



bankers' compliance group®

RECENT DEVELOPMENTS IN OVERDRAFT SERVICES

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EXHIBIT A CFPB OVERDRAFT CHART

RECENT DEVELOPMENTS IN OVERDRAFT SERVICES

I. INTRODUCTION

Overdraft services offer unique compliance challenges for financial institutions. For more than a decade, overdraft services have been the subject of increased regulatory scrutiny. Examinations focus not only on “technical compliance” with applicable regulations, but also on whether any aspect of an institution’s overdraft services have features that may be characterized as unfair, deceptive or even abusive. Furthermore, the risk of class litigation in the context of institutional overdraft practices is ever-present.

In recent months, the CFPB has made reference to overdraft services in a number of issuances. In more than one of these issuances, the CFPB indicated it would be enhancing its supervisory approach and enforcement scrutiny of institutional overdraft practices. Concurrently, several large financial institutions recently announced revisions to their overdraft and NSF fee structures and policies, including in some instances the reduction or elimination of overdraft or NSF fees. The other federal financial institution regulators also have recently published overdraft-related materials and made statements which may indicate that in the near future overdraft services will be subject to stricter regulatory scrutiny. With these major announcements come questions as to how smaller financial institutions offering overdraft services might be impacted, including with regard to both compliance and litigation risk.

Given the financial hardships experienced by many consumers during the pandemic and the new presidential administration’s more consumer-protective supervisory approach, it is critical that institutions evaluate whether their overdraft services are currently operating consistent with regulatory expectations. This Handout discusses recent regulatory and case law developments as well as what appears to be on the horizon for the future of overdraft services.

II. BACKGROUND

A. Historical Context. According to a March 2020 report by the United States Congressional Research Service, one of the earliest documented cases of a bank overdraft dates back to 1728, when a Royal Bank of Scotland customer requested a “cash credit” that would enable him to withdraw more money from his account than what it held. Since then, evolving technologies (such as electronic payments and ATMs) have changed the way consumers use their deposit account funds, resulting in more frequent payment transactions for smaller denominations. In response, financial institutions commonly offer overdraft services to cover gaps in their customers’ available funds.

B. Common Types of Overdraft Services. The most common types of overdraft payment practices employed by financial institutions include automated overdraft payment (ODP) programs, *ad hoc* overdraft payments, overdraft line of credit accounts and savings accounts linked to customers’ deposit account. Most regulatory scrutiny and criticism is reserved for automated ODP programs, as they tend to present heightened risk of repeated and substantial transaction fees and thus increased potential for financial harm to customers.

In recent years, however, some examiners have taken the position that the interagency “Joint Guidance on Overdraft Protection Programs” published in February 2005 (“2005 Joint Guidance”) wholly applies to all types of overdraft payment practices, including *ad hoc* overdraft payments and overdraft line of credit accounts. Although the 2005 Joint Guidance explicitly states that its “Safety and Soundness” section applies to all forms of overdraft payments, some examiners have scrutinized financial institutions’ overdraft payment practices to see whether they wholly conform to the 2005 Joint Guidance (including the “Best Practices” set forth in the 2005 Joint Guidance). As a result, institutions are encouraged to ensure that any overdraft payment practices they employ, including *ad hoc* overdraft payments and overdraft line of credit accounts, conform to the 2005 Joint Guidance. For a detailed discussion of the 2005 Joint Guidance, refer to Part One, Section X.B. of BCG Standard Procedures Manual #7, *Negotiable Instruments Law*.

1. Automated ODP programs. Automated ODP programs are established programs, often partially or fully computerized, that are used by financial institutions to determine whether non-sufficient fund transactions qualify for overdraft coverage based on pre-determined criteria. There is little to no case-by-case review or decision-making with respect to an individual customer or item.

2. Ad Hoc overdraft payments. *Ad hoc* overdraft payments typically involve irregular and infrequent occasions on which a financial institution employee exercises discretion in a specific instance about whether or not to pay a particular item, typically as a customer accommodation and not on a pre-determined or formulaic basis. This is typically done based on the employee's knowledge of the particular customer.

3. Overdraft line of credit accounts. Overdraft line of credit accounts are a form of open-end or revolving credit. Characteristics common to overdraft line of credit accounts include revolving lines of credit that are tied to customers' checking or share accounts (collectively, "checking accounts" or "accounts"). In the event that a customer has insufficient funds in his or her checking account to cover the amount of a transaction, an amount up to a prearranged maximum credit limit will be automatically advanced to the checking account to cover the overdraft. Advances may be made in amounts equal to the overdraft or in increments (or "chunks") of specified dollar amounts. For a detailed discussion of overdraft line of credit accounts, refer to Section XII. of BCG Standard Procedures Manual #1, *Consumer Lending Compliance*.

C. Overdraft and NSF Fees. This Handout discusses many recent regulatory and case law developments regarding overdraft and NSF fees. Since sometimes these terms are used interchangeably, for purposes of this Handout, the following definitions apply.

1. Overdraft fee. The CFPB's website defines an overdraft fee as follows:

An overdraft occurs when you don't have enough money in your account to cover a transaction, but the bank pays the transaction anyway. You can overdraw your account through checks, ATM transactions, debit card purchases, automatic bill payments, and electronic or in-person withdrawals. Many banks and credit unions offer overdraft protection programs in which the bank or credit union generally pays the transaction and charges you a fee (in addition to requiring repayment of the overdraft amount). Overdrafts can also be covered through a transfer of funds from a linked account, credit card, or line of credit.

2. NSF fee. The CFPB's website defines an NSF fee as follows:

An NSF or non-sufficient funds fee may occur when your check or electronic authorization is not paid due to a lack of funds in your account. This is commonly referred to as a 'returned' or 'bounced' check.

Until recently, overdraft fees have traditionally received more regulatory scrutiny and attention from plaintiffs' attorneys than NSF fees. However, some larger institutions have begun to eliminate NSF fees. Recently, some regulators and courts have also addressed circumstances under which charging an NSF fee (or multiple NSF fees) might be problematic or constitute an unfair or deceptive act or practice (UDAP). For more information, refer to Section VIII.A. below.

III. CFPB RECENT OVERDRAFT STUDY

A. Introduction. On December 1, 2021, the CFPB issued its most recent study on overdraft fees. This study is the latest in a series of overdraft studies that the CFPB has published since 2013.

1. Largest overdraft fee revenue producers. The CFPB noted in its press release announcing the study that three banks—JPMorgan Chase, Wells Fargo, and Bank of America—brought in 44% of the total 2019 overdraft and NSF fee revenue reported that year by banks with assets over \$1 billion.

2. Smaller institutions' overdraft fee revenue. The CFPB also stated that while smaller institutions with overdraft programs charged lower fees on average, consumer outcomes were similar to those found at larger banks.

3. Enhanced supervisory approach. As a result of its overdraft-related findings, the CFPB stated it "will be enhancing its supervisory and enforcement scrutiny of [institutions] that are heavily dependent on overdraft fees."

B. First Data Point. The first data point in the CFPB's overdraft study, entitled "Data Point: Overdraft/NSF Fee Reliance Since 2015 – Evidence from Bank Call Reports," focused on larger institutions' revenues from overdraft and NSF fees. For purposes of its study, the CFPB analyzed aggregate overdraft and NSF fee revenues reported in larger financial institutions' call reports from 2015 onward. According to its report, the CFPB's researchers estimated that the overall market revenue from overdraft and NSF fees was \$15.47 billion in 2019 (for larger and smaller institutions combined).

1. FFIEC call report instructions and data. Since 2015, the banking agencies have required financial institutions with more than \$1 billion in assets to itemize revenues earned from deposit accounts, including a separate line item for overdraft and NSF fees. Refer to the FFIEC's "Instructions for Preparation of Consolidated Reports of Condition and Income" at page RI-36. According to the CFPB's overdraft study, approximately 600 banks have met the threshold each year and have specifically reported on their call reports overdraft and NSF fee revenue.

2. Majority of fee revenue. According to the CFPB, institutions' revenues from overdraft and NSF fees made up close to two-thirds of reported fee revenue, which the CFPB noted "emphasiz[ed] banks' heavy reliance on [overdraft and NSF] fees." The CFPB's report

stated that although reliance on such fees varied considerably among institutions based on their call reports, it was generally stable over time for any given institution. The CFPB also noted that although aggregate overdraft and NSF fee revenues declined by 26.2% in 2020, increased checking account balances resulting from federal stimulus payments likely contributed to this decline.

3. Changes in overdraft and NSF fee reliance. The CFPB's first data point also sets forth information on changes institutions can make to be seen as "less reliant" on overdraft and NSF fee income. The CFPB stated that "changes in overdraft/NSF fee reliance can come in response to shifts in financial institutions' practices and policies." According to the CFPB, these changes can result from both short-term and long-term policy revisions.

a. Relief policies. According to the CFPB, reliance-based change can be implemented in the short term via overdraft "relief policies," such as in the form of overdraft or NSF fee waivers.

b. Shifting fee structures. In the longer term, the CFPB said reliance-based change can be achieved through "shifting fee structures or expanding products with particular fee structures," such as by offering checking accounts that do not allow overdrafts.

c. Customer use-based changes. The CFPB's study also noted that non-policy related changes, such as lack of consumer debit card use during the pandemic and increased consumer deposit account balances due to federal relief payments, could also have influenced the fee revenue institutions generated from overdraft services.

C. Second Data Point. The CFPB's second data point, "Checking Account Overdraft at Financial Institutions Served by Core Processors," sets forth institution-level data from several core processors (who offer deposit, payment, and data processing services to these smaller institutions) on the way credit unions and smaller banks set up their overdraft programs, and reviews data on consumer overdraft use and fee revenue for a 12-month time period predominantly covering 2014.

The CFPB explained in this second data point that it neither "requested nor obtained direct reports from individual [institutions] about their overdraft policies, practices, and consumer outcomes. Rather, [the CFPB has] indirect information on these items that [the CFPB] obtained from reports on software configurations at core processors providing services to the [institutions]." In other words, even if the CFPB isn't an institution's primary regulator, the CFPB could still be gathering information and assessing smaller institutions' overdraft practices via information from their core processors.

1. Smaller institutions offering overdraft services. According to this second data point, the CFPB found that 92.9% of smaller banks and 60.9% of credit unions had an overdraft program, making such programs less common at these institutions than among large banks (but still prevalent).

2. Less Regulation E coverage. The CFPB's study found that smaller financial institutions were also less likely to offer the option under CFPB Regulation E to opt in to debit card overdraft services. For further discussion of Regulation E, refer to Section X.C. below. Although overdraft and NSF fees were 13 to 19% lower at small banks and credit unions than at large banks, the CFPB found credit unions and small banks with an overdraft program earned \$42.33 and \$40.37 in annual overdraft revenue per account, respectively, which was just 6% and 11% less than large banks, respectively.

3. Overdraft policies. The CFPB's study also set forth the following findings regarding smaller institution overdraft policies:

a. Automation. The CFPB found that for those institutions that had an overdraft program, overdraft decisions were predominantly automated.

b. Fee waivers. The CFPB's study found that institutions with an overdraft program in place often had policies in place to waive fees in certain circumstances.

(1) For the observed banks, the CFPB found that fee waivers were typically accomplished by waiving fees when an account was overdrawn by a small amount or the transaction overdrawing the account was small (*de minimis* policies) or by having a daily cap on the number of fees that could be incurred.

(2) For the observed credit unions, the CFPB found that fee waivers were more commonly offered through forgiveness periods during which consumers could deposit funds after an overdraft transaction to avoid an overdraft fee.

c. Available vs. ledger balance. For purposes of deciding whether to pay or decline a transaction, more than 90 percent of observed credit unions used an account's available balance, whereas it was closer to a 50/50 split among the observed banks between use of an account's available balance or ledger balance for this purpose. For further discussion of issues associated with the use of available vs. ledger balance, refer to Section VI.B.2. below.

d. Direct deposit availability. The CFPB found that approximately one-third of observed institutions made funds received through electronic direct deposit available for a consumer's use generally before the settlement date, with the share of banks that did so increasing with asset size. Many of the larger financial institutions who have recently announced significant changes to their overdraft and NSF fees and policies (refer to Section VII. below) also have a similar policy regarding direct deposit availability.

e. Overdraft balance cap. The CFPB reported that over 90% of observed credit unions and over 60% of observed banks limited the amount by which an account could be overdrawn.

f. Transaction processing order. According to the CFPB, ordering transactions by size was more common among banks in the dataset than among credit unions. The CFPB reported that observed banks that ordered transactions by size were nearly evenly split between those that ordered high-to-low and those that ordered low-to-high. For further discussion of compliance issues associated with high-to-low posting, refer to Section X.D.3. below.

g. Regulation E opt-in practices. The CFPB's study found that both the incidence of overdraft and overdraft revenues per account largely varied by whether the institution offered Regulation E opt-in overdraft coverage, with those that had Regulation E opt-in overdraft coverage charging a higher number of overdraft fees and collecting more in overdraft revenues per account.

h. Grace period. In addition, the CFPB noted that some institutions offer a forgiveness period, a time period after the day an overdraft transaction posts during which the consumer may deposit sufficient funds to return the account to a positive balance and avoid being charged an overdraft fee.

i. Linked accounts; continuous overdraft fee. The CFPB's study also reported information on the number of institutions that offered linked account overdraft coverage, and separately the number of institutions that charge a continuous overdraft fee for a sustained negative account balance.

4. Sources of scrutiny. The items of information from the CFPB's data point that are discussed in Paragraph 3. above have been sources of overdraft-related regulatory scrutiny for many years. As such, seeing these information points within the CFPB's most recent overdraft study is a helpful reminder that when assessing an institution's overdraft practices, each of these items are overdraft service features that the CFPB (and other regulators) commonly review.

D. Consumer Complaints. The CFPB's press release announcing its most recent overdraft study also included information on how consumers seeking help dealing with overdraft and NSF fees can submit a complaint to the CFPB. As discussed below in Section X.B., the CFPB has previously stated as part of its UDAAP examination procedures that even a single customer complaint can give rise to a potential UDAAP finding. As such, the CFPB's inclusion of information regarding consumer complaints in connection with the publication of its most recent overdraft study is a good reminder of the importance of monitoring, documenting and responding to consumer complaints (particularly with regard to an institution's overdraft practices).

E. CFPB Director Chopra's Prepared Remarks. In conjunction with the CFPB's overdraft study, on December 1, 2021, CFPB Acting Director Rohit Chopra made prepared remarks which gave further insight into the CFPB's intended enhanced supervisory approach regarding overdraft services.

1. Highly charged rhetoric. Director Chopra's remarks in connection with the overdraft study were highly charged. He characterized overdrafts as "exploitative junk fees that can quickly drain a family's bank account." He also stated that large institutions' overdraft practices represent a "clear market failure," and that the price of NSF fees is not proportionate to the costs incurred by institutions in returning transactions unpaid.

2. Regulatory vision. Director Chopra's remarks might provide some indication as to how institutions might expect regulators to scrutinize their overdraft compliance going forward.

a. Focus on illegal conduct; new policy guidance. First, Director Chopra stated that the CFPB intends to take action against large financial institutions whose overdraft practices violate the law.

(1) In investigating, the CFPB will also seek to uncover the individuals who directed any illegal conduct.

(2) According to Director Chopra, the CFPB is also considering additional policy guidance outlining unlawful overdraft practices.

b. Institutions with high overdraft fee revenue. Second, Director Chopra stated that the CFPB's bank examiners are being instructed to prioritize examinations of banks that are heavily reliant on overdraft fee revenue. According to Director Chopra:

(1) Financial institutions that have "a higher share of frequent overdrafters or a higher average fee burden for overdrafting" will receive greater regulatory scrutiny.

(2) The CFPB intends to inform institutions on where they stand relative to their peers with overdraft fee revenue, with the intention of sharing such information in order to "increase transparency and help against the race to the bottom."

c. Use of new technology. Third, the CFPB will be looking to "harness technology in ways that give American families the power to more easily fire poor-performing banks."

(1) Director Chopra stated, "[i]f America can shift to an open banking infrastructure, it will be harder for banks to trap customers into an account for the purpose of fee harvesting."

(2) For reference, "open banking" is use of a technology platform through which retail banks are required to make payment and account information services available through apps.

IV. CFPB "JUNK FEES" INITIATIVE

A. Introduction. As noted above in Section III.E.1., in his December 2021 remarks regarding the CFPB's most recent overdraft study, CFPB Director Chopra referred to overdrafts as "exploitative junk fees that can quickly drain a family's bank account." Using similar language (by referring to "junk fees"), on January 26, 2022, the CFPB announced a new "junk fees" initiative.

B. Director Chopra's Prepared Remarks. In prepared remarks announcing the initiative, CFPB Director Chopra stated: "Many financial institutions obscure the true price of their services by luring customers with enticing offers and then charging excessive junk fees By promoting competition and ridding the market of illegal practices, we hope to save Americans billions."

C. What is a "Junk Fee"? The CFPB somewhat vaguely described junk fees as "exploitative, back-end, hidden, or excessive fees" charged to consumers. The CFPB cited several examples of such fees, including using overdraft and NSF fees as specific examples of the kind of fees that could be seen as "junk fees."

D. Request for Information. In connection with this initiative, on February 2, 2022 the CFPB published a "Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services" (RFI), requesting public comment on "junk fees." 87 FR 5801. The CFPB stated it intends to "craft rules, issue industry guidance, and focus supervision and enforcement resources" to "reduce these kind of junk fees."

1. Overdraft and NSF fees. As noted above, the RFI explicitly calls out overdraft and NSF fees as examples of the types of fees that could be "junk fees."

a. Citation of overdraft study. The RFI cites statistics from the CFPB's December 2020 overdraft study (discussed above in Section III.) to support its position that overdraft fees are "junk fees." Specifically, the CFPB noted that in 2019, larger institutions generated more than \$15.4 billion in overdraft and NSF fee revenue. The RFI stated that by comparison, account maintenance fees generate approximately \$1 billion in annual revenue for these institutions. In the RFI, the CFPB stated: "Since the back-end fees are the bulk of the price, there is effectively no price competition amongst the major banks for deposit accounts."

b. Possible future rulemaking. The CFPB also noted in the RFI: "Only recently have companies started to substantially vary their overdraft practices. This is of course a positive development, but these changes will not reverse the trend of pricing deposit accounts primarily through back-end fees" (emphasis added). This might indicate that the CFPB intends to undertake future rulemaking regarding overdraft services and does not consider the recent overdraft program changes made by several large institutions to constitute sufficient reforms.

2. Intended respondents. In its RFI, the CFPB stated that it hopes for information from the public on how junk fees (defined as "exploitative, back-end, hidden, or excessive fees") have impacted peoples' lives. The CFPB is particularly interested in hearing from individuals (including, according to the CFPB, "older consumers, students, servicemembers, consumers of color, and lower-income consumers"), social services organizations, consumer rights and advocacy organizations, legal aid attorneys, academics and researchers, small businesses, financial institutions, and state and local government officials.

3. Information sought. The RFI has specifically requested submission of the following information points.

a. Consumer fee information. For consumers, the RFI requests submission of responses to the following queries regarding "experiences with fees associated with your bank, credit union, prepaid or credit card account, credit card, mortgage, loan, or payment transfers," including:

- (1) Fees for things the consumer believed were covered by the baseline price of a product or service;
- (2) Unexpected fees for a product or service;
- (3) Fees that seemed too high for the purported service; and
- (4) Fees where it was unclear why the fees were charged.

b. Additional information sought. Additionally, the RFI requests feedback with regard to the following queries:

- (1) Types of fees for financial products or services that obscure the true cost of the product or service by not being built into the upfront price;
- (2) Fees that exceed the cost to the entity that the fee purports to cover. Here, the CFPB cites as an example whether "the amount charged for NSF fees [is] necessary to cover the cost of processing a returned check and associated losses to the depository institution";

(3) Identification of companies or markets that are obtaining significant revenue from backend fees, or consumer costs that are not incorporated into the sticker price;

(4) Any obstacles to building fees into upfront prices consumers shop for;

(5) Whether data or evidence exists with respect to how consumers consider back-end fees, both inside and outside of financial services;

(6) Whether data or evidence exists that suggests that consumers do (or do not) understand fee structures disclosed in fine-print or boilerplate contracts;

(7) Whether data or evidence exists that suggests that consumers do (or do not) make decisions based on fees, even if well disclosed and understood; and

(8) The oversight and/or policy tools the CFPB should use to address the escalation of excessive fees or fees that shift revenue away from the front-end price.

4. Gut-check. The CFPB is using these queries to source information about what is a “junk fee.” Because the CFPB specifically cites overdraft and NSF fees as examples of possible “junk fees,” institutions may be able to use these queries as a sort of checklist to preliminarily determine whether their overdraft or NSF fees and policies and practices raise any red flags. It seems likely that the more an institution’s fees and practices raise red flags, the greater the possibility that the CFPB (or possibly other regulators as well) would view the institution’s overdraft or NSF fees as “junk fees.” However, such an analysis may be somewhat premature given that the CFPB has stated it likely intends to issue more overdraft guidance or rulemaking.

5. Public comments. The RFI’s public comment period closes on March 31, 2022.

V. CFPB CHART ON INSTITUTIONAL OVERDRAFT FEES AND POLICIES

A. Introduction. On February 10, 2022, CFPB published a chart summarizing certain items of information with regard to 20 large financial institutions’ overdraft and NSF fees, policies and practices. In its press release announcing the chart, the CFPB acknowledged that many of these large financial institutions have made recent changes to their ODP programs, and that the Bureau saw this as a positive development. For more information on these institutions’ specific overdraft-related changes, refer to Section VI. below.

B. Items of Information. The CFPB’s chart highlights the following items of information regarding each of the 20 subject institutions’ overdraft practices:

1. Overdraft/NSF fee revenue for January through September 2021;

2. Whether the institution charges overdraft and NSF fees and if so the dollar amount of each fee;

3. Whether the institution charges overdraft fees on ATM or debit card transactions;
4. Whether the institution charges a sustained overdraft fee;
5. Whether the institution imposes a daily cap on overdraft fees;
6. Whether the institution has a *de minimis* amount by which an account can be overdrawn without a fee being charged; and
7. Any extended grace period within which the customer may bring a negative account balance positive without an overdraft fee being charged.

C. Specific Program Changes. The CFPB's press release regarding its chart highlights the following recent changes some of the institutions listed in its chart have undertaken, including:

1. Elimination of NSF fees;
2. Reduction of the overdraft fee amount;
3. Reduction of the daily overdraft/NSF fee cap;
4. Increase of the *de minimis* overdraft amount;
5. Implementation of a grace period before charging an overdraft fee; and
6. Elimination or reduction of continuous overdraft fees.

D. CFPB Scrutiny. The CFPB's references to: (i) certain particular data points set forth in its chart (described in Paragraph B. above); and (ii) specific recent changes made by certain institutions to their overdraft practices (described in Paragraph C. above), could indicate that these are overdraft-related items of information upon which the CFPB (and possibly other regulators as well) may place additional scrutiny from a supervisory approach.

E. Exhibit. According to the CFPB, the overdraft and NSF fee revenue set forth in its chart is based on reported values from January 2021 through September 30, 2021. A copy of the CFPB's chart is attached to this Handout as Exhibit A.

VI. OTHER AGENCIES' RECENT OVERDRAFT DEVELOPMENTS

A. OCC Recent Overdraft Developments.

1. December 2021 remarks by Acting OCC Chair. In December 2021, following the CFPB's publication of its most recent overdraft study and the announcement by several large institutions of changes to their overdraft programs, Acting Comptroller of the Currency Michael Hsu stated in remarks to the Consumer Federation of America's 34th Annual Financial Services Conference that overdraft programs do offer some benefits to consumers, and expressed his opinion that reformation rather than elimination of overdraft services might be the appropriate resolution to concerns regarding overdraft services.

a. Restructuring overdraft programs. According to Hsu's presentation, entitled "Reforming Overdraft Programs to Empower and Promote Financial Health," "[b]anking deposit account services need to be structured so that they improve customers' financial capabilities and are priced to be low to no cost."

b. OCC staff report on overdraft programs. Hsu also noted that OCC staff had been compiling a report on overdraft practices, which included identification of several features of financial institution overdraft programs that could be "modified or recalibrated to support [the] financial health" of consumers:

- (1) Requiring consumers to opt in to the overdraft program;
- (2) Providing a grace period before charging an overdraft fee;
- (3) Allowing negative balances without triggering an overdraft fee;
- (4) Offering consumers balance-related alerts;
- (5) Providing consumers with access to real-time balance information;
- (6) Linking a consumer's checking account to another account for overdraft protection;
- (7) Collecting overdraft or NSF fees from a consumer's next deposit only after other items have been posted or cleared; and
- (8) Not charging separate and multiple overdraft fees for multiple items in a single day and not charging additional fees when an item is re-presented.

c. Recent institution changes. Hsu also cited Capital One and PNC Bank's recent ODP program reforms as efforts that "align" with the features proposed above. For more information on these changes, refer to Section VII. below. Hsu also stated that he "look[s] forward to more OCC-supervised banks adopting overdraft practices that promote consumer financial health and greater income and wealth equality."

2. March 2021 remarks by Acting Comptroller. More recently, on March 9, 2022, Acting Comptroller Hsu made further statements regarding overdraft services during a presentation at the ABA Washington Summit. According to Hsu: "You don't want to be the last bank that still has a traditional overdraft program."

a. "Long overdue" reforms. In reference to several large institutions' recent overdraft program changes, Hsu stated that such reforms are "long overdue," and indicated that all institutions should be re-evaluating overdraft fees, grace periods and payment orders, among other features. Hsu stated, "[a]ll of these are dials that banks can use."

b. Customer base. Hsu also stated that "[i]t's important to look at who your customers are, what they need and how to empower them the most." According to Hsu, the federal banking regulators share a "pro-consumer" approach, evaluating "what is going to be positive and financially empowering for customers—that's what

you want.” Hsu also stated, however, that “it’s very hard to paint with a broad brush,” and that consumers have varying needs and differ in their use of overdraft protection.

B. FDIC Recent Overdraft Developments.

1. FDIC Consumer News Article. In December 2021, the FDIC published on its website an FDIC Consumer News article entitled “Overdraft and Account Fees.” The FDIC’s publication may be viewed at www.fdic.gov/resources/consumers/consumer-news/2021-12.html. The article includes a basic overview of what overdraft and NSF fees are and summarizes consumer opt-in rights under Regulation E’s overdraft rule, 12 CFR Section 1005.17.

2. FDIC Consumer Compliance Supervisory Highlights article. The June 2019 edition of the FDIC’s Consumer Compliance Supervisory Highlights publication featured an article entitled “Overdraft Programs: Debit Card Holds and Transaction Processing.” This article highlighted an issue that regulators have in recent years found might give rise to potential UDAP claims.

a. Background. In 2016, the FDIC along with the CFPB, FRB, NCUA and OCC held an “Interagency Overdraft Services Consumer Compliance” webinar. The webinar discussed overdraft practices and violations observed by the agencies. Among other things, the webinar highlighted this “double dipping” issue. In addition, the CFPB and the Federal Reserve have published articles regarding overdraft practices and the use of the “available balance” method. See CFPB Supervisory Highlights (Winter 2015); FRB Consumer Compliance Supervision Bulletin (July 2018).

b. Issue. Institutions’ processing systems utilize an “available balance” method or a “ledger balance” method to assess overdraft fees.

(1) A ledger balance method calculates the account balance based only on transactions settled during the relevant period. This method typically results in the balance reflected on a consumer’s periodic statement.

(2) An available balance method calculates the account balance based on authorized (but not yet settled) transactions the financial institution is obligated to pay as well as settled transactions. The available balance is generally the amount to which the consumer has access, including the current balance, less debits, holds, and deposits not yet posted to the account.

c. UDAP violation. In the article, the FDIC stated that its examiners identified UDAP-related issues regarding certain overdraft programs that used an available balance method to determine when overdraft fees could be assessed.

(1) Specifically, FDIC examiners observed that some institutions using an available balance method assessed overdraft fees on any point-of-sale (POS) signature-based transaction that settles against a negative available balance, even though the institution previously authorized the transaction based on sufficient funds available in the account at the time of authorization. This creates the possibility of an institution assessing overdraft fees in connection with transactions that did not actually overdraw the consumer’s account.

(2) In addition to the possibility of consumers incurring unwarranted overdraft fees, the article noted that FDIC examiners determined that some institutions did not sufficiently disclose the manner in which their system assessed overdraft fees such that a reasonable consumer might not understand when an overdraft fee could be imposed.

d. Example. The FDIC's article provided the following example of how this issue might occur:

(1) Say a consumer begins the day with an account balance of \$50 and conducts a \$30 POS signature-based transaction. That transaction would authorize against a sufficient positive balance and would lower the consumer's available balance to \$20.

(2) If the consumer authorized another \$30 transaction, the second transaction would authorize against an insufficient available balance and lower the consumer's available balance to negative \$10 (-\$10).

(3) If the first transaction settled after the second transaction had posted, and if the institution's payment system assessed overdraft fees at final settlement, both transactions would be assessed overdraft fees, despite the fact that the consumer's balance was sufficient to cover the first transaction at the time the transaction was authorized.

e. Mitigating risk. In its article, the FDIC stated that its examiners observed certain examples of actions financial institutions have taken to mitigate risk related to overdraft practices and use of the available balance method. For example:

(1) By providing clear and conspicuous disclosures related to the possible imposition of an overdraft fee in connection with use of the available balance method so that consumers can understand the circumstances under which overdraft fees will be assessed and make informed decisions to avoid the assessment of those fees; and

(2) When using an available balance method, by ensuring that any transaction authorized against a positive available balance does not incur an overdraft fee, even if the transaction later settles against a negative available balance.

f. Case law. Recently, there have been a number of cases filed in California raising issues similar to those the FDIC observed with regard to use of the available balance method. Those cases are discussed below in Section VIII.B.

C. FRB Recent Overdraft Developments – FRBNY Staff Report. In June 2021, the Federal Reserve Bank of New York (FRBNY) issued a staff report entitled, "Who Pays the Price? Overdraft Fee Ceilings and the Unbanked." The study was an assessment of whether legislation requiring a cap on overdraft fees "would increase financial inclusion." Perhaps somewhat surprisingly, the paper concluded that [o]verdraft fee caps . . . hamper, rather than foster, financial inclusion." FRBNY found that this was likely because "absent caps, banks charge customers more for overdraft but bounce fewer checks and reduce required minimum deposits." As a result, the FRBNY's report concluded that the lack of overdraft fee caps actually allowed more low-income households to open and maintain bank accounts.

D. NCUA Recent Overdraft Developments.

1. NCUA announces intent to heighten scrutiny of credit union overdraft practices.

a. NCUA scrutiny. In March 2022 at CUNA's Governmental Affairs Conference, NCUA Chairman Todd Harper stated that in the wake of the CFPB's recent announcement that it will enhance its scrutiny of institutions' overdraft practices, the NCUA will follow suit. According to Harper, starting in 2023 the NCUA intends to use data on overdraft procedures and credit union member communications compiled through reviews and audits to more thoroughly review credit union overdraft practices. As part of these efforts, Harper explained that the NCUA intends to determine:

- (1) How credit unions are structuring their overdraft programs;
- (2) Whether credit unions are providing overdraft-related disclosures to consumers;
- (3) Whether there are any features of a credit union's overdraft practices that are unfair to consumers; and
- (4) Whether a credit union relies too heavily on overdraft fee income.

2. Financial exclusion. In his remarks, Harper also framed harmful overdraft practices as an issue of "financial exclusion," noting that "[p]unitive overdraft fees can harm consumers, and households hit by frequent charges often have their checking accounts closed . . . so, such fees can actually lead to financial exclusion, instead of financial inclusion."

3. NCUA proposed rule regarding overdraft policies.

a. Background. NCUA rules require federal credit unions (FCUs) offering overdraft services to have a written overdraft policy in place. Pursuant to 12 CFR Section 701.21(c)(3), that written overdraft policy must address these areas:

- (1) Cap total overdraft dollar amount. The FCU must set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit union's ability to absorb losses;
- (2) Time limit. The FCU must establish a time limit not to exceed 45 calendar days for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft (note that the "2005 Interagency Overdraft Guidance Best Practices," provides for a 60-day charge-off period (rather than 45 days) for financial institutions other than FCUs);
- (3) Limit amount of overdrafts. The FCU must limit the dollar amount of overdrafts the credit union will honor per member; and
- (4) Fee and interest rate. The FCU must establish the fee and interest rate, if any, the credit union will charge members for honoring overdrafts.

4. NCUA proposed rule. In January 2021, the NCUA issued a proposed rule that would eliminate the 45-day requirement and replace it with a more flexible requirement. 86 FR 3876.

a. More flexible repayment time period. Under the NCUA's proposal, the 45-day time limit would be replaced by a requirement that FCUs establish in their written overdraft policies "a specific time limit that is reasonable and universally applicable for a member either to deposit funds or obtain an approved loan" from the credit union to cover each overdraft.

b. Additional language. The proposed rule would also add additional text to Section 701.21(c)(3) that would provide: "Consistent with U.S. GAAP, overdraft balances should generally be charged off when considered uncollectible. In addition, overdraft services covered by Regulation E, 12 CFR part 1005, are subject to applicable requirements set forth in that regulation."

c. Supplementary information. In the proposed rule's supplementary information, the NCUA noted that the agency believed "that this change [to Section 701.21(c)(3) regarding the 45-day time period between overdraft and charge off] would improve a requirement that is not only overly prescriptive, but could be especially detrimental as FCUs take steps to provide their members the flexibility needed to cope with the impacts of COVID-19."

5. Status of proposal. It does not appear the NCUA has finalized the proposed rule. It appears the agency received some negative comments regarding its proposed change to Section 701.21(c)(3). With the COVID-19 pandemic appearing to wind down, the future of this proposal remains uncertain.

VII. FINANCIAL INSTITUTIONS MODIFY OVERDRAFT PRACTICES

A. Introduction. In the past year, a number of large institutions have made significant revisions to their overdraft and NSF fees and policies.

B. Timeline. The following is a timeline of some of the overdraft-related changes recently implemented by certain large financial institutions:

1. PNC Bank. In April 2021, PNC Bank announced it was eliminating all NSF fees, capping overdraft fees to one \$36 fee per day, implementing a 24-hour grace period during which customers could bring a negative account balance positive before an overdraft fee was charged, and implementing customized low-balance alerts on its customer banking app. In February 2022, the Eleventh Circuit Court of Appeals approved a \$7.5 million settlement between PNC Bank and a class of plaintiffs who had brought UDAP claims against a bank PNC acquired resulting from that bank's use of a "high-to-low" transaction processing order. *Dasher v. RBC Bank (USA)*, 2022 U.S. App. LEXIS 4277 (11th Cir. Feb. 16, 2022).

2. Ally Bank. In June 2021, Ally Financial announced it was eliminating all overdraft and NSF fees.

3. JP Morgan Chase. In August 2021, JP Morgan Chase (JPMC) announced it was eliminating NSF fees and increasing its *de minimis* overdraft amount (the amount by which an account may be overdrawn without an overdraft fee being charged) from \$5 to \$50. In December 2021, JPMC announced further changes to its overdraft practices when it pledged

to add a 24-hour grace period for customers to cure an overdrawn account balance and avoid the imposition of an overdraft fee.

4. Santander Bank. In November 2021, Santander Bank announced it was eliminating linked account overdraft transfer fees, increasing its *de minimis* overdraft amount to \$100, and lowering its daily overdraft fee cap from six to three overdrafts. In recent years, the CFPB has cited Santander for UDAAP and Regulation E violations stemming from its Regulation E overdraft opt-in practices. For more information, refer to Section X. below.

5. Capital One. In December 2021, Capital One announced it will completely eliminate all consumer overdraft and NSF fees.

6. Bank of America and Wells Fargo. In January 2022, Bank of America (BofA) and Wells Fargo Bank (WFB) separately announced they were eliminating NSF and overdraft transfer fees, and revising other overdraft practices.

a. BofA changes. BofA announced that starting in February 2022, it will eliminate all NSF fees and the ability for customers to overdraw their account at an ATM. BofA also announced that in May 2022, it will reduce its consumer overdraft fee from \$35 to \$10 and eliminate linked account overdraft transfer fees.

b. WFB changes. WFB announced that by March 30, 2022 it will eliminate NSF and linked account overdraft transfer fees.

(1) Although it appears that its consumer overdraft fee will remain at \$35 per overdraft, WFB is also implementing a new 24-hour grace period.

(2) Under this new grace period, the consumer has 24 hours to cure the overdrawn account balance and avoid the imposition of an overdraft fee.

7. Citigroup. On February 24, 2022, Citi announced that it intends to completely eliminate all overdraft and NSF fees by the summer of 2022.

8. Huntington Bank. On March 9, 2022, Huntington Bank announced that effective July 2022 its overdraft fee will decrease from \$36 to \$15.

VIII. RECENT OVERDRAFT AND NSF LITIGATION

A. NSF Fee Litigation. Recently, a series of cases have raised the issue of whether a financial institution is permitted to impose an additional NSF fee when a returned ACH transaction for which the institution charged an NSF fee is resubmitted by the merchant for processing but is once again returned unpaid by the institution due to insufficient funds.

1. Lambert v. Navy Federal Credit Union. In October 2020, the Eastern District of Virginia approved a \$16 million settlement agreement between Navy Federal Credit Union (NFCU) and a class of plaintiffs who had alleged NFCU had committed UDAP violations of North Carolina state law by improperly charging the plaintiffs multiple NSF fees for single ACH transactions that were rejected for insufficient funds, and then later resubmitted by the merchant but once again returned by NFCU for insufficient funds. *Lambert v. Navy Federal Credit Union*, Case No. 1:19-cv-103 (E.D. Va. Oct. 21, 2020).

a. Multiple NSF fees. According to the plaintiffs' allegations, NFCU would assess multiple \$29 NSF fees for a returned ACH transaction; it would assess a \$29 NSF fee for the first time the credit union returned the transaction due to insufficient funds, and then subsequently assess an NSF fee for each time the merchant re-presented the same ACH transaction for payment and that NFCU would return the transaction for insufficient funds. See *Lambert v. Navy Fed. Credit Union*, 2019 U.S. Dist. LEXIS 138592 (E.D. Va. Aug. 14, 2019); appeal dismissed by *Lambert v. Navy Fed. Credit Union*, 2021 U.S. App. LEXIS 15154 (4th Cir., May 20, 2021).

b. Breach of deposit agreement. The plaintiffs' complaint stated that the NSF fees could be assessed up to three times when a merchant repeatedly presented the same failed transaction for payment. The plaintiffs claimed that because of this practice, NFCU had breached its deposit agreement, which the plaintiffs claimed only permitted NFCU to charge the \$29 NSF fee once per returned item, irrespective of the number of times a merchant re-presented the same rejected item for payment. NFCU had denied that its practice of assessing multiple NSF fees on single re-presented ACH transactions was wrongful. As a part of the \$16 million settlement, NFCU did not have to admit liability or agree with the plaintiffs that its practice was inconsistent with its deposit agreement.

2. Perks v. TD Bank, N.A. Similar facts were presented in the recent New York case, *Perks v. TD Bank, N.A.*, 444 F. Supp. 3d 635 (S.D.N.Y. Mar. 17, 2020). The Southern District of New York denied TD Bank's motion to dismiss the plaintiff class's claim, finding that there was a genuine issue of fact as to whether TD Bank's deposit agreement permitted it to charge multiple NSF fees on single ACH transactions returned for insufficient funds that were later re-presented by the merchant and once again returned for insufficient funds.

3. Noe v. City Nat'l Bank of W. Va. In January 2022, the Fourth Circuit affirmed the lower court's decision to grant City National Bank of West Virginia's motion to compel proceedings to arbitration. Similar to the NFCU and TD Bank cases, Noe is a recent class action suit brought against a bank for assessing multiple NSF fees on single ACH transactions. *Noe v. City Nat'l Bank of W. Va.*, 2022 U.S. App. LEXIS 1853 (4th Cir. Jan. 12, 2022). As in *Perks*, the district court denied the bank's motion to dismiss the plaintiffs' claims, finding that there was a genuine issue of fact as to whether the bank's deposit agreement permitted it to charge multiple NSF fees.

4. Recent California case. In *Magill v. Wells Fargo Bank, N.A.*, 2021 U.S. Dist. LEXIS 248891 (N.D. Cal. Jun. 25, 2021), a California federal district court granted Wells Fargo's motion to compel arbitration but denied its motion to dismiss the plaintiff's claims in an action where the plaintiff brought breach of contract and UCL claims against Wells Fargo for charging multiple NSF fees on a single transaction.

5. Other recent California and Ninth Circuit cases. Since 2020, there appears to have been several cases filed in California and more generally the Ninth Circuit in which plaintiffs have made similar claims regarding NSF fees. See, e.g., *Varga v. Am. Airlines Fed. Credit Union*, 2020 U.S. Dist. LEXIS 252156 (C.D. Cal. Dec. 1, 2020); *Pierce v. Safe Credit Union*, 2020 U.S. Dist. LEXIS 127519 (E.D. Cal. Jul. 17, 2020); *Hartnett v. Wash. Fed. Bank*, 2021 U.S. Dist. LEXIS 250672 (W.D. Wash. Dec. 7, 2021); *Hayes v. Umpqua Bank*, 2020 U.S. Dist. LEXIS 250221 (D. Ore. Aug. 4, 2020).

6. Lessons to be learned. In light of these recent cases, it appears charging multiple NSF fees on single ACH transactions that are resubmitted and once again returned is a hot-button issue and may create risk of class action litigation. Institutions are encouraged

to review their deposit agreements to ensure that their actual practices in this regard are consistent with their deposit agreements' terms. Further, institutions are encouraged to consider their policies with regard to redeposited checks and resubmitted ACH debit transactions, and weigh the risks and benefits posed by these policies. For more information, institutions are encouraged to contact legal counsel.

B. Use of available balance. A series of recent California cases have involved UDAP claims regarding institutions' overdraft payment practices in connection with the use of the available balance method, as discussed in the June 2019 FDIC Consumer Compliance Supervisory Highlights article detailed above in Section VI.B.2. More specifically, some plaintiffs have filed UDAP claims against institutions that assessed overdraft fees on point-of-sale transactions settling against a negative available balance, even though the institution previously authorized the transaction based on sufficient funds available in the account at the time of authorization. See *e.g.*, *Wilson v. Wells Fargo & Co.*, 2021 U.S. Dist. LEXIS 89039 (S.D. Cal. May 8, 2021); *Varga v. Am. Airlines Fed. Credit Union*, 2020 U.S. Dist. LEXIS 252156 (C.D. Cal. Dec. 1, 2020).

IX. PROPOSED LEGISLATION

A. Senate Bill 2677.

1. Background. In August 2021, US Senators Booker and Warren co-sponsored Senate Bill (SB) 2677, "Stop Overdraft Profiteering Act of 2021." No action has been taken on the bill since it was referred to the US Senate's Committee on Banking, Housing, and Urban Affairs on August 9, 2021. As such, it is likely this bill is dead in the water and will not be passed into law. However, this proposal is worth pointing out because it shows what even stricter, more consumer-protective overdraft legislation might look like. It is worth noting that the bill's co-sponsor Senator Warren was one of the original architects of the CFPB.

2. Overdraft coverage requirements. If it were enacted (which again appears not likely), SB 2677 would amend the Truth in Lending Act and impose certain requirements regarding consumer overdraft and NSF fees assessed under an "overdraft coverage program." Among other things, the bill would do the following:

- a. Prohibit institutions from charging consumers overdraft fees on one-time debit card and ATM transactions;
- b. Require consumers to opt in before an institution could charge an overdraft fee on checks and recurring payments;
- c. Cap a consumer's overdraft fees at one per month and six per year;
- d. Prohibit institutions from charging NSF fees on debit card and ATM transactions;
- e. Require NSF fees to be "reasonable and proportional to the cost to the financial institution directly associated with returning the transaction";
- f. Prohibit institutions from reporting negative information regarding consumer use of overdraft coverage to any consumer reporting agency when the overdraft amounts and coverage fees are paid under the terms of an overdraft coverage program; and

g. Implement a transaction processing order that “minimizes overdraft coverage fees and nonsufficient fund fees.”

h. The bill appears to broadly define an “overdraft coverage program” (as “a service under which a depository institution assesses an overdraft coverage fee for overdraft coverage”) and would appear to apply to both automated and *ad hoc* overdraft payments.

3. “Abusive” practices. Interestingly, SB 2677’s preamble cites the following activities as “abusive” overdraft practices:

a. High overdraft fees. Collecting a “high flat fee, including for small dollar transactions, each time the institution covers an overdraft, impos[ing] multiple overdraft coverage fees within a single day, and charg[ing] additional fees for each day during which the account remains overdrawn”; and

b. Steering. Aggressively encouraging consumers to consent to an institution’s most expensive overdraft option.

B. Congressional Research Service Overdraft Report.

1. Background. The Congressional Research Service (CRS), a federal legislative branch agency located within the Library of Congress, serves as shared staff to congressional committees and members of Congress. According to the CRS website, CRS experts assist at every stage of the legislative process, from the early considerations that precede bill drafting, through committee hearings and floor debate, to the oversight of enacted laws and various agency activities.

2. CRS Overdraft Report. In March 2020, the CRS issued a report entitled “Overdraft: Payment Service or Small-Dollar Credit?”. According to this report, how policymakers approach overdraft services may depend on whether they view overdrafts as a service or as a form of credit. The report suggests that Congress may act to further protect consumers from the financial impact of overdraft practices in a number of ways. None of the following proposed ideas are law, but it is worth mentioning that the report ponders each of the following as a potential legislative solution to what detractors of overdraft services see as practices that can negatively financially impact consumers.

a. Reasonable and proportional costs. The report states that legislation limiting overdraft fees to a price that is “reasonable and proportional to the cost of providing the overdraft” might benefit consumers.

b. Fee and interest rate provisions. The report states that because overdraft programs generally act as a form of credit, overdraft fee structures could be legislated consistent with fee and interest rate provisions in lending laws such as the Military Lending Act, which caps certain loans’ applicable interest and fees.

c. Overdraft caps. The report states that legislation limiting the number of overdrafts for which an institution can charge a consumer (this is a best practice mentioned in the 2005 Joint Overdraft Guidance’s best practices and already in place at many institutions offering overdraft services) may benefit consumers.

d. Enhanced disclosures. The CRS report states that legislation requiring enhanced overdraft-related disclosures to customers by compelling institutions to disclose coverage fees and provide notification of an account's overdraft status could aid consumers in comparing rates and account features as they select a financial institution.

X. COMMON ISSUES

A. Introduction. Regulators are still scrutinizing institution's practices for certain common issues that frequently arise with regard to the provision of overdraft services. This Section X. provides an overview of the common laws, regulations and violative practices that regulators frequently look to for potential issues with institutions' overdraft practices.

B. UDAP/UDAAP/UCL. In recent years, regulators have placed additional emphasis on enforcing laws regarding unfair or deceptive acts or practices (UDAP), and unfair, deceptive or abusive acts or practices (UDAAP). This Section X.B. focuses on the federal UDAP and UDAAP statutes, Section 5 of the Federal Trade Commission Act (FTC Act), Section 1031 of the Consumer Financial Protection Act (CFPA), and California Business & Professions Code Section 17200 *et seq.* (otherwise known as the "Unfair Competition Law" or "UCL" or "California UDAP" statute, which provides a private right of action for aggrieved parties (there is no private right of action under either the FTC ACT or the CFPA). Additionally, regulatory enforcement of UDAP/UDAAP/UCL statutes can result in severe civil money penalties, restitution orders and reputational risk to financial institutions.

1. UDAP (FTCA Section 5). Section 5 of the FTC ACT makes it unlawful for any person to engage in UDAPs. 15 USC 45. With respect to UDAP, the FTC has jurisdiction over non-depository financial institutions, such as mortgage lenders, brokers, servicers and lead generators. For insured depository institutions and their subsidiaries, Section 8 of the Federal Deposit Insurance Act authorizes the appropriate federal banking agency to take action to correct violations of law, rule or regulation, including UDAPs under Section 5. The FRB and the FDIC issued a statement in March 2004 setting forth the standards that they will consider in enforcing Section 5. Refer to FIL-26-2004. The statement provides a detailed explanation of what it means for an act or practice to be "unfair" or "deceptive." Since "abusive" is a newer, separate standard created under the Dodd-Frank Reform Act, it is separately defined. Refer to Paragraph 2. below. Section 5 applies to both consumer and commercial products and services.

a. Unfair. Under FTC ACT Section 5, an act or practice is unfair where it:

- (1) Causes or is likely to cause substantial injury to consumers;
- (2) Cannot be reasonably avoided by consumers; and
- (3) Is not outweighed by countervailing benefits to consumers or to competition. According to the FDIC, public policy may also be considered in the analysis of whether a particular act or practice is unfair.

b. Deceptive. A three-part test is used to determine whether a representation, omission or practice is deceptive:

- (1) The representation, omission or practice must mislead or be likely to mislead the consumer;

(2) The consumer's interpretation of the representation, omission or practice must be reasonable under the circumstances; and

(3) The misleading representation, omission or practice must be material.

c. **Four Ps Test.** The UDAAP Section of the CFPB Examination Manual incorporates the "Four Ps Test" developed by the FTC, which can assist in evaluating whether a representation, omission, act or practice may be deceptive. Under the "Four P's" test, relevant considerations include:

(1) Whether the statement is **Prominent** enough for the consumer to notice;

(2) Whether the information is **Presented** in an easy-to-understand format that does not contradict other information in the package and at a time when the consumer's attention is not distracted elsewhere;

(3) Whether the **Placement** of the information is located where consumers can be expected to look or hear; and

(4) Whether the information is in close **Proximity** to the claim it qualifies.

2. UDAAP (CFPA Section 1031). Under CFPB Section 1031, which was part of the Dodd-Frank Reform Act, it is unlawful for any provider of consumer financial products or services to engage in any unfair, deceptive, or abusive act or practice. Section 1031 provides the CFPB with exclusive rulemaking authority over UDAAP. The CFPB also has exclusive UDAAP enforcement authority with regard to institutions with more than \$10 billion in assets. The prudential regulators also have UDAAP enforcement authority with regard to the institutions they supervise. Unlike FTC ACT Section 5, UDAAP applies only to consumer (non-commercial) financial products and services.

a. Abusive. Under Section 1031, an act or practice may be declared abusive if it:

(1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) Takes unreasonable advantage of:

(a) A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(b) The inability of the consumer to protect his or her interests in selecting or using the financial product or service; or

(c) The reasonable reliance by the consumer on a covered person (such as the financial institution in this case) to act in the interests of the consumer.

3. Unfair Competition Law (California UDAP). The California Unfair Competition Law (UCL), California Business & Professions Code Section 17200 *et seq.*, is the California state law that prohibits UDAPs. Functionally, it is the state-law equivalent of Section 5 of the FTC ACT and the CFPA, discussed above in Paragraphs 1. and 2., respectively.

a. “Unfair competition” defined. The UCL prohibits “unfair competition.” Section 17200 defines “unfair competition” as encompassing any of the following categories of activities:

- (1) Unlawful, unfair or fraudulent business acts or practices;
- (2) Unfair, deceptive, untrue or misleading advertising; or
- (3) Violations of the California False Advertising Law, California Business & Professions Code Section 17500 *et seq.*

b. Private right of action. Unlike its federal statutory equivalents, the California UCL provides for a private right of action. This private right of action applies to both consumer and business plaintiffs. Sections 17201; 17206. To assert a UCL claim, a plaintiff must allege that:

- (1) The defendant committed an unfair, unlawful, or fraudulent business act or practice, or put forth a deceptive, false, or misleading advertisement; and
- (2) The plaintiff suffered economic injury because of the defendant’s act. *Kwikset Corp. v. Superior Court*, 246 P.3d 877 (Cal. 2011).

A plaintiff asserting a UCL claim alleging fraud or false, deceptive, or misleading advertising must also prove that the plaintiff relied on the challenged act or practice. *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793 (9th Cir. 2012). In particular, the plaintiff must demonstrate that the alleged unlawful conduct was “an immediate cause of [the plaintiff’s] injury-producing conduct.” *Id.*

A successful private plaintiff asserting a UCL claim can recover its damages, restitution and injunctive relief.

c. Public enforcement. In addition to providing a private right of action, the UCL statute also provides that the California attorney general, any district attorney, county counsel, city attorney or city prosecutor may bring a civil action for alleged UCL violations. The statute provides for civil money penalties of up to \$2,500 per violation. Section 17206.

d. Statute of limitations. Under the UCL, plaintiffs have four years from the date a UCL violation occurred to bring an action. Section 17208.

e. Enforcement by the California Department of Financial Protection and Innovation. In 2020, the California legislature passed AB 1864, entitled “California Consumer Financial Protection Law” (CCFPL), which became effective on January 1, 2021.

(1) UUDAAP enforcement authority. Among other things, the CCFPL expands the scope of the California Department of Financial Protection and Innovation's (DFPI) powers, including regulatory supervision and enforcement with regard to unlawful, unfair, deceptive, or abusive acts or practices (UUDAAP). The new UUDAAP provisions apply to entities that previously were not formally licensed and supervised in California, such as financial technology companies, commonly referred to as fintechs. See California Financial Code Section 90009.

Note that Financial Code Section 90002(b) provides, in part, that the CCFPL does not apply to state-chartered banks, savings associations, and credit unions. Note, further, that Section 90002(c) provides that the CCFPL does not apply to a bank, bank holding company, trust company, savings and loan association, savings and loan holding company, credit union, or an organization subject to oversight of the Farm Credit Administration, when acting under the authority of a license, certificate, or charter under federal law or the laws of another state. Thus, the CCFPL also does not apply to national banks, federal savings associations and federal credit unions.

For purposes of its UUDAAP enforcement authority, the CCFPL requires the DFPI to interpret "unfair" and "deceptive" consistent with UCL Section 17200 and its case law thereunder. Section 90009(c)(1).

(2) Enforcement of UDAAPs under CFPA. Further, AB 1864 reaffirmed the DFPI's power to sue a state-chartered depository institution to enforce the UDAAP prohibition under the CFPA and the CFPB's implementing regulations. Financial Code Section 326(b). The Reform Act has always allowed a state regulator to bring a civil action or other appropriate proceeding to enforce the CFPA and the CFPB's implementing regulations against state-chartered depository institutions. 15 USC 5552(a)(2)).

C. Regulation E. Regulation E prohibits an institution from charging a fee for paying an ATM or one-time debit card transaction that overdraws a consumer's account unless the consumer has consented (that is, opted in) to the overdraft service. 12 CFR Section 1005.17(b)(1). As defined under the rule, "overdraft service" does not include transfers made from lines of credit, other deposit accounts with the institution or, effective April 1, 2019, prepaid cards or accounts with credit features under the Prepaid Account Final Rule. For information regarding the Prepaid Account Final Rule, refer to Part One, Section XIII. of BCG Standard Procedures Manual #5, *Electronic Banking*. An institution may assess a fee for paying an ATM or one-time debit card transaction pursuant to an overdraft service only if it has met the following requirements:

1. Written notice. The institution provides the consumer with written (or if the consumer agrees, electronic) notice, segregated from all other information, describing the overdraft service. The notice must be substantially similar to Regulation E Model Form A-9;
2. Reasonable opportunity. The institution provides the consumer with a reasonable opportunity to affirmatively consent to the overdraft service on ATM and one-time debit card transactions;
3. Affirmative consent in writing. The institution obtains the consumer's affirmative consent (that is, the consumer must opt in in writing) for overdraft services on ATM and one-time debit card transactions; and

4. Confirmation of consent. The institution mails or delivers (or if a consumer agrees, sends electronic) confirmation of the consumer's consent, including a statement informing the consumer of the right to revoke their consent.

Note that the opt-in rules under Regulation E Section 1005.17(b) do not apply to checks or recurring debits. That is, an institution is not required to obtain a consumer's affirmative consent under Section 1005.17(b) before the institution charges a fee for paying a check or recurring debit that overdraws a consumer's account.

5. CFPB request for comment on Regulation E overdraft rule. In May 2019, the CFPB announced it was conducting a review of the Regulation E overdraft rule. 84 FR 21729. The agency's stated goal was to minimize any significant economic impact imposed by Section 1005.17. The CFPB sought comments to assist it in determining whether the rule should be continued without change, amended or rescinded. It does not appear the CFPB has taken any further action with regard to its review of Regulation E.

6. FDIC Regional Newsletter – Opt-in and UDAP Considerations. In the September 2018 issue of the FDIC San Francisco region's Quarterly Newsletter, the FDIC addressed scenarios it had encountered back in 2018 involving overdraft programs and the interplay with the Regulation E opt-in requirements. The article emphasizes that the observed practices pose potential consumer harm in violation of the FTC's UDAP statute. It also includes information on effective practices to help prevent violations and consumer harm and considerations regarding appropriate corrective action when these situations are identified.

a. Problematic opt-in processes. Some financial institutions have prescribed automated ODP qualification criteria, such as minimum time frames for having a banking relationship with the institution, and are preemptively opting the consumer in at account opening, to take effect upon satisfaction of the criteria. While this practice is not violative of the opt-in rules on its own, what the FDIC examiners are seeing (at least in 2018) is that the affirmative opt-in status is activated in the deposit processing platform at the time of account opening, before automated ODP coverage kicks in. In these cases, one-time debit card or ATM transactions that would overdraw the account are declined because there is no overdraft program in place. However, when required-pay or force-pay transactions are paid, these account holders are assessed overdraft fees without receiving access to the automated ODP program.

b. Deactivating the opt-in election. When account holders are terminated from an overdraft program for excessive use or other reasons, they are no longer eligible for the overdraft program. In such cases, the affirmative opt-in selection must be deactivated. However, the FDIC examiners identified instances where the opt-in selection remained active in the deposit account processing platform even though the account holder was no longer enrolled. Issues arise, again, where force-pay transactions are paid, for which an overdraft fee is charged that otherwise would not have been. Examiners were seeing similar issues where a financial institution extended a loan to an account holder to satisfy outstanding negative balances whereby the loan agreement states that the account holder no longer has access to the overdraft program.

c. Effective practices to help ensure compliance. The FDIC stated that institutions can take certain actions in order to avoid Regulation E violations and consumer harm, including implementing strong internal controls and periodic monitoring that ensures the opt-in indicator in the deposit account processing platform accurately reflects an active or inactive status. As to the preemptive opt-in practice

specifically, institutions may also consider having customers opt in once they actually qualify for the automated overdraft program.

D. Common UDAP/UDAAP/UCL and Regulation E Violations. In addition to problems with the Regulation E opt-in process discussed above, there are certain overdraft-related practices that regulators (and plaintiffs' attorneys) commonly cite in connection with alleged UDAP/UDAAP/UCL violations.

1. Disclosure issues. A common UDAP/UDAAP/UCL issue arises when an institution's actual back-end overdraft practices do not match its disclosures.

a. Example # 1. In the series of NSF fee cases discussed in Section VIII.A. above, plaintiffs have alleged certain institutions' actual practices (charging multiple NSF fees when items are resubmitted and returned unpaid multiple times) constitute an unfair or deceptive practice because the institution's practices allegedly do not match its account disclosures.

b. Example # 2. The available balance cases discussed in Section VIII.B. also exemplify situations where plaintiffs have alleged unfair or deceptive practices where an institution's overdraft disclosures allegedly did not sync up to its actual practices.

c. Example # 3. In its August 2020 enforcement action against TD Bank, N.A., the CFPB alleged that TD Bank made claims to its customers that its overdraft service was "free," despite the fact that the bank charged an overdraft fee, and automatically enrolled some consumers without offering other options.

2. Steering.

a. Introduction. Another common UDAP/UDAAP/UCL finding involves allegations that an institution has steered (or highly pressured) a consumer into accepting overdraft or Regulation E overdraft coverage. According to FDIC FIL-81-2010, entitled "FDIC Overdraft Payment Supervisory Guidance," "[a]ny steering activity with respect to credit products raises potential legal issues, including . . . concerns about [UDAPs], among others, and will be closely scrutinized."

b. Example. In the CFPB's 2017 enforcement action against TCF Bank, the CFPB alleged that TCF Bank had committed UDAAP and Regulation E violations when, according to the CFPB, bank employees used emotional manipulation to persuade hesitant consumers to opt in to Regulation E overdraft coverage. The CFPB's complaint stated that TCF Bank systematically instructed its staff not to "over explain" the terms and conditions of its opt-in program. Rather, TCF instructed its personnel that if new or existing consumers challenged or questioned opting in, the staff should urge the consumer to opt in by suggesting a hypothetical situation, such as a life-threatening emergency, where the consumer would urgently need access to money. Such steering practices are highly discouraged.

3. Activities designed to maximize overdraft fee revenue. Any overdraft-related practice that a regulator determines was designed to maximize overdraft fee revenue has the potential to be seen as a UDAP/UDAAP/UCL or Regulation E violation.

a. Example # 1: Staff incentivization. Many recent enforcement actions involve institutions incentivizing their employees to obtain high Regulation E overdraft opt-in numbers. Regulatory guidance on overdraft practices specifically discourages financial institutions from giving incentives to their employees and agents in enrolling consumers in overdraft services.

(1) In 2016, the CFPB alleged that Santander Bank had engaged in deceptive practices by rewarding its telemarketer-employees who were able to enroll a high number of consumers in the bank's overdraft service. Furthermore, when telemarketers used fraudulent tactics in order to raise the number of consumers they enrolled in the overdraft service, the CFPB alleged that Santander failed to stop the deceptive practices.

(2) In its 2017 enforcement action against TCF Bank, the CFPB alleged that TCF committed UDAAP violations by incentivizing high overdraft opt-in rates. For example, the CFPB alleged that in order to boost opt-in rates, TCF incentivized its employees by paying bonuses of up to \$7,000 to branch personnel for obtaining a high number of opt-ins on new accounts. Additionally, the CFPB found that certain TCF regional managers set sales goals for their branch staff, requiring personnel to obtain an opt-in for at least 80 percent of new account holders. TCF's official policy was that staff could not be terminated for low opt-in rates; however, some employees still feared that they could lose their job if they did not meet the stated sales goals. For example, when a new customer declined to opt in, a regional manager would often contact the responsible branch manager to question why the new customer had not opted in. A former branch employee testified that she was placed on "probation" after only obtaining opt-ins for 50 percent of new customers. Senior TCF executives were so pleased with the high opt-in rates that TCF threw parties to celebrate certain milestones, such as when 500,000 customers had opted in. TCF's sales tactics and related revenue were so successful, TCF's CEO even named his boat "Overdraft."

b. Example # 2: High-to-low transaction processing. Separately, banking regulators and case law have criticized transaction processing order policies that reorder transactions from high-to-low, a practice that the FDIC has said was designed to maximize overdraft fee revenue.

(1) In FIL-81-2010, the FDIC stated that institutions should process transactions in a neutral order that avoids manipulating or structuring processing order to maximize customer overdraft and related fees. In a related FAQ, the FDIC stated that high-to-low transaction processing is not considered neutral "because this approach will tend to increase the number of overdraft fees."

(2) Over the past decade, a series of cases have focused on UDAP-related claims against institutions that employ high-to-low posting. See e.g., *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 67298, cert. denied, 136 S. Ct. 1512 (2016); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560 (N.D. Ill. 2011); *Webb v. Republic Bank & Trust Co.*, 2013 U.S. Dist. LEXIS 140135 (W.D. Ky. Sept. 27, 2013); *Levin v. HSBC Bank USA, N.A.*, 2013 U.S. Dist. LEXIS 102221 (E.D.N.Y. July 22, 2013).

XI. WHAT'S NEXT?

A. Introduction. With so many recent overdraft-related developments, institutions are asking, from a compliance perspective, what the future of overdraft services looks like. The following sets forth a few likely possibilities.

B. Enhanced Regulatory Scrutiny. The CFPB, OCC, and NCUA have each recently expressed that institutions offering overdraft services, and particularly those institutions that are “heavily reliant” on overdraft fee income (commonly understood to mean the institution is making higher than average overdraft or NSF fee revenue or is enjoying higher-than-typical Regulation E opt-in rates) will be subjected to enhanced scrutiny. As such, institutions can likely expect heightened scrutiny by regulators, examiners and perhaps even customers with regard to overdraft practices, especially those institutions that generate high overdraft/NSF fee revenue.

C. Rulemaking or Guidance; Legislation. CFPB Director Chopra stated in December 2020 that the CFPB is considering publishing additional policy guidance outlining unlawful overdraft practices. The NCUA has made similar statements regarding its oversight of federal credit unions. Further, depending on how the next election cycle goes, it is possible that more overdraft legislation (such as SB 2677) might be proposed or even potentially become law.

D. More Institutions Implementing Similar Changes. With so many large financial institutions recently implementing major changes to their overdraft policies, it is likely other institutions (including smaller institutions) will follow suit.

XII. ACTION PLAN

A. Review Your Current Overdraft/NSF Practices. In light of the CFPB and other regulators’ statements that enhanced scrutiny of institutions’ overdraft practices is on the horizon, it is recommended that financial institutions review their current overdraft and NSF fee structures, policies, and practices to ensure that each are consistent with current (and evolving) regulatory expectations. This may involve evaluating an institution's third-party relationships as well.

B. Ensure Overdraft-Related Disclosures Match Actual Practices. With the recent rise in regulatory actions involving claims that institutions’ overdraft practices do not match their consumer-facing disclosures, financial institutions should ensure that their overdraft disclosures match their actual practices and that their fee structures and other important terms are clearly and accurately disclosed to customers.

C. Review Overdraft/NSF Fees. Again, to avoid UDAP/UDAAP attention, as well as other claims (such as claims of unconscionability), financial institutions are encouraged to revisit their overdraft fee structures to ensure they are consistent with current regulatory expectations. Additionally, financial institutions should stay abreast of this evolving area of consumer protection.

D. Consider Impact of Recent Changes by Other Institutions. Institutions are encouraged to consider how other banks’ recent overdraft program changes might impact the institution’s own overdraft practices. It is possible that today’s revolutionary overdraft program changes will become tomorrow’s standards of commercial reasonableness.



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EXHIBIT A

CFPB OVERDRAFT CHART

Overdraft/NSF metrics for Top 20 banks based on overdraft/NSF revenue reported

Overdraft (OD) and NSF (non-sufficient fund) fee revenue is based on reported values from January 2021 through September 30, 2021.

Blue shading reflects recent changes reported since approximately September 1, 2021 that are either already in effect or are planned to go into effect in the near term. Check with the bank or review your account agreement to confirm the details prior to opening an account. Some banks below also offer accounts with no overdraft or NSF fees, or with other terms that differ from the account terms listed below.

Bank	Overdraft/NSF Revenue for 9 months ended September 2021	No overdraft fees on any transactions ¹	No NSF fees	No overdraft fees on debit card purchases ²	No overdraft fees on ATM withdrawals	No extended/sustained overdraft fees	Size of overdraft and/or NSF fee ³	Daily limit on number of overdraft/NSF fees ⁴	Cushion before overdraft fee is charged ⁵	Extended grace period
Wells Fargo Bank, N.A.	\$1 billion	✓	✓			✓	\$35	3 (\$105)	\$5	next day
JP Morgan Chase Bank, N.A.	\$924 million	✓	✓	✓	✓	✓	\$34	3 (\$102)	\$50	next day
Bank of America, N.A.	\$823 million	✓	✓	✓	✓	✓	\$10	4 (\$40)	\$1	--
TD Bank, N.A.	\$347 million					✓	\$35	3 (\$105)	\$50	next day

¹ Overdraft practices reflected in this chart exclude those associated with formal overdraft lines of credit or links to credit cards or savings accounts.

² This column describes non-recurring debit card transactions, like point-of-sale transactions. Recurring debit card transactions may still result in overdraft fees if the institution otherwise charges overdraft fees.

³ If a bank's fee size changes based on the number of overdraft fees charged, the highest overdraft fee is reflected here.

⁴ Unless otherwise noted, this limit applies to the total number of overdraft and NSF fees combined. Huntington and Santander appear to apply this limit to overdraft and NSF fees separately. From public information, it is not clear whether Fifth Third applies this limit to overdraft and NSF fees combined, or only to overdraft fees.

⁵ Banks reflected here vary as to whether they apply de minimis buffers of up to \$5 based on the size of the transaction, the size of the negative balance, or both. All cushions of \$50 or more reflected here apply to the size of the negative balance.

Bank	Overdraft/NSF Revenue for 9 months ended September 2021	No overdraft fees on any transactions ¹	No NSF fees	No overdraft fees on debit card purchases ²	No overdraft fees on ATM withdrawals	No extended/sustained overdraft fees	Size of overdraft and/or NSF fee ³	Daily limit on number of overdraft/NSF fees ⁴	Cushion before overdraft fee is charged ⁵	Extended grace period
Truist Bank	\$301 million	✓	✓			✓	\$36	6 (\$216)	\$5	--
U.S. Bank N.A.	\$242 million	✓					\$36	4 (\$144)	\$50	next day
Regions Bank	\$221 million	✓				✓	\$36	3 (\$108)	--	--
PNC Bank, N.A. ⁶	\$210 million	✓	✓			✓	\$35	1 (\$35)	\$5	next day
USAA Federal Savings Bank	\$139 million	✓		✓	✓	✓	\$29	3 (\$87)	--	n/a
Huntington National Bank	\$119 million						\$36	4 each (\$288)	\$50	next day
Citizens Bank, N.A.	\$115 million						\$37	5 (\$185)	\$5	next day
Woodforest National Bank	\$107 million					✓	\$32	3 (\$96)	\$1	--
KeyBank N.A.	\$80 million						\$36.50	--	--	--
Fifth Third Bank, N.A.	\$78 million						\$37	3 (\$111 in overdraft fees)	\$5	next day

⁶ Includes overdraft/NSF revenue of BBVA USA, which PNC acquired effective June 1, 2021.

Bank	Overdraft/NSF Revenue for 9 months ended September 2021	No overdraft fees on any transactions ¹	No NSF fees	No overdraft fees on debit card purchases ²	No overdraft fees on ATM withdrawals	No extended/sustained overdraft fees	Size of overdraft and/or NSF fee ³	Daily limit on number of overdraft/NSF fees ⁴	Cushion before overdraft fee is charged ⁵	Extended grace period
Citibank, N.A.	\$70 million	✓	✓	✓	✓	✓	\$34	4 (\$136)	--	--
Manufacturers and Traders Trust Company	\$62 million		✓			✓	\$15	1 (\$15)	\$5	--
Capital One, N.A.	\$58 million	✓	✓	✓	✓	✓	n/a	n/a	see note ⁷	n/a
Avnet Bank	\$52 million					✓	\$17	8 (\$136)	--	--
Santander Bank, N.A.	\$38 million						\$35	3 each (\$210)	\$100	--
Bank of The West	\$33 million						\$35	5 (\$175)	\$5	--

Note: The chart reflects a snapshot of the CFPB's review of press releases, publicly available account disclosures, and news reports. We will continue to assess bank practices and update the chart periodically. Information on this chart has not been independently verified by the CFPB, and the inclusion of an institution on this list does not reflect a CFPB endorsement, or lack thereof, of the institution by the CFPB.

⁷ Capital One announced "No-Fee Overdraft" which provides overdraft coverage of an unspecified amount.