

Virginia Bankers Association



ODP & UDAAP Risk

Presented by Brenda Payne, CRCM

Vice President, TCA

I am not a
lawyer...



What we will cover today...

- Regulators' increased scrutiny of overdraft programs
- UDAAP issues associated with transaction processing & fees
- Recent consumer harm claims and penalties
- What to look for in your Bank's program
- Proactive measures you may want to consider



A Little History Lesson...

- Overdraft fees were originally designed to discourage overdrafts. Income from fees in general was not a significant part of the revenue stream.
- All the way back to the 1980's, Banks' most significant source of revenue was interest margin: the difference between interest rates charged for loans and interest paid on deposits.

[The Historic Relationship between bank net interest margins and short-term interest rates \(fdic.gov\)](#)

Overdraft Privilege



- Save consumers money, time, embarrassment of a returned check
- Help banks become more operationally efficient – minimize pay/return decisions
- It's a win-win for everyone!



2005 Interagency Guidance



- Specifically addressed automated programs
 - Focus on “marketed” programs
 - Ad hoc pay/return decisions were not covered...yet...
- Laundry list of best practices
 - Not laws but expectations

[FDIC: FIL-11-2005: Joint Agency Guidance](#)

[Overdraft Protection Programs: Interagency Guidance | OCC](#)

2005 – ODP Criteria



- Bank informs consumers of the ODP feature and promotes use of the service and aggregate dollar limits under the ODP.
- Coverage is automatic for consumers who meet eligibility criteria. No credit underwriting. Fees will be applied.
- Overdrafts are paid up to a limit set by the Bank for the specific class of accounts.
- Disclosure states Bank has no legal obligation to pay any overdraft.
- Extends to checks, ATM withdrawals, debit card transactions, pre-authorized automatic debits, telephone-initiated transfers and online banking transactions.

2005 Guidance–Consumer Concerns



- Promoted to resemble a line of credit; terms and conditions are not being clearly disclosed including how fees reduce the ODP dollar limits and how it differs from a line of credit.
- Appear to encourage consumers to overdraw their accounts, such as promoting use before their next paycheck, or leading consumers to believe overdrafts will always be paid.
- Advertising accounts with ODP as “Free”, leading consumers to believe there are no fees associated with use of ODP.



2005 Guidance-Bank Risks

- Safety and soundness concerns
- Credit risk
- Operational risk
- Identify, measure and manage overdraft volumes
- Provide performance reports to management
- Repayment practices
- UDAAP concerns

2005 – Regulatory Expectations



- Prominently distinguish account balances from overdraft coverage amounts
- Monitor program for “excessive” usage – more than 6 overdrafts in a 12-month period, and follow up
 - Offer less costly alternatives
- Establish daily limits & Consider De Minimis Limits
- Provide opportunities for low- or no-cost financial counseling
- Review your check clearing procedures
- “Fair Lending” considerations!!!

2005 Guidance Takeaways



- Board Oversight
- Review Program Materials
- Train Staff



Potential Pitfalls

- Promoting poor account management
- Not fully describing all of the features and fees; consumer doesn't understand the service
- Not explaining the discretionary nature of the program—Bank is not required to pay all overdrafts
- Not distinguishing ODP from “free” features of the account



2005 – Best Practices



- Provide Opt-In or Opt-Out
- Alert consumers before a transaction triggers fees
- Distinguish ledger balance from ODP funds
- Notify consumer each time ODP is used
- Establish daily limits on fees and de minimus fee level
- Monitor usage and report to Board and Management

Guidance issued July 2010



- Opt-In Requirement for ATM and 1X debit card transactions
- Avoid Steering
- Offer Opt-Out – allow customers an opportunity to decline ODP

FDIC: FIL-47-2010: Joint Agency Guidance





Renewed Regulatory Interest

- December 2021 CFPB released research reports
 - How Banks rely on OD fees as a major source of revenue
 - How Banks do not compete on transparent, upfront pricing
- Banks with a higher share of frequent overdrafters or higher average fees would result in closer supervisory attention

CFPB December 2021 Report



- OD/NSF fee revenue reached an estimated \$15.47 billion in 2019
- 44% of that total from banks over \$1 billion in assets was from JPMorgan Chase, Wells Fargo and Bank of America
- Study found that small institutions with ODP charged lower fees on average, however consumer outcomes were similar to the large banks.
- While fees dropped during COVID-19, “fee harvesting” practices persisted during the pandemic.

[CFPB Research Shows Banks' Deep Dependence on Overdraft Fees | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

CFPB Study



- June 2022 – CFPB is measuring impact of ODP on consumers
- Reviewed 5 metrics
 - Annual dollar amount consumers receive in OD coverage compared to the amount of fees charged
 - Annual dollar amount of OD fees charged per active checking account
 - Annual dollar amount of NSF fees charged per active checking account
 - Prevalence of frequent overdrafters: active checking accounts with > 6 and >12 overdrafts and/or NSF fees per year
 - Active checking accounts that Opt-in for ATM and 1X debit transactions

[CFPB Research Shows Banks' Deep Dependence on Overdraft Fees | Consumer Financial Protection Bureau \(consumerfinance.gov\)](https://www.consumerfinance.gov)



CFPB Study (continued)

- How banks assess their OD/NSF fees
- Grace periods
- Dollar thresholds before assessing OD/NSF fee
- Caps on number of fees charged per day/statement period



ABA Chairman's View

- Banks don't want consumers to overdraw their accounts
- ODP provides clients liquidity when there is an emergency expense, disruption in pay, misalignment in the timing of expenses and income.
- Consumers appreciate their rent/mortgage being paid or grocery bill to be covered
- Banks charge a small fee to reflect the costs and risks involved
- Consumers recognize there is value in ODP coverage
- Regulatory officials are trying to change ODP without actually changing the law.

[BankThinkABA op-ed OD fees 2022.04](#)

Overdrafts Scrutinized by Congress

9/22/2022



- Large retail bank CEOs testified before Congress
- Seven had eliminated overdraft services or offered non-overdraft alternatives.
- Chase: most customers opt-in to overdraft coverage – they don't want to miss payments.
- US Bancorp offers an option without overdraft services.

[Bank CEOs Testify Before Congressional Committees on Financial Services | Consumer Financial Services Law Monitor](#)

Industry Reaction to ODP Spotlight



- Reducing charges for overdrafts/NSFs
- Eliminating ODP/NSF charges altogether
- Providing 24-hour grace period
- Waiving charges for small overdrafts to account for honest customer mistakes or misalignments in timing of deposits and payments.
- Offering mobile alerts when balances run low.

[Bank Overdraft Fees: How They Work and How to Avoid Them - CNET Money](#)

Overdraft Protection Act of 2021

HR 4277



- Introduced in Congress June 30, 2021 – Died in Congress
- Introduced in Congress July 27, 2022 – Did not receive a vote.
- Bill would prohibit financial institutions from engaging in unfair or deceptive acts or practices in connection with overdraft coverage.
- Disclosure requirements
 - Overdraft coverage fees
 - Fact that the consumer's transaction may be declined (if NSF)
 - Consumer will NOT be charged a fee if such transaction is declined

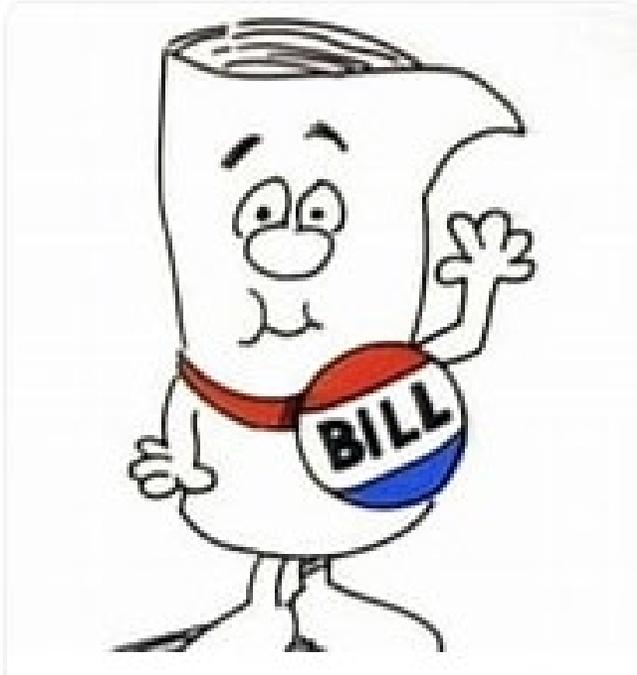
[H.R.4277 - 117th Congress \(2021-2022\): Overdraft Protection Act of 2021 | Congress.gov | Library of Congress](#)

Overdraft Protection Act of 2021 (continued)



- Prompt notification of account's overdraft status
- Limits number of overdraft fees per month and year (Fees must be "reasonable")
- Prohibits overdraft coverage fee if OD results solely from debit hold amount that exceeds the actual dollar amount of the transaction
- Prohibits OD fees for NSF items at ATM or debit card transactions
- Prohibits reporting negative information to Consumer Reporting Agency when overdrafts are paid under the terms of an overdraft coverage program

What happened to the Bill?



Did not pass in the 117th Congress
Jan 3, 2021 – Jan 3, 2023. Cleared from the books

Meanwhile....August 2022



Hello Digit's Automated Savings Program

- Program promised savings and falsely guaranteed consumers would not have overdrafts
- Faulty algorithm caused overdrafts and overdraft penalties to consumers
- Company fined \$2.7 million and restore funds to harmed consumers

[CFPB Takes Action Against Hello Digit for Lying to Consumers About Its Automated Savings Algorithm, August 10, 2022](#)

Hello Digit and UDAAP



- Falsely guaranteed no overdrafts
- Broke promises to make whole on its mistakes.
- Pocketed interest that should have gone to consumers.
- \$2.7 million fine – CFPB's Victim Relief Fund
- Approximately \$68,000 in reimbursements

Regions Bank 9/8/2022

Illegal Surprise Overdraft Fees (CFPB)



- \$141 Million to customers harmed
- \$50 Million to the Victim's Relief Fund
- Charged overdraft fees on certain ATM withdrawals and debit card transactions, after approving the transactions
- Customers had sufficient funds when the transactions were approved.
- CFPB determined leadership knew about this and could have discontinued the practice

https://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf

Whoops they did it again....



CFPB ORDERS WELLS FARGO TO PAY \$3.7 BILLION

- More than \$2 billion to consumers
- \$1.7 billion in civil penalties
- One of the charges—surprise overdraft fees

[CFPB Orders Wells Fargo to Pay \\$3.7 Billion for Widespread Mismanagement of Auto Loans, Mortgages, and Deposit Accounts | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

Authorize Positive-Settle Negative



- Transaction is authorized on positive funds.
- A second transaction posts to the customer's account, lowering the available balance.
- When the above “authorized” transaction posts, it posts against negative funds and the customer is assessed an overdraft fee.

ABA Staff Analysis “Overdraft Fees Resulting from “Authorize Positive, Settle Negative” Transactions

Description	Transaction	Available Balance	Ledger Balance
Day 1			
Opening Balance		\$100	\$100
Debit card transaction – authorized	-\$50	\$50	\$100
Day 2			
Preauthorized ACH debit – posted	-\$120	-\$70	-\$20
Overdraft fee	-\$34	-\$104	-\$54
Day 3			
Debit card transaction – posted	-\$50	-\$104	-\$104
Overdraft fee	-\$34	-\$138	-\$138

ABA Staff Analysis “Overdraft Fees Resulting from “Authorize Positive, Settle Negative” Transactions

Description	Transaction	Available Balance	Ledger Balance
Day 1			
Opening Balance		\$100	\$100
Debit card transaction – authorized	-\$50	\$50	\$100
Day 2			
Preauthorized ACH debit – posted	-\$60	-\$10	\$40
Overdraft fee (assessed based on available balance)	-\$34	-\$44	\$6 (But if the financial institution had used ledger balance for fee assessment, the balance would not have been reduced by an overdraft fee.)
Day 3			
Debit card transaction – posted	-\$50	-\$44	-\$44
Overdraft fee	-\$34	-\$78	-\$78

ABA Staff Analysis “Overdraft Fees Resulting from “Authorize Positive, Settle Negative” Transactions



ATM & 1X Debit Card NSF's

All of the following conditions must be met in order for the Bank to charge an NSF fee for ATM or 1X debit transactions:

- Bank provides written notice, set apart from all other information, describing overdraft protection program.
- Bank provides reasonable opportunity for you to affirmatively consent (opt-in) to the program for ATM and 1X debit transactions (and you have not revoked this consent).

[§ 1005.17 Requirements for overdraft services. | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

The Multiple Representment Dilemma

- Item is returned unpaid due to insufficient funds. Consumer is charged an NSF fee....
- Merchant redeposits the returned item. Item is once again returned due to insufficient funds. Consumer is charged another NSF fee for the same item....and so on.....

[Supervisory Guidance on Multiple Re-Presentment NSF Fees \(fdic.gov\)](https://www.fdic.gov/supervisory-guidance/multiple-representment-nsf-fees/)

Multiple Representments -- Where's the UDAP?



- Deceptive Practice: Disclosure does not adequately advise the consumer of charges stemming from multiple presentments of the same item.
- Unfair Practice: The practice of charging for multiple representments may result in substantial injury to the customer; the injury may not be reasonably avoidable; and there may be no countervailing benefit to either customers or competition.
- Potential for class action lawsuits.

Sample #1 NSF Fee Disclosure



* NSF Fee- Returned Item(s)	\$ 35.00
* NSF Fee-Paid Item(s)	\$ 35.00

*An NSF fee will be imposed per overdraft item created by check, in-person withdrawal, ACH debit, or recurring debit card transactions

Sample #2 NSF Fee Disclosure



Overdraft and Insufficient Funds (NSF) Related Fees*

Paid/Overdraft Fee or Return Item Fee**

\$36.00/item

Overdraft Protection Advance Fee

\$7.50/advance

Overdraft Service Charge (Negative balance - on Business/Commercial Accounts only***)

\$2.75/day

*These fees apply to overdrafts created by check, in-person withdrawal, or other electronic means, as applicable (there are not sufficient funds to cover a transaction)

**Fees on retail/non-business accounts will not exceed four charges per calendar day. You will not be charged the overdraft/return item fee, if overdrawn amount is less than \$10. These limits do not apply to business/commercial accounts.

***An additional \$2.75 per day will be charged for each day the business/commercial account remains in an overdrawn status.

INTEREST EARNING

Get rewards and essentials
with
U.S. Bank Smartly™ Checking.



Why it may be right for you

You want it all – overdraft protection tools, rewards for growing your money and the option to use checks.

Benefits:

- **Banking essentials + rewards.** Transfer money, set alerts and more, plus get access to [Smart Rewards™](#).
- **Overdraft protection tools.** \$50 overdrawn available balance threshold, overdraft protection² and Overdraft Fee Forgiven³
- **Waive monthly maintenance fee.** Fee of \$6.95 can be waived in multiple ways.⁴

NO OVERDRAFT FEES

Stay in control of your money
with a Safe Debit account.⁵



Why it may be right for you

You want tools to help manage your money and build credit, no overdraft fees and you don't need checks.

Benefits:

- **Banking essentials.** Directly deposit paychecks, lock a lost card, pay bills for free and more.
- **No overdraft fees.**⁶ In most situations a transaction more than your balance won't go through. If it does, there's no fee.
- **No surprise fees.** Pay a \$4.95 monthly maintenance fee with no minimum balance penalty.

Our Fees: We charge an Overdraft Paid Fee for each item or transaction we pay that causes the Available Balance to become negative or occurs while the Available Balance is negative on the account. Any Overdraft Paid Fees are deducted from your account on the next business day. See the current pricing information disclosure for information on fees and how fees will be assessed. If you want to avoid the inconvenience and extra expense of overdraft fees, refer to the sections titled “Overdraft Handling” on page 7 and “Overdraft Protection Plans” on page 8 for information.

There are some circumstances that can take your account into a negative balance where we will not charge a fee, for example:

- If certain fees such as your monthly maintenance fee are the only items that resulted in the negative balance.
- If the negative Available Balance is less than our threshold. See your *Consumer Pricing or Business Pricing Information* disclosure for specific information. (Both can be obtained by stopping in a U.S. Bank branch or for the *Consumer Pricing Information* only, call 800-872-2657 to request a copy.)

Multiple Representments – Risk Mitigation



- Review all disclosures and account agreements to ensure that the way your system is charging fees for NSF's clearly and conspicuously describe when, how and how often an NSF fee can be charged. If the language is changed, send updated agreements and/or disclosures to all affected customers.
- Review and understand your core system's ability or inability to recognize multiple representments as they relate to multiple NSF fees. Can it identify and track represented items?

NSF Class Action Suit Dismissed



10/25/22 – US Court of Appeals 7th Circuit dismissed a class action suit in Illinois

- Accused of breaching agreement when it charged NSF fees
- Credit Union used available balance to assess NSF fees
- Account agreement referenced “sufficient available funds” and stated checks or other transfer or payment orders which are drawn against insufficient funds may be subject to a service charge...if exceeds total of all overdraft sources, items will be returned as NSF and you will be charged applicable fees.
- Schedule listed NSF fee as \$25 each

<https://www.consumerfinance.gov/newsroom/2022/11/07/7th-circuit-affirms-district-courts-dismissal-of-nsf-class-action/>

Other Targeted Fees



“Indiscriminately charging depositor fees, regardless of circumstances, likely violates the Consumer Financial Protection Act”

- Chargeback fee for returned deposited items (\$10 - \$19 range)
Person depositing check has no control over whether check will clear.
- FTC jumped on the Junk Fee bandwagon with a Notice of Proposed Rulemaking – Comment period ended January 9, 2023.

[CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

[Federal Register :: Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011](#)



ABA Lawsuit

- Group supports fair enforcement of nondiscrimination laws
- “Cannot stand by while a federal agency exceeds its statutory authority, creates regulatory uncertainty, and imposes costly burdens on the business community”
- Court’s intervention is needed to ensure that the CFPB is accountable to legal constraints, the rule of law and the public

[ABA Sues CFPB for Abuse of Statutory Authority | American Bankers Association](#)

FIL-40-2022 (8/18/2022)



- FDIC will recognize institution's proactive efforts to self-identify and correct violations.
- In determining the scope of restitution, the FDIC will consider an institution's recordkeeping practices and challenges it may have retrieving, reviewing and analyzing re-presentment data, on a case-by-case basis, when evaluating the time period institutions utilized for customer remediation.
- Failing to provide restitution for harmed customers when data on re-presentments is reasonably available will not be considered full corrective action.

[Supervisory Guidance on Multiple Re-Presentment NSF Fees \(fdic.gov\)](https://www.fdic.gov/supervisory-guidance/multiple-re-presentment-nsf-fees/)

FIL-40-2022 (8/18/2022) Restitution



[4] In recent examinations, the FDIC has identified instances where institutions have been unable to reasonably access accurate ACH data for re-presented transactions beyond two years. In these cases, the **FDIC has accepted a two year lookback** period for restitution. The FDIC expects supervised institutions to promptly address this issue. Institutions with challenges readily accessing accurate ACH data that self-correct this issue and provide restitution to harmed customers, as appropriate, for transactions occurring two years before the date of this Financial Institution Letter will generally be considered as having made full corrective action.



Takeaways

- Understand how your bank dispositions “Authorize Positive-Settle Negative” transactions and take appropriate action to avoid charging overdraft fees for these transactions.
- Explore ways not to charge an overdraft fee when the customer cannot “reasonably expect” to be charged the fee or is not able to avoid the fee.
- Understand your fee structure across all products.
- When you find a potential UDAP issue, address it promptly—
 - Make necessary system changes
 - Make necessary disclosure and agreement changes and send to customers
 - Perform a lookback and reimburse customers who have been harmed.



Takeaways

- Be sure your Consumer Complaint monitoring processes are sufficient to identify patterns of small consumer complaints which may indicate a larger issue that needs to be addressed.
- Perform sufficient due diligence on business customers and Fintech partners. If you were approached by the Fintech company, Hello Digit, to open a business account OR to enter into an arrangement to offer their products through a third-party agreement, would your due diligence reveal their past transgressions?

Current Administration's Agenda....



CFPB will examine –

- New rules regarding NSF fees—not disclosed.
- Are overdraft fees finance charges subject to Reg Z?
- Small business lending data collection.
- Penalty fees levied by card issuers
- Amendments to Reg V – Fair Credit Reporting Act

OCC, FRB, FDIC project March issuance of new CRA Regulations

FinCEN – Nov revision to Customer Due Diligence requirements

[Current Unified Agenda of Regulatory and Deregulatory Actions \(reginfo.gov\)](http://reginfo.gov)

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QUESTIONS?

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