

# RISK Alert

ACTIONABLE INSIGHTS FOR BOND POLICYHOLDERS.



Alert Type

Awareness

Watch

Warning

## Spike in Overdraft / NSF Fee Demand Letters Witnessed By Credit Unions

The number of Overdraft / NSF Fee demand letters sent to credit unions has recently spiked, according to CUNA Mutual Group's Third-Party Litigation team. The demand letters target alleged deceptive practices and excessive overdraft / NSF fees. It's imperative for credit unions to review member account agreements and disclosures to ensure the documents properly disclose how and when overdraft and NSF are assessed.

### Details

Allegations and class action lawsuits related to overdraft / NSF fees have plagued credit unions dating back to 2012. The demand letters contain the same allegations as recent lawsuits filed against credit unions:

- Credit unions improperly charged overdraft fees based on the "available" balance rather than the "actual" (ledger) balance. Plaintiff attorneys claim that basing overdraft fees on the available balance results in improper fees being assessed since the actual balance in many cases was sufficient to cover the debit(s).
- Credit unions improperly assessed overdraft fees on debit card transactions since funds were previously "set aside" when credit unions place preauthorization holds on the available funds.
- Credit unions improperly assess multiple NSF fees on the same transactions.

Unfortunately, **plaintiff attorneys are** seeking potential plaintiffs through websites (e.g. one website lists 23 credit unions being investigated), social media outlets, and then issuing demand letters that threaten class action lawsuits.

It is believed that plaintiff attorneys also search credit union websites to review member account agreements looking for disclosure language on how credit unions assess overdraft and NSF fees.

To assist credit unions on mitigating the potential risk from these Overdraft / NSF fee demand letters, CUNA Mutual Group has shared a number of resources with Bond policyholders (outlined Risk Prevention Resources on the following page).

**Note:** Updating account agreements and disclosures to accurately describe how and when overdraft and NSF fees are assessed or adding mandatory arbitration language with a class action waiver to account agreements, will not eliminate this litigation risk.

**Date:** August 27, 2019

**Risk Category:** Deposit Account Services; Overdrafts; NSF Fees; Demand Letters; Litigation; Compliance

**States:** All

**Share with:**

- Compliance
- Executive Management
- Legal
- Risk Manager
- Transaction Services



**To share risk insights or gain additional assistance:**

- [Report a RISK Alert](#)
- [Ask a Risk Consultant](#)
- Contact a CUNA Mutual Group Risk & Compliance Consultant
  - **800.637.2676**
  - [riskconsultant@cunamutual.com](mailto:riskconsultant@cunamutual.com)

# Spike in Overdraft / NSF Fee Demand Letters Witnessed By Credit Unions

Plaintiff attorneys can still initiate a class action lawsuit against the credit union. In these cases, plaintiff attorneys simply define the class as any member who incurred overdraft and/or NSF fees up to the effective date of the changes to the account agreement.

## Risk Mitigation

Consider these risk mitigation tips:

- If your credit union assesses overdraft fees based on available balance rather than actual (ledger) balance, ensure your account agreement clearly describes the balance calculation method including examples of transactions (e.g., check holds and preauthorization holds) that impact the available balance.
- For debit card preauthorization holds, ensure the account agreement discloses how subsequent debits to the account (e.g., a check clearing the account) impact the available balance and that an overdraft fee could be assessed when the debit card transaction posts to the account taking it negative.
- When referring to NSF fees in the account agreement and disclosures for items presented for payment to the credit union, avoid using terms such as NSF fees will be assessed “per item,” “per transaction,” or “for each transaction.” Instead, use terms such as “per presentment,” “per submission,” “for each presentment,” or “for each time a check, ACH or debit transfer [and any other type of item] is presented or payment is otherwise requested.” The terms may need to be modified depending on your processes and terminology used.
- For payments (ACH debits) the credit union originates for members (e.g., to make loan payments from external accounts) ensure the ACH authorization form and/or other disclosures contains a notice that an NSF fee can be assessed by the credit union “for each submission” returned unpaid by receiving depository financial institutions.
- Ensure your account agreement and disclosures accurately describe the posting order of transactions – both credits and debits. Avoid any resequencing of debits from high dollar to low dollar debits.
- Avoid placing your member account agreement on your website.
- Consider adding binding arbitration language with a class action waiver to the account agreement. Such language can be used to avoid these situations from becoming class action lawsuits. Work with legal counsel in developing binding arbitration language with a class action waiver for your account agreement.
- **If a lawsuit is filed against your credit union, or you receive a demand letter threatening a lawsuit**, policyholders should immediately report it. Submit claims online or via email at [litigation.team@cunamutual.com](mailto:litigation.team@cunamutual.com).

To submit loss go to [www.cunamutual.com/myservices](http://www.cunamutual.com/myservices), then select the most appropriate claim type to initiate a claim. For password resets or web support, please call 800-962-5465. For additional guidance, watch this [short video](#).



## Risk Prevention Resources

Access the [Protection Resource Center](http://cunamutual.com) at [cunamutual.com](http://cunamutual.com) for exclusive risk and compliance resources to assist with your loss control.

Review these resources:

- [Overdraft / NSF Fee Litigation Risk Overview](#)
- [Partner Perspective: LOANLINER Compliance Solutions – Overdraft / NSF Fee Litigation](#)
- RISK Alert – [Overdraft / NSF Fee Lawsuits Again Target Credit Unions](#) (04/04/2019)
- RISK Alert - [Credit unions face overdraft fee lawsuits](#) (07/18/2018)
- On-Demand Recording: [2019 Q2 Risk Management Office Hours session](#)
- On-demand Recording: [2019 Q3 Risk Management Office Hours session](#)

The Protection Resource Center requires a User ID and Password.

© CUNA Mutual Group, 2019.

Insurance products offered to credit unions are underwritten by CUMIS Insurance Society, Inc., a member of the CUNA Mutual Group. This RISK Alert is intended solely for CUNA Mutual Group Fidelity Bond policyowners to prevent fraud losses. Any further distribution of this information could subject you to liability under common law and various statutes including the Fair Credit Reporting Act.

This resource was created by CUNA Mutual Group based on our experience in the credit union, insurance, and risk management marketplace. It is intended to be used only as a guide, not as legal advice. Any examples provided have been simplified to give you an overview of the importance of selecting appropriate coverage limits, insuring-to-value, and implementing loss prevention techniques. No coverage is provided by this resource, nor does it replace any provisions of any insurance policy or bond. Please read the actual policy for specific coverage, terms, conditions, and exclusions.

**Interested in learning more about emerging risks?**

Contact CUNA Mutual Group's Risk & Compliance Solutions at **800.637.2676** or by email at [riskconsultant@cunamutual.com](mailto:riskconsultant@cunamutual.com).