

## Overdrafts and Lawsuits: What you need to know

### OVERVIEW

Overdraft protection has been a widely talked about service in Washington D.C. and the court room. Critics claim this program is a means to earning income and/or exploiting low-income account holders. While the topic has temporarily quieted in D.C., lawsuits, demand letters continue to surface in our industry. As a result, the MCUL wants to make sure that credit unions are utilizing best practices to minimize risk.

Routinely, we have heard about lawsuits against credit unions or banks that center around overdraft practices. Here in Michigan, lawsuits have been filed against credit unions on overdraft protection with a chance of more to come. In 2017, a Birmingham-based law firm was actively seeking plaintiffs who had been a “victim” of “multiple overdraft charges.” There is lingering confusion and debate regarding the benefit and/or harm of overdraft protection programs, as well as attorneys eager for a class-action lawsuit to stick against a credit union. As such, the MCUL is highlighting overdraft “best-practices” and moving them to the front of your “to-do” lists.

In April, CUToday reported that numerous credit unions have been hit with overdraft lawsuits including Navy Federal, Ent Credit Union, Alliant Credit Union and others (4/08/19). These lawsuits are being compared to the rash of ADA lawsuits that have hit across the country, including some in Michigan.

### ACTION STEPS

There are steps your credit union can take to make sure that you are positioned to defend against a demand letter or lawsuit from a class-action minded attorney. More importantly, the list below reflects best practices regardless of any perceived threat. We recommend credit unions review the following with staff:

1. **Agreement language:** Review your account agreement language for overdraft procedures. Consider how you are explaining available and actual balances and confirm the language is clear to members. Best practice is to set forth two or three scenarios explaining hypotheticals of actual and available balances and how fees are accessed and how transactions are applied, and in what order, to an account.
2. **Procedures:** What are your overdraft procedures and policies and when were they last reviewed? Is your team following your procedures and policies and do they match with how funds are applied and debited from accounts?

3. Returned Items: How are you, in practice, processing returned items? Do you change the order based on amount? Is this practice properly disclosed or could it be perceived as your credit union trying to increase fee income?
4. Member Perspectives: What is printed on your member account statements in terms of available versus actual account balance and does it cause confusion?
5. Communication: How do you disclose holds on deposits and is it clear? Do you provide examples?
6. Disclosures: Have you recently reviewed your opt-in disclosure language for compliance? Be sure to maintain copies of signed opt-ins.
7. Legal Review: Consider having your account agreement and policies reviewed by legal counsel and alert your attorney to the surge in lawsuits on this topic.
8. Policies: Has your Funds Availability Policy been reviewed and updated recently? Are your practices and procedures in line with the policy?
9. Additional Protections: Even if you follow the federal model for courtesy pay opt-in, you may want to consider additional language to better protect your credit union.

#### **ADDITIONAL RECOMMENDATIONS**

Recently, the CFPB has been relatively quiet on overdraft protection. However, their supplementary resources are helpful while reviewing your program.

CFPB released a Study of Overdraft Programs in 2013 that may also more insight.

<https://www.consumerfinance.gov/data-research/research-reports/the-cfpb-study-of-overdraft-programs/>

In 2017, the CFPB released a “*Know Before You Overdraft*” disclosure that is not required but that you may consider for additional instructions to members.

<https://www.consumerfinance.gov/about-us/newsroom/cfpb-unveils-prototypes-know-you-owe-overdraft-disclosure-designed-make-costs-and-risks-easier-understand/>

Additionally, the NCUA has the review of the overdraft policies and procedures for compliance under Regulation E as part of its Supervisory Priorities.

While it appears that the previously proposed bills at the federal level to eliminate or curtail overdraft protection programs have been stalled, the MCUL continues to keep a close eye on this issue. MCUL recommends credit unions continue to gather data and stories on courtesy pay programs. This program is designed to help members and offer value.

If your credit union has been sued or is in receipt of a demand letter relating to overdraft practices, please contact Patty Corkery, EVP/COO and General Counsel at

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