

## *CFPB Review of Overdraft Protection has Broad Implications for Banks*

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On February 22, the Consumer Financial Protection Bureau (“CFPB”) announced an inquiry into checking account overdraft programs to determine how depository institution overdraft practices are impacting consumers.<sup>1</sup> In connection with its review of the existing regulatory and supervisory framework established by the other federal banking agencies (“FBAs”) for bank overdraft protection programs, the agency issued a notice and request for information (“Notice”) from the public on the costs, benefits, risks to consumers and other issues with such programs.<sup>2</sup> The CFPB is conducting the review in connection with the regulatory authority transferred to it last year under the Electronic Funds Transfer Act (“EFTA”)<sup>3</sup> and Truth in Savings Act (“TISA”),<sup>4</sup> among other federal consumer protection laws.

A principal concern for depository institutions operating automated overdraft programs that are now subject to the CFPB’s regulatory jurisdiction is the potential impact of new regulatory requirements initiated for consumer protection purposes that could conflict with or be additive to safety and soundness considerations and/or other legal risks and requirements. As the CFPB gears up for this inquiry, depository institutions should review past guidance to ensure that their policies and procedures continue to conform to “Best Practices” offered by the FBAs, as well as more recent guidance issued by several of the FBAs. Areas warranting particular attention include institution transaction clearing policies with respect to the ordering of transactions, including check, debit, ACH and other electronic processing transactions; overdraft program marketing materials; and the demographics of those who are paying the costs of a program.

### **CFPB Review of Overdraft Programs**

In the press release announcing the CFPB’s overdraft review, the agency notes that it will focus on four main areas of concern.<sup>5</sup> First, it will examine how institutions order transactions to see if such practices increase consumer costs. Second, the CFPB will study how overdraft terms are disclosed and the extent to which consumers are made aware of alternative means of covering overdraft transactions. Third, the CFPB will examine marketing materials to see how institutions explain and promote their overdraft protection programs. Fourth, the CFPB will revisit the results of a 2008 Federal Deposit Insurance Corporation (“FDIC”) study that suggested overdraft programs disproportionately impact low-income and young consumers. The CFPB is also seeking public input on a prototype “penalty fee box” – a disclosure on a consumer’s checking account statement that would highlight the amount overdrawn and total overdraft fees charged.<sup>6</sup>

Pursuant to the Dodd-Frank Act (“DFA”),<sup>7</sup> the CFPB was granted jurisdiction over various consumer protection statutes, five of which taken together govern various aspects of consumer transaction accounts and overdraft protection programs.<sup>8</sup> These include: (i) the EFTA, which governs overdraft protection when applied to an ATM withdrawal or point-of-sale debit card transaction; (ii) the Truth in

Lending Act (“TILA”)<sup>9</sup>, which requires cost disclosures for certain fees associated with overdraft protection; (iii) TISA, which regulates notice and advertising requirements for deposit accounts; (iv) the Equal Credit Opportunity Act (“ECOA”)<sup>10</sup>, which regulates how institutions may target consumers for overdraft protection and possibly the procedures for denials; and (v) Section 5 of the Federal Trade Commission Act (“FTCA”)<sup>11</sup>, which prohibits unfair or deceptive acts or practices

(“UDAP”), including with respect to the marketing and implementation of overdraft protection programs. The CFPB is expected to review existing overdraft practices and programs in light of all of the consumer protection laws within its jurisdiction; thus, institutions should review compliance with each of these laws with respect to an existing overdraft program.

### **Transaction Ordering Policies and Procedures**

Certainly, an important area in which the CFPB may regulate involves institution transaction ordering policies and procedures. As noted by CFPB Director Cordray, there may be valid consumer protection reasons for an institution program that pays off the largest transactions first during a given time frame; however, this also tends to maximize the number of transactions triggering overdraft fees. A CFPB rule setting forth requirements for ordering transactions is certainly one way in which the CFPB could regulate on this issue, which would require a number of institutions to alter their programs.

Prior guidance issued by several of the FBAs (“Joint Overdraft Guidance”) stated that depository institutions should explain that transactions presented to the institution for payment may not necessarily be processed in the order in which they are received.<sup>12</sup> Further, the agencies noted that it is an industry “best practice” to disclose to consumers how an institution orders transactions processing, and that the order in which transactions are cleared can impact the amount of overdraft fees that are charged. The guidance did not, however, indicate that institutions should adopt a particular method for ordering transactions for payment.<sup>13,14</sup>

In separate guidance issued the week before the Joint Overdraft Guidance, the Office of Thrift Supervision (“OTS”) largely tracked the interagency “best practices” guidance, but specifically noted that the method for transaction ordering should not be manipulated by an institution to inflate customer fees.<sup>15</sup> In recent supervisory guidance, the FDIC also noted that institutions should ensure check-clearing procedures operate in a manner that “avoids maximizing customer overdrafts and related fees.”<sup>16</sup> If the CFPB concludes that depository institutions are ordering transactions in a way that increases the overdraft fees paid by consumers, the agency certainly could (and likely would) mandate a particular fee-neutral method of transaction ordering, such as “first-in, first-out.”

### **Adequate Disclosure of Overdraft Program Terms and Alternatives**

The CFPB intends to review the adequacy of disclosures regarding overdraft program terms and the availability of alternative means to cover overdraft transactions. This is an interesting aspect of the CFPB’s exercise of its consumer financial protection powers, suggesting the possibility of a higher threshold to inform consumers of certain information that they may or may not choose to act on. Clearly, a regulatory requirement to avoid confusing information or provide omitted “material” information is a defensible regulatory position. The calculus gets more complicated, however, by an affirmative obligation imposed on an institution to counsel customers regarding alternative means of covering overdraft transactions, particularly if one or more of the alternatives involve a credit product offered by the institution. This could create a significant tension between the CFPB and a prudential regulator concerned about safety and soundness risks posed to an institution that is required to implement an effective underwriting program to support small dollar loans or products that look substantially like payday loans.

## Misleading Marketing Materials

While adequate disclosures and available alternatives pose potential regulatory tensions and present difficult issues from a policy standpoint, advertising and marketing issues are much more clear-cut. In this regard, the FBAs have consistently maintained the importance of institutions avoiding misleading statements in marketing and advertising materials. This is also a potential trap for institutions that fail to monitor and update their marketing materials, particularly given the CFPB's authority to regulate unfair, deceptive or abusive acts or practices and enforce Section 5 of the FTCA with respect to the same. In addition, marketing an overdraft protection product as a substitute for a payday loan, or providing an alternative credit product as a substitute for an overdraft, could trigger the requirements of the ECOA; including the reporting and notice provisions of Regulation E if the credit is not deemed to be "incidental credit" under Regulation B.<sup>17</sup>

## Disproportionate Impact

Issues under the ECOA could also be triggered by a program in which overdraft fees are disproportionately paid by certain consumers. This could be the case, for example, where low-income and young consumers pay a much higher portion of overdraft fees relative to other consumers. Exacerbating this issue would be a situation where certain types of account holders are steered into an overdraft protection program while other account holders are provided more favorable terms on an overdraft line of credit. Institutions should continue to be vigilant to avoid situations that could be viewed as steering or targeting certain consumers on a prohibited basis to an overdraft protection program while offering other consumers more favorable terms via an overdraft line of credit.

## Other Considerations

In addition to the consumer protection issues raised by overdraft protection programs, there are legal risks and safety and soundness considerations that the FBAs previously addressed at length in the Joint Overdraft Guidance. These issues include safety and soundness, reputational, legal and operational considerations. As previously noted, this creates a tension between the CFPB's consumer protection focus and the focus of the FBAs and state prudential regulators on issues such as the potential for increased credit risk resulting from a lack of individual underwriting for overdraft credit alternatives, and the capital treatment of outstanding overdrawn balances and unused commitments.<sup>18</sup> This regulatory tension also adds to the existing tension among some of the prudential regulators regarding both consumer protection and safety and soundness issues related to overdraft protection programs. As noted in the Notice, the American Bankers Association has raised concerns about developing a "uniform set of supervisory expectations" among the FBAs and the CFPB, as well as establishing consistent regulatory treatment for other similar products that fall within the overlapping jurisdictions of the CFPB, FBAs, and state banking supervisors, as well as state Attorneys General.<sup>19</sup> These will be important issues to watch as the CFPB attempts to work with the FBAs to forge a consensus regarding the appropriate balance between consumer financial protection and depository institution safety and soundness considerations.

## **Action Plan — (1) Review Overdraft Programs for Conformity with Existing FBA Guidance and Best Practices; and (2) Review Notice and Provide Comments to the CFPB to Address Particular Areas of Concern**

### *Review FBA Guidance and Best Practices*

In preparation for any CFPB inquiry or future rulemaking or guidance on overdraft protection, institutions should review past guidance from the FBAs, particularly the "Best Practices" set forth in the Joint Overdraft Guidance; and consider any steps that may be needed to conform to that guidance

and to gather data to support existing operating policies and procedures in light of that guidance.<sup>20</sup> Of particular note are the following:

#### *Marketing and Communications with Consumers*

- **Avoid promoting poor account management** by marketing the program in a manner that encourages routine or intentional overdrafts.
- **Fairly represent overdraft protection programs and alternatives** by informing consumers about other overdraft services and credit products, if any, that are available at the institution and how the terms, including fees, for these services and products differ from overdraft protection. Identify the consequences of extensive use of overdraft protection.
- **Train staff to explain program features and other choices.** This includes an overdraft program's features, costs, and terms, including how to opt out of the service, as well as other available products offered by the institution and how consumers may qualify for them.
- **Clearly explain the discretionary nature of program.** Do not represent that payment of overdrafts is guaranteed or assured if the institution retains discretion not to pay an overdraft.
- **Distinguish overdraft protection services from "free" account features** by not promoting "free" accounts and overdraft protection programs in the same advertisement in a manner that suggests the overdraft protection program is free of charges.
- **Clearly disclose program fees** for each overdraft and interest rates or fees that apply.
- **Clarify that fees count against the disclosed overdraft protection dollar limit.**
- **Clearly disclose that multiple fees may be charged** against the account per day based on the number of checks presented on, and other withdrawals from, a customer's account.
- **Explain the impact of transaction clearing policies,** such as if transactions are not processed in the order in which they occurred, and how the order in which transactions are processed may affect the total amount of overdraft fees incurred by the consumer.
- **Illustrate the type of transactions that may trigger overdraft fees,** such as ATM and debit card transactions, preauthorized automatic debits, telephone or other electronic transfers, to avoid implying that check transactions are the only transactions covered.

#### *Program Features and Operations*

- **Provide election or opt-out of service.** Obtain the affirmative consent of consumers to receive overdraft protection or, if overdraft protection is automatically provided, permit consumers to "opt out" and provide a clear disclosure of this option.
- **Alert consumers before a transaction triggers any fees** with a specific consumer notice, where feasible, e.g., at a branch teller window. This notice should be presented in a manner that permits consumers to cancel a transaction. If this is not feasible, then notices should explain that transactions that overdraw an account will incur an overdraft fee.
- **Prominently distinguish balances from available overdraft protection funds** by not including overdraft protection funds in a single account balance. If more than one balance is provided, separately (and prominently) identify the balance not including overdraft protection.

- **Promptly notify consumers of overdraft protection program usage each time used**, e.g., by sending a notice to consumers the day overdraft protection is accessed. The notification should identify the date and type of transaction, overdraft amount, overdraft fee, the amount (and amount of time) to restore a positive balance, and the consequences of not returning the account to a positive balance within the given timeframe.
- **Consider imposing daily limits on consumer's costs**. Consider limiting daily costs from a program by providing a numerical limit on the total overdraft transactions that will be subject to a fee per day or by providing a dollar limit on the total fees that will be imposed per day.
- **Monitor overdraft protection program usage**. Excessive consumer usage may indicate a need for alternative credit arrangements or other services; inform consumers on options.
- **Fairly report program usage**. Do not report negative information to consumer reporting agencies when overdrafts are paid under the terms of the program promoted by the institution.

#### ***Review Notice and Provide Comments to Address Particular Areas of Concern***

The Notice issued by the CFPB seeks comment on the following subject areas:

- The availability and marketing of lower cost alternatives to overdraft programs;
- Consumer alerts and information provided to account holders regarding balances and overdraft triggers;
- The impact of changes to Regulation DD, Regulation E, and overdraft opt-in rates;
- The impact on consumers of transaction ordering changes financial institutions have made to their operating policies;
- The economics of overdraft programs;
- The long-term impact of overdraft programs on consumers.

The specific questions raised by the Notice in each of these subject areas are attached. Comments are due to the CFPB on April 30, 2012.

The questions raised in the Notice provide institutions with important information regarding the parameters of the CFPB's overdraft review, and potential areas of future regulatory action. The subject areas addressed by the questions generally track issues and concerns previously articulated by the FBAs. While the CFPB's review is to gather information relevant to its regulatory authority to implement consumer financial protection laws, the agency recognizes the need to coordinate its efforts with those of the prudential federal and state banking regulators. This underscores an important consideration – a natural tension between the CFPB and FBAs – that institutions will have to deal with as the CFPB reviews existing consumer financial protections and regulations, and explores new regulatory programs. In this regard, depository institutions should pay close attention to the questions raised in the Notice and respond to the CFPB, as appropriate, to highlight issues or concerns with respect to the overlapping jurisdiction of the CFPB and FBAs and the potential for increased regulatory burden if the CFPB and FBAs fail to develop a uniform set of supervisory and regulatory expectations for the industry.

The Notice provides an important opportunity for institutions to participate in the CFPB's efforts to review overdraft protection programs, including providing information and data with respect to costs, benefits, the availability of alternatives, and issues for institutions that market alternative credit

products. Institutions with successful overdraft protection programs that enjoy strong customer support may want to consider discussing particular features or issues that they believe promote success, both from a consumer protection and a business perspective. Institutions may also want to consider weighing in with their experiences with programs that have not been optimal, along with sharing their first-hand knowledge, experience and understanding of overdraft protection products and how products are likely to evolve in the future. Finally and most importantly, institutions should use the comment period as an opportunity to inform the CFPB regarding aspects of the Notice and the agency's review that may require clarification, modification, and/or a different or additional focus.



*If you have any questions concerning the Proposal, or if you are interested in working with Paul Hastings lawyers to provide comments to the CFPB on the Proposal, please do not hesitate to contact any of the following:*

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<sup>1</sup> See “Consumer Financial Protection Bureau Launches Inquiry into Overdraft Practices” (February 22, 2012), online at <http://www.consumerfinance.gov/pressrelease/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/>

<sup>2</sup> 77 Fed. Reg. 12031 (February 28, 2012).

<sup>3</sup> 15 U.S.C. § 1693 *et seq.* The EFTA is implemented by Regulation E, 12 CFR § 1005.

<sup>4</sup> 12 U.S.C. § 4301 *et seq.* TISA is implemented by Regulation DD, 12 CFR § 1030.

<sup>5</sup> See *supra*, note 1.

<sup>6</sup> *Id.* The prototype penalty fee box is available online at [http://www.consumerfinance.gov/wp-content/uploads/2012/02/Sample\\_Fee\\_Penalty\\_Box.pdf](http://www.consumerfinance.gov/wp-content/uploads/2012/02/Sample_Fee_Penalty_Box.pdf).

<sup>7</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (enacted July 21, 2010).

<sup>8</sup> See 12 U.S.C. § 5491(a).

<sup>9</sup> 15 U.S.C. §§ 1601 *et seq.* TILA is implemented by Regulation Z, 12 CFR § 1026.

<sup>10</sup> 15 U.S.C. §§ 1691 *et seq.* The ECOA is implemented by Regulation B, 12 CFR § 1002.

<sup>11</sup> 15 U.S.C. § 45.

<sup>12</sup> See “Joint Guidance on Overdraft Protection Programs,” issued by the Office of the Comptroller of the Currency (“OCC”), FDIC, Board of Governors of the Federal Reserve System (“FRB”), and National Credit Union Administration (“NCUA”), 70 Fed. Reg. 9127 (February 24, 2005).

<sup>13</sup> *Id.*

<sup>14</sup> See “Joint Guidance on Overdraft Protection Programs” (Joint Overdraft Guidance), issued by the Office of the Comptroller of the Currency (“OCC”), FDIC, Board of Governors of the Federal Reserve System (“FRB”), and National Credit Union Administration (“NCUA”), 70 Fed. Reg. 9127 (February 24, 2005).

<sup>15</sup> See Guidance on Overdraft Protection, 70 Fed. Reg. 8428, 8431 (February 18, 2005) (OTS Overdraft Guidance).

<sup>16</sup> See FDIC FIL-81-2010, “Final Overdraft Payment Supervisory Guidance” (November 24, 2010).

<sup>17</sup> See 12 CFR § 202.3(c). As noted in the Joint Overdraft Guidance, “incidental credit” is consumer credit not subject to a finance charge, not payable by agreement in more than four installments, and not made pursuant to the terms of a credit card account.

<sup>18</sup> See Joint Overdraft Guidance at 3-5.

<sup>19</sup> 77 Fed. Reg. 12032.

<sup>20</sup> See OTS Overdraft Protection and Joint Overdraft Guidance.

## Questions Raised in CFPB Notice on Overdraft Programs

### Lower Cost Alternatives to Overdraft Protection Programs:

1. What alternatives do institutions offer to overdraft protection programs and how much do consumers make use of these alternatives? Among other things, comments could address the availability and utilization of alternatives to traditional overdraft fees – for example, linked savings accounts or overdraft lines of credit – especially among those who incur overdraft charges on their checking accounts.
2. To what extent do consumers avail themselves of alternatives to incurring overdraft fees?
3. How are consumers informed of alternatives to overdraft protection programs and how are such alternatives marketed to new customers, existing customers, and to particular customer segments?
4. What portion of the most frequent overdrafters – those who would benefit the most from alternatives – would qualify for a linked savings account (i.e., have a savings account) or line of credit (i.e., pose acceptable credit risk)?

### Consumer Alerts and Information Provided Regarding Balances and Overdraft Triggers:

5. What opportunities do financial institutions offer consumers to sign up for alerts via text message and/or e-mail that inform consumers when their balances are low and, thus, when payment transactions might put them at risk of incurring an overdraft? The Bureau is interested in programs and technologies that make consumers aware at the time they engage in a transaction that they may incur an overdraft fee. Among other things, comments could address:
  - a. The extent, if any, to which consumers are given the opportunity to be alerted to and avoid a transaction that would cause an overdraft fee;
  - b. The marketing of, participation rates in, and impact on consumers, of such alert programs, particularly among those who are likely to incur overdraft fees;
  - c. The way account balances are communicated generally in response to routine ATM or telephone inquiries;
  - d. The extent to which communicated balances differ from available balances and whether these differences affect consumers' ability to avoid incurring overdrafts; and
  - e. The balance calculations – e.g., available vs. actual balances – used to determine when an overdraft has occurred in end-of-day batch processing.
6. Whether a particular transaction will incur an overdraft fee depends upon the interaction of various terms, rules, and practices, including those governing funds availability, the posting order of debits and credits, the amount by which an account must be overdrawn to trigger an overdraft fee, the number of overdraft fees that can be incurred in a single day, and whether the fee is one-time or for each day the account remains in overdraft status. Comments could include information regarding how these are communicated to consumers and the extent to which consumers understand them. For example:
  - a. In what ways are consumers informed of the rules and practices that determine which transactions will cause overdraft fees to be incurred? When they enroll in an account? As part of notices that they have incurred an overdraft?

- b. Is there any customer research available that documents consumers' perceptions regarding how transactions are processed, when overdrafts are incurred, and when related fees are charged?
- c. What changes in consumer behavior or understanding of overdrafts have resulted from the changes that took effect in Regulation DD in 2010?

### **Impact of Changes to Regulation DD, Regulation E, and Overdraft Opt-In Rates:**

- 7. The Bureau is interested in the impact of the changes to Regulation E that took effect in 2010 on consumers. Among other things, comments could address:
  - a. What were the variations across institutions in opt-in rates among consumers with accounts as of July 1, 2010? What variations in opt-in rates occur now among institutions? What differences in marketing and disclosures practices may be responsible for differences in opt-in rates?
  - b. How did opt-in rates vary based upon prior usage of overdraft? Were there significant variations between non-overdrafters, occasional overdrafters, and frequent overdrafters (e.g., those who incurred 10 or more overdrafts in a year)?
  - c. How did the opt-in rates vary based upon average account balance or demographic characteristics, such as income, age, or education level?
  - d. How do the overdraft frequencies of consumers who opted in differ from those who did not?
- 8. The Bureau is interested in learning how institutions are conducting outreach to customers who incur overdrafts repeatedly, what policies have been implemented to manage both the risks and needs such customers may present, and which options are given to such customers. The Bureau is aware that some institutions may charge fees based on accounts being overdrawn, notwithstanding the customer's request to close the account, and would like to understand what impact this practice may have. Among other things, the Bureau is particularly interested in hearing more about:
  - a. The extent to which consumers are permitted to close existing accounts when there are outstanding overdraft fees;
  - b. The consequences to consumers of keeping accounts open that have outstanding overdraft fees and what additional fees consumers accrue; and
  - c. The practices that can best serve consumers who have incurred negative balances while protecting institutional safety.

### **Impact of Changes in Financial Institutions' Operating Policies:**

- 9. The Bureau is aware that some institutions have recently changed their order of processing transactions in various ways, including, for example, adoption of a purely chronological system of posting debit transactions; adoption of a system that separates different types of debit transactions (e.g., ATM and point of sale debit, ACH, check, and various account fees) and applies different rules to order transactions in discrete buckets; and adoption of a system which orders debit transactions from smallest to highest dollar amount. The Bureau is interested in learning how these changes have affected consumers. Comments could include information regarding:
  - a. The different ways in which institutions currently group and order different types of transactions;
  - b. How institutions disclose the ways in which they currently group and order transactions;

- c. The consequences in practice of different grouping and ordering policies for the frequency with which consumers may incur overdrafts and related fees. Or the consequences for whether certain overdraft items will or will not be paid; or
  - d. The impact of funds availability policies on when overdrafts are determined to have occurred.
10. In addition to transaction ordering policies, the Bureau is also aware that some institutions have adopted other new policies with respect to overdrafts. For example, some institutions have declined to permit consumers to opt in to overdraft coverage of electronic debits and instead reject those transactions or allow consumers to opt in at the point of the transaction. Other institutions have adopted cushions on the amount by which an account must be overdrawn to incur an overdraft fee; caps on the number of fees that may be incurred in a given day; tiered overdraft fees; a grace period to cover an overdraft item without incurring a fee; or a waiver of fees on a certain number of overdraft items per month. In what way do such changes– or other new policies with respect to overdraft – affect the incidence and/or severity of overdraft charges?

### **The Economics of Overdraft Programs:**

11. The Bureau is interested in the economics of overdraft programs, including their contribution to overall costs and revenues associated with checking accounts. There is concern based on the FDIC study's data from 2006 that many institutions are reliant on fees from a small group of frequent overdrafters for a disproportionate share of revenue from checking accounts, while many other accountholders benefit as "free riders." The Bureau is interested to learn the extent to which the FDIC study's findings from 2006 are representative of the market today. At the same time, the Bureau also seeks to learn what costs regulations affecting overdrafts might impose on institutions. Comments may address, among other things:
- a. How the distribution of overdraft revenue from consumers may have evolved since the FDIC study and the implementation of changes in Regulations DD and E;
  - b. The distribution of overdraft fees by type of transaction (check, ACH, debit, ATM, etc.) today relative to what the FDIC found in its study;
  - c. The extent to which different groups of consumers incur overdrafts and related fees disproportionately (for example, the FDIC study suggested that young adults and consumers with low or moderate incomes might incur overdrafts more frequently than other groups);
  - d. The share of deposit service fees charged to consumer accounts that are attributable to overdrafts and NSF's today;
  - e. The costs to institutions of administering overdraft programs; and
  - f. The losses (e.g., charge-offs) that occur as a result of extending overdraft coverage.

### **Long-term Impact on Consumers:**

12. The long term impact of overdraft programs on consumer behavior and options is of particular interest to the Bureau. Some have argued that overdraft programs allow consumers to meet liquidity challenges while others argue that overdraft eventually adds to liquidity issues because of the high recurring fees that frequent overdrafters must pay. Further, there is concern that heavy use may lead a significant percentage of users to damage their credit records in databases institutions use to qualify consumers for checking accounts and thereby to lose access to the services of competing providers or to the banking system altogether. To what extent are these various perspectives valid?