



Testimony of

**Mark Colley
President and CEO**

Tulsa Postal & Community Federal Credit Union

The National Association of Federal Credit Unions

“H.R. 3904, the Overdraft Protection Act of 2009”

Before the

**House Financial Services Committee
United States House of Representatives**

October 30, 2009

National Association of Federal Credit Unions
3138 10th St. North
Arlington, VA 22201
(703) 522-4770
www.nafcu.org

Good Morning Chairman Frank, Ranking Member Bachus, and Members of the Committee. My name is Mark Colley and I am here today to testify on behalf of the National Association of Federal Credit Unions (NAFCU). I serve as the President and Chief Executive Officer of Tulsa Postal & Community Federal Credit Union, headquartered in Tulsa, Oklahoma.

Tulsa Postal & Community FCU was chartered in 1923, making us the oldest credit union in the state of Oklahoma. We are a small credit union, with only 11 full-time employees and approximately \$23.6 million in assets. U.S. Postal Service employees and retirees, as well as their family members, make up most of our membership base. The rest of our members are people who live, work, or worship in Tulsa County and are classified as “underserved.” These are low-income, hard-working people, the vast majority of which are on some form of public assistance.

NAFCU is the only national organization exclusively representing the interests of our nation’s federally chartered credit unions. NAFCU is comprised of nearly 800 federal credit unions—member-owned financial institutions across the nation—representing more than 28 million individual credit union members. NAFCU-member credit unions collectively account for 79 percent of the assets of all federal credit unions. NAFCU and the entire credit union community appreciate the opportunity to participate in this hearing regarding H.R. 3904, the *Overdraft Protection Act of 2009*.

Historically, credit unions have served a unique function in the delivery of financial services to Americans. Established by an act of Congress in 1934, the federal credit union system was created, and has been recognized, as a way to promote thrift and make financial services available to all Americans, many of whom would otherwise have no access to financial services. Congress established credit unions as an alternative to banks and to meet a precise public need—a niche that credit unions continue to fill today for approximately 92 million Americans. Every credit union is a cooperative institution organized “for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes” (12 U.S.C. 1752(1)). While 75 years have passed since the *Federal Credit Union Act* (FCUA) was signed into law, two fundamental principles regarding the operation of credit unions remain every bit as important today as in 1934:

- Credit unions remain committed to providing their members with efficient, low-cost personal service; and
- Credit unions continue to emphasize traditional cooperative values, such as democracy and volunteerism.

Credit unions are not banks. The nation’s 7,691 federally insured credit unions serve a different purpose and have a fundamentally different structure, existing solely for the purpose of providing financial services to their members. As owners of cooperative financial institutions united by a common bond, all credit union members have an equal say in the operation of their credit union—“one member, one vote”—regardless of the dollar amount they have on account. Unlike their counterparts at banks and thrifts,

federal credit union directors generally serve without pay—a fact epitomizing the true “volunteer spirit” permeating the credit union community.

Credit Union Overdraft Services

Most credit union members welcome and appreciate the opportunity to benefit from a courtesy pay or overdraft protection program, and consider it a useful and convenient service. Overdraft programs can prevent high fees and penalties that result from bounced checks, and provide important financial coverage in unexpected circumstances when members may need it most. For instance, the nation’s largest retailer, Wal-Mart, charges a \$35.00 fee for a returned check. Many credit union members have thanked their credit unions after using these services and have added that, as with insurance, they did not realize the true benefit until they actually needed it.

At Tulsa Postal & Community FCU, we currently provide courtesy pay programs for 936 of our 1,440 share draft (or checking) accounts. Only two of those 936 members have chosen to opt out of the courtesy pay program. In order to be enrolled in the program, a member must select a transfer from another deposit account as the first overdraft coverage option; courtesy pay is not triggered unless coverage is still needed after transfer options have been exhausted. Members must also qualify for courtesy pay protection. We check each applicant’s credit history, eFunds, and past performance on checking accounts; in short, we do essentially the same kind of underwriting as we would for a car loan. Furthermore, we have several casinos in the vicinity, and if we notice

frequent casino activity, we shut off debit cards and courtesy pay to prevent our members from running up high debts.

We also do not report any overdraft protection balances to ATM or debit networks. Only funds that actually exist and are available in a member's account are displayed. In addition, if a member comes to us concerned that they have overdrafted their account because of an error, we refund 100% of the courtesy pay fee they were charged. If this happens multiple times, we ask them to come in so that we can educate them about proper use of the service. I have read the stories about individuals who are charged a \$35 fee for spending just a few dollars more than what they have in their accounts. At my credit union, we refund these fees without a problem, provided the member does not abuse the privilege. Many credit unions do the same, as they have a finite field of membership and cannot afford to lose members. This program prevents our members from seeking to obtain funds they need from the pawn shop across the street from our credit union, or from local payday lenders who charge high interest rates and can institute legal action in Oklahoma if these rates are not repaid within 14 days. We have never had a single member complain about our courtesy pay program.

While overdraft and courtesy pay programs vary from credit union to credit union, data from the Government Accountability Office (GAO) has demonstrated that credit union overdraft protection programs are generally more favorable to consumers than are those at banks and thrifts. According to the findings contained in a January 2008 GAO Report on Bank Fees, commissioned by Congresswoman Carolyn Maloney, banks

and thrifts charge higher fees on almost all checking and savings account services. The GAO report specifically stated that “on average, large banks and thrifts consistently charged the highest insufficient funds and overdraft fees, while small credit unions consistently charged the lowest.” Furthermore, NAFCU data shows that approximately 83% of our members who offer overdraft protection programs have waived overdraft or NSF fees for their members, whether the member requested that the fee be waived or not. In addition, 98% of NAFCU credit unions offer their members the choice to opt-out of overdraft protection programs, if they choose to do so.

Finally, although the report notes that the percentage of income institutions are deriving from non-interest sources has somewhat risen since the year 2000, this increase is not solely the result of a rise in fees. According to the GAO, the growth in non-interest income over the last few years may be due in significant part to consumer behavior. The report found that more and more consumers are using electronic forms of payment, which result in instant debits to their account. Since electronic payments can be made in large numbers very quickly, overdraft charges can likewise be incurred at an increased rate.

H.R. 3904, the *Overdraft Protection Act of 2009*

I would now like to turn to H.R. 3904, the *Overdraft Protection Act* introduced by Congresswoman Maloney last week. This well-intentioned legislation would make considerable changes to overdraft protection programs at all financial institutions, including federal credit unions.

NAFCU appreciates the bill's effort to address credit union concerns with the inclusion of overdraft protection programs under the *Truth in Lending Act* (TILA). Under TILA, any fee associated with an overdraft protection program would be counted as a finance charge. This would pose a particular problem for federal credit unions, as they are the only federal financial institutions subject to a statutory usury ceiling of 18%. Since it is impossible for a credit union to determine when a member will pay back an overdraft credit line, it cannot calculate the APR when an account is overdrawn, meaning every transaction could potentially violate the usury ceiling. Under H.R. 3904, credit union overdraft fees would be exempt from the usury ceiling, addressing a significant credit union concern. We thank Congresswoman Maloney for taking this critical issue into account when drafting this legislation.

The *Overdraft Protection Act* continues to be problematic from a credit union perspective, however, and NAFCU maintains several significant concerns with the legislation and opposes it in its current form.

First, the current "opt-in" provision contained in the bill would impose a considerable regulatory burden on credit unions and create consumer confusion among those who believe that they already have this protection. This requirement would cause significant operational difficulties, particularly for smaller institutions. Credit unions would be forced to contact their members, who currently enjoy these programs, to obtain an affirmative response stating they would like to continue to receive a service from which they already benefit and which many believe is already in place. NAFCU would

support language establishing an “opt-out” requirement instead, allowing existing members who are currently covered by overdraft protection programs to deny the coverage if they wish. This would reduce the burden on credit unions while still providing consumers with the option of avoiding any charges associated with overdraft protection programs. We would support a provision stating that all providers of such programs are required to contact their members after enactment of the legislation to notify them of their ability to opt out. We could also support a condition that new member or customer accounts include an opt-in requirement, as those that are signing up do not already have a presumption that they are being provided with these services.

Second, NAFCU is concerned about provisions in the bill limiting NSF fees for debit card and ATM transactions. These types of transactions are covered by financial institutions when the transaction is made, even if there are insufficient funds in the consumer’s account at the time the transaction actually clears. Since the transaction is authorized by the merchant at the time it takes place, the credit union is contractually obligated to post the payment, even though the funds are not available in the consumer’s account to cover it. Many credit unions complain that merchants are not checking accounts in “real time” to ensure a transaction has cleared the account and does not create an overdraft. Merchants instead often process all transactions at the end of the day, when a consumer’s multiple transactions may cause him or her to overdraft several times. As it stands, this provision appears impractical and impossible to comply with unless all merchants were required to process in real time. The limitation to one overdraft fee per

month is therefore highly problematic for the vast majority of credit unions that receive transactions not cleared by the merchant at the exact point in time that they are made.

Further, providing same-day notification to members who have overdrawn their accounts would constitute another considerable burden for credit unions. Credit unions that batch their transactions may not learn that an overdraft has taken place until all transactions clear at the end of the day, including checks. It would also be impossible for a credit union to provide notification to a consumer the same day an account has been overdrawn, if merchants process all transactions at the end of the day. NAFCU could support a more reasonable and realistic notification timeframe, however.

I would also like to add that many of the policy concerns that have been expressed in relation to overdraft protection programs and disclosures at financial institutions will be addressed when the Federal Reserve makes changes to Regulation E next year. The Federal Reserve has already issued a proposed rule prohibiting the assessment of overdraft fees for the payment of ATM withdrawals and one-time debit card transactions, unless the consumer is given notice of the right to opt out of overdraft protection and chooses not to, or if the consumer specifically opts in to overdraft protection. The changes may also speak to some of the concerns that form the basis for this legislation.

NAFCU is also concerned about the bill's limitation on the number of overdraft coverage fees charged by a depository institution. We believe that the restriction to no more than one overdraft fee per month and six overdraft fees per year would significantly

limit consumer choice. To limit a consumer who is fully informed of his or her choices and decides on this product, smacks of a big-brother approach. In order to continue to provide consumers with the choice of benefiting from overdraft protection, NAFCU instead proposes that the bill require financial institutions to send a notification to consumers who have overdrafted several times during the course of a month delineating other options available to them. Consumers would then have the choice of opting out of the overdraft protection program, continuing to receive overdraft coverage, or obtaining some form of credit from the institution, such as a short-term loan.

NAFCU does support efforts to prevent overdraft fee maximization. We are opposed to attempts by some financial institutions to take advantage of consumers by manipulating the order in which transactions are posted, as a way to increase their overdraft fee revenue. In fact, many credit unions, particularly those with university and college student fields of membership, seek to post the smallest transactions first to prevent their members from being charged avoidable overdraft fees.

NAFCU also supports efforts to increase disclosure. At Tulsa Postal & Community FCU, we provide our members notification on their monthly statement of the amount of overdraft fees paid in the previous month and their year-to-date total. We believe such a disclosure requirement is reasonable.

We would also support Congress making changes to increase the outdated limitation on the six Regulation D transfers the Federal Reserve allows each month. This

arbitrary limitation is actually harming consumers and restricting many overdraft programs. Many credit unions, like mine, use their members' savings accounts as a first line of defense when an overdraft takes place, by making automatic transfers from savings accounts to cover overdrafts, often at no charge. However, this outdated limitation only permits such transfers six times a month, meaning members would then have to resort to courtesy pay programs for protection and face additional fees. We would encourage this change to be included as part of any overdraft reform legislation.

Enactment of the *Overdraft Protection Act* in its current form will likely cause many federal credit unions to end overdraft protection programs for their members, drying up an important customer service. The many members who currently benefit from these programs would lose this option; what is worse, if they are unaware of this change in the law and do not read the disclosures they are sent from their financial institutions, consumers may continue to assume that they have overdraft coverage and potentially incur even higher fees for their bounced checks, or have important transactions declined.

Many credit unions are no longer primarily interest income-only institutions, and rely on fee income to continue to operate. The exponential growth in the number and complexity of regulatory requirements on financial institutions is staggering, and the constant change in these requirements necessitates the hiring of additional legal and compliance staff. Moreover, credit unions are limited in the amount of non-fee income they can raise. Credit union options for balance sheet management are limited in that they may only raise capital through retained earnings. While there is industry support for

other sources of capital being raised from the membership, at present, Congress has not changed the capital regime for credit unions. In addition, as I mentioned earlier, credit unions are subject to an 18% usury ceiling. While a good thing, this cap significantly limits the amount of income credit unions can derive from interest, as compared to other financial institutions.

Furthermore, such limitations on credit union income as those contained in H.R. 3904 could severely impact the ability of many credit unions to continue to operate, and potentially force some of our smaller members to close their doors forever. Credit union members in some regions, particularly rural and low-income areas, may have few other banking options and may be forced to look to payday lenders, check cashiers, and pawn shops to obtain the financial services they need. NAFCU does not believe that this is the result the *Overdraft Protection Act* is seeking to achieve.

NAFCU welcomes the opportunity to work with members of the Committee to address credit union concerns with this legislation and improve it for both consumers and financial institutions. While we support the Committee's mission to increase protections for consumers, we believe that this legislation is deeply flawed and could severely hurt both credit unions and their members if enacted in its current form.

Conclusion

In conclusion, I would like to note that when I joined Tulsa Postal & Community Federal Credit Union in 2002, our net worth was less than 4% and we had a CAMEL rating of 4.5. Previous management's poor performance in following loan and accounting policies nearly resulted in a forced merger. My staff and I have worked very hard to rescue this credit union, and our net worth is now up to 7.8%. This year, for the second year in a row, our credit union has earned a CAMEL 1 rating after its NCUA examination. We are dismayed to learn that all of our hard work may be for nothing should the *Overdraft Protection Act* become law. Although our credit union only earned \$150,000 from overdraft fees in 2008, these fees made the difference between being open to serve our members this year, or possibly closing our doors after 86 years of service and forcing our members to find other options, such as the pawn shop across the street or the payday lenders around town.

Credit union fees for overdraft protection and courtesy pay programs continue to be lower on average than they are at banks and thrifts, but are an important source of income for these not-for-profit institutions. The limitations that would be imposed by this legislation would cause considerable drops in income for most credit unions, forcing many of them to either make up their losses by charging for other services, or face the possibility of going out of business. Finally, I would urge the Committee to keep in mind that consumers can avoid overdraft fees no matter what the law is, in one simple way – by managing the funds in their accounts. Increased focus on financial education and literacy to teach consumers this personal responsibility would make the need for

overdraft protection moot. We urge the Committee to take these concerns into account and make some significant changes to the legislation before it moves forward.

I thank you for the opportunity to testify before you today, and I welcome any questions that you may have.