



April 1, 2024

Comment Intake—2024 NPRM Overdraft  
c/o Legal Division Docket Manager  
Bureau of Consumer Financial Protection  
1700 G St. NW  
Washington, DC 20552

**RE: Overdraft Lending: Very Large Financial Institutions (Docket No. CFPB-2024-0002)**

Dear Sir or Madam:

I am writing on behalf of the California and Nevada Credit Union Leagues (Leagues), whose combined strength makes up one of the largest state trade associations for credit unions in the United States, representing the interests of approximately 285 credit unions and their more than 13.6 million members.

In January 2024, the Consumer Financial Protection Bureau (CFPB) issued a notice of proposed rulemaking to amend Regulations E and Z, implementing the Electronic Fund Transfers Act (EFTA) and the Truth in Lending Act (TILA), respectively. This proposal aims to update regulatory exceptions for overdraft credit provided by "very large" financial institutions, defined as insured banks or credit unions with total assets exceeding \$10 billion.

Under the proposal, a covered financial institution could offer either *courtesy overdraft* services, with fees designed to cover costs and losses, or an *overdraft line of credit*, subject to applicable credit card lending regulations. For courtesy overdraft, it would give covered financial institutions the ability to calculate their costs using either: (1) a "breakeven standard", i.e., calculating its own costs and losses using standards set forth in the proposal; or (2) relying on a "benchmark fee" set by the CFPB. The CFPB is considering setting the benchmark fee at \$3, \$6, \$7, or \$14.

The Leagues appreciate the opportunity to comment to the CFPB regarding the proposed rule. We have identified several concerns with this proposal:

1. Competitive harm in the financial marketplace.
2. Consumers' understanding of and preference for overdraft protection.
3. Oversight of critical operational costs.
4. Implications of the proposed rule on TILA.
5. Potential impact on access to overdraft services for low-to-moderate income households.
6. The significance of credit union member outreach.

We respectfully provide the following comments for your consideration.

**General Comments: *The Credit Union Difference***

We would first like to highlight the distinctive nature of credit unions as compared to other financial service providers for the CFPB's consideration. The credit union structure is vastly different than that of for-profit entities. Credit unions are member-owned, democratically governed, not-for-profit cooperatives whose

purpose is to promote thrift and improve access to credit for their member-owners, particularly those of modest means. “Owners” are not just shareholders in a business whose primary goal is to maximize individual shareholder profits. Instead, credit union owners or shareholders are the member accountholders of the cooperative. Credit union earnings are passed on to their member-owners in the forms of reduced fees, higher savings rates, and lower loan rates. Each member has one vote, regardless of the amount of shares (funds) held in the credit union. They have a volunteer board of directors comprised of members and elected by the members. Credit unions exist for the financial benefit of their member-owners, but they are ultimately driven by the philosophy of people-helping-people.

We firmly believe that the unique role of credit unions within the financial services marketplace and the invaluable contributions they make to their members and the communities they serve cannot be understated.

### *1. There is Competition in the Financial Marketplace*

The Leagues wish to emphasize that the CFPB’s ongoing narrative of anti-competitive behavior in the financial marketplace is misguided given the robust competition evident in the United States banking systems. While the marketplace may appear to be dominated by a few of the largest banking entities, the fact is that consumers continue to enjoy a multitude of choices when it comes to financial services, contributing to a highly competitive landscape that ultimately benefits consumers. Credit unions operate effectively within this competitive framework, facing challenges from traditional banks, online banks, and fintech companies.

Credit unions, as the only consumer-owned cooperatives in the financial services sector, provide a valuable and necessary option in this competitive environment. Their mission specifically recognizes the importance of providing members with credit at competitive rates, and they have a longstanding commitment to safeguarding consumer interests. The significant role credit unions play in promoting competition and consumer well-being within the financial services marketplace cannot be overstated.

With that said, we believe the proposal, as drafted, creates a significant risk of competitive harm. The market for deposit accounts and overdraft services is competitive. It’s important to remember that each credit union serves members within its designated field of membership, which members may have needs that differ from those in other fields of membership. Credit unions in California and Nevada each face market pressure to structure their overdraft service in a way that best meets their members’ unique needs. The proposal would limit credit unions’ ability to tailor their overdraft services to suit the diverse needs of their members, resulting in reduced member choice and less flexibility to effectively manage their finances. Moreover, credit unions continuously innovate and adapt their overdraft programs to align with changing member preferences and financial circumstances. Overdraft programs must strike a careful balance between providing services that protect a consumer’s immediate interests while also encouraging long term behaviors designed to ensure personal financial responsibility. Moreover, the cost and structure of overdraft programs must take into consideration the inherent level of risk assumed by a financial institution in paying overdrafts. Restrictive regulations could stifle this innovation and hinder credit unions’ ability to provide responsive and member-centric solutions.

The CFPB argues that consumers will significantly benefit from the proposed rule because it will save them money, citing changes in times. However, this estimation overlooks the fact that overdraft programs carry

inherent risk to a financial institution. Excessive restrictions on the ability to effectively manage that risk could lead to a reduction in the availability of overdraft programs, which could have a potential negative impact on consumers, leading to late fees when checks or debit payments are simply returned unpaid. Contrary to the CFPB's position, evidence suggests that consumers actively choose to enroll in overdraft programs even after receiving comprehensive, transparent, and meaningful disclosures about the program.

- ***Regarding “Junk Fees”***

Furthermore, overdraft fees are not inherently unfair or deceptive, and labeling them as "junk fees" is both a mischaracterization and unwarranted. Unlike “junk fees,” overdraft fees are neither hidden nor unavoidable.

Credit unions provide reasonable and transparent overdraft services to consumers. Regulation E (12 CFR 1005.17) mandates that financial institutions cannot charge a fee for paying an ATM or one-time debit card transaction as part of an overdraft service unless the consumer has expressly consented to participate. They are under no obligation to participate and will suffer no adverse consequences for choosing not to do so. Similarly, the Truth in Savings Act regulations (12 CFR §707.11) require credit unions to disclose all fees imposed for returning items unpaid on periodic statements.

Consumers are given the opportunity to opt out of overdraft services at any time, ensuring transparency and control over their financial decisions. No consumer is ever obligated to incur an overdraft transaction or to remain enrolled in an overdraft program. The decision to do so is ultimately a matter of consumer choice for qualifying consumers. The current regulatory framework ensures that credit unions offer overdraft services that are both reasonable and disclosed to consumers, aligning with consumer choice and regulatory standards.

## ***2. Consumers understand the benefit and value of overdraft.***

Consumers actively anticipate and value overdraft protection and are willing to pay the fees associated with this service, as evidenced by their voluntary participation in these programs. According to a comprehensive 2021 study conducted by Curinos<sup>1</sup>, two-thirds of consumers express a desire to maintain access to overdraft protection, demonstrating their preference for these services. More than 80 percent of overdraft transactions originate from consumers who opt into debit card overdraft programs, clearly indicating their intention to utilize this feature to cover payments.

The Curinos study further highlights that consumers possess a deep understanding of overdraft protection and available alternatives, particularly among regular users. Over sixty percent of overdrafts originate from consumers who actively intend to use the service. Credit unions play a pivotal role in facilitating this participation by providing clear and meaningful disclosures, ensuring that members fully comprehend the associated terms and conditions. Additionally, the option to opt out at any time empowers consumers to make informed decisions regarding their financial needs and preferences.

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<sup>1</sup> See Curinos: “Competition Drives Overdraft Disruption” at: <https://curinos.com/our-insights/competition-drives-overdraft-disruption/>.

Before enrolling in overdraft protection, credit unions emphasize the importance of members carefully reviewing the service's terms and conditions. This includes a detailed explanation of the credit union's overdraft fees, any applicable limits on overdraft amounts, and a transparent overview of how overdraft transactions are processed. Such proactive communication fosters consumer understanding and helps mitigate potential misunderstandings or unexpected charges.

### **3. *The proposal does not consider key operational costs.***

Regarding the proposed standards for financial institutions in handling overdraft fees, there are concerns about the feasibility of implementing either the “breakeven fee” or “benchmark fee” standard. The proposal appears to overlook the actual operational costs and financial risk associated with covering overdrafts and managing repayment processes.

The CFPB states in the proposal that it estimates that 10 percent of non-covered overdraft transactions would require 10 minutes of a customer service representative's time and that 20 percent of these customer service contacts also would require ten minutes of a supervisor's time<sup>2</sup>. The proposal also estimates that a financial institution’s cost of funds and operational costs associated with each overdraft transaction will not exceed \$0.50.

However, this analysis overlooks the comprehensive costs tied to overdraft programs. These include expenses related to compliant account opening and servicing, such as collection efforts, administrative tasks associated with managing overdraft services (e.g., postage for notices, branch services, core processors, and compliance testing), among others. Even the largest credit unions would struggle to achieve the economies of scale required to operate within the margins outlined in the cost analysis of the proposal. This places credit unions of all asset sizes at a competitive disadvantage compared to institutions relying on the operating cost analysis proposed.

We believe that the proposal not only hinders credit unions' ability to innovate and serve their communities effectively but also ignores the considerable variations in operational efficiencies, market focus, and consumer demographics among different financial institutions.

### **4. *TILA Implications***

Under the proposal, among other changes, it would apply the portions of Regulation Z that implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) to covered overdraft credit that can be accessed by a hybrid debit-credit card, such as a debit card or other single credit device (including certain account numbers) that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution. Provisions of the CARD Act that would apply to such overdraft credit include but are not limited to: (i) ability-to-pay underwriting requirements; (ii) limitations on penalty fees, including certain fees on transactions that are declined due to nonsufficient funds; and (iii) various requirements related to rate changes. Further, the proposed rule would require nonexempt overdraft fees to be managed in a separate credit account and would apply the prohibition on conditioning an extension of credit on a preauthorized transfer pursuant to Regulation E.

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<sup>2</sup> *Id.* at 9.

The CFPB's decision to amend Regulations Z, updating the exceptions for overdraft credit provided by large financial institutions, presents significant challenges for institutions, including credit unions, that offer overdraft services. While the CFPB advocates for financial institutions to underwrite consumers into credit programs, the reality is that many of these consumers may not meet the creditworthiness criteria to qualify for such credit products. Credit unions already provide various credit options, such as lines of credit and credit cards, where consumers undergo appropriate underwriting processes. These credit products are often offered to consumers as primary solutions before considering overdraft services. However, if the proposal is finalized in its current form, it could disproportionately affect consumers who fall short of credit standards, potentially excluding them from accessing overdraft credit. Consequently, these consumers would lose a vital means of obtaining short-term liquidity to meet their essential needs.

- ***Breakeven Amount***

As noted above, the proposal would give financial institutions the ability to determine whether an overdraft charge is considered above breakeven overdraft credit by calculating its own costs and losses using standards set forth in the proposal.

These compliance requirements would severely restrict overdraft fees in excess of breakeven amounts by larger institutions and would effectively eliminate such fees in the marketplace.

Moreover, this approach could disproportionately affect credit unions, particularly smaller ones, as they may not have the resources or scale to compete with larger institutions in setting fees that meet the proposed standards. This could lead to an uneven playing field in the marketplace, disadvantaging credit unions in California and Nevada.

Additionally, the proposal's lack of a clear formula or safe harbor for conducting breakeven analysis exposes credit unions to litigation risk. Even if a credit union conducts a thorough analysis to set appropriate fees, they could still face legal challenges from plaintiffs alleging improper calculations. This uncertainty and potential for litigation could create a chilling effect, discouraging credit unions from offering overdraft services altogether or leading to overly cautious fee structures that may not align with their members' needs.

- ***Benchmark Fees***

The CFPB's proposal regarding the benchmark fee approach is not a reasonable option. Its approach to setting the cost calculation under the benchmark fee standard is overly restrictive, focusing solely on direct costs related to overdraft allocation and ignoring operational expenses.

For larger credit unions, especially as not-for-profit entities, complying with the proposed benchmark fee standard would pose significant challenges. These credit unions would struggle to absorb operational costs related to overdraft programs, potentially leading them to discontinue offering overdraft coverage altogether.

Furthermore, if larger financial institutions face reductions under this proposal, it would establish a precedent for similar standards to apply to smaller credit unions. This pressure for price fixing would impose substantial strain on smaller credit unions, severely limiting the services they can provide to their communities and hindering their ability to compete effectively in the financial marketplace.

The CFPB must reconsider its proposal and collaborate with industry stakeholders to develop a more practical and equitable solution that takes into account the diverse challenges faced by credit unions of all sizes. Failure to do so will have far-reaching negative consequences for credit unions and the communities they serve.

- ***Open-End Credit (§1026.2(A)(20)***

This proposed language introduces significant ambiguity around finance charges and their application. Under the proposed comment 2(a)(20)-4.iii, it states that it would "...[e]xplain that charges for paying a transaction that overdraws a consumer's account generally would be finance charges unless they are expressly excluded from the definition of finance charge by the proposed rule."

The proposal suggests that charges may be "imposed from time to time on an outstanding unpaid balance," with no specific amount financed for the plan. This lack of clarity on the amount financed at the time of establishing the credit plan poses a challenge for credit unions in determining the exact financial obligations and potential risks. Such uncertainty complicates not only a credit union's compliance efforts but also their ability to transparently communicate terms to their members.

***5. We urge the CFPB to carefully consider the potential unintended consequences of the proposed changes – particularly for consumers of moderate means.***

For many credit union members, overdraft protection is not just a convenience but a lifeline, especially for those with low to moderate means or a low credit score. It serves as a crucial emergency safety net, allowing them to cover essential expenses like groceries, gas, utilities, and housing payments.

A Federal Reserve Bank of New York study<sup>3</sup> revealed that "Overdraft fee caps hamper, rather than foster, financial inclusion." This is because financial institutions compensate for lost overdraft income by increasing monthly account fees and imposing stricter requirements to waive these fees, such as raising the minimum checking balance required to avoid a monthly service fee from \$500 to \$1,500. Consequently, low-income consumers who cannot afford these higher fees, which can amount to hundreds of dollars annually, may opt to remain unbanked.

Additionally, the study highlights that fee caps can lead to the "rationing" of overdraft liquidity, particularly affecting riskier depositors.

As indicated in the proposal, although the CFPB acknowledges this study, it disagrees with the study's conclusion. However, the study's findings cannot be dismissed. There is no empirical evidence supporting the CFPB's position that capping overdraft fees would genuinely benefit consumers.

Currently, credit unions offer rates that best support their credit union's particular field of membership and business model. With the current structure of the proposed rule, large financial institutions will be forced to cap overdraft fees. To remain competitive, smaller financial institutions may be forced to significantly adjust their rates or discontinue their overdraft program in response. If credit unions are compelled to reduce

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<sup>3</sup> See Federal Reserve of New York: "Who Pays the Price? Overdraft Fee Ceilings and the Unbanked" available at: [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr973.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr973.pdf)  
2855 E. Guasti Road, Suite 202 • Ontario, CA 91761-1250 • 909.212.6000  
[www.ccul.org](http://www.ccul.org) • [league@ccul.org](mailto:league@ccul.org)

or eliminate overdraft services due to market pressures, it could disproportionately impact those who rely on it the most. Without overdraft protection, failing to cover these transactions could result in severe consequences, such as hefty third-party penalties or even eviction, or force members to seek out more expensive alternatives, such as predatory lenders.

Credit unions may experience “safety and soundness” challenges during examination periods with their regulator if forced to lower overdraft fees to offer a competitive service. Specifically, credit unions are required to operate under a profitability threshold. It may be difficult for credit unions to maintain profitability and offer competitive rates if the proposed rule is finalized. Therefore, the CFPB's proposal to restrict overdraft fees could lead to reduced access to financial services and increased costs for basic necessities, disproportionately impacting financially vulnerable consumers. Such a move contradicts the objectives of promoting access to, and inclusion in, financial services that regulators, including the CFPB, strive to achieve.

We strongly urge the CFPB to work collaboratively with industry stakeholders, including credit unions, instead of proposing a rule that ignores the Federal Reserve’s study. Through collaboration with the industry, it would continue to encourage a greater focus on fairness instead of a problematic proposed rule would be a better result for everyone.

#### **6. *Credit unions prioritize member outreach.***

In the interest of protecting their members, credit unions have implemented positive, proactive measures that expand choices, strengthen transparency, and increase affordability for their members. Across the credit union industry, many credit unions have taken steps to: (1) reduce fees overall, (2) reduce fees on small transactions, (3) eliminate or reduce fees on transactions resulting in small negative balances, (4) eliminate transfer fees, (5) automate the fee waiver process; and/or or (6) cap the number of instances certain fees can be charged per day or another specified period.

Furthermore, credit unions are focused on assisting credit union members that frequently incur overdraft fees. According to data from America’s Credit Unions (formerly Credit Union National Association (CUNA)), credit unions nationwide exhibit a high degree of flexibility and consumer-centricity in their unique approach to overdraft fees on behalf of their members:

- 98 percent waive overdraft fees on a case-by-case basis.
- 78 percent intervene when a member engages in frequent overdrafts.
- 71 percent provide targeted outreach or education to members who miss payments.

When a credit union becomes aware of a member’s frequent overdraft usage, the credit union may attempt to contact the member to address their financial situation and offer financial education and/or alternative credit products tailored to their unique needs. This proactive approach exemplifies the pro-consumer nature of the credit union-member relationship, which distinguishes it within the financial services industry.

#### **Conclusion**

Thank you for considering our perspective on this critical issue. At its core, the CFPB's proposal represents a solution in search of a problem, and it is deeply misguided. This proposal unfairly burdens larger credit

unions and has unintended consequences that will impact smaller credit unions as well. The proposed price cap on overdraft services is a direct threat to the effective provision of overdraft services that could force many credit unions to discontinue these vital programs, leaving consumers with limited options to cover short-term financial gaps and placing them at significant risk.

The Leagues strongly urge the CFPB to withdraw its proposal immediately. Instead, we call for meaningful collaboration with the stakeholders across the financial services industry to develop a fair and balanced solution. Failure to adequately address the unique challenges faced by financial institutions, particularly credit unions, in today's complex financial landscape can be detrimental to both credit unions and the consumers they serve.

Sincerely,

Diana R. Dykstra  
President/CEO  
California and Nevada Credit Union Leagues