

RISK Alert

ACTIONABLE INSIGHTS FOR BOND POLICYHOLDERS.



Alert Type

Awareness

Watch

Warning

Overdraft / NSF Fee Lawsuits Target Reg E's Model Opt-in Form

In overdraft / NSF fee lawsuits alleging credit unions improperly charged overdraft and/or NSF fees, plaintiffs' attorneys have started targeting Reg E's Model A-9 opt-in form for paying overdrafts from ATM and one-time debit card transactions. They argue that the opt-in form creates ambiguity on how credit unions assess overdraft fees and, therefore, fails to comply with Reg E. Since a noncompliant opt-in form is used, plaintiffs' attorneys claim that credit unions may not assess overdraft fees on ATM and debit card transactions that overdraw the account.

Details

Recent overdraft / NSF fee lawsuits have plaintiffs' attorneys targeting Reg E's [Model A-9](#) opt-in form for ATM and one-time debit card transactions. They claim the opt-in form is ambiguous on how credit unions assess overdraft fees and therefore fails to comply with Reg E requirements. They cite the following sentence: "An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway." Since a noncompliant opt-in form is used, plaintiffs' attorneys claim credit unions may not assess overdraft fees for ATM and one-time debit card transactions that overdraw the account.

It should be noted that the Eleventh Circuit Court of Appeals, in the [Tims case](#), ruled that a financial institution potentially violates Reg E by failing to disclose in its opt-in form that it uses the available balance method to calculate overdraft fees.

Reg E's Opt-In Requirements

Credit unions offering a courtesy pay / overdraft privilege program for paying overdrafts are required to comply with Reg E's opt-in requirements under [§1005.17 \(Requirements for Overdraft Services\)](#) for assessing overdraft fees on ATM and one-time debit card transactions. §1005.17 prohibits credit unions from charging overdraft fees to consumer-members on ATM and one-time debit card transactions unless the consumer-members consent, or opts in, to the overdraft service for these types of transactions. To comply with the requirements, credit unions must:

- Provide the opt-in notice in writing (or electronic notice if the consumer-member agrees), segregated from all other information, describing the credit union's overdraft service;
- Provide a reasonable opportunity for consumer-members to affirmatively consent, or opt-in, to the service for ATM and one-time debit card transactions;
- Obtain consumer-members' affirmative consent, or opt-in, to the credit union's payment of ATM or one-time debit card transactions; and

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Risk Category: Compliance; Regulation E; Class Action; Lawsuits; Overdrafts/NSF Fees

States: All

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Overdraft / NSF Fee Lawsuits Target Reg E's Model Opt-in Form

- Provide consumer-members with confirmation of the consent in writing (or an electronic confirmation if the consumer-member agrees), which includes a statement informing the consumer-members of the right to revoke their consent

The opt-in notice used must be substantially similar to Model A-9. The notice must include:

- A description of the overdraft service that includes the types of transactions covered by the service;
- All fees associated with paying an overdraft from ATM and one-time debit card transactions, including per-item fees, daily overdraft fees, sustained overdraft fees (e.g., fees assessed when a consumer-member has not repaid the overdraft within a specified period of time), or negative balance fees;
- Any maximum number of fees that will be imposed per day;
- An explanation of the member's right to opt-in; and
- All other options for paying overdrafts that the credit union offers.

Risk Mitigation

Credit unions should ensure their account agreements have been updated as recommended in our prior RISK Alerts on overdraft / NSF fee lawsuits. Credit unions using Reg E's Model A-9 opt-in form should revise it to address the available balance method for calculating overdraft fees. This can be accomplished by incorporating the terms of the account agreement, which describes the available balance method for calculating overdrafts, into the opt-in form. Consider using the following language:

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. Please refer to [the Account Agreement] for a more thorough explanation of factors that determine when an overdraft occurs and when you may incur a fee for overdrawing your account. The terms of [the Account Agreement] are incorporated herein, and both this document and [the Account Agreement] are meant to be interpreted together.

LOANLINER® has updated the Overdraft Services Consent form (opt-in form) to include risk mitigating language. You can contact LOANLINER Compliance Solutions with questions about this update by using this [online information request form](#).

If a lawsuit is filed against your credit union, or you receive a demand letter threatening a lawsuit, policyholders should immediately report it to CUNA Mutual Group. Submit claims via email at litigation.team@cunamutual.com.

Risk Prevention Resources

Access CUNA Mutual Group's [Protection Resource Center](#) at cunamutual.com for exclusive risk and compliance resources to assist with your loss control efforts. The Protection Resource Center requires a User ID and password.

- For related RISK Alerts, access the [RISK Alert library](#) and enter "compliance" in the Search function.
- On-Demand Webinar: [Key Trends in Class Action Litigation](#)



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