of credit attached to checking accounts to protect against overdrafts or to allow for special purchases. Still others have followed the example of the banks in structuring formal courtesy pay or overdraft privilege programs. While the terms and features of these overdraft privilege programs may vary, most are consistent in offering to pay, rather than return, non-sufficient funds transactions on checking accounts in exchange for fees that are similar to those typically charged for returned items. All these programs are intended to spare members the embarrassment of returned checks as well as avoid additional fees charged by merchants.

**CUNA POSITION:** As more credit unions began to initiate overdraft protection programs, CUNA sought to encourage its members to adopt "best practices" standards to distinguish credit union overdraft services from many bank programs that were being marketed to boost fee income without regard for the best interests of consumers. CUNA has adopted policy positions supporting the ability of credit unions to offer overdraft privilege programs, but urging credit unions to avoid practices that are inconsistent with the philosophy and principles that are unique to the credit union system. In particular, CUNA called on credit unions to refrain from:

- Deceptive advertising that leads consumers to expect all overdrafts to be paid when other documents indicate payment of overdrafts is discretionary;
- Promoting overdraft protection in a manner that encourages consumers to frequently or regularly overdraw their account;
- Enticing consumers to overdraw their accounts by including the amount of overdraft coverage as part of "available funds" in ATM messages, online statements and telephone balance statements; and
- Failing to inform frequent users of overdraft protection services of available alternatives that could be more appropriate and less expensive.

**STATUS/OUTLOOK:** On October 22, 2009, Representative Carolyn Maloney (D-NY), a senior member of the House Financial Services Committee, introduced H.R. 3904, the *Overdraft Protection Act of 2009*. The bill seeks to eliminate abusive overdraft protection practices. On October 30, 2009, the Committee on Financial Services held a [hearing](#) on the bill, during which Rod Staatz, President & CEO of SECU of Maryland, testified on behalf of CUNA. While Mr.

Staatz's testimony was generally supportive of efforts to eliminate abusive practices in overdraft protection programs, CUNA staff expressed concerns to Committee staff regarding the operational burdens the legislation would impose as well as the restrictions that would likely prevent credit unions from continuing to offer these programs, if the legislation were to become law. Committee staff agreed to discuss these concerns prior to the legislation moving forward.

On October 19, 2009, Senator Chris Dodd, chairman of the Senate Banking Committee, introduced S.1799, *the FAIR Overdraft Coverage Act*. This bill is similar in intent to the bill in the House with one primary exception: the bill only requires an opt-in for ATM and debit transactions while the House version requires an opt-in for ATM, debit transactions and checks. The Senate Banking Committee has announced it will hold a hearing on November 10, 2009 entitled, "Protecting Consumers from Abusive Overdraft Fees: The Fairness and Accountability in Receiving Overdraft Coverage Act." CUNA will be monitoring this hearing closely and will continue to talk with Committee staff about our concerns of this legislation.

**IMPACT ON CREDIT UNIONS:** CUNA believes that overdraft protection programs are not a lending product subject to TILA. In addition, the arbitrary limits on the number of fees would make such programs unworkable for credit unions. Also, without an opt-out requirement for those already being served, the legislation is unpractical.

H.R. 3904 would make several changes to the way that overdraft protection programs are treated under the law. Most troublesome, the bill would cap the number of overdraft fees members can incur to no more than one per month and six per year. This arbitrary restriction would force many credit unions to simply end their overdraft protection programs.

Secondly, the bill would classify overdraft protection products under the *Truth in Lending Act* (TILA), and require additional disclosures and periodic statements. This presents credit unions with two issues: (1) the additional disclosures would be confusing for consumers (2) credit unions have historically believed that these products are not lending products.

Thirdly, H.R. 3904 would require that consumers opt-in to overdraft programs by signing a written disclosure, and require financial institutions to obtain written disclosures from members already being served by overdraft protection program. And, it would give financial institutions one year within which to become compliant with legislation. The burden of having to go out and get members to sign-up for this service, would present credit unions (and banks) with considerable operational difficulties.

The legislation, as introduced, also has additional provisions including a requirement that financial institutions disclose immediately to the consumer if an ATM or point-of-sale (POS) transaction will cause an overdraft in the account; a prohibition against manipulating debits and credits to an account in order to generate overdrafts; and a prohibition on advertising a checking account as a "free" account if overdraft protection is offered as a service of the account for a fee.

**UPDATE:** On August 31, 2009, the National Credit Union Administration (NCUA) amended its Truth in Savings Act (TISA) rules to incorporate two recent final rules that were issued by the Federal Reserve Board (Fed) under Regulation DD. The two Fed rules addressed in NCUA's rule are those that impose disclosure requirements for overdraft protection plan fees and those that address electronic disclosures. The effective date for these provisions on overdraft fee

disclosures will be January 1, 2010.

On March 30, 2009, CUNA sent a comment [letter](#) to the Fed in response to the Regulation E proposal on overdraft protection plans. CUNA expressed support for an opt-in approach for new accounts for ATM and debit card transactions, but urged the Fed to continue to allow financial institutions to use an opt-out approach for existing accounts. CUNA also supports not requiring consumers to elect overdraft protection for these transactions in exchange for receiving overdraft protection for checks and other transactions; providing consumers with equivalent accounts, regardless of whether they have overdraft protection; allowing consumers 30 days to decide whether to opt-out; and allowing consumers to opt-out orally. CUNA opposes any requirement to provide a toll-free telephone number that consumers may use to opt-out; to segregate the required disclosures; or to include opt-out notices on periodic statements. As for overdrafts in connection with debit holds, CUNA believes that merchants should be required to submit transactions promptly for settlement.

In 2008, CUNA revised its official policies to address new realities in the financial services marketplace. CUNA supports the ability of credit unions to offer overdraft protection plans as a means to help their members resolve short-term financial problems. This is in contrast to others who may heavily market these programs in an often misleading manner.

While the terms of credit union overdraft protection programs may vary, they are structured to pay, rather than return, non-sufficient funds transactions in exchange for fees that are similar to those charged for returned items. This spares members the embarrassment of returned checks, as well as additional fees charged by merchants and other payees. Such programs, when used appropriately by members, serve as a valuable alternative to overdrawing share drafts and are fully consistent with the philosophy and principles unique to the credit union system. To that end, CUNA would support new law or regulation that:

- Prohibits the manipulation of debits and credits with the intent of generating overdraft fees.
- Provides clear and conspicuous disclosure of all costs associated with these programs to ensure that credit union members have the ability to compare the costs and features of overdraft protection programs among the various types of financial institutions that offer them.
- Recognizes, consistent with the current Federal Reserve Board position, that funds accessed through overdraft protection programs are not loans and do not require that fees be calculated and disclosed as an “annual percentage rate” under the Truth in Lending Act.
- Permits, but does not require, credit unions to obtain a written agreement from members to participate in an overdraft protection program, while recognizing the need to allow members to decline participation in the program if they so choose.
- Does not impose new burdensome requirements on credit unions with which compliance would be difficult to achieve. This would include, but is not limited to, requiring new disclosures on automated teller machine transactions.

CUNA’s Board of Directors also calls on every CUNA member credit union that offers overdraft protection services to adopt overdraft protection standards and ethical guidelines that will help emphasize credit unions’ concern for consumers and further distinguish credit unions as institutions that care more about people than money. When offering overdraft protection services,

credit unions adopting these guidelines and ethical standards recognize that the following practices are **NOT** consistent with the credit union philosophy and principles and publicly affirm that they will not engage in any of these practices:

**Deceptive Advertisement:** Advertising, representing, or implying that the member should expect that all overdrafts will be paid but then stating in other documents that the paying of overdrafts is discretionary, which is a standard feature of overdraft protection plans. Such advertising may lead members to rely on the service in expectation that all overdrafts will be paid, which would be detrimental if any overdrafts are not ultimately paid by the financial institution.

**Enticing Members to Overdraw Accounts Repeatedly:** Advertising or promoting the overdraft protection plan in a manner that encourages the member to overdraw repeatedly his or her share draft account, as opposed to such a plan being used as an occasional convenience for the member. The frequent overdraw of accounts is a practice that financial education programs, such as those offered by credit unions, generally discourage.

**Structuring Programs that Mislead Members:** Including a feature that records the amount of coverage being offered to cover overdrawn share drafts as part of the “available funds,” such as on ATM receipts, online statements and telephone balance statements.

**Failure to Inform Heavy Users of Overdraft Protection Programs of Alternatives:** Overdraft protection programs may not be appropriate for members who heavily use and rely on overdraft protection programs as a means to pay a significant proportion of every day living expenses. For these members, credit unions may offer a number of other products and services that would be more appropriate. These may include transfers from a savings account to the share draft account, as well as other types of less expensive secured and unsecured loans that the credit union offers to all its members.

**Failure to Provide Financial Counseling Information:** Credit unions recognize that they have a role in helping their members use overdraft protection services in a responsible manner. In addition to providing adequate disclosures regarding the features and fees associated with the programs, credit unions should also provide information regarding counseling services provided by the credit union or other reputable counseling services.

CUNA’s Regulatory Affairs Department [comments](#) on proposed regulations. CUNA lobbyists will continue to monitor overdraft protection legislation and support efforts to weed out questionable industry practices while also protecting credit unions and their members from any unintended consequences that would hamper the availability and affordability of overdraft protection programs.

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