

Professional Perspective

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# Navigating CFPB Regulation of Bank Overdraft Fees

Contributed by [Ryan Scarborough](#), [Jesse Smallwood](#) & [Richard Olderman](#), *Williams & Connolly*

Bank overdraft fees are in the crosshairs. Regulators have called them unfair and abusive, and class action plaintiffs' firms are attacking the adequacy of bank disclosures. The Consumer Financial Protection Bureau's director, Rohit Chopra, asserted that some banks are "hooked on exploitative junk fees that can quickly drain a family's bank account."

He promised that the CFPB would turn its attention to overdraft practices that lead to fees based on "the difference between authorization and settlement, the significance of the timing gap between the two, the amount of time a credit may take to show up in the account, the use of one kind of balance over another for fee calculation purposes, or the order of transaction processing across different types of credit and debits."

This regulatory development comes against the backdrop of a wave of civil lawsuits over the past few years challenging bank overdraft fee practices on legal theories ranging from breach of contract to unjust enrichment. This article examines the current regulatory landscape, recent court decisions in cases challenging current bank overdraft practices, the reaction of banks to the CFPB's renewed interest in this area, and measures financial institutions can take to reduce their exposure.

## The CFPB's Enforcement of Overdraft Fees

The CFPB's enforcement activity with respect to overdraft fees has changed from administration to administration. Under President Barack Obama, the CFPB commenced enforcement actions against banks that charged overdraft fees to consumers who had not opted-in for overdraft coverage or that allegedly pushed customers to opt in without fully understanding the consequences. See, e.g., Consent Order, *In Re Regions Bank* (File No. 2015-CFPB-0009) (Apr. 28, 2015); Stipulated Final Judgment and Order, *CFPB v. TCF National Bank*, Civ. No. 17-166 (Aug. 1, 2018 D. Minn.). Plans were made to more actively regulate these fees. See CFPB, [Supervisory Highlights](#) 8-9 (Winter 2015).

Under President Donald Trump, the CFPB paused enforcement and stepped back from regulation. At one point it considered eliminating the opt-in requirement. See CFPB Overdraft Rule Review, Docket No. CFPB-2019-0023 (May 6, 2019). Ultimately, the opt-in requirement remained in place, but the CFPB shelved plans by the previous administration to more vigorously regulate these fees. After an initial pause, the CFPB resumed enforcement actions. In August 2020, for example, the CFPB announced a \$122 million settlement with TD Bank for illegal overdraft marketing and enrollment practices affecting customers who opened new checking accounts and were charged overdraft fees without their consent. The settlement encompassed allegedly deceptive and abusive practices that violated the Electronic Fund Transfer Act and Regulation E, including pre-marking the enrollment form and taking steps to obscure the overdraft notice and opt-in form.

This changed again with the Biden administration. On Dec. 21, 2021, the CFPB issued two reports criticizing the profits the banking industry made from overdraft fees during calendar year 2019. Overdraft and other nonsufficient fund fees generated profits of \$15.47 billion for large banks with assets over \$10 billion. Even smaller banks and credit unions with assets under \$10 billion derived significant profits from these practices.

More recently, the CFPB issued a request for public comment on a range of bank fees: "If you are a consumer, please tell us about your experiences with fees associated with your bank, credit union, prepaid or credit card account, credit card, mortgage, loan, or payment transfers." The Bureau is poised, in other words, to regulate bank overdraft fees and, if experience is any guide, may choose to regulate through enforcement actions that advance expansive interpretations of its abusiveness authority.

## Overdraft Fee Litigation

The CFPB's criticism of bank overdraft practices coincides with a wave of private class action litigation challenging the adequacy of bank overdraft fees disclosures that have been percolating over the past several years. These cases are often brought as putative class actions, and are filed by a handful of plaintiffs' firms against banks—large and small—around the country.

Among the most frequently challenged fees are "authorize positive, settle negative" (APSN) transactions, which describe debit card transactions authorized when the customer's account had sufficient funds to cover them, but later settled when the account lacked sufficient funds, resulting in the assessment of overdraft fees; and multiple fee claims, where a fee is

charged when a second request for payment of a previously declined item is submitted for payment. In the latter instance, a bank may decline a payment request and assess a non-sufficient funds (NSF) fee, and the consumer or vendor may subsequently resubmit its request for payment, causing another NSF or overdraft fee to be imposed.

These cases invariably turn on the language of the contract. Where there is no ambiguity in the bank's disclosures, defendants typically prevail. For instance, in *Mason v. Dubuque Bank & Tr. Co.*, No. LACV111838 (Iowa Dist. Ct. Dubuque Cnty. Nov. 4, 2021) and *Schmidt v. Wisconsin Bank & Tr.*, No. 21CV854 (Wisconsin Cir. Ct., Dane Cnty. Mar. 23, 2022) (note: the authors' law firm represented both banks), the account holders challenged APSN transactions and/or multiple fee claims. The courts ruled that the bank's actions were supported by the language of the customer agreements. Accordingly, they granted the banks' motions to dismiss.

In so ruling, the courts rejected plaintiff's broader policy arguments regarding the imposition of such fees. The *Mason* court noted that such arguments are not for the courts to decide: "To the extent Plaintiff seeks to use an allegation of breach of contract to correct some generalized injustice based on this possibility of a chain of overdraft fees occurring, Plaintiff asks this Court to exceed its proper role. The Court will not do so."

Where there is ambiguity regarding procedures and key terms, however, courts have denied motions to dismiss. In *Hash v. First Fin. Bancorp*, No. 1:20-CV-1321 RLM-MJD, [2021 BL 81375](#) (S.D. Ind. Mar. 8, 2021), the court denied the bank's motion to dismiss an APSN complaint, explaining that "[n]one of the contract sections cited by First Financial unambiguously establish that the contract allows First Financial to determine overdraft fees at settlement on the type of transactions on which Mr. Hash alleges he was improperly charged overdraft fees." See also *Gardner v. Flagstar Bank*, No. 20-cv-12061, [2021 WL 3772866](#) (E.D. Mich., Aug. 23, 2021). These lawsuits can be expensive, whether the choice is to litigate or settle. See *Morris et al. v. Bank of Am. N.A.*, No. 3:18-CV-00157 (W.D.N.C.) (\$75 million settlement).

Recently, creative lawyers have filed lawsuits in federal courts challenging "buy now pay later" services. For example, in a California putative class action against AfterPay, the plaintiff asserts that the company deceived customers in the U.S.; that plaintiff "had no idea small, automatic Afterpay repayments could cause \$35 bank fees from [her] bank," or that "Afterpay would process transactions when [her] accounts had insufficient funds." *Miller v. AfterPay U.S.* (N.D. Calif. No. 4:21-cv-04032-DMR). In short, there is a wave of cases in state and federal courts that challenge the imposition of overdraft fees in light of the operative language in the account agreement.

## Reaction of Financial Institutions

On Dec. 1, 2021, the day the CFPB released its two reports on bank overdraft fees, Capital One, the sixth-largest U.S. bank, announced that it would eliminate all overdraft fees for consumer accounts. Bank of America, the second-largest U.S. bank, also announced that it will reduce the overdraft fee it charges customers from \$35 to \$10, beginning in May 2022.

Other banks announcing new overdraft fee policies include Ally Bank, Wells Fargo, J.P. Morgan Chase, and TD Bank. On Feb. 24, 2022, Citigroup announced that it intends to eliminate overdraft fees, non-sufficient funds fees and overdraft protection fees, becoming the only top five bank to abolish these fees in their entirety.

A key factor these financial institutions presumably considered when making decisions concerning overdraft fees is litigation and enforcement risk; there has been a marked increase in litigation against banks related to certain fees, such as for APSN transactions or multiple fee claims.

Another factor, less influential, is competition from digital-only banks such as Chime and Current, whose platforms have eliminated many of the common fees associated with brick-and-mortar banks including overdraft fees. It is estimated that there will be 47.8 million digital-only bank account holders in the U.S. by 2024.

Overdraft fees have also attracted the attention—and scorn—of legislators, another factor in the calculus. For example, in New York, Executive Order No. 202.9 (Mar. 21, 2020), which is aimed at individuals facing hardship due to Covid-19, requires New York-regulated banking organizations to eliminate overdraft fees during the period specified in the order. While the order is not permanent, New York recently enacted a statute requiring banks to adopt check processing practices that minimize NSF fees. Under that law, all banking institutions must process customer transactions as they come in, rather than processing larger transactions first to maximize overdrafts and fees. Banks are required to disclose overdraft policies when a new account is opened.

Several other states, including Alaska, Illinois, Missouri, and Tennessee, have capped overdraft fees at \$15 to \$25. On the federal side, H.R. 4277, the Stop Overdraft Profiteering Act of 2021, (introduced June 30, 2021) would, if enacted, bar institutions from re-ordering transactions to artificially increase their fees and also limits the number of fees banks can charge to one per month and six per year.

The litigation, legislation, and regulatory action reflect a debate concerning the societal value of overdraft fees. According to a June 2020 report from the Center for Responsible Lending, overdraft fees often fall most heavily on economically vulnerable bank customers. Approximately 9% of account holders paid around 84% of total overdraft and non-sufficient fund fees in 2019.

On the other hand, the banking industry argues that overdraft fees can be beneficial, helping customers avoid bounced checks as well as recourse to payday loans and similar high-cost credit products. “For millions of American families, short-term liquidity products such as overdraft protection provide a valued emergency safety net to put food on the table, commute to work, pay their rent, and cover other expenses in times of need,” said Dan Smith, the head of regulatory affairs at the Consumer Bankers Association, in an [August 2021 Bloomberg banking law article](#).

## Possible CFPB Regulatory Action

Under [12 U.S.C. § 5531\(b\)](#), the CFPB has rule-making authority to address unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. The CFPB could in theory issue a rule that makes it an unfair and abusive practice to charge overdraft fees, or in the alternative, a rule limiting such fees in number and amount per year. However, overdraft rules, with their notice and comment requirements, and subsequent court challenges, are not likely any time soon.

If the past is prologue, the CFPB will likely regulate overdraft fees through enforcement actions. It will, no doubt, assert expansive interpretations of its abusiveness authority, as well as the unfair and deceptive standards, in both supervisory and enforcement matters concerning bank overdraft fees.

The CFPB's abusiveness authority is broad. It applies to an act or practice that “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service;” or takes unreasonable advantage of:

- A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service
- The inability of the consumer to protect its interests in selecting or using a consumer financial product or service
- The reasonable reliance by the consumer on a covered person to act in the interests of the consumer

[12 U.S.C. § 5531\(a\)](#)); [12 U.S.C. § 5536\(a\)\(1\)\(B\)](#).

The cases on the horizon are likely to differ from prior enforcement actions involving overdraft fees. We anticipate that the Bureau will bring claims in the future focused not on enrollment status, but on the circumstances when the bank charges an overdraft fee—such as APSN or multiple fee claims. It may point to interpretative guidance issued by the Federal Reserve in years past suggesting that charging a fee in an APSN situation amounts to an unfair act or practice. Fed. Rrv. Bd., [Consumer Compliance Supervision Bulletin 12](#) (July 2018).

## How Banks Can Minimize Risk

With increased regulatory scrutiny anticipated, banks should closely review materials that inform consumers about their processing and overdraft practices. When an account is opened, banks should provide full written disclosures of their overdraft policies and the opt-in requirement. This goes beyond providing the model form proposed by the Federal Reserve in its 2009 amendment to Regulation E. As the Eleventh Circuit has held, using language from a model opt-in clause “does not shield [a financial institution] for claims based on their failure to make adequate disclosures.” *Tims v. LGE Cmty. Credit Union*, [935 F.3d 1228](#), 1243, 1244 (11th Cir. 2021) (reversing dismissal of putative class action complaint).

The language of the agreement between the bank and the customer should be clear, free of inconsistencies, and ideally should include examples to illustrate how overdraft fees work. If the contract language is ambiguous and the bank is sued, a motion to dismiss is likely to be denied. Expensive, time-consuming litigation will follow. Banks may also want to consider

whether to forgo APSN fees or multiple fee claims to minimize their regulatory and litigation risk. Finally, there may be other measures that banks can take to minimize their litigation risk, at least in the class action context, by requiring customers to arbitrate disputes.

While several major banks have announced plans to change overdraft rules, and in the case of Citigroup to eliminate overdraft fees, many other banks have maintained the status quo. If these banks are not transparent concerning their fees and the consumer's opt-in rights, and if their counsel do not draft clear contractual language explaining the bank's overdraft procedures, they may continue to feel heat from regulators, legislatures, and plaintiffs who bring class action lawsuits. The tide is definitely turning.