



March 25, 2024

The Honorable Rohit Chopra  
Director  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552

RE: Fees for Instantaneously Declined Transactions  
(RIN 3170-AB16)

Dear Director Chopra,

On behalf of its member credit unions, the Cooperative Credit Union Association, Inc. ("Association") appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("Bureau's") proposed rule on Fees for Instantaneously Declined Transactions which would prohibit—as an unfair, deceptive, or abusive act or practice (UDAAP)—credit unions and other financial institutions from charging non-sufficient funds (NSF) fees when consumers initiate payments transactions that are instantly declined. The Association is the state trade association representing approximately 200 state and federally-chartered credit unions located in the states of Delaware, Massachusetts, New Hampshire, and Rhode Island, which further serve over 4.9 million consumer members. The Association has developed these comments in consultation with our members.

### **The Association's High-Level Comments**

- We do not agree that such fees are "junk fees" consumers are unaware of or cannot protect themselves against.. Credit union members are well-informed concerning the possibility of such fees because credit unions disclose them in pursuant to the Truth in Savings Act and the National Credit Union Administration's Truth in Savings Regulation, 12 C.F.R. pt. 707, as well as pursuant to the Electronic Funds Transfer Act and the Bureau's Regulation E. 12 C.F.R. pt. 1005
- While many credit unions do not charge NSF fees for instantly declined transactions, such as point-of-sale debit card declines, the Associations does not agree with the Bureau's proposal to ban such fees as an abusive practice pursuant to the agency's UDAAP authority. If finalized, this rule would be an unreasonable interpretation of the plain language of the UDAAP provisions of Section 1031 of the Consumer Financial Protection Act.

- This regulation, if finalized, will have an impact on small credit unions and therefore should have been subject to the Small Business Regulatory Enforcement Fairness Act (SBREFA) review prior to being proposed.

### **The Association's Detailed Comments**

The Association does not support the Bureau's proposal to create a new Part 1042 ("Nonsufficient Funds Fees") of Title 12 of the Code of Federal Regulations that would prohibit credit unions and other financial institutions from charging NSF fees for instantly declined transactions, such as point-of-sale debit card declines. This proposal is not a reasonable interpretation of the Bureau's statutory UDAAP authority. We urge the Bureau to withdraw this proposal.

Section 1031 of the Consumer Financial Protection Act, 12 U.S.C. § 5531 ("Prohibiting unfair, deceptive, or abusive acts or practices") allows the Bureau to prohibit abusive practices but only when such practices meet the statutory definition of "abusive." While Section 1031 also allows the Bureau to ban acts or practices for being "unfair" or "deceptive," the agency has premised this rulemaking on the definition of "abusive", which in effect concedes that a credit union charging an NSF fee for an instantly declined transaction is be neither unfair nor deceptive. The definition of "abusive" in Section 1031(d) reads as follows:

The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice-

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) takes unreasonable advantage of-

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

An institution charging an NSF fee on an instantly declined transaction does not meet Section 1031's statutory definition of "abusive". Credit union members are well-informed concerning the possibility of such fees because credit unions disclose them in pursuant to the Truth in Savings Act and the National Credit Union Administration's Truth in Savings Regulation, 12 C.F.R. pt. 707, as well as pursuant to the Electronic Funds Transfer Act and the Bureau's Regulation E. 12 C.F.R. pt. 1005.

As the Bureau itself noted in the preamble to the proposal, NCUA's Part 707 regulations already ban some types of NSF fees that other financial institutions are

allowed to charge. Credit unions' member agreements also establish the basis for such fees, and most credit unions further publish their fee schedules on their websites and post them in their offices.

Simply put, there is no factual basis for the Bureau to conclude that NSF fees currently permissible for credit unions "materially interferes with the ability of a consumer to understand a term or condition" of credit unions' account products or otherwise take "unreasonable advantage" of credit union members within the meaning of the Bureau's Section 1031 statutory UDAAP authority.

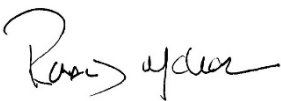
We also do not agree that such fees are "junk fees" that consumers are unaware of or cannot protect themselves against, which are also requirements for a practice to be "abusive" under Section 1031. As democratically controlled, not-for-profit cooperatives, credit unions have no reason to charge their member-owners excessive fees. Since every credit union member has one vote in the election of the credit union's board of directors, who typically control such fees, credit union members can directly influence their credit union's fee structures through its governance process.

Credit unions typically offer mobile, online and telephone banking, meaning that credit union members can check their account balances to ensure that they are not trying to spend money they don't have in their account. Debit card programs are also expensive for credit unions to provide to their members. Credit unions should have the option to charge a fee when a member attempts to spend more money than the member has in their account in order to discourage behavior that can cause operational challenges for the institution.

This proposed rule also should have been subject to review by a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel review prior to being proposed because it will affect small credit unions as defined by the Small Business Administration (SBA). The SBA defines "small credit union" for SBREFA purposes as one with less than \$850 million in assets, *see* 31 C.F.R. § 121.201, which includes a significant proportion of the Association's members. The Bureau should withdraw this proposed rule and either abandon it entirely or rework the proposal through the SBREFA panel process to limit unreasonable burdens on small credit unions.

Thank you for the opportunity to comment on the Bureau's proposed rule on Fees for Instantaneously Declined Transactions. If you have any questions or desire further information, please do not hesitate to contact the Association at (508) 481-6755 or [govaff-reg@ccua.org](mailto:govaff-reg@ccua.org).

Sincerely,



Ronald McLean  
President/CEO  
Cooperative Credit Union Association, Inc.  
[rmclean@ccua.org](mailto:rmclean@ccua.org)