FALL 2020

REGULATORY UPDATE

Is COMMUNICATION Putting Your Financial Institution at Risk?

"Nothing is so simple that it cannot be misunderstood." - Freeman Teague, Jr.

We've likely all seen or heard various communication failures. Some are more serious than others and can be dangerous, like when a traffic sign instructs you to turn right but the arrow is directing you left. Banking communication can also be dangerous to a Financial Institution. When done poorly, they can be deemed misleading and deceptive, which can lead to regulatory violations and class action lawsuits, both of which can be expensive in terms of time, money, and reputation.

Your **Courtesy Overdraft Program** is a simple concept that was once easily understood by all. If the consumer doesn't have enough money in their account to cover a transaction, you pay it anyway and charge a fee – generally the same fee that you would charge for the item to be returned unpaid, without the additional expenses and frustrations related to a returned item. With the many changes in the payment system, and the many additional channels available to conduct banking transactions, combined with different balance calculations and funds availability policies, it is less obvious to many consumers what "enough money" means. There may be one balance calculation to approve transactions, but another to determine an overdraft status, and another one used to assess fees.

While there have not been any recent substantive changes or amendments to the various Regulations and Laws governing Overdraft Programs or practices, regulatory agencies and class action attorneys have increasingly focused on what they consider to be unclear, misleading or conflicting communications being presented to consumers in the form of account documents, disclosures, and marketing materials to provide the basis for regulatory actions and class action lawsuits.

Our *Fall 2019 Regulatory Update* provided examples of regulatory and legal actions taken last year, along with substantial regulatory guidance on the violations being cited. In the following pages, we summarize a few of the cited or alleged violations from the *Fall 2019 Regulatory Update*, along with links to the Consumer Financial Protection Bureau's (CFPB) Consent Orders or Lawsuits so you can review them more thoroughly.

In addition to our 2019 recap, we are providing numerous additional examples of practices that have been found in more recent Regulatory Actions and Class Actions that warrant your attention and are provided in this 2020 Fall Regulatory update.

We strongly encourage you to review the following information and review your own practices with your ODP, Deposit Operations, Compliance, Marketing, and frontline managers, and consider whether your documents, employees, and marketing materials clearly and consistently communicate and reflect your actual operational practices. Any weaknesses in your program should be remedied immediately.

A link to the complete version of the Fall 2019 Regulatory Update can be found at the end of this document.

If you need assistance with your program or would like to review our most current brochure, ODP Policy or recommendations regarding your Opt-In practices, please reach out to your Client Services Manager or Client Care at clientcare@pinnstrat.com

RECAP OF FALL 2019 REGULATORY UPDATE

This section contains a summary of the primary actions or practices explained in detail in our last Regulatory Update. Throughout this document, we note practices or actions that have been deemed misleading, deceptive, or abusive; or were found to be in violation of regulations as indicated with the following symbol: ⚠. As you will observe, the practice of determining the overdraft status of an item when presented for payment and incurring fees using the available balance method, as opposed to ledger balance method, creates the most problems for institutions. Similarly, numerous improper procedures are cited when obtaining a customer's opt-in for debit and ATM overdraft coverage. We also note that many of the institutions' standard account agreements either do not adequately disclose or disclose improperly the institution's actual operational practices. These observations from our 2019 update continue to be observed in 2020.

REGULATORY CITATIONS

1. **Regions Bank** – $7.5 Million CFBP Fine; $49 Million OD Fee Refunds

   ⚠ Charging overdraft fees to consumers who had not opted-in for overdraft coverage and charging overdraft and non-sufficient funds fees on its deposit advance product despite claims that it would not.

   https://www.consumerfinance.gov/about-us/newsroom/cfpb-fines-regions-bank-7-5-million-for-unlawful-overdraft-practices/

2. **Santander Bank** – CFPB Fines of $10 million for illegal overdraft practices

   ⚠ Telemarketing vendor deceptively marketed the overdraft service and signed certain bank customers up for the service without their consent.

   https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-orders-santander-bank-pay-10-million-fine-illegal-overdraft-practices/

CLASS ACTION CLAIMS

1. **Navy Federal Credit Union** – Settled $24.5 million lawsuit

   ⚠ Charging OD Fees at posting using an Available Balance that includes debit holds

   https://classactionsreporter.com/settlement/navy-federal-credit-union-overdraft-fee-settlement/

2. **City National Bank of West Virginia** – This is still in the courts. A motion to dismiss the case was denied in February 2020.

   ⚠ Charging multiple NSF fees on the same transaction, when the website and account agreements stated that the bank would charge customers one NSF Fee each time a customer bought something that was beyond their account balance. An NSF Fee was charged each time the item was presented.

   https://www.classaction.org/media/noe-v-city-national-bank-of-west-virginia.pdf

ADDITIONAL TOPICS WE ADDRESSED IN DETAIL INCLUDE

- ⚠ Charging OD fees at posting using an available balance that includes debit holds
- ⚠ Charging OD fees for signature POS debit items that post to a negative balance, but that were AUTHORIZED when the available balance was positive
- ⚠ Charging a Returned Item Fee (NSF FEE) each time an item is presented for payment
- ⚠ Misleading consumers on how electronic items are presented and posted
- ⚠ Charging OD fees for ATM and POS items when the OD program limit is not available
- ⚠ Charging DAILY OD fees when the account becomes overdrawn because of ATM and POS items when the Account holder has not opted in
- ⚠ A-9 Errors (Regulation E Opt-In Form)

NEW REGULATORY ACTIONS AND CLASS ACTION CLAIMS

Regulatory Consent Order and CMP

TD BANK, N.A. – CONSENT ORDER - CFPB
$25 MILLION FINE AND $97 MILLION IN RESTITUTION
Covered Transactions: ATM and one-time (everyday) Debit Card Transactions

TD Bank's overdraft program was cited for several violations of Regulations E (Electronic Funds Transfer Act) and the Consumer Financial Protection Act of 2010 (CFPA) for abusive acts or practices while enrolling customers into their Debit Card Advance (DCA) program. DCA covers ATM and everyday debit card transaction overdrafts, which Regulation E requires the consumer opt-in for. They were also cited for violations of Regulation V (Fair Credit Reporting Act, or FCRA) due to their failure to establish reasonable written policies and procedures to ensure the integrity of consumer checking account information they were reporting to Nationwide Specialty Credit Report Agencies (NSCRAs), and their failure to promptly investigate indirect disputes concerning information provided to NSCRAs. A summary of their violations follows. We will refer to TD Bank as "Bank" and DCA as "OPT-IN". The period covered was from January 1, 2014 through December 31, 2018.

1. **FAILING TO OBTAIN CONSUMERS' AFFIRMATIVE CONSENT TO OPT-IN FOR ATM AND EVERYDAY DEBIT CARD TRANSACTION OVERDRAFT-PROTECTION SERVICE, AND SUBSEQUENTLY CHARGING THOSE CONSUMERS OVERDRAFT FEES PURSUANT TO THAT SERVICE**

    - ⚠ Employees orally present OPT-IN to new customers who are opening consumer-checking accounts and request those customers to orally indicate whether they want to enroll following that presentation. The employee documents the customer's oral OPT-IN preference in the bank's account-opening computer system.
    - ⚠ Employees do not print and present new customers with a written overdraft notice (OPT-IN Form) until the end of the account-opening process.
    - ⚠ The OPT-IN Form that is presented at the end of the account opening process is pre-marked with a checked box to reflect the customer's oral enrollment preference from earlier in the account opening process.
    - ⚠ New customers did not receive written disclosures about overdraft services before receiving the OPT-IN Form at the end of the account-opening process.

- ⚠ If new customers who previously opted in want to amend their decision after receiving the OPT-IN Form, they must seek a different version of the OPT-IN Form without their previous decision pre-marked.
- ⚠ Bank's offsite account-opening authorization form features a box to check to OPT-IN but does not disclose any required information.
- ⚠ Bank instructed its employee to complete the OPT-IN Form on behalf of new customers at offsite account-opening events – including marking their OPT-IN preference – before presenting the OPT-IN Form to the new customer for their signature.
- ⚠ Employees sometimes failed to bring required OPT-IN Forms to offsite account-opening events to present to new customers for their signature, but still opted them in.

Violation(s): Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693 et seq, and its implementing Regulation E

The bank does not obtain a new customer's affirmative consent to OPT-IN through a signature on a form that is already marked with the customer's OPT-IN preference. Approximately 1.42 million consumers were charged for Covered Overdraft Fees.

- A financial institution may not charge Covered Overdraft Fees unless it first obtains the consumers affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions. 12 C.F.R. § 1005.17(b)(1)(iii).
- A financial institution must provide a consumer with the written (or if the consumer agrees, electronic) notice required by 12 C.F.R. § 1005.17(b)(1)(i) before it can obtain that consumer's affirmative consent as required by 12 C.F.R. § 1005.17(b)(1)(iii).
- Bank does not obtain a new customer's affirmative consent to OPT-IN through the customer's oral enrollment preference when bank obtains that oral decision before providing the customer the written notice required by 12 C.F.R. § 1005.17(b)(1)(i).

2. Abusive acts or practices while offering OPT-IN to consumers in person

- ⚠ Employees request that new customers orally indicate whether they want to OPT-IN based on the employee's oral presentation of the service, before providing customers with the OPT-IN Form.
- ⚠ Bank did not create a script for employees to use to present OPT-IN to new customers before requesting their oral enrollment decisions. Managers created their own talking points and scripts for employees to use to explain OPT-IN to new customers in the office they supervised.
- ⚠ Managers instructed employees, for their oral presentation of OPT-IN to new customers, to: 1) present OPT-IN as a "free" service or benefit, while downplaying the fees and disclosures associated with the service; and 2) frame OPT-IN as a "feature" or "package" that "comes with" all new consumer-checking accounts, rather than as an option they must opt in to. (Factually untrue.)
- ⚠ Some employees represented, expressly or by implication, that: 1) OPT-IN would allow the bank to pay transactions – including a mortgage or light bill – likely already covered by the standard overdraft service; and 2) OPT-IN is a default setting required to open a new consumer-checking account. (Factually untrue.)
- ⚠ Employees do not provide new customers with an OPT-IN Form for their signature until the end of the account-opening process, and the form presented features a pre-checked box reflecting the customer's oral enrollment preference from earlier in the account-opening process. (Also cited as a violation above under Reg E.)
- ⚠ The OPT-IN Form that employees present to new customers in stores and at offsite account-opening events features a pre-checked box reflecting the customer's oral OPT-IN preference from earlier in the account-opening process, and at other times employees failed to bring OPT-IN Forms at all to offsite account-opening events to

present to new customers for their signature. (Also cited as a violation above under Reg E.)

Violation(s): Consumer Financial Protection Act of 2010 (CFPA), 12. U.S.C. §§ 5531(d)(1), 5536(a)(1)(B)

An act or practice is abusive under the CFPA if it, among other things, "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service." 12 U.S.C. § 5531(d)(1)

It is unlawful to engage in any unfair, deceptive, or abusive act or practice. 5536(a)(1)(B)

- Through a misleading or incomplete oral presentation of the OPT-IN service for the purpose of eliciting an oral-enrollment decision, and then by not providing new customers with the OPT-IN Form until the end of the account-opening process (and pre-marked), or not providing the form at all, the bank materially interfered with the consumers' ability to understand the terms and conditions of OPT-IN.
- In certain circumstances, employees further materially interfered with consumers' ability to understand the terms and conditions of OPT-IN by: requiring new customers to sign OPT-IN Forms with the "enrolled" option pre-checked without mentioning the OPT-IN service at all; Opting in new customers without requesting the customer's oral enrollment decision; and deliberately obscuring, or attempting to obscure, the OPT-IN Form to prevent a new customer's review of their pre-marked "enrolled" status.

3. DECEPTIVE ACTS OR PRACTICES WHILE OFFERING OPT-IN TO CONSUMERS IN PERSON, OVER THE PHONE, AND THROUGH MAILED SOLICITATIONS

In Person

- ⚠ In connection with the marketing, promoting and offering of OPT-IN, employees represented, expressly or impliedly, that 1) OPT-IN is a "free" service or benefit; and 2) OPT-IN is a "feature" or "package" that "comes with" all new consumer checking accounts. (Factually untrue.)
- ⚠ Some employees represented, expressly or by implication, that: 1) OPT-IN would allow the bank to pay transactions – including a mortgage or light bill – likely already covered by the standard overdraft service; and 2) OPT-IN is a default setting required to open a new consumer-checking account. (Factually untrue.)

Violation(s): Employees representations constitute deceptive acts or practices in violation of sections 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

By Phone

Bank permits consumers who have a checking account to OPT-IN a new or existing checking account over the phone. Bank requires its employees to read (or play an automated version of) a scripted disclosure regarding overdraft fees and the transactions covered by OPT-IN when obtaining a consumer's enrollment decision.

- ⚠ During phone enrollments, in certain instances, bank employees represented the OPT-IN covers check transactions, mortgage payments, car payments, utility bills, and other recurring-bill payments, rather than only ATM and One-Time (everyday) debit card transactions. But OPT-IN is not required to cover check transactions, utility bills, or other recurring-bill payments.
- ⚠ On some calls, employees stated that OPT-IN takes effect on the date of enrollment, including to a consumer who wished to use the service immediately, and implied that OPT-IN would allow customers to exceed the daily ATM withdrawal limit of $750 while

incurring only one OD Fee. But enrollment takes effect the next business day following enrollment. Enrollment does not allow a consumer to exceed the Bank's daily $750 ATM withdrawal limit, and the consumer could incur multiple OD Fees if withdrawing more than that amount.

Violation(s): Section 1036(a)(1)(B) of the CFPA prohibits deceptive acts or practices. 12 U.S.C. § 5536(a)(1)(B)

- In certain instances, employees represented, expressly or impliedly, that OPT-IN covers check transactions, mortgage payments, car payments, utility bills, and other recurring-bill payments. (Factually untrue.)
- In certain instances, employees represented, expressly or impliedly, that 1) OPT-IN takes effect the date of enrollment, and 2) OPT-IN would allow customers to exceed bank's daily ATM withdrawal limit of $750 while incurring only one Covered Overdraft Fee.

Violation(s): §§ 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

By Mail

Bank used targeted mail marketing to solicit existing customers who had previously declined to OPT-IN and who recently had a check returned for insufficient funds or a debit card that was declined.

- ⚠ Marketing mailers described its standard overdraft service as covering "checks and recurring items only" such as mortgage payments or monthly utility bills. Transactions such as "online banking transfers" and "payments through bill pay" were presented as being covered by OPT-IN but not the standard overdraft service.
- ⚠ Marketing mailers advertised OPT-IN as allowing bank "to cover all types of transactions, including ATM, one-time debit card transactions, checks, automatic bill payments, online banking transfers, and payments through bill pay, at our discretion."

Violation(s): Section 1036(a)(1)(B) of the CFPA prohibits deceptive acts or practices. 12 U.S.C. § 5536(a)(1)(B).

- ⚠ The bank represented either expressly or impliedly that OPT-IN covers checks, automatic bill payments, online banking transfers and payments through bill pay. OPT-IN is required to cover ATM and one-time debit card transactions only.

Violation(s): §§ 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B)

4. **FAILING TO ESTABLISH AND IMPLEMENT REASONABLE WRITTEN POLICIES AND PROCEDURES CONCERNING THE ACCURACY AND INTEGRITY OF INFORMATION RESPONDENT FURNISHED TO NATIONWIDE SPECIALTY CONSUMER REPORTING AGENCIES (NSCRAS)**

- ⚠ Bank furnished consumer-deposit-account information to two NSCRAs (nationwide specialty consumer reporting agencies).
- ⚠ Bank did not establish and implement policies or procedures concerning the accuracy and integrity of the information it furnished to those two NSCRAs until it implemented a furnishing policy relating to one of the NSCRAs in July 2016.
- ⚠ Bank failed to implement policies or procedures for handling NSCRA furnishing disputes until it implemented a policy relating to one of the NSCRAs in August 2016
- ⚠ Bank failed to implement a policy or procedure for investigating disputes relating to furnishing information to the second NSCRA until April 2017.

- ⚠ Before at least June 2016, the bank instructed consumers who called to dispute information the bank had furnished to at least one NSCRA to contact the NSCRA, rather than submit a direct dispute to bank.

Violation(s): Regulation V (implementing regulation of the Fair Credit Reporting Act, or FCRA)

- Section 1022.42(a) of Regulation V requires a Furnisher to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the consumer information that it furnishes to a Consumer Reporting Agency (CRA), and further provides that the policies and procedures must be appropriate to the nature, size, complexity, and scope of each Furnisher's activities. 12 C.F.R. § 1022.42(a)
- 12 C.F.R. § 1022.42(b)of Regulation V requires that Furnisher consider guidelines in Appendix E of the Furnisher Rule in developing appropriate policies and procedures and incorporate them where appropriate.
- Appendix E to 12 C.F.R. Part 1022 of the Furnisher Rule includes guidelines for furnishing policies and procedures that are reasonably designed to promote, among other things: accurate furnishing through appropriate internal controls, such as by verifying random samples of information provided to consumer-reporting agencies; conducting a periodic evaluation of a Furnisher's own practices, investigations of disputed information, and corrections of inaccurate information; and maintaining records for a reasonable period in order to substantiate the accuracy of any information about consumers it furnishes that is subject to a Direct Dispute.

5. FAILING TO CONDUCT TIMELY INVESTIGATIONS OF INDIRECT DISPUTES CONCERNING NSCRA FURNISHING

- ⚠ In certain cases, the bank failed to complete its investigations, reviews, and reports, including reporting the results of its investigation to an NSCRA, stemming from indirect disputes concerning consumer information the bank had furnished to one NSCRA within 30 days or 45 days.
- ⚠ The bank is unable to provide evidence of timely investigations of the vast majority of indirect disputes concerning NSCRA furnishing that it received prior to mid-2016.
- ⚠ After mid-2016, the bank failed to investigate some indirect disputes within 30 days.

Violation(s): Regulation V (implementing regulation of the Fair Credit Reporting Act, or FCRA)

- Section 623(b)(2) of FCRA requires a Furnisher to complete all investigations, reviews, and reports, including reporting the results of its investigations to Consumer Reporting Agencies, stemming from an indirect dispute concerning the completeness or accuracy of information furnished to a Consumer Reporting Agency within 30 days. 15 U.S.C. § 1681s-2(b)(2).
- The 30-day period may be extended for up to an additional 15 days if the Consumer Reporting Agency receives information from the consumer during the 30-day period that is relevant to the reinvestigation. 15 U.S.C. § 1681s-2(b)(2); *see also id* § 1681i(a)(1)(B).

The TD Bank, N.A. Consent Order can be found at:
https://files.consumerfinance.gov/f/documents/cfpb_td-bank-na_consent-order_2020-08.pdf

Class Action Lawsuits

TD BANK, N.A. – $70 MILLION SETTLEMENT
$43 MILLION IN COMPENSATION AND $27 MILLION IN OVERDRAFT FORGIVENESS

This settlement was to six "classes", which were consolidated from multiple other lawsuits. In addition to the $43 Million in compensation, an additional $27 Million has also been awarded to be distributed to the first three classes below in such a manner as to reduce the amount owed to TD Bank as "Overdraft Forgiveness" to an amount below $75.00 for the maximum number of accounts possible. ChexSystems (NSCRA) will also be instructed to remove negative reporting for all accounts brought to an amount owed of less than $75 through Overdraft Forgiveness. Here is a breakdown of the compensation along with the related violation(s).

1. **Available Balance Consumer Class** - $33.4 Million plus $21.6 Million Overdraft Forgiveness has been awarded to personal account holder who incurred one or more Overdraft Fees due to TD Bank's practice of:

   - ⚠ Assessing Overdraft Fees based on the account's Available Balance rather than its Ledger Balance.

2. **Available Balance Business Class** - $2.1 Million plus $2.7 Million Overdraft Forgiveness awarded to business account holders who incurred one or more Overdraft Fees due to TD Bank's practice of:

   - ⚠ Assessing Overdraft Fees based on the account's Available Balance rather than its Ledger Balance. (Business accounts are included since unfair and deceptive practices are not limited to consumer accounts only, and the class actions are often based on breach of contract, also not limited to consumer only.)

3. **Usury Class** - $2.1 Million plus $2.7 Million Overdraft Forgiveness awarded to account holders who incurred one or more Sustained Overdraft Fee due to the banks practice of:

   - ⚠ Charging ongoing sustained overdraft fees in addition to the per item fees. (Note – this was part of the settlement in spite of the Regulatory considerations of these fees not being considered as interest. A final decision by the court was never made on this premise.)

4. **South Financial Class** - $4.2 Million awarded to Caroline First Bank and Mercantile Bank (acquired) account holders due to the practice of:

   - ⚠ High-to-Low Posting.
   - ⚠ 2) Assessing Overdraft Fees on the accounts Available Balance rather than its Ledger Balance. (TD Bank had previously settled another $62 Million lawsuit for their practice of posting high to low.)

5. **Regulation E Class** - $1 Million awarded personal account holders who were assessed one or more Overdraft Fees for an ATM or One-Time Debit Card transaction from August 16, 2010 to June 13, 2019 that per the claim were:

   - ⚠ In violation to Regulation E

6. **Uber/Lyft Class** - $267,544 awarded to personal account holders who incurred one or more Overdraft Fee on Uber or Lyft ride-sharing transactions when the bank:

   - ⚠ Authorized OD charges when the consumer had not opted in for ATM and everyday debit card transaction coverage.

   In addition to the funds distribution above, any funds not distributed are not to be returned to TD, and they are to be included as "Cy Pres" Distribution. As the settlement reads, any funds remaining after all Class Members have been paid the amounts to which they are entitled, the Cy Pres Distribution requires those funds be distributed to a program that benefits consumer financial literacy education, and to educate and assist consumers with financial services issues through advisory and related services.

The TD Bank, N.A. lawsuit can be found at:
https://www.classaction.org/media/in-re-td-bank-na-debit-card-overdraft-fee-litigation.pdf

LGE COMMUNITY CREDIT UNION (LGE) LAWSUIT – STILL IN THE COURTS, HOWEVER 11TH CIRCUIT COURT OF APPEALS RETURNED THE CASE PREVIOUSLY DISMISSED WITH THE FOLLOWING CONSIDERATIONS THAT WARRANT STRONG CONSIDERATION AND CONCERN AS IT MAY AFFECT SOME PORTION OF THE SAFE HARBOR STATUS OF THE A-9 MODEL FORM.

A member of LGE initiated a class action lawsuit against LGE, claiming they promised to use the ledger balance in assessing overdraft fees, but instead used her available balance, resulting in more fees. The ledger balance method considers only settled transactions; the available balance method considers both settled transactions and authorized but not yet settled transactions, as well as deposits placed on hold that have not yet cleared.

The district court dismissed the case after determining that the two parties' agreements unambiguously permitted LGE to assess overdraft fees using the available balance calculation method. The Court of Appeals for the Eleventh Circuit disagreed and reversed the circuit court's decision, allowing the case to continue. They ruled the deposit account agreements were ambiguous as to whether LGE could rely on an account's available balance, rather than its ledger balance to assess overdraft fees.

The two documents included in the court's review were LGE's Opt-In Agreement (A-9) and the Account Agreement. The Opt-In Agreement does not specify which balance calculation method LGE employs, stating only that "an overdraft occurs when you do not have enough money in your account to cover transactions, but we pay it anyway." (**LGE's Opt-In Agreement is nearly an exact copy of model form A-9**.) The court indicates the form is ambiguous because it could describe either the available or the ledger balance calculation method for unsettled debts, making it plausible that the notice does not describe the overdraft service in a "clear and readily understandable" way. Making it also plausible that the consumer had no reasonable opportunity to affirmatively consent to LGE's overdraft services. Affirmative consent requires "plain and clear consent...before certain acts or events...that could impair an individual's rights or interests."

Although LGE's Opt-In Agreement is nearly an exact copy of model form A-9, the court maintains the CFPB interprets the safe harbor to preclude liability "for failure to make disclosures in proper form" provided the institution "uses [the model form's] clauses accurately to reflect its services." The court determined the following: **"The safe-harbor provision insulates financial institutions from EFTA claims based on the means by which the institution has communicated its overdraft policy. But it does not shield them for claims based on their failure to make adequate disclosures. A financial institution thus strays beyond the safe harbor when communications within its overdraft disclosure inadequately informs the consumer of the overdraft policy that the institution actually follows.**"

The appeals court also noted in their decision several issues related to the "Payment Order" provision and the "Funds Availability" disclosure in the Account Agreement.

The Account Agreement contained a "Payment Order" provision explaining that in processing items drawn on a consumer's account, LGE's "policy is to pay the items as we receive them." The Account Agreement went on to say "if an item is presented without sufficient funds in your account to pay it" or "if funds are not available to pay all of the items" presented for payment, LGE "may, at its discretion, pay" the item or items, creating an overdraft for which LGE will charge a fee.

The "Funds Availability Disclosure," addressed the conditions under which funds were available for consumers' use and variations of the word "available" were included more than 20 times, but never in conjunction with the word "balance." LGE explained that its general policy was "to make funds from your deposits available to you on the same business day that LGE receives your deposit," but certain deposits would not be "available" to consumers until the second business day at the earliest, but said nothing about whether pending debits affected consumers' ability to withdraw funds. LGE's argument that the repeated use of the word "available" unambiguously communicated that overdraft fees would be assessed using the available balance method.

The court found that the Account Agreement nowhere explained the mechanics of how and when LGE would assess overdrafts, nor linked the concept of an "available balance" to those mechanics; and as discussed above, they stated the Opt-In Agreement was not clear on this either.

General Recommendations : For ALL institutions, based on all of the various cases we have seen, we strongly recommend that you closely review all new account documents and disclosures related to describing balance calculations, the assessment of overdraft fees and the availability of funds. These may include your Reg E Opt-In Form, Account Agreement (a/k/a Terms and Conditions), Funds Availability Disclosure and any materials related to your overdraft program and practices. Consistent terminology with consistent meanings should be used across all documents and in conformance with TISA requirements. Is your system doing what your documents disclose? Is it clear to the consumer how you calculate the balance to determine when an overdraft is authorized, created and charged? Do you provide examples in your account documents of balance calculations and fee assessments? These are some of the things that should be reviewed and considered.

Reg E and A-9 Considerations:

Perhaps the more disturbing part of this case is the perceived court's abandonment (in part) of the Safe Harbor provision under Reg E. The gist of it is that the court felt that the balance used by the FI for charging and fee assessment is not clearly described by the A-9. While we know the language developed by the Federal Reserve at the time as was reported in the federal register was based on multiple customer surveys they did at the time. Their focus was, as the court contends in fact, to provide a safe harbor for the documented process of opting in, leaving the balance used issue and technical disclosures to the FI to provide in other documents.

This now leaves the door open to the need to provide more detail about the specific balance used and presenting that in the opt in form, which deviates from the "standard example." We see the courts argument holds to the terms "substantially similar" in the regulation, and the implication by the plaintiff and now the Appellate court is that the balance used – either available balance, ledger balance, or actual balance, might be better described within the A-9, resulting in a more transparent and defensible disclosure.

The 11th Federal District Court jurisdiction includes the states of Georgia, Alabama and Florida. Financial institutions in those states should consider the effect this case has on other potential cases

using this precedent. Consideration should be given to provide more clarity on the balance used within the confines of the "substantially similar" allowance of the regulation and the suggestions of the appellate court's decision.

Of course, you will want to closely review all deposit account documents and operational practices to ensure your practices match what you disclose. As noted previously, the CFPB has continuously advocated the use of the ledger balance (also a Pinnacle best practice), rather than the available balance when assessing overdraft fees in its compliance advisory bulletins and in its enforcement actions.

The appeal can be found at:
https://media.ca11.uscourts.gov/opinions/pub/files/201714968.pdf

VARIOUS OTHER LAWSUITS

We selected the above two lawsuits and the CFPB Regulatory action because they represented issues that we believe you should be aware of that we are seeing in multiple cases of class action suits and other regulatory actions.

Traditionally the legal documents created as part of a deposit agreement were designed as contracts to protect the institution and establish the liabilities of the depositor. Over time, regulations added required language to the deposit contracts as part of the TISA disclosure requirements. At the same time deposit products became more complex, the payment system become more complex, and the computer programs used for assessing fees became more complex. This has resulted in a multitude of documents required to properly meet all of the legal and regulatory requirements and presented an obvious challenge to financial institutions to present clear and transparent disclosures to its depositors.

While regulatory actions typically look back to the last examination, many of the class actions suits revolve around not violations, but rather claims of deceptive practices and breach of contract law, which in many states have rather lengthy statute of limitations, some of which may extent up to ten years depending on the state. If you have not done a thorough review of all of your deposit documents and disclosures and marketing materials in the past year, we strongly encourage you to do so now.

SUMMARY

A courtesy OD program should provide a beneficial service to the consumer, which will in return provide additional fee revenue for the financial institution.

For a program to be successful, it should:

- Be fair and transparent with clear brochures and disclosures and assure that the account agreements and Reg DD fee disclosures are correct and accurately presented (match actual practice).
- Comply with all laws and regulations.
- Use the proper core parameter settings for authorizing and posting balances and making fee assessments.
- Have reasonable fees for the services provided.

As always, please feel free to contact your Client Services Manager or Client Care at clientcare@pinnstrat.com for assistance with your program, or information regarding our updated brochure and ODP Policy that incorporates changes to address many of the above concerns.

REFERENCE MATERIALS

Fall 2019 Regulatory Update
https://www.pinnaclefinancialstrategies.com/getattachment/581b721b-ec5f-4db2-9def-75472de01b35/Fall-2019-Regulatory-Update.aspx

FDIC Consumer Compliance Supervisory Highlights Insight June 2019
https://www.fdic.gov/regulations/examinations/consumercomplsupervisoryhighlights.pdf

CFPB's Supervisory Highlights, Winter 2015
https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf

FDIC Chicago Region's Quarterly Newsletter of June 30, 2018
https://www.pinnaclefinancialstrategies.com/getattachment/6f6a6584-da7b-4ff6-945e-49c1306b6eb7/Quarterly-Newsletter-Division-of-Depositor-Cons.aspx

Federal Reserve board's Consumer Compliance Supervision Bulletin, dated July 2018
https://www.federalreserve.gov/publications/2018-july-consumer-compliance-supervision-bulletin.htm