

Overdraft Protection

**Hidden Litigation Risks of Overdraft Programs**

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Overview

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- Overdraft Protection Terminology
- Review Existing Requirements
  - Truth in Savings; Regulation E
- Class Action Lawsuits
  - Main Allegations
  - Preventive Actions
- Best Practices to Reduce Risk



## Background

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- Different Terminology Used by CUs
  - **Courtesy Pay**
  - **Overdraft Privilege**
  - **Overdraft Protection**
- Basic Feature: Credit union pays a transaction even though member does not have *available funds*



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## Transfer versus Protection

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- Overdraft Transfer is when the CU transfers funds from another account or a line of credit (many CUs charge a fee)
  - **Ex: Savings account; LOC; credit card**
- Overdraft Protection/Privilege is when the CU charges a fee for paying an item and taking the checking account into the negative



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## Truth in Savings – 12 CFR 707.11

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- Must disclose on each periodic statement
  - Total Overdraft Fees
  - Total Returned Item Fees
- Must disclose Fees in the Period and YTD
  - Fees for transferring funds are excluded

B-12 AGGREGATE OVERDRAFT AND RETURNED ITEM FEES SAMPLE FORM

	Total for this period	Total year-to-date
Total overdraft fees	\$60.00	\$150.00
Total returned item fees	\$0.00	\$30.00



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## Truth in Savings – 12 CFR 707.11

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- Describing CU's overdraft program to reduce litigation and UDAAP risks may be "advertisements"
- Advertising Requirements – 12 CFR 707.11(b)(1)

(b) *Advertising disclosures for overdraft services*—(1) *Disclosures*. Except as provided in paragraphs (b)(2),(b)(3), and (b)(4) of this section, any advertisement promoting the payment of overdrafts must disclose in a clear and conspicuous manner:

- (i) The fee or fees for the payment of each overdraft;
- (ii) The categories of transactions for which a fee for paying an overdraft may be imposed;
- (iii) The time period by which the member must repay or cover any overdraft; and
- (iv) The circumstances under which the credit union will not pay an overdraft.



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## Regulation E – 12 CFR 1005.17

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- Special Rules for ATM and One-Time Debit Card Transactions
  - **Must obtain an Opt-In from members**
    - No Opt-In = No Fee
    - CU can pay the transaction, just no fee
      - Example: “Force Pay” transactions
    - Overdraft Transfer options (savings, LOC, credit card) are excluded from 1005.17



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## Regulation E – 12 CFR 1005.17

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- Opt-In Procedure
  1. Provide Disclosure of Overdraft Services
  2. Provide Reasonable Opportunity to Opt-In
  3. **Obtain Member’s Affirmative Consent**
  4. Provide Confirmation – including the Member’s Right to Revoke their Consent
- Use Model Form A-9 for Disclosure



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# Regulation E – 12 CFR 1005.17

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## A-9 Model Consent Form for Overdraft Services § 1005.17

### What You Need to Know about Overdrafts and Overdraft Fees

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover your overdrafts in two different ways:

1. We have standard overdraft practices that come with your account.
2. We also offer overdraft protection plans, such as a link to a savings account, which may be less expensive than our standard overdraft practices. To learn more, ask us about these plans.

This notice explains our standard overdraft practices.

➤ **What are the standard overdraft practices that come with my account?**

We do authorize and pay overdrafts for the following types of transactions:

- Checks and other transactions made using your checking account number
- Automatic bill payments

We do not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below)

- ATM transactions
- Everyday debit card transactions

We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction.

If we do not authorize and pay an overdraft, your transaction will be declined.



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# Regulation E – 12 CFR 1005.17

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➤ **What fees will I be charged if [Institution Name] pays my overdraft?**

Under our standard overdraft practices:

- We will charge you a fee of up to **\$30** each time we pay an overdraft.
- Also, if your account is overdrawn for 5 or more consecutive business days, we will charge an additional \$5 per day.
- There is no limit on the total fees we can charge you for overdrawing your account.

➤ **What if I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions?**

If you also want us to authorize and pay overdrafts on ATM and everyday debit card transactions, call [telephone number], visit [website], or complete the form below and [present it at a branch][mail it to]:

\_\_\_\_\_

I do not want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

I want [Institution Name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

Printed Name: \_\_\_\_\_

Date: \_\_\_\_\_

[Account Number]: \_\_\_\_\_



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# Class Action Lawsuits

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**ARE YOU A CREDIT UNION MEMBER?**

**OVERDRAFT**

**HAVE YOU BEEN CHARGED OVERDRAFT  
FEES OR INSUFFICIENT FUNDS FEES ON YOUR CHECKING ACCOUNT?**

[www.creditunionclassaction.com](http://www.creditunionclassaction.com)



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# Class Action Lawsuits

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**If you are a member of a credit union and you paid an overdraft fee or an  
insufficient funds fee after using your debit card, contact us today!**

**WE NEED YOUR HELP!**

If you paid overdraft fees as a credit union member at any time since 2014 we would like to talk with you about your experience. If you are interested in discussing your experiences or would like additional information, please contact us today at the number and/or email listed below, or simply submit your information and we will contact you.

THERE IS NO COST OR OBLIGATION TO DO SO.

[www.creditunionclassaction.com](http://www.creditunionclassaction.com)



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## Class Action Lawsuits

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### ■ Main Allegations

- Charged an overdraft fee when the actual/ledger balance was positive
  - Fee was charged based on available balance
- Lack of details explaining holds on funds
  - Check deposits and funds availability
  - Debit card transactions and authorization holds for “signature” transactions



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## Class Action Lawsuits

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### ■ Main Allegations

- Not based on legal or regulatory violation
  - But do contain claims of violating Reg E and EFTA
  - Breach of contract claims as well
- Allegations similar to an UDAAP claim
- Claims related to lack of transparency
  - Best preventive action for CUs?
    - Update overdraft materials to clarify the “how” and “when” of CU’s program



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## Class Action Lawsuits

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- **Preventive Actions**
  - Review overdraft disclosure
  - Review membership agreement
  - Review website materials
  - Review account opening materials
- Ensure consistency of all information
- Enhance with more details
  - Examples and FAQs



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## Class Action Lawsuits

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- Add information to credit union's website
  - Explanation of overdraft options
    - Alternative options and opt-out reminder
  - Available Balance versus Actual Balance
    - Examples of when a fee would be charged
  - Discussion of posting order
  - Frequently-asked-questions
    - Debit card authorization holds



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# Sample Language

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## Understanding Your Account Balance for Overdrafts

Your checking account has two kinds of balances: the “actual” balance and the “available” balance. **We use your available balance when determining whether a transaction will cause your account to overdraw and for charging overdraft fees.** You can review both balances when you review your account online, at an ATM, by phone or at a branch.



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# CFPB Overdraft Reports/Research

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## 5.1 Calculating Available Funds

To determine whether a consumer’s transactions cause his or her account balance to become negative, depository institutions calculate an account’s available funds. Institutions’ information and accounting systems use a set of rules to determine when newly deposited items are deemed to increase the available funds be available in an account and when a payment or debit transaction is deemed to reduce the available funds in the account. When a consumer makes a check deposit into his or her account, there will often be a delay before the deposited check clears and the bank receives funds from the bank on which the item is drawn. Similarly, when a consumer writes a check, uses a debit card, or authorizes an ACH payment, there can be a delay between the time the consumer initiates the payment and the time the item is settled by the institution and funds are disbursed to cover the transaction.



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# CFPB Overdraft Reports/Research

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**Authorization, Settlement and Available Balance:** When a consumer attempts a debit card purchase or ATM withdrawal, the consumer's financial institution receives an instantaneous request to authorize the transaction.

Some authorized transactions, such as PIN-based debit card and ATM transactions, nearly always settle the same business day they are authorized. Other authorized transactions, most notably signature-based debit card transactions, may not be presented for settlement for a day or two after authorization. Many institutions, upon authorizing a transaction, will then make an entry (referred to as "memo posting") that reduces the funds deemed to be available to the consumer.<sup>37</sup> This enables these institutions to take these transactions into consideration in determining whether to authorize subsequent electronic transactions during the course of the day. Generally, available funds are reduced by the amount of the authorized transaction. However, for certain types of transactions where the amount authorized is often different than the amount that will settle – for example, gasoline purchases – institutions may reduce the available funds by the full authorization amount (which could exceed that actual purchase amount), reduce the available funds by an amount that may be substantially less than the purchase amount (such as \$1), or elect not to make any reduction in available funds.



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# Supervisory Highlights – Winter 2015

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## 2.3 Deposits

The Bureau has reviewed overdraft protection services at multiple financial institutions. Bureau examiners observed that one or more financial institutions switched from a ledger-balance method to an available-balance method for purposes of deciding whether to authorize signature-based debit transactions and other electronic transactions (collectively "electronic transactions") and whether to post or return checks and ACH transactions. In addition, one or more institutions switched to an available-balance method for purposes of calculating whether a transaction results in an overdraft and/or whether an overdraft fee is assessed when a transaction is settled.

At one or more financial institutions, examiners noted that these changes to the balance-calculation method used were not disclosed at all, or were not sufficiently disclosed, resulting in customers being misled as to the circumstances under which overdraft fees would be assessed. Because these misleading practices could be material to a reasonable consumer's decision-making and actions, they were found to be deceptive.



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## Supervisory Highlights – Winter 2015

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At one or more institutions, examiners found deceptive practices relating to the disclosure of overdraft processing logic for electronic transactions. Examiners noted that these disclosures created a misimpression that the institutions would not charge an overdraft fee with respect to an electronic transaction if the authorization of the transaction did not push the customer's available balance into overdraft status. But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the overall net impression created by the disclosures. Examiners therefore concluded that the disclosures were misleading or likely to mislead, and because such misimpressions could be material to a reasonable consumer's decision-making and actions, examiners found the practice to be deceptive. Furthermore, because consumers were substantially injured or likely to be so injured by overdraft fees assessed contrary to the overall net impression created by the disclosures (in a manner not outweighed by countervailing benefits to consumers or competition), and because consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures), the practice of assessing the fees under these circumstances was found to be unfair.



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## Federal Reserve – Supervisory Bulletin

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- For example, the Federal Reserve has cited an unfair or deceptive practice based on a certain overdraft processing methodology applied to point of sale (POS), signature-based transactions. In effect, the UDAP violation occurred when a bank imposed overdraft fees on POS transactions based on insufficient funds in the account's available balance at the time of posting, even though the bank had previously authorized the transaction based on sufficient funds in the account's available balance when the consumer entered into the transaction. There can be a delay of one to a few days between the authorizing and posting of a POS transaction, during which time the account's available balance may have decreased and the POS transaction could exceed the account's available balance at the time of posting. Charging an overdraft fee on the POS transaction in this circumstance was found to violate section 5 of the FTC Act.
- <https://www.federalreserve.gov/publications/2018-july-consumer-compliance-supervision-bulletin.htm>



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# Interagency Webinar – 2016

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## Available Balance at Posting

- Bank uses “available balance” to determine whether to assess overdraft fees
- Sufficient funds are in the available balance when the signature-based debit transaction is authorized
- Bank reduces the available balance by the authorized transaction
- Subsequent transactions further reduce the available balance (some may be assessed overdraft fees)
- Bank assesses an overdraft fee on the authorized transaction when it posts because there are insufficient funds in the available balance at posting

**Unfair Practice:** Assessing an overdraft fee based on the available balance at the time a transaction is posted when there were sufficient funds in the available balance to cover the transaction when it was authorized



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# Interagency Webinar – 2016

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## Available Balance at Posting Example

Description	Transaction	Available Balance	Ledger Balance
Day 1			
Opening Balance		\$100	\$100
Signature-based debit transaction - authorized	<\$80>	\$20	\$100
Day 2			
Check - posted	<\$40>	<\$20>	\$60
Overdraft fee	<\$30>	<\$50>	\$30
Day 3			
Signature-based debit transaction - posted	<\$80>	<\$50>	<\$50>
Overdraft fee	<\$30>	<\$80>	<\$80>



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## Bank of America

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- \$66 million settlement
- Extended overdraft fees
  - Charged additional \$35 fee after 5 days
  - Allegation that “fee” was actually “interest”

BUSINESS NEWS NOVEMBER 2, 2017 / 1:14 PM / 10 MONTHS AGO

### Bank of America settles overdraft lawsuit for \$66.6 million



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## BCFP Settles with TCF Bank

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- Allegations related to overdraft marketing
  - Claims of deceptive actions related to opt-in consent

JULY 23, 2018

### BCFP files settlement with TCF National Bank on overdraft

The Bureau of Consumer Financial Protection filed a settlement with TCF National Bank over its marketing and sale of overdraft services. The bureau alleges that the bank, while attempting to obtain consumers' consent to its overdraft program, obscured its fees and made the program seem mandatory for new customers.

TCF has agreed to pay \$25 million in restitution to customers who were charged overdraft fees and has agreed to an injunction to prevent future violations.

The bureau's court filing, announced last week, would also impose a civil money penalty of \$5 million. However, it would be adjusted to account for a \$3 million penalty imposed by the Office of the Comptroller of the Currency (OCC) in a separate order.



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## Best Practices to Reduce Risks

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- Inform Members of Alternatives to Overdraft
  - Line of credit; overdraft transfer [e.g. add to notices]
  - Explain the overdraft priority (and whether members can request an alternative process)
- Review CU's "Heavy Hitters"
  - Reach out to discuss alternatives
  - If necessary, remove overdraft protection services
- Consider Fee Caps, *De Minimis* or Forgiveness
  - Be sure to add into Regulation E Opt-In form



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## Best Practices to Reduce Risks

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- **Overdraft Practices → Risk Management**
  - Compliance, legal and reputation risk
    - Review TISA periodic statement disclosures
    - Review Regulation E opt-in procedures
    - Explain overdraft protection options
  - Explain how CU's overdraft options work
    - Details and FAQs on CU's website
    - Inform members of Available Balance
      - Actual Balance versus Available Balance; authorization holds
  - **Reduce your odds of being a class action target**



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Overdraft Protection

**QUESTIONS?**

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Overdraft Protection Resources

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- CFPB White Paper (June 2013)
  - [http://files.consumerfinance.gov/f/201306\\_cfpb\\_whitepaper\\_overdraft-practices.pdf](http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf)
- Overdraft Report (July 2014)
  - [http://files.consumerfinance.gov/f/201407\\_cfpb\\_report\\_data-point\\_overdrafts.pdf](http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf)
- Winter 2015 Supervisory Highlights (starting on Page 8 of the PDF)
  - [http://files.consumerfinance.gov/f/201503\\_cfpb\\_supervisory-highlights-winter-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf)
- Industry Articles on Class Action Lawsuits
  - <http://www.cutoday.info/THE-feature/Class-Action-Lawsuits-Target-CU-Overdraft-Programs>
  - <http://www.cutimes.com/2016/01/05/12-credit-unions-face-overdraft-suits>
  - <https://www.nafcu.org/compliance-blog/special-edition-overdraft-litigation-risk>
- Interagency Webinar – 2016
  - <https://consumercomplianceoutlook.org/outlook-live/2016/interagency-overdraft-services-consumer-compliance-discussion/>

