



Compliance Bulletin 19-18

Overdraft Class Action Lawsuit Alert

The Northwest Credit Union Association became aware of ongoing website and social media advertising, sponsored by a class action law firm, which invite credit union members who have been charged an overdraft of NSF fee in connection with the use of a debit card to contact the law firm.

Due to the ongoing nature of these issues, we are rerunning a bulletin that was issued in 2018.

Recent class action lawsuits against credit unions for overdraft practices have focused on:

- Available versus actual balances and what was in the credit union's disclosures;
- Regulation E disclosures and opt-in requirements;
- Posting order;
- NSF returned check fees based on presentment when the disclosures say per item; and
- Double dipping when an item was originally approved with available balance, but then cleared in overdraft state causing a fee to be assessed

We wanted to make sure you are aware of efforts by these law firm in case you are contacted by a concerned member or volunteer.

We recommend credit unions audit their overdraft programs to ensure actual processes match what has been disclosed to members.

The following list of best practices for overdraft programs was shared by Brian Witt of Farleigh Wada Witt.

**Dozen Best Practice Guidelines
For
Overdraft Payment/Protection Programs**

1. Payment Order – Pay items in chronological order based on when they were presented to the extent possible. Where items presented in batches have serial numbers (e.g. checks), pay items presented in the same batch in serial number order. Where batch presentation items do not have a serial number, pay in the order in which they are contained in the batch, or in a random order. Do not pay based on high to low amount.

2. Balance Calculation – Assess overdraft fees based on the actual (ledger) balance, not based on available balance. Unless it is explained and disclosed on a real-time basis, members will not know their available balance.

3. Available Balance Calculation and Disclosure – If overdraft fees are imposed based on the available balance, explain the process and disclose available balance in real-time (e.g. ATMS or online) so members can know their available balance before

4. Overdraft Opt-In or Opt-out – Provide an opt-out or require an opt-in for all overdraft options, not just the Regulation E required opt-in for ATM/debit card transactions. Any automatic enrollment must provide members an easy opt-out.

5. Overdraft Fees on Negative Savings Accounts – Avoid permitting savings accounts to go negative as a result of overdraft transfers to checking accounts. Instead, either decline the transaction or pay the transaction and allow the checking account to be overdrawn. If an overdraft transfer from a savings account is triggered by an ATM or debit card transaction, do not charge an overdraft fee (which would violate Regulation E unless the member has opted in to the arrangement after receiving the Regulation E overdraft protection disclosure).

6. Overdraft Limits – Set limits on the amount of fees that will be imposed on an account or number of overdrafts that will be covered in any one day or month. Do not allow unlimited overdrafts.

7. Overdraft Notices – Notify members whenever an NSF transaction occurs. The notice can be via email, text message, mail, or any other means of communication the member has agreed to. Notice to members helps the member avoid incurring additional fees if the initial transaction is the result of a mistake.

8. Fee Amount – Set the overdraft fee to be equal to your return item fee. This avoids any perceived incentive for the credit union to either pay or return an item in order to increase income.

9. Monitor Overdraft Usage – Monitor overdraft usage. Contact members who frequently create overdrafts to offer education or counseling assistance in decreasing overdraft usage.

10. Advertise Overdraft Services Accurately – Do not refer to your overdraft program as free, low cost or protective. These services are about convenience. To regulators and consumer advocates, any fee is unfair.

11. Education – Educate members about common circumstances or issues that create or multiply overdrafts, such as debit card holds, delays in transaction posting. Inform members about the credit union’s practices related to transaction posting order.

12. Protect the Credit Union – If you have purchased or are considering an overdraft program or consulting service to “enhance” your overdraft service, examine your compliance warranty carefully. Avoid making program changes or setting fees based on projections for enhanced revenue.

If you have any questions on your overdraft compliance and operational issues please call or email one of us at Farleigh Wada Witt (503.228.6044) for more information.

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If I have questions what should I do?

Please contact NWCUA’s compliance team at 800.546.4465 or compliance@nwcua.org, if you have questions.

#CUobsessed

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