



**America's  
Credit Unions**

March 21, 2024

Mr. Frank Kressman  
General Counsel  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314

**RE: Request for Legal Opinion Letter and to Refrain from Public Disclosure of Overdraft and Non-Sufficient Funds Fee Data**

Dear Mr. Kressman:

On behalf of America's Credit Unions, I am writing to urge the National Credit Union Administration (NCUA) to issue a legal opinion letter regarding whether the data to be collected in recent Call Report changes is legally protected business information. America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their nearly 140 million members nationwide. To best protect the credit union system and consumers, ideally, the NCUA should rescind or at least delay its planned changes to the Call Report regarding overdraft fees and non-sufficient funds (NSF) fees; or, in the alternative, refrain from disclosing such information publicly.

As noticed in the *Federal Register* in December, the agency has added fields to the Call Report requiring credit unions above \$1 billion in assets to report revenue from overdraft and NSF fees, effective March 31, 2024.<sup>1</sup> America's Credit Unions raised concerns regarding the process through which these changes were proposed, explaining that the NCUA should have provided direct notice to all credit unions and generally should not propose significant changes without first notifying the industry of such proposed changes at least two quarters in advance.<sup>2</sup>

If the NCUA is determined to proceed with these changes, the Office of General Counsel (OGC) should issue a legal opinion letter as soon as possible regarding the applicability of the Freedom of Information Act (FOIA) to information collected and disclosed publicly as part of the Call Report requirements in Section 741.6(a)(2). America's Credit Unions urges the agency to refrain from disclosing publicly the Fee Income reported under revised Call Report account code 131 as this information is confidential business information protected under the FOIA exemptions. We maintain that this information on overdraft and NSF fees is exempt from a FOIA request under FOIA Exemption 4 and therefore should not be made public by the NCUA. Specifically, FOIA Exemption 4 protects from disclosure "trade secrets and commercial or financial information

---

<sup>1</sup> 88 Fed. Reg. 85,327 (Dec. 7, 2023).

<sup>2</sup> America's Credit Unions Letter to NCUA Chairman Harper on Transparency Regarding Call Report Changes (Feb. 28, 2024), <https://www.americascrreditunions.org/wp-content/uploads/2024/02/ACU-Letter-to-NCUA-Call-Report-Changes-2.28.2024.pdf>.

obtained from a person and privileged or confidential[.]”<sup>3</sup> Credit union information about revenue from overdraft and NSF fees is precisely such protected information.

The Non-Interest Income section of the Call Report includes a number of fields, such as Gain (Loss) on Derivatives and Gain (Loss) on Sales of Loans and Leases. However, unlike every other field included in the Non-Interest Income section, Fee Income is unique in that it can be argued to be a trade secret, as a credit union’s determination of how much non-interest income to derive from overdraft fees and NSF fees is a key element of their business strategy and is therefore intellectual property, which is protected under FOIA. Alternatively, it could be argued that the “commercial or financial information” category of FOIA Exemption 4 applies to information reported under revised Call Report account code 131. Regardless of how the OGC arrives at its conclusion, it is clear that data on overdraft fees and NSF fees should be exempt from a FOIA request for such information, and as such should be redacted from the Call Report data for all credit unions. We urge the OGC to explicitly clarify in a legal opinion letter that given the nature of this fee income information, it is imperative that the agency refrain from disclosing it publicly.

Aside from the rationale concerning the exempt nature of this information in regard to a FOIA request, as noted in our recent letter to NCUA Chairman Harper, there are significant reputational risks that are likely to arise with the public disclosure of such information. As we have already seen following the release of certain information on overdraft and NSF fees charged by California state-chartered credit unions and banks,<sup>4</sup> this information can and will be spun in a misleading and potentially inaccurate way to meet the agenda of the media. What the media fails to recognize, time and time again, is that credit unions are so very different from banks. As the NCUA is well aware, unlike for-profit financial institutions, which exist solely to maximize shareholder profit, credit unions always put their members first and have a statutory mission to promote thrift and provide access to credit for provident purposes.

To avoid unnecessary and potentially irreparable reputational risk, as well as to avoid running afoul of FOIA’s exemptions, the OGC can and should issue a legal opinion letter regarding the applicability of FOIA’s exemptions to the Call Report requirements and the addition of overdraft fee and NSF fee revenue included under account code 131 in the revised Call Report. While we believe rescinding the modified Call Report is most appropriate, refraining from publicly disclosing this fee income will satisfy the objective of the agency in explicitly requiring disclosure of such information (*i.e.*, the NCUA will have this information and can act in instances where, for example, overreliance on overdraft fee income could create a safety and soundness concern) while, at the same time, not needlessly introducing reputational and litigation risks.

America’s Credit Unions urges your swift review of this request, as time is of the essence given the impending deadline for first quarter Call Reports. Should you have any questions or require

---

<sup>3</sup> 5 U.S.C. § 552(b)(4).

<sup>4</sup> Annual Report of Income from Fees on Nonsufficient Funds and Overdraft Charges (2023), [https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/04/Annual-Report-of-Income-from-Fees-on-Nonsufficient-Funds-and-Overdraft-Charges\\_2023.pdf](https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/04/Annual-Report-of-Income-from-Fees-on-Nonsufficient-Funds-and-Overdraft-Charges_2023.pdf).

National Credit Union Administration

March 21, 2024

Page 3 of 3

any additional information, please do not hesitate to contact me at [chunt@americascreditunions.org](mailto:chunt@americascreditunions.org) or 703-581-4254 or Luke Martone, Senior Director of Advocacy & Counsel at [lmartone@americascreditunions.org](mailto:lmartone@americascreditunions.org) or 202-508-6743.

Sincerely,

A handwritten signature in black ink that reads "Carrie R. Hunt". The signature is written in a cursive, flowing style.

Carrie R. Hunt  
Chief Advocacy Officer