

Client Alert

August 2017

The Bureau's Continued Efforts to Curb Overdraft Usage

On August 4, 2017, the Consumer Financial Protection Bureau ("Bureau") issued its latest salvo in the area of consumer protection and deposit overdraft practices. Specifically, during a press call, Richard Cordray, the Bureau's Director, announced the release of a new Bureau report on customers' use of overdraft products and four prototypes of what a new overdraft model disclosure form might look like.¹ The announcement does not presently change any existing legal obligations vis-à-vis overdraft practices: the press release says "the model form [found in Appendix A to 12 C.F.R. Part 1005 and] provided in the 2010 rule continues to apply." Banks should, therefore, continue to use the existing model opt-in form found in the regulation.

But some version of the prototype overdraft disclosure may eventually replace the current required model overdraft form, possibly as part of a broader overdraft rulemaking. And, through his remarks, Director Cordray made clear that overdraft issues are at the forefront of the Bureau's attention. In his speech, Director Cordray said, "We are not proposing any regulatory amendments at this time, though we are considering new overdraft regulations, and currently we are in the 'pre-rule stage' with no timing stated for when a rule may be proposed." We think it is unlikely that the Bureau will release a new overdraft regulation before September 8, 2017, which is the deadline under the Congressional Review Act for Congress to challenge the Bureau's recent arbitration regulation. We do, however, think it likely that the Bureau will continue to focus on overdraft issues in the coming year.

The proposed model forms do not materially differ from the existing form. In both cases, consumers are asked whether they would like to authorize their bank to pay overdrafts on ATM withdrawals and everyday debit card transactions (checks and automatic bill payments are covered under standard overdraft practices). The prototype forms differ from the existing model form in their use of graphs and transaction examples that appear intended to educate the consumer on the potential consequences of their choice to opt in. These consumer-oriented changes are driven by key findings from the report that accompany the prototype forms, including the following:

- Frequent overdrafters account for 9 percent of all accounts at the study banks but paid 79 percent of all overdraft and NSF fees.
- Frequent overdrafters generally have lower credit scores and are less likely to have a general purpose credit card.
- Frequent overdrafters carry low daily balances. The typical frequent overdrafter has an average end-of-day balance of less than \$350. The typical non-overdrafter has an average end-of-day balance of more than \$1,550.
- Frequent overdrafters use debit cards six times more often per month. Median debit card usage—measured as the number of transactions per month—is highest among frequent overdrafters and lowest among non-overdrafters.²

¹ A copy of Director Cordray's remarks may be found at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-overdraft-press-call/>.

² A copy of the report may be found at http://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf. The ABA has pointed out in a public comment letter that the report relies on old data from a small number of large banks. See http://www.aba.com/Advocacy/commentletters/Documents/cl-OverdraftDisclosure-2017Aug.pdf#_ga=2.76718997.1807315956.1503496783-1120190522.1503496783.

Since the Bureau's inception, deposit overdraft practices have been a regulatory, supervisory and enforcement priority for the Bureau. Shortly before the Bureau was established, the Board of Governors of the Federal Reserve System amended Regulation E to cover overdraft programs.³ Rulemaking authority for Regulation E was transferred to the Bureau as part of the Dodd-Frank Act, and Regulation E was republished as a Bureau regulation in December of 2011. As noted above, the Bureau has not yet amended the overdraft provisions of Regulation E, but is in the "pre-rule stage" of an overdraft Regulation E rulemaking.

In February of 2012, the Bureau launched an inquiry into overdraft programs.⁴ A June 2013 Bureau white paper identified consumer protection concerns related to overdraft, including the ways consumers opt in to overdraft coverage for ATM and everyday debit card transactions.⁵ A July 2014 study found that the median debit card transaction resulting in overdraft fees is for \$24, and that of opted-in consumers, nearly one in five overdrafts more than 10 times per year.⁶

Following these studies, the Bureau engaged in significant enforcement actions to curb overdraft practices. In April 2015, one regional bank paid \$49 million in restitution and \$7.5 million in civil money penalties to settle allegations from the Bureau that it had engaged in illegal overdraft practices. Thereafter, in July 2016, a second regional bank, paid \$10 million in civil money penalties (but no restitution) to the Bureau, also to settle allegations of illegal overdraft practices. In both cases, the settlement documents allege violations of the Regulation E overdraft regulation (12 C.F.R. § 1005.17), as well as deceptive acts or practices (12 U.S.C. § 5536).

At least one bank has recently challenged the Bureau's enforcement of overdraft requirements: in January 2017, the Bureau filed a federal lawsuit against TCF National Bank ("TCF") for illegal overdraft practices (the Bureau typically files a lawsuit only when settlement negotiations break down).⁷ The thrust of the Bureau's complaint is that TCF engaged in abusive and deceptive practices to get TCF's customers to opt in to overdraft protection. Specifically, the Bureau criticized the following practices:

- Incentivizing branch employees to sell opt-in aggressively;
- Using an uninformative script that failed to mention fees;
- Structuring the opt-in discussion in a way that interfered with consumers' ability to consider disclosures that would inform their decision; and
- Directing branch employees not to provide consumers with information that might discourage them from opting-in.

These alleged abusive and deceptive practices resulted in an opt-in enrollment rate of approximately 66 percent, which is, according to the Bureau, more than triple the average opt-in rate at other banks.⁸ The case is currently pending in the US District Court of Minnesota before Judge Richard Kyle.

Banks should continue to carefully monitor developments with respect to overdraft compliance (including the TCF case), especially if they are examined by the Bureau or if overdraft revenue constitutes a

³ See 74 Fed. Reg. 59033 (Nov. 17, 2009).

⁴ See <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/>.

⁵ See http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.

⁶ See http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf.

⁷ See <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-tcf-national-bank-tricking-consumers-costly-overdraft-service/>. TCF's decision to take a stand against the Bureau on overdraft is not necessarily surprising given that TCF challenged in court the Federal Reserve's overdraft rulemaking in 2010 and that overdraft revenue constitutes a greater degree of TCF's revenue as compared with its competitors. See <http://www.reuters.com/article/us-tcf-financial-usa-cfpb-idUSKBN1532MO>.

⁸ A copy of the TCF complaint can be found at http://files.consumerfinance.gov/f/documents/201701_cfpb_TCF-National-Bank-complaint.pdf.

material portion of net revenue. Building on the Bureau's focus, we have also seen a recent uptick in overdraft inquiries from primary regulators, such as the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency and Federal Reserve who often view overdraft issues as additionally raising unfair or deceptive practices and excessive overdrafts raising potential safety and soundness concerns. With this continued focus, banks should reexamine their overdraft policies and procedures, in particular, the scripting and procedures for how the product is explained and offered to consumers.

Further, if they are not doing so already, banks should monitor their opt-in enrollment rates, as that was identified as a red flag in the TCF action. According to the 2013 Bureau white paper on overdrafts, the average opt-in rate for recently opened accounts was approximately 22.3 percent. Banks with significantly higher opt-in rates for recently opened accounts may want to consider examining the causes for such higher rates and whether any of those causes could be characterized as unfair, deceptive or abusive. Such reviews would typically include attorney reviews of marketing scripts, disclosures and sample recordings for compliance with consumer protection laws. The results of attorney reviews are generally protected under the attorney-client privilege.

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