

Overdraft & NSF Fees

Mitigating Litigation and Regulatory Risk

Overview

Many credit unions offer overdraft protection services to their members, often referred to as “Courtesy Pay” or “Overdraft Privilege” programs. Once a member is approved or authorized to use the service, the credit union may use its discretion to pay items and assess overdraft fees if the member’s account does not have a sufficient balance to cover the items when presented for payment. Alternatively, the credit union may return the items and assess NSF fees.

Class action lawsuits continue to be filed or threatened against credit unions that offer these programs, alleging that their practices for assessing overdraft and NSF fees are improper and/or do not align with account agreements or other documents provided to members. Additionally, the Consumer Financial Protection Bureau (CFPB) has undertaken an initiative to reduce or eliminate what it considers “exploitive junk fees,” including overdraft fees on “Authorize Positive, Settle Negative” (“APSN”) transactions and re-presentment fees on NSF transactions. As part of this initiative, the CFPB has issued enforcement actions against large banks for engaging in these types of fee assessment practices.

Costs incurred in responding to class action lawsuits and monetary penalties assessed in relation to enforcement actions can be significant, and credit unions may suffer reputational harm. Therefore, credit unions that are engaged in similar practices should carefully consider whether to continue assessing these types of fees in light of the ongoing litigation trend and the CFPB’s scrutiny of and stance on such practices.

Common Class Action Allegations

The following are common allegations raised by plaintiffs’ attorneys against credit unions:

- **Overdraft Fees Based on “Available” Balance versus “Actual” (Ledger) Balance.**

Many credit unions assess overdraft fees based on the “available balance” rather than the “actual balance” (or “ledger balance”) in the account. Different components can impact how the “available balance” is determined, such as deposit holds, and debit card preauthorization holds. Both types of holds, for example, reduce an account’s “available balance” but do not impact the “actual balance.”

Plaintiffs’ attorneys have alleged that credit unions using the “available balance” to determine whether an account is overdrawn breach their account agreements because the agreements fail to explain that the overdraft fees are based on the account’s “available balance” rather than the “actual balance,” and do not clearly describe how the “available balance” is determined.

- **Overdraft Fees on Debit Card Transactions**

When a member uses their debit card for a signature-based transaction and there are sufficient funds in the member's account to cover the transaction at that time, a preauthorization hold may be placed on funds in the account which reduces the member's "available balance." The funds are considered to be set aside when the preauthorization hold is placed. When an intervening transaction(s) occurs, it may further reduce the "available balance" (e.g., a check clears) before the debit card transaction posts to the account. If, because of the intervening transaction(s), the account balance is not sufficient to cover the debit card transaction at the time it posts, an overdraft fee may be assessed even though funds were sufficient at the time the transaction was initiated. These are often referred to as overdraft fees on "Approve Positive, Settle Negative" ("APSN") transactions.

Plaintiffs' attorneys claim the practice of assessing overdraft fees on APSN transactions is improper since funds are previously set aside at the time the preauthorization holds are placed.

- **Returned Items and NSF Fees**

Another trend in class action litigation pertains to the assessment of fees for items that are returned unpaid due to insufficient funds. In these situations, an item is returned unpaid, and the member is assessed an NSF fee. If the item is re-presented (or resubmitted) for payment and it is returned again due to insufficient funds, an additional NSF fee is assessed (re-presentation NSF fee). Items are often re-presented/resubmitted for payment up to two times, so the member may be assessed multiple re-resentation NSF fees.

Plaintiffs' attorneys allege that account agreements fail to clearly explain that multiple NSF fees may be assessed (i.e., a fee is assessed each time the item is returned unpaid).

CFPB Actions

The CFPB has taken the following actions in relation to deposit account "junk fees," including overdraft and NSF fees:

- **Regulatory Guidance**

In October 2022, the CFPB issued [guidance](#) intended to help institutions "avoid charging illegal junk fees on deposit accounts." The guidance specifically targets what the CFPB calls "surprise overdraft fees" and "surprise depositor fees," stating they are "likely unfair and unlawful under existing law."

- **Enforcements Actions**

In September 2022, the CFPB issued an [enforcement action](#) against Regions Bank for its practice of assessing what were described as "illegal" overdraft fees on APSN transactions, requiring the bank to refund \$141 million in overdraft fees to customers and pay a fine of \$50 million to the CFPB.

In December 2022, the CFPB issued an [enforcement action](#) against Wells Fargo for engaging in "illegal" practices across multiple product lines, including assessing deposit accountholders overdraft fees on

APSN transactions. The bank was ordered to pay a total of \$3.7 billion in penalties for engaging in these practices, with \$205 million to be paid to customers harmed by overdraft fee assessments.

In July 2023, the CFPB issued an [enforcement action](#) against Bank of America for engaging in “illegal” practices across product lines, including assessing re-presentment NSF fees on ACH and check transactions that were returned unpaid despite having already assessed a fee for the same ACH or check transaction at the time it was previously returned unpaid. Bank of America was ordered to pay the CFPB and the Office of the Comptroller of the Currency (OCC) each a \$60 million penalty related to its NSF fee practices. Additionally, the bank was ordered to pay \$100 million to customers for the various “illegal” practice identified by the CFPB.

Through its guidance and enforcement actions, the CFPB has made its position clear that the practice of assessing “surprise overdraft fees,” “surprise depositor fees” or re-presentment NSF fees is likely unfair and illegal, **even if financial institutions disclose these fees to their customers.**

Credit Union Next Steps

Consider the following action steps:

- Determine if your credit union engages in any of the practices targeted in class action lawsuits and enforcement actions.
- Be aware of the CFPB's stance on and scrutiny of what it has identified as “illegal junk fees.” Weigh potential risks and make an informed business decision about whether to continue or change the credit union's overdraft and NSF fee assessment practices. Engage legal counsel for guidance as needed.
- Review the credit union's account agreements and other documents. Assess whether they accurately describe and align with credit union practices. Engage legal counsel to assist with this assessment.
- Update the credit union's Membership and Account Agreement (MAA), Business Membership and Account Agreement (Business MAA), fee disclosures and/or other documents as needed based on the credit union's document assessment.

Document Impacts

The following is an overview of the optional language that may be included in the MAA and Business MAA that address the litigation risks described above:

Available Balance/Transaction Posting/Overdraft Fee Disclosures

“Understanding Your Account Balance” (Optional - see Appendix A for language)

This language serves to define the difference between the “available balance” and “actual balance” in an account and clarifies that the “available balance” is used to determine if the account is overdrawn. Additionally, the language establishes that subsequent posting of pending transactions/items that are subject to holds (e.g., debit card transactions) may result in assessments of overdraft fees at the time the transactions are posted.

How Transactions are Posted to Your Account” (Optional - see Appendix B for language)

This language describes how different transaction types, including preauthorized debit card transactions, are processed and posted to members' accounts. It is important for members to understand how each transaction type is applied to their account(s), so they know how much money they have and how much is available to them at any given time.

Returned Items/NSF Fee Disclosures

Overdraft provisions in the MAA and Business MAA explain that, when an item is presented for payment against insufficient funds, the credit union may choose to pay or return the item and assess a fee. A clarifying statement can be included in these agreements for credit unions that assess a fee (e.g., NSF/returned item fee) each time an item is presented/submitted for payment:

We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item.

Note: Previously, this statement was automatically included in both the MAA and Business MAA. Credit unions will now choose whether or not to include the statement when ordering or re-ordering the agreements to ensure alignment with credit union practices.

Questions?

If you have any questions regarding these updates, please contact our compliance specialists [here](#).

Appendix A: Sample Language

Understanding Your Account Balance. Your [\[checking\]](#)[\[sharedraft\]](#) account has two kinds of balances: the actual balance and the available balance. Your actual balance reflects the full amount of all deposits to your account as well as payment transactions that have been posted to your account. It does not reflect checks you have written and are still outstanding or transactions that have been authorized but are still pending. Your available balance is the amount of money in your account that is available for you to use. Your available balance is your actual balance less: (1) holds placed on deposits; (2) holds on debit card or other transactions that have been authorized but are not yet posted; and (3) any other holds, such as holds related to pledges of account funds and minimum balance requirements or to comply with court orders. We use your available balance to determine whether there are sufficient funds in your account to pay items, including checks and drafts, as well as ACH, debit card and other electronic transactions. Pending transactions and holds placed on your account may reduce your available balance and may cause your account to become overdrawn regardless of your actual balance. In such cases, subsequent posting of the pending transactions may further overdraw your account and be subject to additional fees. You should assume that any item which would overdraw your account based on your available balance may create an overdraft. You may check your available balance [\[online at \(web address\)\]](#), [\[at an ATM\]](#), [\[by visiting a credit union branch\]](#) or [\[by calling us at \(phone number\)\]](#).

NOTE: *This is an optional language piece that credit unions may elect to include in the MAA (section 14) and/or the Business MAA (section 9). Verbiage in blue denotes variables to be completed by the credit union at the time of ordering the agreement(s).*

Appendix B: Sample Language

Fees Assessed on APSN Transactions

How Transactions are Posted to Your Account. Basically, there are two types of transactions that affect your account: credits (deposits of money into your account) and debits (payments out of your account). It is important to understand how each is applied to your account so that you know how much money you have and how much is available to you at any given time. This section explains generally how and when we post transactions to your account.

Credits. Deposits are generally added to your account when we receive them. However, in some cases when you deposit a check, the full amount of the deposit may not be available to you at the time of deposit. Please refer to the Funds Availability Policy Disclosure for details regarding the timing and availability of funds from deposits.

Debits. There are several types of debit transactions. Common debit transactions are generally described below. Keep in mind that there are many ways transactions are presented for payment by merchants, and we are not necessarily in control of when transactions are received.

- **Checks.** When you write a check, it is processed through the Federal Reserve system. We receive data files of cashed checks from the Federal Reserve each day. The checks drawn on your account are compiled from these data files and paid each day. We process the payments [from low to high dollar value] [in the order contained in the data file].
- **ACH Payments.** We receive data files every day from the Federal Reserve with Automated Clearing House (ACH) transactions. These include, for example, automatic bill payments you have authorized. ACH transactions for your account are posted [throughout the day (in order of receipt) (from low to high dollar value)] [at the end of the day (in order of receipt) (from low to high dollar value)].
- **PIN-Based Debit Card Purchase Transactions.** These are purchase transactions using your debit card for which a merchant may require you to enter your personal identification number (PIN) at the time of sale. They are processed through a PIN debit network. These transactions are similar to ATM withdrawal transactions because the money is usually deducted from your account immediately at the time of the transaction. However, depending on the merchant, a PIN-based transaction may not be immediately presented for payment.
- **Signature-Based Debit Card Purchase Transactions.** These are purchase transactions using your debit card that are processed through a signature-based network. Rather than entering a PIN, you typically sign for the purchase; however, merchants may not require your signature for certain transactions. Merchants may seek authorization for these types of transactions. The authorization request places a hold on funds in your account when the authorization is completed. This is referred to as an "authorization hold." An authorization hold will reduce your available balance by the amount authorized but will not affect your actual balance. The transaction is subsequently

processed by the merchant and submitted to us for payment. This can happen hours or sometimes days after the transaction, depending on the merchant and its payment processor. These payment requests are received in real time throughout the day and are posted to your account [\[when they are received\]](#).

The amount of an authorization hold may differ from the actual payment because the final transaction amount may not yet be known to the merchant when you present your card for payment. For example, if you use your debit card at a restaurant, a hold will be placed in an amount equal to the bill presented to you; but when the transaction posts, it will include any tip that you may have added to the bill. This may also be the case where you present your debit card for payment at gas stations, hotels and certain other retail establishments. We cannot control how much a merchant asks us to authorize, or when a merchant submits a transaction for payment.

For debit card transactions involving merchant authorization holds, there may be a delay between the hold being applied and the transaction posting to your account. During the delay, intervening transactions may impact the available balance in your account. It is important to keep in mind that we check your available balance both at the time the merchant's authorization request is received and again when the transaction settles and posts to your account. If your available balance is insufficient to cover the amount of the merchant's authorization request, we will decline the request. If your available balance is sufficient to cover the merchant's authorization request, the request will be approved, and an authorization hold in the amount of the request will be placed on your account. The transaction will be subsequently processed by the merchant and submitted to us for payment. If the transaction settles and posts to your account at a time when the available balance is insufficient to pay the transaction without causing an overdraft (i.e., posting the transaction results in an available balance of less than \$0), **we will charge you a fee** for overdrawing your account, **even though** the available balance in your account was sufficient to cover the transaction at the time it was authorized.

The following example illustrates how this works:

Assume your actual and available balances are both \$40, and you use your debit card at a restaurant to pay your bill totaling \$30. If the restaurant requests authorization in the amount of \$30, an authorization hold is placed on \$30 in your account. Your available balance is only \$10, but the actual balance remains \$40. Before the restaurant charge is sent to us for payment, a check that you wrote for \$40 is presented for payment. Because your available balance is only \$10 due to the \$30 authorization hold, your account will be overdrawn by \$30 when the check transaction is posted to your account even though your actual balance is \$40. In this example, if we pay the \$40 check in accordance with our standard overdraft services, we will charge you a fee for overdrawing your account as disclosed in the Schedule of Fees and Charges. The fee will also be deducted from your account, further increasing the overdrawn amount. In addition, when the restaurant charge is finally submitted to us for payment, we will release the authorization hold and pay the transaction amount to the restaurant. The transaction amount may be \$30 or a different amount (for example, if you added a tip). **Because** the amount of the restaurant charge exceeds your available balance at the time the charge is settled (i.e., at the time the merchant or its financial institution requests payment or the transaction posts to your account), **we will charge you**

another fee for overdrawing your account, even though you had a sufficient available balance in your account at the time the restaurant charge was authorized and approved.

This is a general description of certain types of transactions. These practices may change, and we reserve the right to pay items in any order we choose as permitted by law.

Fees Not Assessed on APSN Transactions

How Transactions are Posted to Your Account. Basically, there are two types of transactions that affect your account: credits (deposits of money into your account) and debits (payments out of your account). It is important to understand how each is applied to your account so that you know how much money you have and how much is available to you at any given time. This section explains generally how and when we post transactions to your account.

Credits. Deposits are generally added to your account when we receive them. However, in some cases when you deposit a check, the full amount of the deposit may not be available to you at the time of deposit. Please refer to the Funds Availability Policy Disclosure for details regarding the timing and availability of funds from deposits.

Debits. There are several types of debit transactions. Common debit transactions are generally described below. Keep in mind that there are many ways transactions are presented for payment by merchants, and we are not necessarily in control of when transactions are received.

- **Checks.** When you write a check, it is processed through the Federal Reserve system. We receive data files of cashed checks from the Federal Reserve each day. The checks drawn on your account are compiled from these data files and paid each day. We process the payments [from low to high dollar value] [in the order contained in the data file].
- **ACH Payments.** We receive data files every day from the Federal Reserve with Automated Clearing House (ACH) transactions. These include, for example, automatic bill payments you have authorized. ACH transactions for your account are posted [throughout the day (in order of receipt) (from low to high dollar value)] [at the end of the day (in order of receipt) (from low to high dollar value)].
- **PIN-Based Debit Card Purchase Transactions.** These are purchase transactions using your debit card for which a merchant may require you to enter your personal identification number (PIN) at the time of sale. They are processed through a PIN debit network. These transactions are similar to ATM withdrawal transactions because the money is usually deducted from your account immediately at the time of the transaction. However, depending on the merchant, a PIN-based transaction may not be immediately presented for payment.
- **Signature-Based Debit Card Purchase Transactions.** These are purchase transactions using your debit card that are processed through a signature-based network. Rather than entering a PIN, you

typically sign for the purchase; however, merchants may not require your signature for certain transactions. Merchants may seek authorization for these types of transactions. The authorization request places a hold on funds in your account when the authorization is completed. This is referred to as an "authorization hold." An authorization hold will reduce your available balance by the amount authorized but will not affect your actual balance. The transaction is subsequently processed by the merchant and submitted to us for payment. This can happen hours or sometimes days after the transaction, depending on the merchant and its payment processor. These payment requests are received in real time throughout the day and are posted to your account [\[when they are received/other\]](#).

The amount of an authorization hold may differ from the actual payment because the final transaction amount may not yet be known to the merchant when you present your card for payment. For example, if you use your debit card at a restaurant, a hold will be placed in an amount equal to the bill presented to you; but when the transaction posts, it will include any tip that you may have added to the bill. This may also be the case where you present your debit card for payment at gas stations, hotels and certain other retail establishments. We cannot control how much a merchant asks us to authorize, or when a merchant submits a transaction for payment.

For debit card transactions involving merchant authorization holds, there may be a delay between the hold being applied and the transaction posting to your account. During the delay, intervening transactions may impact the available balance in your account. If your available balance is insufficient to cover the amount of the merchant's authorization request, we will decline the request. If your available balance is sufficient to cover the merchant's authorization request, the request will be approved, and an authorization hold in the amount of the request will be placed on your account. The transaction will be subsequently processed by the merchant and submitted to us for payment. If the transaction settles and posts to your account at a time when the available balance is insufficient to pay the transaction without causing an overdraft (i.e., posting the transaction results in an available balance of less than \$0), **we will not charge you a fee** for overdrawing your account **since** the available balance in your account was sufficient to cover the transaction at the time it was authorized.

The following example illustrates how this works:

Assume your actual and available balances are both \$40, and you use your debit card at a restaurant to pay your bill totaling \$30. If the restaurant requests authorization in the amount of \$30, an authorization hold is placed on \$30 in your account. Your available balance is only \$10, but the actual balance remains \$40. Before the restaurant charge is sent to us for payment, a check that you wrote for \$40 is presented for payment. Because your available balance is only \$10 due to the \$30 authorization hold, your account will be overdrawn by \$30 when the check transaction is posted to your account even though your actual balance is \$40. In this example, if we pay the \$40 check in accordance with our standard overdraft services, we will charge you a fee for overdrawing your account as disclosed in the Schedule of Fees and Charges. The fee will also be deducted from your account, further increasing the overdrawn amount. In addition, when the restaurant charge is finally submitted to us for payment, we will release the authorization hold and pay the transaction amount to the restaurant. The transaction amount may be \$30 or a different



amount (for example, if you added a tip). Even though the amount of the restaurant charge exceeds your available balance at the time the charge is settled (i.e., at the time the merchant or its financial institution requests payment or the transaction posts to your account), we will not charge you a fee for overdrawing your account since you had a sufficient available balance in your account at the time the restaurant charge was authorized and approved.

This is a general description of certain types of transactions. These practices may change, and we reserve the right to pay items in any order we choose as permitted by law.

NOTE: *These are optional language pieces, and credit unions may elect to include one of the options in the MAA (Section 14) and/or the Business MAA (section 9). Verbiage in blue denotes variables to be completed by the credit union at the time of ordering the agreement(s). Gray highlighting is used to illustrate the differences between the two language options.*