



Print (/print/pdf/node/16801)

On Compliance: Avoiding a UDAAP Lawsuit

October 2017: Vol 40 No 10

Steve Van Beek

CUs must analyze and enhance overdraft disclosures to reduce risks.

The Dodd-Frank Act's creation of the Consumer Financial Protection Bureau and the addition of the "abusive" test in the "unfair, deceptive or abusive acts or practices" clause has resulted in an ongoing increase of compliance costs for credit unions. However, the focus on UDAAP is not limited to regulatory compliance risks. Financial institutions, including credit unions, have been targeted in class action lawsuits alleging inadequate disclosures of overdraft protection programs. As with UDAAP claims, the best approach for credit unions to avoid such allegations is to closely analyze their overdraft programs and disclosures and, as necessary, enhance the information provided to members.



Available Balance

Many credit unions use the "available balance" (which considers transactions authorized but not yet cleared) to determine whether to pay a particular transaction and also whether to charge a non-sufficient funds fee (when returning an item) or an overdraft fee (when paying an item). Lawsuits allege that the usage of the available balance was not clear and, thus, the overdraft fees were improper because the member's actual balance was positive.

Importantly, using the available balance is allowed. And, there are no regulatory requirements outlining how and when a credit union is required to disclose its usage of the available balance. Rather, the overarching UDAAP standard results in the need to ensure the CU's overall overdraft program—including usage of available balance—is upfront, clear and transparent to members.

Initial Steps

As lawsuits continue, credit unions should be sure to carefully examine their overdraft protection programs. The fact that past exams and audits may not have raised red flags should not provide a sense of security. Rather, all credit unions should conduct a comprehensive analysis of their overdraft protection programs to determine how their program works, how it is disclosed and whether the risks presented in the lawsuits can be managed by making revisions. This can be done by reviewing their membership agreements, overdraft disclosures, website materials and account opening materials (including **Regulation E** (<https://www.federalreserve.gov/bankinforeg/regecg.htm>) opt-in form and procedures).

Initial steps should focus on ensuring the consistency of all information and viewing the materials and disclosures with the lawsuits and any past member questions or complaints in mind. Ask yourself whether your CU's materials clearly explain to members how your overdraft program works—including a member's options for overdraft transfers or to opt out.

Notably, litigation is not the only risk. In November 2016, the federal banking agencies—including the National Credit Union Administration—**conducted a webinar** (<https://consumercomplianceoutlook.org/outlook-live/2016/interagency-overdraft-services-consumer-compliance-discussion/>) focusing on overdraft services. A significant portion of the event analyzed practices considered "unfair, deceptive or abusive." Credit unions should review the free webinar in preparation for future examinations (and, of course, adjust procedures, systems configurations and disclosures if necessary).

Proactive Actions

The best approach to reducing risks is to be proactive in enhancing the credit union's description of its overdraft program. Importantly, this does not need to be limited to the credit union's formal disclosures and account agreements. Enhancing and clarifying the information on a credit union's website regarding its overdraft protection program—including adding FAQs and examples—can be very effective in providing plain English explanations to members. Further, these resources and examples can be utilized when training staff on the CU's overdraft program as well as for sharing with members that have questions or complaints.

One area of confusion for members is debit card authorization holds and how such holds impact their available balance. Credit unions utilizing the available balance can reduce confusion by clearly explaining to members what debit card authorization holds are, when they occur and ways they can be avoided.

Credit unions can also be proactive by explaining to members the various ways they can track and monitor their available balance. For example, members may be able to view their available balance online, at ATMs, via a mobile app or through phone or text banking. By clearly disclosing these options—as well as providing low-balance text/email alert options—credit unions can point back to additional efforts to notify members when overdrafts could occur.

Overdraft programs can vary significantly from credit union to credit union, and this makes it very important for each organization to understand its own practices. Doing so helps ensure the CU has been up front, clear and transparent about its overdraft program. While there is no silver bullet when it comes to preventing UDAAP claims from regulators or class action lawsuits, credit unions can take the proactive steps described in this article to reduce risk while continuing to provide valuable service to members.

Steve Van Beek (<http://www.howardandhoward.com/en/attorneys/steven-m-van-beek.aspx>) is an attorney and counselor at Howard & Howard Attorneys PLLC in Royal Oak, Mich. He focuses his practice on helping credit unions serve their members by successfully managing their compliance, legal and strategic risks. Reach him at SVB@h2law.com ([SVB@h2law.com](http://www.h2law.com)).