

DATE: December 16, 2019
BULLETIN: 2019-KDCU-CUB-17
TO: Kansas Chartered Credit Unions
SUBJECT: Overdraft Fees

OVERDRAFT FEES

Since 2012, when the Consumer Financial Protection Bureau (CFPB) announced its intent to review overdraft fee programs, this issue has remained in the news. One of the first, and most prominent enforcement cases, involved Birmingham, Alabama's Regions Bank in April 2015. [Regions Bank](#) was fined \$7.5 million, and required to refund \$49 million in illegal fees, after it was found to have been charging overdraft fees to consumers who had not opted-in for overdraft coverage. Regions was also charging overdraft and NSF fees on its deposit advance product despite claims that it would not assess fees.

The CFPB has expressed interest in four areas: (1) transaction re-ordering; (2) disclosure; (3) marketing; and (4) disproportionate impact on low-income and young consumers.

In 2010, NCUA issued a regulatory alert notifying credit unions of the prohibition against "...charging consumer fees for paying overdrafts on automated teller machines (ATM) transactions and one-time debit card transactions – unless consumers 'opt in' to overdraft services for those types of transactions." ([NCUA Regulatory Alert No. 10-RA-12](#)) On May 13, 2019, the CFPB [announced](#) that it would review the 2009 Overdraft Rule as its first rule review under the Regulatory Flexibility Act.

Credit unions have not been immune to charges of misleading members on overdraft fees. Practices being challenged include taking transactions out of the order they are made, failing to properly disclose how "opt-in" practices work and failing to explain how balances are calculated. Also at issue is whether the credit union uses "available balance" or "actual balance." As you go forward, keep in mind the following:

- Verify that your policies and procedures are compliant and review them regularly. Also consider if your fees are fair. The Truth in Savings Act requires financial institutions to disclose the amount of a fee and the conditions under which the fee may be imposed. (12 CFR §1030.4(b)(4))
- Disclose, disclose, disclose. Are your disclosures clear and conspicuous? When members are informed, they can make informed decisions. Easy-to-understand disclosures will benefit all and could save you from future litigation or exam findings. Does a member question raise an issue that can be addressed and corrected before problems arise?
- Maintain awareness of compliance issues. In addition to changes in state and federal laws, law firms have targeted financial institutions for Reg E violations and breach of contract.

NCUA advises that the risks and benefits should be carefully evaluated by the credit union before offering the service. While the program may assist infrequent users, repeat use can negatively impact a member's financial position. ([NCUA Letter No. 05-CU-21](#)) In addition, [NCUA Letter No. 05-CU-03](#) addressing Overdraft Protection Bounce Protection Programs remains active.