

# Overdraft Opt-In Practices Hold Risks For Banks

By **Kristen Larson** (March 28, 2024)

Are you ready for regulators to check under your hood?

In recent years, the Consumer Financial Protection Bureau, Office of the Comptroller of the Currency and Federal Deposit Insurance Corp. have issued guidance — and entered into consent orders with supervised institutions — that found charging overdraft fees for transactions that authorize positive and settle negative, and charging multiple fees on represented items to constitute unfair practices.[1]



Kristen Larson

Earlier this year, the CFPB proposed rules to limit the amount of overdraft fees that may be charged and to prohibit the charging of rarely charged nonsufficient fund fees on certain instantaneous transactions.[2]

While institutions should pay attention to the fee guidance, consent orders and the proposed rules, they should not lose sight of the overdraft opt-in process — the process that enables overdraft fees to be charged on ATM and one-time debit card transactions. Institutions don't want to discover a gap in their overdraft opt-in processes during an examination, civil investigative demand or lawsuit.

Over a decade after the passing of the overdraft service opt-in regulations, we are still observing financial institution processes that do not fully comply with Regulation E's requirement to collect affirmative consent to opt into the payment of overdrafts for ATM and one-time debit card transactions.[3]

Most recently, Atlantic Union Bank entered into a **consent order** to resolve an administrative proceeding brought by the CFPB related to its in-person and telephone overdraft opt-in sales processes during 2017-2020; at the same time, Atlantic also settled a class action that alleged misleading and deceptive practices related to its overdraft and nonsufficient fund fees.[4]

The Electronic Funds Transfer Act and Regulation E prohibit financial institutions from charging an overdraft fee for paying ATM or one-time debit card transactions unless an institution (1) provides the consumer with its overdraft service disclosure, (2) provides the consumer a reasonable opportunity to opt in, (3) obtains the consumer's affirmative consent, and (4) provides the consumer with a written confirmation of the consent, which includes a statement informing the consumer of the right to revoke such consent.

Regulation E requires the written overdraft service disclosure to be provided before a financial institution can obtain affirmative consent from a consumer, so the consumer can make an informed decision to consent to the payment of overdrafts.

As set forth in the consent order, the CFPB concluded that Atlantic violated the EFTA and Regulation E, and engaged in deceptive practices in violation of the Consumer Financial Protection Act based on the following overdraft service opt-in processes.

## **In-Branch Opt-In Process**

For consumers who enrolled in the overdraft service in branches, employees gave verbal

descriptions of the bank's overdraft service and collected a verbal opt-in from consumers prior to delivering the written overdraft service disclosure. The employees then documented the verbal election in the account-opening system.

The consumers were asked at the end of the account-opening process to sign the written overdraft service disclosure prepopulated with a checked box for opt-in, despite the official commentary to Regulation E stating, "[n]or does an institution obtain a consumer's affirmative consent by providing a signature card that contains a pre-selected check box indicating that the consumer is requesting the service."

### **Phone Opt-In Process**

For consumers who enrolled in the overdraft service by phone, employees, who had no script to follow, did not clearly explain which transactions were covered by the overdraft service and made other misleading statements about the overdraft service.

The misleading statements included stating

(1) [that] opting in would provide consumers with emergency funds when they needed them, with no other context about the costs of the service; (2) that consumers could avoid returned-item fees by opting in, even though such fees do not apply to ATM and one-time debit card transactions; and (3) that opting in would cover debit card transactions as well as checks, even though checks were already covered by [the standard overdraft service].

Some bank employees failed to inform callers that they could incur a \$36 or \$38 overdraft fee for each overdraft transaction. Many calls also evidenced consumer confusion about the overdraft service terms and conditions.

The consent order prohibits Atlantic from violating Regulation E and the Consumer Financial Protection Act by deceiving consumers about the overdraft service terms and conditions, transactions covered by opt-in, risks and costs associated with opt-in and not opting in, associated overdraft fees, and any other terms material to the opt-in decision.

The consent order required Atlantic to obtain a new affirmative consent from each affected consumer who opted into the overdraft service in branches or by phone between 2017 and 2020 before charging any overdraft fees for ATM or one-time debit card transactions. Atlantic was required to refund affected consumers \$5 million in overdraft fees and pay a \$1.2 million civil money penalty to the CFPB.

Notably, the consent order included new requirements related to obtaining regulated overdraft opt-ins during a phone interaction by requiring Atlantic to send the "What You Need to Know About Overdrafts and Overdraft Fees" disclosure prior to obtaining consent, and to obtain the consumer's written signature.

The consent order does not mention whether a prior disclosure was provided at account opening, but we assume it was. Based on the consent order, institutions should review all of their overdraft opt-in practices.

Given that delivering the disclosure would be challenging to implement during phone interactions, institutions might want to consider a more practical approach to eliminate phone opt-in processes in favor of an online opt-in process where the overdraft service

information provided to consumers can be completely controlled, and the disclosure and consent process can be clearly documented.

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*Kristen E. Larson is of counsel at [Ballard Spahr LLP](#)*

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[1] Prior fee guidance includes: CFPB [Circular](#) on unanticipated overdraft fees assessment practices; CFPB Supervisory Highlights "Junk Fees" Special Edition [Issue 29](#), Winter 2023 & Supervisory Highlights Junk Fees Update Special Edition [Issue 31](#), Fall 2023 on UDAAPs related to charging overdraft fees for APSN transactions and multiple NSF fees on the same transaction; FDIC [FIL 32-2023](#) Supervisory Guidance on Multiple Re-Presentation NSF Fees; FDIC [FIL-19-2023](#): Supervisory Guidance on Charging Overdraft Fees for Authorize Positive, Settle Negative (APSN) Transactions; OCC Bulletin [2023-12](#): Overdraft Protection Programs: Risk Management Practices on APSN fee practices and representation fee practices; FDIC Consumer Compliance Supervisory Highlights March 2022 and [March 2023](#) on UDAP violations for charging multiple representation NSF fees. The CFPB consent orders on APSN fee transactions are available [here](#) and [here](#). The CFPB consent order on NSF fee is available [here](#) and OCC consent order on NSF fees is available [here](#).

[2] See the CFPB's proposed overdraft rule [here](#) and the CFPB's proposed NSF fee rule [here](#).

[3] We have seen fourteen overdraft practices consent orders from the OCC and the CFPB, and while many were for marketing and sales practices, four have specifically addressed the processes to obtain affirmative consent. CFPB consent orders on overdraft fees are available [here](#).

[4] The Atlantic consent order is available [here](#). As we have seen in many other CFPB overdraft and NSF consent orders, a change in practices will not help an institution avoid enforcement for prior acts or practices that the CFPB disfavors or deems unlawful. The class action lawsuit settled in January 2023 alleged that Atlantic Union assesses two or more NSF fees, or an NSF fee followed by an overdraft fee, on only one electronic payment item, ACH item or check when the fee disclosures stated that only one fee would be assessed per item.