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On Compliance: Keep It Classy

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Tips for steering clear of overdraft class action lawsuits

With passage of the **Dodd Frank Act** in 2009, the financial services industry has become even more highly regulated. Not surprisingly, there has been a corresponding uptick in consumer class action litigation against financial institutions. In recent years,

dozens of credit unions across the country have faced class action lawsuits relating to overdraft and non-sufficient funds fees.

The suits have been costly to credit unions and their membership. Years after the first wave of suits, new class action lawsuits relating to fees are still being filed, resulting in numerous multi-million-dollar settlements.

The suits filed in recent years typically challenge several different alleged "improper practices" relating to assessment of overdraft and NSF fees:

1. Ordering transactions in an order different than they are made, such as processing larger payments before smaller ones, which allegedly causes more overdrafts;
2. Failing to adequately explain in account agreements how account balances are calculated for purposes of assessing overdraft fees;
3. Failing to alter a federally mandated opt-in disclosure form to describe when an account will be overdrawn; and
4. Authorizing a debit card transaction on an account with a positive balance, sequestering checking account funds to cover the transaction, but settling the account into a negative balance because of subsequent posted transactions; and
5. Assessing multiple NSF fees on the same transaction.

Some of these alleged "improper practices" are not actually unlawful. Instead, class plaintiffs frequently allege that the credit union breaches its own account agreement by failing to explicitly say that the credit union will process member transactions or assess fees in a particular fashion.

Although the financial services industry is fraught with consumer litigation, several best practices, if adopted, should reduce the risk of being subject to overdraft class litigation.

One Size Does Not Fit All

The vast majority of overdraft lawsuits are filed because plaintiff's lawyers perceive deficiencies in the credit union's account agreement and related disclosures. Many credit unions use third-party vendors to supply form account agreements and disclosures. Boiler plate account agreements may fail to fully reflect the manner in which credit union processes member transactions or assesses fees. These form documents also often do not include plain language or real-life examples that further explain how the credit union handles member transactions and when it assesses fees. Credit unions should consult with experienced legal counsel to tailor an account agreement and disclosures that provide abundant notice of the credit union's policies and procedures.

When the CFPB Speaks, Listen

In the wake of the Great Recession, Congress established the **Consumer Financial Protection Bureau** to regulate consumer financial products and services. CFPB is vested with broad rulemaking, supervisory, investigatory, adjudicatory, and enforcement authority. The CFPB has publicly weighed in on overdraft fees numerous times. For example, in 2013, the bureau issued the whitepaper, "CFPB Study of Overdraft Programs." Its website includes articles, studies and statements about overdraft fees. More importantly, CFPB has occasionally reviewed practices of financial institutions, and has declared some to be deceptive. These declarations are often a dog whistle heard loudly by plaintiff's attorneys and frequently spawn new kinds of class-action claims. Credit unions are wise to listen also.

Know Your Core Processor

Credit unions should work with their core processors to understand fully how their vendor handles member transactions, e.g. what account balance method is used on

each type of transaction, the order in which items are posted, and how and when fees are assessed.

Get an Annual Checkup

The regulatory landscape is constantly changing. The plaintiff's bar is always looking for new claims. Credit unions should have their account agreements, disclosures and practices reviewed by experienced counsel at least annually. This small investment will mitigate the risk of being targeted for class action litigation, which could cost millions.

Batten Down the Hatches

If your credit union is the target of a class action complaint, contact experienced legal counsel immediately. Consumer class action litigation is complex and potential exposure is significant. Get all hands on deck, including IT, compliance, and customer support. Devising a defense plan early on in the litigation is crucial to obtaining the best outcome.

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