

Interagency Overdraft Services Consumer Compliance Discussion

Outlook Live Webinar – November 9, 2016

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Overview

- Office of the Comptroller of the Currency
- National Credit Union Administration
- Federal Reserve Board
- Consumer Financial Protection Bureau
- Federal Deposit Insurance Corporation



Kimberly G. Hebb, Director
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Laws, Regulations, and Guidance

- [Regulation E](#) (Electronic Fund Transfers)
- [Regulation DD](#) (Truth in Savings)
- [Section 5 of the Federal Trade Commission Act](#)
- [OCC Bulletin 2005-9](#), “Joint Guidance on Overdraft Protection Programs”
- [OCC Bulletin 2010-15](#), “Opt-In Requirements and Related Marketing Issues”
- [OCC Bulletin 2013-29](#), “Third-Party Relationships: Risk Management Guidance”

Scenario 1

- Bank used available balance to decide whether there was an overdraft and for fee decisions
- Bank subtracted deposited funds not yet available AND “must-pay” items from available balance
- Account disclosures only stated deposits not yet available would be subtracted

Key Take Away:

- Disclosures provided to customers must accurately describe Bank’s practices

Scenario 2

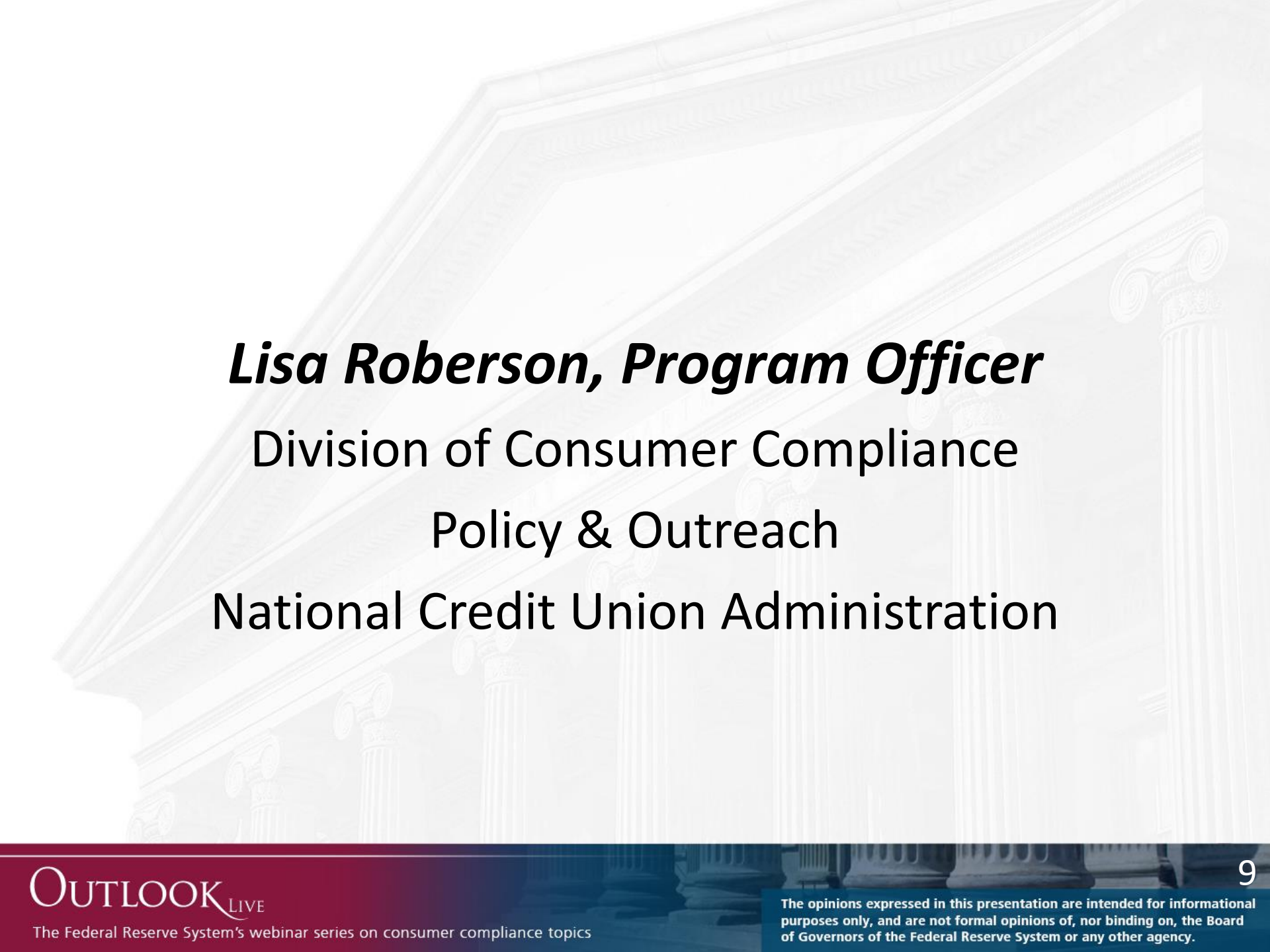
- Brochures highlighted free or low cost features of its deposit accounts
 - Suggested accounts were well suited for those who had previous difficulty managing accounts
- Omitted information on costly features such as overdraft protection

Key Take Away:

- Use balanced marketing materials that include information on the costs, as well as the benefits, of overdraft programs

Risk Management

- Monitor and control risks presented by third party vendors
- Monitor systems and software changes that could require changes in disclosures and marketing materials
- Implement appropriate complaint management systems
 - Consumer complaints are an important early warning signal
- Pay attention to other red flags
 - Very high opt-in rates



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Credit Unions & Financial Literacy

- Provide counseling in response to frequent overdrafts and help credit union members find accounts that are best suited for them
- Provide alternative products to overdrafts such as OD lines of credit, linked savings accounts, and short-term small dollar loans
- Waive overdraft fees after communicating with member

Opt In / Opt Out

- Regulation E – 12 C.F.R. § 1005.17
- Without consent, financial institutions cannot charge a fee for paying ATM or one-time debit card transactions

Opt In / Opt Out Consent

May assess a fee for paying ATM or one-time debit card transaction overdraft service if:

- Provides written notice to the consumer:
 - Consumer may agree to electronic notice
 - Segregates written notice from describing the service from other information
- Provides reasonable opportunity for the consumer to affirmatively consent (opt in)
- Member's affirmative consent has been obtained
- Deliver confirmation of consent, including right to revoke

Opt In / Opt Out Affirmative Consent

Affirmative Consent or Opt In is Required

- Must be obtained separately from other consents or acknowledgements
- May include check box and signature line if it is solely to consent to opt in or opt out
- May not be with other account disclosures provided with signature card
- May not be included on the signature card with a pre-selected check box that the consumer is requesting the service

Opt In / Opt Out Notice

Confirmation of opt in must be mailed or delivered to the consumer

- May be a copy of the consumer's completed opt in notice
- Alternatively, may be in the form of a letter or notice
- Must include notice of right to revoke
- Notice shall be substantially similar to Model Form A-9 in the Appendix to Regulation E

Opt In / Opt Out Condition Prohibition

Same criteria must be applied to consumers whether they opt in or not:

- May not condition the payment of any overdrafts for checks, ACH transactions, etc. on whether the consumer opted in to the ATM/debit card overdraft service
- May not decline to pay checks, ACH transactions, etc. and overdraw the consumer's account because the consumer did not opt in to the ATM/ debit card overdraft service

Opt In / Opt Out

Same Terms/Features

Terms, Conditions, and Features of an account may not vary because a consumer did not affirmatively consent to the ATM/debit card overdraft service.

This includes:

- Interest Rate and Fees
- Type of ATM or Debit Card provided
- Minimum Balance Requirements
- Other Account Features (i.e., Online Bill Pay)

NCUA Overdraft Regulation

[12 C.F.R. § 701.21\(c\)\(3\)](#)

If Credit Union has a Written Overdraft Policy:

- Does not have to have a credit application for borrowers for overdrafts

NCUA Overdraft Regulation

(continued)

12 C.F.R. § 701.21(c)(3)

Written Overdraft Policy must:

- Set cap on total dollar amount of all overdrafts credit union will honor consistent with ability to absorb losses
- Establish a time limit not to exceed 45 calendar days for funds to be deposited or obtain an approved loan
- Limit dollar amount of overdrafts honored per member
- Establish the fee and interest rate (if any) for overdrafts



Ducie Le, Managing Counsel

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Federal Reserve Board

Available Balance at Posting

- Bank uses “available balance” to determine whether to assess overdraft fees
- Sufficient funds are in the available balance when the signature-based debit transaction is authorized
- Bank reduces the available balance by the authorized transaction
- Subsequent transactions further reduce the available balance (some may be assessed overdraft fees)
- Bank assesses an overdraft fee on the authorized transaction when it posts because there are insufficient funds in the available balance at posting

Unfair Practice: Assessing an overdraft fee based on the available balance at the time a transaction is posted when there were sufficient funds in the available balance to cover the transaction when it was authorized

Available Balance at Posting Example

Description	Transaction	Available Balance	Ledger Balance
Day 1			
Opening Balance		\$100	\$100
Signature-based debit transaction - authorized	<\$80>	\$20	\$100
Day 2			
Check - posted	<\$40>	<\$20>	\$60
Overdraft fee	<\$30>	<\$50>	\$30
Day 3			
Signature-based debit transaction - posted	<\$80>	<\$50>	<\$50>
Overdraft fee	<\$30>	<\$80>	<\$80>

Overdrawn Balances added to Existing Loans

- Customer has deposit account with the Bank
- Customer overdraws the deposit account
- Customer does not bring the negative deposit account balance current
- Bank adds overdraft amount to loan customer has with the bank without a cross-collateralization clause or any other authorization providing the Bank with the right to do so
- Bank improperly inflated the amounts owed on consumers' loans and represented that the consumers owed the improperly inflated amounts

Deceptive Practice: Making misleading statements about the amounts consumers owed on their loans

May also be unfair practice



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CFPB Supervisory and Enforcement Actions

- Regulation E Overdraft Opt-In Violations
- Deceptive Statements About Overdraft Fees, Services, and Marketing
- Compliance Monitoring Weaknesses
- Inadequate Service Provider Oversight
- Unfair and Deceptive Acts and Practices involving Balance-Calculation Methods and Overdraft Processing

Regions Bank

CFPB Enforcement Action (4/2015)

- The CFPB found that Regions:
 - Failed to obtain affirmative opt-in consent from certain customers before charging overdraft fees, in violation of Regulation E, 12 C.F.R. § 1005.17
 - Deceptively represented in advertisements and information provided to consumers that it would not charge overdraft fees for ATM and one-time debit card transactions without their prior opt-in consent, in violation of 12 U.S.C. §§ 5531, 5536
 - Delayed fixing this violation for almost a year after discovery
- And also found that the Bank:
 - Deceptively represented in information provided to consumers that it would not charge overdraft and NSF fees with deposit advance product loan repayments, in violation of 12 U.S.C. §§ 5531, 5536

Regions Bank

CFPB Enforcement Order

- Regulation E opt-in compliance required
- Prohibition on deceptive communications
- Ordered to fully reimburse consumers
- Ordered to correct negative information reported to Consumer Reporting Agencies as a result of unlawful fees
- Civil Money Penalty of \$7.5 million imposed

Santander Bank, N.A.

CFPB Enforcement Action (7/2016)

- The CFPB found:
 - Santander's third party service provider enrolled customers in the Bank's overdraft service without obtaining consumer consent
 - As a result, the Bank failed to obtain affirmative opt-in consent from certain customers before charging overdraft fees in connection with ATM and one-time debit card transactions, in violation of Regulation E, 12 C.F.R. § 1005.17

Santander Bank, N.A.

CFPB Enforcement Action *(continued)*

- The Bank, through its telemarketing service provider, misled consumers about the following, in violation of 12 U.S.C. §§ 5531, 5536:
 - Overdraft fees that could be charged for opting in to overdraft service for ATM and one-time debit card transactions
 - Consequences of not opting in
 - Nature of sales calls seeking consumer opt-in consent
 - Types of transactions covered by overdraft service
- The Bank failed to exercise appropriate oversight of telemarketing service provider activities and incentives

Santander Bank, N.A.

CFPB Enforcement Order

- The Bank must contact affected consumers, give them the opportunity to validate opt-in decisions, and secure affirmative opt-in consent before charging overdraft fees
- Prohibitions on: use of service providers to telemarket overdraft services, and employee opt-in targets, incentives, or punitive consequences
- Ordered to improve telemarketing service provider oversight
- Civil Money Penalty of \$10 million imposed

Background: Balance-Calculation Findings

CFPB *Supervisory Highlights*

- Ledger Balance Method
 - Account balance calculated based on settled transactions only
- Available Balance Method
 - Account balance calculated based on:
 - » Settled transactions, and
 - » Electronic transactions authorized but not settled, and
 - » Reflects deposit holds not yet cleared
- Examiners observed overdrafts and overdraft fees in some instances under an available balance method that would not have occurred using a ledger balance method

Background: Balance-Calculation Findings

CFPB Supervisory Highlights (continued)

- Reviewed overdraft protection services at multiple financial institutions and found that one or more institutions:
 - Switched from ledger balance to available balance method to decide whether to:
 - » Authorize signature-based debit and other electronic transactions, and
 - » Post or return checks and ACH transactions
 - Switched to an available balance method to calculate whether:
 - » A transaction resulted in an overdraft, and/or
 - » An overdraft fee was assessed when a transaction settled

Deceptive Practices

CFPB *Supervisory Highlights*

- At one or more financial institutions:
 - Changes to balance-calculation methods were not disclosed, or not sufficiently disclosed
 - As a result, customers were misled about the circumstances under which overdraft fees would be assessed
 - The misleading practices could be material to a reasonable consumer's decision-making and actions
 - The practices were found to be deceptive

Background: Balance-Calculation Findings

CFPB Supervisory Highlights

- At one or more institutions, the institution switched balance-calculation methods and:
 - Authorized an electronic transaction, which reduced a customer's available balance but did not result in an overdraft at the time of authorization
 - A subsequent, unrelated transaction settled, further lowered the customer's available balance, and pushed the account into overdraft status
 - When the original electronic transaction was later presented for settlement, the electronic transaction also posted as an overdraft and an additional overdraft fee was charged
 - » This was due to the intervening transaction and overdraft fee

Unfair & Deceptive Practices

CFPB *Supervisory Highlights*

- One or more institutions were found to have acted unfairly when they charged fees as described because:
 - The fees caused harm to consumers
 - Consumers had no reason to anticipate the practice, which was not appropriately disclosed
 - Consumers could not reasonably avoid incurring the overdraft fees charged
- Consistent with the above deception findings, the failure to properly disclose the practice of charging overdraft fees in these circumstances was also found to be deceptive

Deceptive Practices

CFPB *Supervisory Highlights*

- In addition, one or more institutions were found to have engaged in deceptive practices relating to the disclosure of overdraft processing logic for electronic transactions:
 - Disclosures created a misimpression that the institutions would not charge an overdraft fee for an electronic transaction if its authorization did not push the customer's available balance into overdraft status
 - » But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the disclosures' overall net impression
 - The disclosures were misleading or likely to mislead consumers
 - The misimpressions could be material to a reasonable consumer's decision-making and actions

Unfair Practices

CFPB *Supervisory Highlights*

- The practice of assessing fees under these circumstances was also found to be unfair:
 - Consumers were, or were likely to be substantially injured by overdraft fees contrary to the overall net impression created by the disclosures
 - Consumers could not reasonably avoid the fees given the misimpressions created
 - The injury was not outweighed by countervailing benefits to consumers or to competition



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Common Practices Identified

- Fee-on Fee
- Ability/Right to Cure Overdrawn Balance
- Calendar versus Business Day

Fee-on-Fee Assessment Practices

- Overdrafts Caused by Bank-Assessed Fees
- Two Main Subsets:
 - Classic fee-on-fee
 - Interest on fees

Ability/Right to Cure Overdrawn Balances

- Consumer overdraws account on Thursday
- On Friday, consumer deposits a check, which if credited immediately, would cure the amount of the overdrawn balance
- The Bank treats the check as received the following business day (Monday), and makes the funds available for withdrawal the following business day (Tuesday)
- While the check is subject to a Regulation CC hold, the Bank charges the consumer a daily continuous overdraft fee and per diem interest on the overdrawn balance
- UDAP, TISA, Regulation CC, UCC

Calendar versus Business Days

- Disclosure and System Mismatches
- Pre-Charging Fees to Avoid Non-Processing Days
 - Specific to Continuous Overdraft fees (or any other continuous fee or interest triggered by a negative balance)
 - Only occurs when system is set to assess on calendar days
 - Non-processing days are usually Saturday, Sunday, and federal holidays



Questions?