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# Opting-in to Overdraft Compliance

Association of Credit Union Audit  
and Risk Professionals

September 2024



# Agenda

-  Background
-  Risks
-  Trends
-  Audit Techniques
-  Common Findings



# Polling Question #1

What is your experience with overdraft compliance?

- A. I know very little
- B. Intermediate
- C. I'm an expert
- D. There are overdraft compliance requirements?

# Background

# Regulatory Requirements

## Electronic Fund Transfers – Regulation E: 12 CFR 1005.17

- (a) Definition: *a service under which a financial institution assesses a fee or charge on a consumer's account held by the institution for paying a transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account*
- **(b) Opt-In Requirement**
- (c) Timing
- **(d) Content and Format**
- (e) Joint Relationships
- **(f) Continuing Right to opt in or to revoke the opt-in**
- **(g) Duration and Revocation of Opt-In**

## Truth in Savings Act 12 CFR 707.11

- (a) Disclosure of Total Fees on Periodic Statement
- (b) Advertising Disclosures for Overdraft Services
- (c) Disclosure of Account Balances

## Section 5 of the Federal Trade Commission Act (FTC Act)

- Prohibits unfair or deceptive acts or practices.
- Applies to all persons engaging in commerce.

# Supervisory Guidance and Priorities

## Joint Guidance on Overdraft Protection Programs

**Joint Guidance on Overdraft Protection Programs**

**AGENCIES:** Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and National Credit Union Administration (NCUA).

**ACTION:** Final Guidance.

**SUMMARY:** The OCC, Board, FDIC, and NCUA (the Agencies), are issuing final Joint Guidance on Overdraft Protection Programs (guidance). This guidance is intended to assist insured depository institutions in the responsible disclosure and administration of overdraft protection services.

**FOR FURTHER INFORMATION CONTACT:**

**OCC:** Michael Bylsma, Director, Margaret Hesse, Special Counsel, or Deana Lee, Attorney, Community and Consumer Law Division, (202) 874-5750; or Kim Scherer, National Bank Examiner/Credit Risk Specialist, Credit Risk Policy, (202) 874-5170.

**Board:** Minh-Duc T. Le, Senior Attorney, Daniel Lonergan, Counsel, or Elizabeth Eargubian, Attorney, Division of Consumer and Community Affairs, (202) 452-3667; or William H. Tierney, Supervisory Financial Analyst, Division of Bank Supervision and Regulation, (202) 452-2412. For users of Telecommunications Device for the Deaf ("TDD") only, contact (202) 263-4869.

**FDIC:** Mark Mellon, Counsel, (202) 898-3884, Legal Division; James Leitner, Examination Specialist, (202) 898-6790; Patricia Cashman, Senior Policy Analyst, (202) 898-6534; or April Breslaw, Chief, Compliance Section, (202) 898-6609, Division of Supervision and Consumer Protection.

**NCUA:** Elizabeth A. Habring, Program Officer, Office of Examination and Insurance, (703) 518-6392; or Ross P. Kendall, Staff Attorney, Office of the General Counsel, (703) 518-6562.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Agencies have developed this final joint guidance to address a service offered by insured depository institutions commonly referred to as "bounced-check protection" or "overdraft protection." This service is sometimes offered to transaction account customers as an alternative to traditional ways of covering overdrafts (e.g., overdraft lines of credit or linked accounts).

While both the availability and customer acceptance of these overdraft protection services have increased, aspects of the marketing, disclosure, and implementation of

- Joint Guidance on Overdraft Protection
- NCUA remarks:
  - NCUA Chairman Todd M. Harper's Remarks at the Brookings Institution: Agenda for Credit Union Regulation:
  - *Overdraft and non-sufficient fund fees are a key component of the NCUA's review.*
  - *Problematic overdraft programs and non-sufficient funds alerts include fees that aren't reasonable and proportional, rely on systems that authorize positive and settle negative, or impose multiple representation fees, often in one day.*
- 2024 Supervisory Priorities
  - *NCUA examiners this year will continue an expanded review of credit union overdraft programs, including website advertising, balance calculation methods, and settlement processes.*
  - *The NCUA will also continue to evaluate adjustments credit unions made to their overdraft programs to address consumer compliance risk and potential consumer harm from unexpected overdraft fees. (NCUA's 2024 Supervisory Priorities)*

# Risks



# Most Impactful Risks Within an Overdraft Program

- Opt-in Process
- Authorize Positive, Settle Negative
- Non-Sufficient Funds Fees
- Third party reliance



# Opt-in Process

- May not assess a fee for paying an ATM or one-time debit card transaction unless the CU:
  - Provides the consumer with a notice in writing, or if the consumer agrees, electronically, **segregated** from all other information, describing the institution's overdraft service;
  - Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions;
  - Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions; and
  - Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically, which includes a statement informing the consumer of the right to revoke such consent.
- Telephone consent ≠ In Person
  - By telephone. The institution provides a readily-available telephone line that consumers may call to provide affirmative consent.
  - In person. The institution provides a form for the consumer to complete and present at a branch or office to affirmatively consent to the service. (Official Interpretation to 12 CFR 1005.17(b)(4))
- Official Interpretations:
  - For example, the institution could require the consumer, at account opening, to sign a signature line or check a box on a form indicating whether or not the consumer affirmatively consents at account opening.
  - A consumer's affirmative consent, or opt-in, to a financial institution's overdraft service must be obtained separately from other consents or acknowledgements obtained by the institution, including a consent to receive disclosures electronically. An institution may obtain a consumer's affirmative consent by providing a blank signature line or check box that the consumer could sign or select to affirmatively consent, provided that the signature line or check box is used solely for purposes of evidencing the consumer's choice whether or not to opt into the overdraft service and not for other purposes

# Authorize Positive, Settle Negative (APSN)

- Unfair unanticipated overdraft fees for transactions authorized against a positive balance but settled against a negative balance.
- Example: Filling up the tank. \$1 transaction authorizes with \$40 account balance. Settles negative after filling up for \$65.
- Verify if core system is set up to charge an overdraft fee in APSN situations. If so:
- Update core to cease charging overdraft fee (preferred). Core systems are capable of this.
- Evaluate and update account disclosures to indicate an overdraft fee may be charged if APSN.





# Non-Sufficient Funds (NSF) Fees

- Non-Sufficient Funds (NSF) Fees
  - Check or ACH transaction presented for payment but cannot be covered by member balance. Merchant resubmits transaction for payment. CU charges multiple NSF fees for the same transaction.
  - Evaluate core system capabilities for preventing charging multiple NSF fees.
    - Possible limitation where core cannot identify that the merchant is presenting the same transaction.
  - Evaluate and update account disclosures to clearly describe CU representment practice, including explaining that the same unpaid transaction might result in multiple NSF fees if an item was presented more than once.
- Consider:
  - Eliminating NSF fees
  - Reviewing member notification or alert practices related to NSF transactions.



# Third Party Reliance

- Core systems
  - APSN
  - NSF fees
  - Align core overdraft settings with account disclosures (fee amount, de minimis, continuous overdraft fee, daily maximums)
- Third party overdraft program administration
  - Same as core system considerations
  - Dynamic overdraft limits, especially if converting from static to dynamic limits: Disclosures should indicate that the dynamic limit is established based on the algorithms or rules and include the variables. Also mention when the limit may be suspended or reduced to zero due to the eligibility criteria you have in place.
- Any third party relationship: Due diligence
- “Out of the box” functionality does not guarantee compliance



## Polling Question #2

What overdraft risk concerns you most?

- A. Opt-in Process
- B. Authorize Positive, Settle Negative
- C. NSF Fees
- D. Third Party Reliance
- E. Other (please share in comments)

# Trends and Best Practices



# Overdraft Program Trends and Best Practices

- Evaluate program against peers. Consider avoiding charging fees that are less favorable compared to similar organizations. Higher fees and fees assessed more frequently could be perceived as “junk fees”.
  - Individual overdraft fee amount
  - De minimis amount
  - Continuous overdraft fee amount
- Advertising
  - If you opt to advertise overdraft payment, advertisement must include:
    - The fee or fees for the payment of each overdraft;
    - The categories of transactions for which a fee for paying an overdraft may be imposed;
    - The time period by which the member must repay or cover any overdraft; and
    - The circumstances under which the credit union will not pay an overdraft.
  - Website advertised statements related to the overdraft program must be consistent with how the program is administered.



# Overdraft Program Trends and Best Practices

- Balance calculation methods:
  - When disclosing balance information through an automated system, a CU must disclose a balance that excludes any funds that the CU may provide to cover an overdraft. This must exclude balances from retail sweep programs.
  - May disclose additional balances that include funds provided by the CU to cover an overdraft as long as the CU prominently states that any additional balance includes these additional overdraft amounts.
- Posting order
  - Use a “neutral” posting order for processing checks and other items presented against the account each day. This method should not be designed to create the greatest number of overdrawn or unpaid items.
  - Disclose the posting order.
  - Verify that core system parameters align with expected posting order.



# Audit Techniques

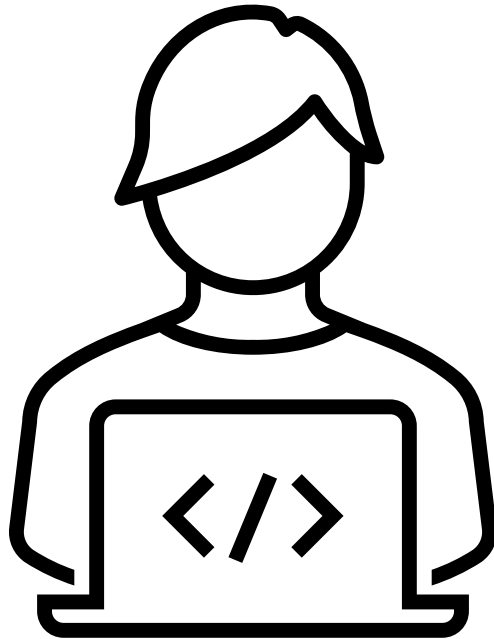


## Polling Question #3

When was your last overdraft program audit?

- A. Don't know. We need an audit.
- B. 2022
- C. 2023
- D. Occurred/scheduled in 2024

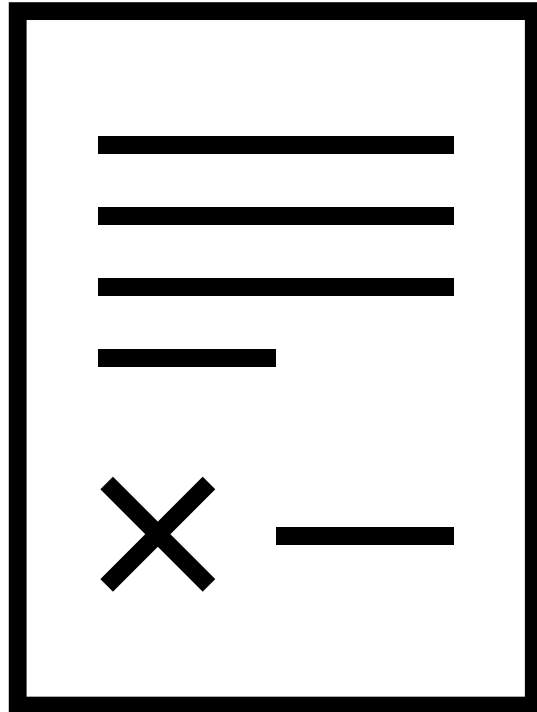
# Scoping



## Consider:

- Conduct an overdraft program audit rather than auditing Regulation E and TISA requirements together/separately.
- Complaints received related to the overdraft process.
- Account types that offer overdraft protection.
- Account opening methods (phone, online, in-person, virtual teller, etc)
- Third party reliance
- Recent supervisory guidance and NCUA priorities

# Disclosure Review



## **Design Effectiveness:**

- Assess the process and associated controls for confirming Legal / Compliance periodically reviews disclosures.

## **Operating Effectiveness:**

- Test disclosures provided to consumers to confirm compliance with applicable requirements.

# Opt-In Process



## **Design Effectiveness:**

- Assess the process and associated controls for opt-in and opt-out of overdraft protection programs. Include each opt-in channel at the time of account opening and after account opening (phone, in-person, online, etc.)

## **Operating Effectiveness:**

- Obtain a population of overdrafts assessed for ATM and one time debit card transactions and test a sample to determine if opt-in was captured. Consider interviewing front-line personnel to determine their understanding of the opt-in process.

# Periodic Statements

## Design Effectiveness:

- Assess the process and associated controls for populating periodic statements with the required aggregate overdraft and returned item fee table, labeling consistent with disclosure. Obtain core system parameters and verify fee assessment logic aligns with disclosures.

## Operating Effectiveness:

- Test periodic statements for accounts assessed overdrafts and returned items to confirm compliance with applicable requirements. Sample accounts triggering various scenarios such as multiple NSF's, continuous overdraft fee, de minimis amount, APSN.

## 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

# Written Policies and Procedures



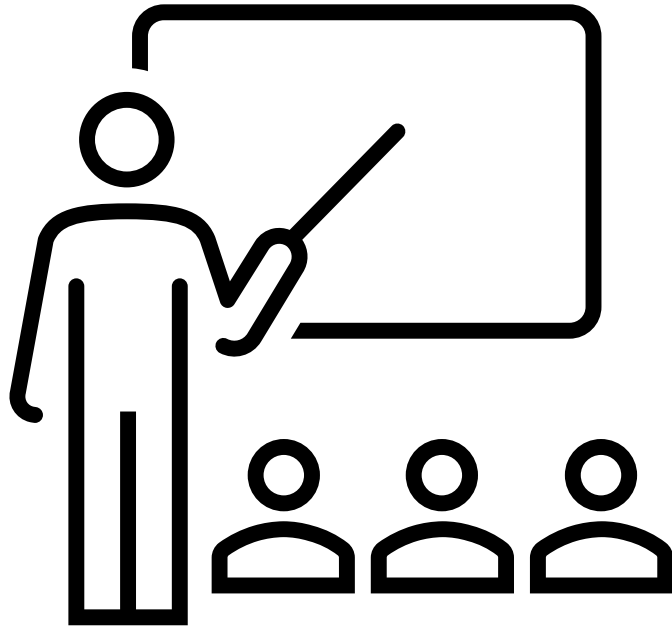
## **Design Effectiveness:**

- Assess the process and associated controls around developing, approving and communicating effective policies and procedures to support compliance and direct the opt-in process.

## **Operating Effectiveness:**

- Review policies and procedures for alignment with regulatory requirements and confirm that they are periodically reviewed, approved and communicated to impacted employees.

# Employee Training



## **Design Effectiveness:**

- Assess the process and associated controls for providing impacted employees with sufficient training around complying with overdraft regulatory requirements.

## **Operating Effectiveness:**

- Confirm that all assigned training has been satisfactorily completed and that training program addresses regulatory requirements for the relevant audience.



# Common Findings

# Recent Enforcement Actions – CFPB Bank Overdraft Consent Order (12/7/2023)

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UNITED STATES OF AMERICA  
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING  
File No. 2023-CFPB-0017

In the Matter of:

ATLANTIC UNION BANK

CONSENT ORDER

The Consumer Financial Protection Bureau (Bureau) has reviewed the policies and practices of Atlantic Union Bank (Respondent or AUB, as defined below) relating to the enrollment of consumers into overdraft services and has identified the following violations of law: failing to obtain consumers' affirmative consent to enroll in Respondent's opt-in overdraft service and subsequently charging those consumers overdraft fees pursuant to that service, in violation of the Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693 et seq., and its implementing Regulation E, 12 C.F.R. § 1005.17(b)(1)(iii); and engaging in deceptive acts or practices while offering opt-in overdraft services to consumers over the phone, in violation of the Consumer Financial Protection Act (CFPA), 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

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*The Consumer Financial Protection Bureau has reviewed the policies and practices of a regional bank relating to the enrollment of consumers into overdraft services and has identified the following violations of law:*

- Failing to obtain consumers' affirmative consent to enroll in Respondent's opt-in overdraft service and subsequently charging those consumers overdraft fees pursuant to that service;
  - Specific focus on the branch enrollment process:
  - Orally presenting overdraft opt-in to the consumer and allowing the consumer to orally indicate if they would like to opt-in. Documenting consumer in branch, oral opt-in within system is insufficient.
- EA criticizes printing the written overdraft notice at the end of the account-opening process. EA indicates presenting the form to the consumer pre-populated with a check box to reflect oral enrollment preference previously obtained is not acceptable.
- Engaging in deceptive acts or practices while offering opt-in overdraft services to consumers over the phone
  - EA cited lack of a script for representatives to read to consumers about the fees and features of the overdraft opt-in process before enrolling consumers by phone.



# Common Findings

- Opt-in process
- Disclosures do not align with APSN, NSF process
- Inconsistency in fee labeling between disclosures and statements.
  - Example: Disclosure or fee schedule lists a “\$30 Overdraft Fee”. The periodic statement does not match because it discloses a “\$30 ODP Fee”.
- Failure to disclose when switching from a static to a dynamic limit.

# Questions and Answers



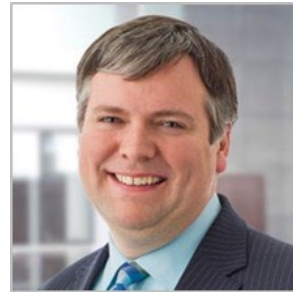
# Thank You



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