

Regulatory Compliance Hot Spots

*Presented by
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Today's Speaker



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Agenda

- Overdraft & NSF Fees
- UDAAP and Consumer Fairness

Overdraft & NSF Fees

Overdraft Programs


News

Non-sufficient fund (NSF) fee practices of the 25 banks reporting the most overdraft/NSF revenue in 2021

The chart reflects a snapshot of the CFPB's review of press releases, publicly available account disclosures, and news reports.

* Implementation dates vary; check with bank for details on timing.

** Some banks may be enacting changes that have not been publicly announced.



Banks that do not charge NSF fees, or have publicly announced eliminating them.*	Banks that have not publicly announced elimination of NSF fees as of 6/24/2022.**
Bank of America Capital One Citibank Citizens Fifth Third First Citizens Green Dot JPMorgan Chase KeyBank M&T PNC Regions SouthState TD Bank Truist USAA U.S. Bank Wells Fargo	Arvest Bank of the West First Horizon First Nat'l Bank of Texas/ First Convenience Bank Huntington Santander Woodforest

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CREDIT UNIONS

Pressure mounts on credit unions to cut overdraft fees

Overdraft Fees Draw Critical Scrutiny in New Filene Report

Filene report says credit unions are re-evaluating their worth and fairness.

Forbes ADVISOR

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Is 2021 The Beginning Of The End For Overdraft Fees?

Cutting overdraft fees could save Americans \$17 billion a year—but banks are slow to make changes

Overdraft Programs

CFPB Blog Post – February 10, 2022

- Notable trends in changes to overdraft programs include:
 - Eliminating NSF fees charged when transactions bounce;
 - Reducing the size of the overdraft fee;
 - Reducing the number of overdraft/NSF fees the financial institution can charge you each day;
 - Providing or increasing the amount your account can go negative before charging an overdraft fee;
 - Providing a grace period for you to bring the account back to positive before charging an overdraft fee; and
 - Eliminating “extended” or “sustained” overdraft fees charged when the account is not brought back to a positive balance after a certain period of time.

Overdraft Programs

CFPB – Overdraft/NSF Metrics Top 20 Banks

	Feb 2022	June 2022	Dec 2022	April 2023
No overdraft fee on any transaction	10%	15%	15%	15%
No NSF fees	45%	60%	80%	90%
Average overdraft/NSF fee amount	\$32	\$29	\$28	\$28
Average daily limit on number of overdraft/NSF fees	4	4	4	3
Average cushion before overdraft fee is charged	\$24	\$18	\$18	\$17
Extended (next day) grace period	40%	50%	59%	50%

Overdraft Programs

NCUA

- A focus area for 2023, with a more in-depth reviews expected in 2024 and 2025
- Overview of NCUA webinar in March
- Addressed how overdraft programs can harm members
 - Emphasized complete discontinuance of overdraft programs may not be the best fit for all credit unions
 - Encouraged credit unions to offer a greater variety of loan products, including small personal loans
 - Described characteristics of members who may need more flexible options

Overdraft Programs

POS Transactions – Authorization vs Posting

- Federal Reserve Consumer Compliance Supervision Bulletin July 2018
 - They cited unfair or deceptive practice based on overdraft processing methodology applied to point of sale (POS) transactions
 - Time between authorization and posting can take up to a few days
 - If there were sufficient funds in the account at the time the transaction was authorized, charging an overdraft fee at the time the transaction posts is violating section 5 of the FTC Act

Overdraft Programs

Responsible and Fair Overdraft Programs

- Overview of OCC's Attributes
 - Opt-in requirements
 - Grace periods before charging an overdraft fee
 - Allowing negative balances without triggering an overdraft fee
 - Offering balance-related alerts
 - Linking accounts
 - Providing access to real-time balance information
 - Allowing items to post or clear before collecting an overdraft fee
 - Avoid charging separate and multiple overdraft fees in a single day and not charging additional fees when an item is re-presented

Overdraft Programs

Representation Fee

- FDIC FIL-40-2022
 - Review disclosures to ensure they are not deceptive
 - This includes agreement, fees schedules, and any other document provided to customers
 - Provide restitution to customers charged representation fees if practices were unfair. This can mean:
 - Disclosures were deceptive; or
 - Multiple NSF fees were charged for the same transaction in a short period of time without sufficient notice or opportunity for customers to bring their account to a positive balance in order to avoid the assessment of additional NSF fees

Restitution

- No restitution lookback period cap. One exception – if unable to reasonably access accurate ACH data for re-presented transactions beyond two years.
- Failing to provide restitution for harmed customers when data on re-presentation is reasonably available will not be considered full corrective action.
- Examiners will not cite UDAAP violations that have been self-identified and fully corrected prior to the start of a consumer compliance examination.
- If examiners identify violations of law due to re-presentation NSF fee practices that have not been self-identified and fully corrected prior to a consumer compliance examination, the FDIC will evaluate appropriate supervisory or enforcement actions, including civil money penalties.

CFPB Uncovers Illegal Junk Fees

- **Surprise Overdraft Fees** – it is unfair to authorize a debit that was made with a positive balance, but later charge an overdraft fee because of intervening transactions that were processed before the debit settled.

CFPB Fines Regions Financial for Surprise Overdraft Fees

Bank agrees to pay \$191 million to settle regulator's accusations that the fees harmed customers

- **Multiple NSF Fees** – It is unfair to charge customers multiple NSF fees for a single item against an insufficient balance in the consumer's account, potentially as soon as the next day.

Overdraft Programs

OCC Bulletin 2023-12

- Authorize Positive, Settle Negative Fee Practices

“Even when disclosures described the circumstances under which consumers may incur overdraft fees, the OCC has found that overdraft fees charged for APSN transactions are unfair for purposes of Section 5 (FTC Act) because consumers were still unlikely to be able to reasonably avoid injury and the facts met the other factors for establishing unfairness.”

- Representment Fee Practices

“Even when customer disclosures explain that a single check or ACH transaction may result in more than one fee, a Bank’s practice of assessing fees on each representment may also be unfair, for purposes of Section 5, if consumers cannot reasonably avoid the harm and the other factors for establishing unfairness under Section 5 are met.”

- High limits or lack of daily limits on the number of fees assessed
- Sustained overdraft fees

Overdraft Programs

Policies, Processes, and Control Systems

- Eligibility
- Opt-in Status
- Disclosures
- Overdraft Protection Product Analysis
- Periodic Account Analysis
- Account Monitoring
- Grace Amounts
- Grace Periods
- Online Access and Timely Automated Alerts
- Single Daily Fee
- Timing of Fee Collection
- Complaints Management

Common Findings

- Chronic use monitoring – total amount of fees paid and sending letters after 6 occurrences
- Negative account balances – 60-day charge-off
- Waived fees – procedures and monitoring
- Representment fee – fee disclosure stating “per item”
- No record of Reg E opt-in (affirmative consent)
- Disclosing overdraft limit through automated system – balance includes overdraft funds and overdraft funds may not be available for ATM and one-time debit card transactions.

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UDAAP and Consumer Fairness



Agenda



Overview of the Basics



Examples



The Role of Complaint Management



Consumer Fairness



Resources

Overview of the Basics

Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

- Under the Dodd-Frank Act 1026 it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive, abusive act or practice.
- The Act also provides CFPB with rule-making authority, and with respect to entities within its jurisdiction, enforcement authority to prevent unfair, deceptive, abusive acts or practices in connection with any transaction with a consumer for any consumer financial product or service.

Overview of the Basics

Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

- The standard for unfairness in the Dodd-Frank Act is that an act or practice is unfair when:
 - It causes, or is likely to cause, substantial injury to consumers;
 - The injury is not reasonably avoidable by consumers; and
 - The injury is not outweighed by countervailing benefits to consumers or to the competition.

Examples

Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

- Offering a “Rewards Account” when it is not clear how to earn the Reward or although a reward is offered, no one seems to meet the criteria for obtaining the reward.
- Are your practices for processing holds on demand accounts vs. savings accounts fair?
- Is a deceptive statement likely to affect a consumer’s choice in product?
 - Purpose or Cost
 - Performance or Quality
 - Benefits and Limitations

Examples

Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

- Charging expensive fees to customers is not the only potential issue
- Unfair practices can look like:
 - Not properly disclosing to customers clearly and concisely
 - Not educating frequent-use customers of cheaper alternatives
 - Charging fees when a consumer doesn't reasonably expect their actions to incur an overdraft fees
 - Charging multiple NSF fees for one transaction in a short amount of time

Examples

The Overdraft issue again (I know)

- Example:

• Chick-Fil-A breakfast	\$7.00	\$28.00
• Chipotle lunch	\$13.00	\$28.00
• Target shopping	\$20.00	\$28.00
• Gas fill up	\$40.00	\$28.00
Total	\$80.00	\$112.00

You paid more in fees than you did for all of your purchases.

- Imagine this happening six times in a year - that would be $\$112 \times 6 = \672
- It is not uncommon for financial institutions to have customers who have paid over \$1,000 in fees within a year.

Examples

Fee Income

Asset Size	Overdraft-Related Service Charges (Item 15a)
\$1.4 Billion	\$2.4 million
\$1.8 Billion	\$1.025 million
\$3.5 Billion	\$2.051 million

The Role of Complaint Management

Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

- Consumer complaints play a key role in the detection of unfair, deceptive, or abusive practices. Consumer complaints have been an essential source of information for examinations, enforcement and rule-making for regulators.
- Consumer complaints can indicate weaknesses in elements of the institution's compliance management system such as training, internal controls, or monitoring.

The Role of Complaint Management

Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

- Obstacles for effective complaint management:
 - Lack of standardization
 - Struggle to balance consistency
 - Failure to admit fault
 - Cost of the program

The Role of Complaint Management

Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)

- Standard Resolution Methods:
 - Establish a complaint management policy that includes definitions of complaints, disputes and inquiries
 - Establish common reporting across lines of businesses, channels, regions, and 3rd party providers
 - Define common escalation triggers
 - Consistent training (including training on higher UDAAP risk complaints)
 - Complaint data aggregation from all sources

Consumer Fairness and Protection

- Regulatory emphasis on accurate disclosure and fairness principles along with related expectations around compliance are driving the need for Banks to pay closer attention than ever to this vast concept.

Consumer Fairness

Consumer Fairness and Protection

- Joint-regulator emphasis on accurate disclosure and fairness principles along with related expectations around compliance are expediting the need for Banks to pay closer attention than ever to this vast concept.
- Now encompassing across all industry, market, and business lines.

Consumer Fairness

Consumer Fairness and Protection

- Bank and Third-Party Disclosures
- Access Availability Fairness and Consumer Impact
- Fair Sales Practices
- Fairness in Every Phase of the Consumer Life Cycle
- Ethical Use of Analytics and/or Artificial Intelligence

Consumer Fairness

Consumer Fairness and Protection

- Regulations to Consider Consumer Fairness
 - UDAAP
 - Truth-In-Lending (TILA)
 - Fair Credit Reporting Act (FCRA)
 - Equal Credit Opportunity Act (ECOA)
 - Fair Debt Collection Practices Act (FDCPA)
 - Servicemembers Civil Relief Act (SCRA)
 - Americans with Disabilities Act (ADA)

Consumer Fairness and Protection

- Considerations for enhancing your institution's consumer fairness program
 - Conduct risk assessments
 - Simplify marketing communication
 - Don't forget consumer complaints
 - Assess your customer base and its life cycle

Resources

Publications to Know

- Corporate Transparency Act – FinCEN’s Beneficial Ownership Home Page <https://www.fincen.gov/boi>
- CTA Printable Brochure https://www.fincen.gov/sites/default/files/shared/BOI_FinCEN_Brochure_508C.pdf
- FDIC Equal Housing Lender Poster Update - <https://www.fdic.gov/news/financial-institution-letters/2023/fil23047.html>
- CFPB Fair Lending Update - https://files.consumerfinance.gov/f/documents/cfpb_fair-lending-report_2023-06.pdf

CFPB Enforcement Actions

- CFPB Enforcement Against Citibank, N.A. - <https://www.consumerfinance.gov/enforcement/actions/citibank-n-a/>
- CFPB Enforcement Against Freedom Mortgage and Realty Connect - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-freedom-mortgage-and-realty-connect-for-illegal-kickbacks/>
- CFPB Filed Lawsuit Against USASF Servicing, LLC - <https://www.consumerfinance.gov/enforcement/actions/usasf-servicing-llc/>
- CFPB Enforcement Against Bank of America - <https://www.consumerfinance.gov/about-us/newsroom/bank-of-america-for-illegally-charging-junk-fees-withholding-credit-card-rewards-opening-fake-accounts/>
- CFPB Enforcement Against Wells Fargo - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-wells-fargo-to-pay-37-billion-for-widespread-mismanagement-of-auto-loans-mortgages-and-deposit-accounts/>
- CFPB Enforcement Against Regions Bank - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/>

Resources, *continued*

On the Mind of the CFPB

- CFPB Artificial Intelligence - Home Appraisals - <https://www.consumerfinance.gov/about-us/blog/algorithms-artificial-intelligence-fairness-in-home-appraisals/>
- CFPB Artificial Intelligence – Chatbots in Banking - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issue-spotlight-analyzes-artificial-intelligence-chatbots-in-banking/>
- CFPB Reconsiderations of Value for Residential Real Estate Valuations - <https://www.consumerfinance.gov/about-us/newsroom/agencies-propose-interagency-guidance-on-reconsiderations-value-residential-real-estate-valuations/>
- CFPB Streamline Mortgage Servicing Rules - <https://www.consumerfinance.gov/about-us/blog/the-cfpb-intends-to-identify-ways-to-simplify-and-streamline-the-existing-mortgage-servicing-rules/>
- CFPB Artificial Intelligence – Credit Denials - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-on-credit-denials-by-lenders-using-artificial-intelligence/>
- CFPB Remove Medical Bills from Credit Report - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-kicks-off-rulemaking-to-remove-medical-bills-from-credit-reports/>
- CFPB Discrimination Against Immigration Status - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-justice-department-issue-joint-statement-cautioning-that-financial-institutions-may-not-use-immigration-status-to-illegally-discriminate-against-credit-applicants/>
- CFPB Open Banking - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-jumpstart-competition-and-accelerate-shift-to-open-banking/>

Resources, *continued*

UDAAP

- CFPB Summer Supervisory Highlights on Deceptive Practices – <https://www.consumerfinance.gov/compliance/supervisory-highlights/>
- CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-help-banks-avoid-charging-illegal-junk-fees-on-deposit-accounts/>
- CFPB Uncovers Illegal Junk Fees on Bank Accounts, Mortgages, and Student and Auto Loans - <https://www.consumerfinance.gov/about-us/newsroom/cfpb-uncovers-illegal-junk-fees-on-bank-accounts-mortgages-and-student-and-auto-loans/>
- OCC’s Attributes of a Responsible and Fair Overdraft Program - <https://www.occ.gov/news-issuances/speeches/2021/pub-speech-2021-129.pdf>
- ABA Banking Journal CFPB UDAAP Litigation– <https://bankingjournal.aba.com/2023/10/texas-federal-court-rules-for-aba-trades-in-cfpb-udaap-manual-litigation/>
- Congressman Barr Update- <https://barr.house.gov/2023/9/barr-releases-statement-on-u-s-district-court-udaap-ruling>



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Services: Assurance | **Emphasis:** Financial Services

Professional Overview

Drew works exclusively with financial institutions to provide regulatory compliance services, including risk-based regulatory compliance review, Bank Secrecy Act/Anti-Money Laundering review, fair lending analysis, consultation, audit and training. He has over fifteen years of experience in the Banking and regulatory compliance industry and has served institutions of various asset sizes across the United States

Education, Credentials, and Special Training

Certified Regulatory Compliance Manager (CRCM)

Certified BSA/AML Professional (CBAP)

B.A., Interdisciplinary Studies, Valdosta State University

Professional Affiliations

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