February 16, 2021

Ms. Melane Conyers-Ausbrooks
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314
Submitted via regulations.gov

Re: Comment on proposed change to overdraft policy, RIN 3133-AF20

Dear Ms. Ausbrooks:

The **Center for Responsible Lending (CRL)**, **Self-Help Federal Credit Union**, and **Self-Help Credit Union**, **along with the undersigned [consumer, civil rights, faith and community organizations],** write to oppose the proposed change to the National Credit Union Administration (NCUA)'s overdraft policy.[1]

For 40 years, Self-Help has created asset-building opportunities for low-income individuals, rural communities, women, and families of color. In total, Self-Help has provided over $9 billion in financing to 172,000 homebuyers, small businesses, and nonprofit organizations and serves more than 185,000 mostly low-income families through 65 credit union branches in North Carolina, California, Florida, Illinois, South Carolina, Virginia, Washington and Wisconsin.

Over the past 18 years, Self-Help has merged with 24 credit unions and acquired two failed banks. All of these institutions primarily served low- and moderate-income communities. All but a handful operated high-cost overdraft programs prior to the merger. Self-Help phased out those overdraft programs within six months following the merger and received virtually no complaints. Our experience is that low-income consumers do not want overdraft programs, such that expanding them for credit union members is not a true benefit to those members.

NCUA's proposal, which would permit federal credit unions (FCUs) to keep members' negative account balances open for longer than the current limit of 45 days, offers no evidence that it will achieve its stated goal -- to provide relief to FCU members. At the same time, the proposal fails to consider the significant risks it poses members or include elements to mitigate those risks.

Credit union overdraft practices, like those of banks, most heavily impact the financially vulnerable and leave them worse off. During the best of times, any NCUA action related to overdraft practices should provide a net benefit to FCU members. During a health and economic crisis, it's only more important that the agency take a do-no-harm approach. Instead, this proposal undermines and contradicts federal relief efforts.

To avoid causing net harm to members, any final rule must prohibit additional overdrafts, overdraft fees, and non-sufficient funds (NSF) fees during the period beyond 45 days. More generally, the Board should use its broad authority to provide meaningful relief from harmful credit union overdraft practices during the pandemic and beyond.

1. The proposal presents no evidence that it will achieve its stated goal -- relief to members.

The stated goal of this proposal is to enable credit unions "to provide relief to their members" in light of the impacts of COVID-19.[2] But the proposal presents no evidence that suggests that it will accomplish this goal. It makes general statements like that the current policy is "overly prescriptive" and "potentially harmful" and that the proposal will enable federal credit members "flexibility" to cope with the current crisis.[3] It provides no evidence, though, that extended negative balances are more common now than prior to the pandemic -- whether, for example, more overdrawn accounts are staying negative for 45 days, or whether more accounts are being charged-off at the 45-day point.

2. The proposal fails to consider the substantial risks it poses members.

At the same time the proposal presents no evidence of its purported benefit, it fails to wrestle with or even acknowledge the substantial risks it poses to credit union members.

By extending the time period for negative balance resolution beyond 45 days, the proposal would expose members to additional overdrafts, overdraft fees, and non-sufficient funds fees during the extended period. These overdraft fees include "sustained," "extended," or "continuous" overdraft fees that some credit unions charge when an account remains negative (e.g., one sustained overdraft fee per day once the account has been negative for more than five days). Additional overdrafts and fees assessed after the 45-day period will only increase members' debt burden and exacerbate their financial distress.

In addition, extending the resolution period would extend the period during which the credit union maintains an effective super-lien position to collect from members' incoming deposits. One hallmark dysfunction of today's overdraft programs is that the financial institution repays itself the entire negative balance (the overdrafts plus the outsized fees) from the depositor's next incoming deposit. This practice puts the depository first in line for collection before the member has the opportunity to pay for essential expenses or other obligations. This proposal increases the likelihood that the credit union will seize significant portions of incoming funds for repayment of negative balances, much of which typically consist of outsized overdraft fees. These incoming deposits could include delayed or future stimulus or COVID relief payments, unemployment payments, and especially this time of year, tax refunds, including earned income tax credit payments.

The impact of exposing members to additional overdraft fees is profound. Credit union overdraft fees average about $30 each,[4] and members are often charged multiple fees in a single day. Across the checking account market, overdrafts are most commonly caused by debit card transactions, which cause overdrafts averaging only $20 each and which the credit union could easily decline at no cost rather than charge any fee at all.[5]

The vast majority of overdraft fees are paid by a relatively small portion of members least able to shoulder them. At one credit union that merged into Self-Help, out of roughly 10,000 members, 60 members were charged between 50 and 214 overdraft fees in one year. The fee was $29 each, meaning these 60 members paid between $1,450 and $6,200 each.

African Americans and Latinos are disproportionately harmed by overdraft fees. Across the entire U.S. population, African Americans and Latinos are disproportionately likely to pay multiple overdraft fees annually.[6] This is particularly significant given that African Americans and Latinos are four-to-five times more likely to be unbanked than white Americans,[7] meaning that among consumers with checking accounts, African Americans and Latinos pay far more than a representative share of the fees.

The proposal fails to consider any of the above. This is especially disappointing given that these risks were presented to the Board by several of the undersigned organizations[8] and by Board Member, now Chairman, Harper,[9] when the initial interim final rule was voted down in May 2020.

3. The proposal undermines and contradicts federal relief efforts and initiatives.

Since the onset of the pandemic, the federal government has taken unprecedented steps to provide relief to consumers, including multiple rounds of stimulus payments and expanded unemployment benefits. This proposal would enable federal credit unions to siphon off that relief in the form of additional overdraft and non-sufficient funds fees.

The federal financial regulators have also issued multiple guidances appropriately encouraging depositories to work with customers dealing with the impacts of the COVID-19 crisis by, among other actions, providing loan modifications[10] and relief from overdraft fees.[11] This proposal, by enabling additional punitive fees, is contradictory to those guidances.

In January, President Biden ordered agencies to review any questions of fact, law and policy implicated by rules, including proposed rules, that have not yet taken effect.[12] NCUA's proposal clearly raises significant questions of fact and policy given it provides no evidence of its purported benefit and fails to consider the harms it could inflict.

This proposal also contradicts the Biden Administration's policy on advancing racial equity, which orders that "each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups."[13] This proposal fails to consider that it will likely increase overdraft and NSF fees, which disproportionately harm communities of color, as noted above. The agency should only move forward with any rule addressing overdraft practices after complying with this executive order.

4. If NCUA moves forward with this proposal, it should prohibit additional overdrafts and additional overdraft and non-sufficient funds (NSF) fees during the period beyond 45 days.

As noted above, NCUA has offered no evidence to support that this proposal will actually help members. Instead of proposing to extend the 45-day period, NCUA should be encouraging credit unions to offer members an amortizing loan to clear their negative balance -- clearly in the better interest of the member -- sooner rather than later. Indeed, the proposal notes that "it is imperative that FCUs have the flexibility to work with their members to take positive and proactive actions that can manage or mitigate adverse impacts on members while maintaining safe-and-sound operations."[14] Yet the proposal suggests no particular offers of flexibility beyond holding the account open and exposing members to additional fees and seizures of funds.

Should the Board proceed nonetheless, the rule -- in order to avoid inflicting affirmative harm on FCU members -- must prohibit additional overdrafts and additional overdraft and non-sufficient funds (NSF) fees during the period beyond 45 days to ensure that this proposal does not increase the burden on members.

5. NCUA should instead be providing meaningful relief from overdraft fees during this crisis and beyond.

NCUA has the opportunity to provide meaningful relief to FCU members during this crisis and beyond. As the proposal notes, the Board has broad authority under the Federal Credit Union Act to "prescribe rules and regulations for the administration of the Act."[15] Its current overdraft regulations, including the one it now proposes to amend, already establish certain requirements credit unions must follow with respect to their overdraft programs.[16]

As we have said many times before, the overdraft fee practices of many federal credit unions are fundamentally detrimental to members and inconsistent with the very definition of "Federal credit union" in the Federal Credit Union Act: "a cooperative association organized . . . for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes."[17] Rather than promote sound financial management, so-called "courtesy" overdraft fee programs undermine it. Rather than provide credit for provident or productive purposes, these overdraft fee programs make it harder for members to regain their financial footing, or kick them off the ladder altogether.[18]

The Consumer Financial Protection Bureau's research on overdraft practices has shed further light on the profound impact they have on many consumers. Its studies of several banks' transactional data found:

- 80% of overdraft fees are paid by those with average account balances of less than $350;[19]

- Median annual deposits for those charged many fees each year range from approximately $27,000-$31,000;[20]

· Overdraft fees hit hardest those with deep subprime credit scores, in the 563-585 range;[21]

· The average overdraft-related fees paid by accounts with at least one overdraft was $225 in 2011 across the banks studied;[22]

· For one group of hard-hit consumers, the median number of overdraft fees was 37, nearly $1,300 annually, meaning some pay much more;[23]

· Involuntary account closure rates were 2.5 times as high for consumers subjected to overdraft fees on debit card transactions than those not.[24]

We encourage the Board to require credit unions to provide members meaningful relief from overdraft fees during the COVID-19 crisis and beyond. NCUA could, for example, require that credit unions:

· stop charging “sustained” or “extended” overdraft fees when accounts are not quickly brought back to positive;

· reduce the size of the overdraft fee so that it is reasonable and proportional to the cost to the credit union;

· adhere to a meaningful limit on the number of fees charged per month and per year. The FDIC’s 2010 guidance advises that its supervisee banks charge no more than six overdraft fees in a rolling twelve months;[25] and

· cease collecting repayment of negative balances through a single balloon payment from the next incoming deposit, even before the 45-day point.

We attach for your reference the Center for Responsible Lending’s recent report on overdraft practices released early during the COVID crisis.[26] While the data in the report focuses on overdraft fees by banks in light of the availability of that data, the report notes that credit unions likewise engage in many of the abusive overdraft-related practices the report discusses.

We thank you for your consideration of our concerns and would be happy to discuss them further.

Sincerely,

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Additional Consumer, Civil Rights, Faith and Community Organizations

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[1] NCUA, Proposed Rule, Overdraft Policy, 86 Fed. Reg. 3876 (Jan. 15, 2021).

[2] 86 Fed. Reg. 3877.

[3] 86 Fed. Reg. 877.

[4] *Id.* at 52.

[5] Rebecca Borné & Peter Smith, The State of Lending in America & its Impact on U.S. Households at 3, Center for Responsible Lending (July 2013), https://www.responsiblelending.org/sites/default/files/uploads/8-overdrafts.pdf

[6] The Pew Charitable Trusts, *Heavy Overdrafters* at 8 (April 2016) (finding that African Americans and Hispanics each represented 19% of those who paid three or more overdraft-related fees in 2014, while representing only 12% and 17% of the U.S. population as a whole), https://www.pewtrusts.org/-/media/assets/2016/04/heavyoverdrafters.pdf.

[7] About 17 percent of African American and 14 percent of Latino households are unbanked, compared to 3 percent of white households. FDIC 2017 Survey of Unbanked and Underbanked Households at 19 Table 3.2, https://www.fdic.gov/householdsurvey/2017/2017report.pdf.

[8] Letter to NCUA Board Members from the Center for Responsible Lending, Self-Help Federal Credit Union, Self-Help Credit Union, and the National Consumer Law Center (June 10, 2020),

https://www.responsiblelending.org/research-publication/concerns-ncua-interim-final-rule-overdraft-policy.

[9] NCUA Board Member Todd M. Harper Statement on the Interim Final Rule on Overdrafts, As Prepared for Delivery on May 21, 2020,

https://www.ncua.gov/newsroom/speech/2020/ncua-board-member-todd-m-harper-statement-interim-final-rule-overdrafts.

[10] Federal Reserve, FDIC, NCUA, OCC, and CFPB, Interagency Statement on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by the Coronavirus (Revised) (April 7, 2020), https://www.fdic.gov/news/press-releases/2020/pr20049a.pdf.

[11] Federal Reserve, FDIC, and OCC, CA 20-10: Community Reinvestment Act (CRA) Consideration for Activities in Response to the Coronavirus (May 2020), https://www.federalreserve.gov/supervisionreg/caletters/CA%2020-10%20Attachment%20CRA%20Consideration%20for%20Activities%20in%20Response%20to%20COVID-19%20FAQs%20-%20Final.pdf.

[12] Memorandum for the Heads of Executive Departments and Agencies, From Ronald A. Klain, Assistant to the President and Chief of Staff, Re: Regulatory Freeze Pending Review (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/.

[13] Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Jan. 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

[14] 86 Fed. Reg. 3878.

[15] 86 Fed. Reg. 3877.

[16] *Id.* at 3878.

[17] 12 U.S.C. § 1752(1).

[18] *See* National Consumer Law Center and Cities for Financial Empowerment Fund, Account Screening Consumer Reporting Agencies: A Banking Access Perspective (Oct. 2015), *available at* http://www.nclc.org/images/pdf/pr-reports/Account-Screening-CRA-Agencies-BankingAccess101915.pdf.

[19] *CFPB 2014 Data Point* at 12, Table 3; *see also CFPB 2017 Data Point* at 16, Table 2.

[20] *CFPB 2017 Data Point* at 16, Table 2.

[21] *Id.*

[22] *CFPB 2013 White Paper* at 5.

[23] *CFPB 2014 Data Point* at 12, Table 3; *see also CFPB Data Point: Frequent overdrafters* at 16, Table 2 (Aug. 2017),

https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf [*CFPB 2017 Data Point*].

[24] *CFPB 2013 White Paper* at 34.

[25] FDIC Overdraft Payment Program Supervisory Guidance, FIL-81-2010 (2010), https://www.fdic.gov/news/financial-institution-letters/2010/fil10081.pdf.

[26] Peter Smith, et al., *Overdraft Fees: Banks Must Stop Gouging Consumers During the COVID-19 Crisis*, Center for Responsible Lending (June 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-overdraft-covid19-jun2019.pdf.