



# Understanding Key Overdraft Compliance Issues and Planning for What Comes Next

*Cheryl Lawson, EVP of Compliance at JMFA*

Overdraft programs have certainly been thrust into the limelight over the past few years, with an uptick in interest from regulators, consumers, politicians, litigators, and even the media. These conversations largely stem from a single issue: How should consumers be treated if they make use of an overdraft protection plan?

We've also seen some of the large national players eliminate overdraft fees altogether rather than find ways to work within the existing guidance. And while trillion-dollar behemoths have that luxury, community financial institutions know that the loss of fee income from overdrafts isn't easily replaced.

While many are taking a wait-and-see approach to an ever-changing climate, this comes with its own set of risks. Instead, compliance departments should focus on understanding the key issues at hand and charting a path for reviewing and updating overdraft policies.

<sup>1</sup> *Overdraft Protection Act, HB4277 and Stop Profiteering Act, S.2677*

## **The Noise About Excessive and Junk Fees**

In 2021, Rohit Chopra, director of the CFPB, made a lot of noise about “junk fees.” He ascribed that nomenclature to financial institutions, and shortly thereafter the Office of the Comptroller of the Currency and National Credit Union Administration announced that they were looking hard at overdraft programs. Yet in its entire history, the CFPB has never issued any rulings that have impacted overdraft programs.

Certainly, some of the largest institutions were engaging in practices that drew attention to how overdraft fees are assessed. Wells Fargo came under fire for posting items in a way that would maximize fees. “Excessive” fees have often been described in proposed legislation as exceeding one fee per month or more than six per year. These issues are largely addressed by core providers that could control the order in which simultaneous transactions were posted to an account and limit the fees assessed.


## **The Problem with Re-Presentation**

Since 2020, we have seen an increase in lawsuits around re-presentation. On the heels of that, the Federal Deposit Insurance Corporation's March 2022 Consumer Compliance Survey highlighted re-presentation as a potential violation of the Federal Trade Commission Act.

Re-presentation has been a longtime merchant practice for non-sufficient funds items, but examiners may now request reporting on all re-presented items and the fees assessed. The FDIC's stance is that describing fee assessments as “per item” or “per transaction” is unclear. Litigation has further pushed this issue to the forefront, forcing financial institutions to respond and describe re-presentation fees in a more transparent way.

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### **Pro-Consumer Disclosures and Employee Education**

Years ago, the FDIC did a study and went into multiple branches of the same financial institution where the frontline staff were asked the same questions about products and services. All replied with different answers.

The reality is that if your employees aren't educated about how your credit union's overdraft program works, they won't be able to communicate properly with your members. The risks of this miscommunication are twofold:


1. Members won't use the service because they don't understand it; and
2. Members may be given inaccurate information.

Your members should know what balance to look at, how decisions are made to pay a transaction, and what fees will be assessed.

Staff education should be combined with clear and transparent disclosures. Such disclosures will stave off any critiques from examiners and potential litigation. Even the best disclosures should still be regularly reviewed to ensure they're aligned with current guidance. If you're not constantly monitoring the overdraft environment, you might miss something and open the door for risk.

### **What Will Satisfy Both Consumers and Regulators?**

We've been having these discussions around overdraft protection programs for a long time. Legislation has been introduced in Congress repeatedly, and it's been a theme of CFPB rhetoric for years. But we have yet to get any clear next steps, leaving community financial institutions in limbo. Should they act now, or wait for a potential lawsuit or direct feedback from examiners?

The reality is that pro-consumer policies will satisfy the regulators, can continue to deliver revenue, and provide customers with a valuable service. Transparency is paramount. Credit unions can update their disclosures and make crystal clear how and when fees will be assessed. 

**Cheryl Lawson** serves as JMFA's principal compliance liaison for regulatory requirements of overdraft services, including consumer protection issues and strategies to enhance safety and soundness.

#### **About JMFA**

JMFA, a preferred provider for Cornerstone Resources, provides credit unions comprehensive overdraft consulting with consumer-focused recommendations, data-driven intelligence, and a 100% compliance guarantee to address your evolving needs.