Credit unions face overdraft fee lawsuits

Law firms, alleging overdraft fees are being improperly assessed, have again ramped up class-action lawsuits against credit unions. Plaintiff attorneys allege overdraft fees are being improperly assessed on the available balance in the account rather than the actual balance, and that credit unions failed to accurately describe this in the agreements – member account agreement and/or Regulation E’s (Reg E) opt-in agreement for ATM and one-time debit card transactions. One law firm has sent demand letters threatening a lawsuit unless the credit union is willing to cooperate in resolving the overdraft fee issue.

Details
A common practice in the financial service industry, including credit unions, is to impose overdraft fees based on the available balance rather than the actual balance in member accounts. There are different factors that result in a member's available balance being less than the actual balance, including debit card preauthorization holds and check holds. Both types of holds reduce the available balance in member accounts but have no impact on the actual balance.

Law firms are pursuing class-action lawsuits alleging overdraft fees are being improperly assessed in this situation and causes confusion and misleads members when overdraft fees are based on available balance even though the actual balance in the account is sufficient to cover the transaction.

The common allegation in the lawsuits is that the credit union breached the account agreement and/or Reg E’s opt-in agreement for ATM and one-time debit card transactions by improperly assessing overdraft fees based on the available balance when the actual balance was sufficient to cover the transaction. The lawsuits allege this practice misleads members as to when overdraft fees would be assessed by failing to clearly define available balance.

In the allegations involving a breach of Reg E’s model opt-in agreement for ATM and one-time debit card transactions (Model A-9 contained in Appendix A, Model Disclosure Clauses and Forms), which is required for overdraft programs under §1005.17, plaintiff attorneys target the language contained in the agreement: “An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway.”
Potential damages awarded to plaintiffs can be significant. If a court rules in favor of the plaintiffs and determines the overdraft fees were unlawful and/or improper, a credit union could be required to return significant amounts of overdraft fees to its members. Any return of fees deemed unlawful or improper is not insurable. It is expected that the overdraft fee lawsuits against credit unions will continue as some law firms are aggressively pursuing clients, in some cases specifically targeting credit union members, to initiate the lawsuits.

**Risk Mitigation**

To mitigate the risk of overdraft fee lawsuits, credit unions should consider:

- If your credit union assesses overdraft fees based on available balance rather than actual balance, understand how your credit union calculates overdraft fees and review your agreements (e.g., account agreement and Reg E opt-in agreement) along with other materials (e.g., written policies/procedures and marketing material) to confirm they accurately describe your practice of assessing overdraft fees based on available balance without any ambiguity.

- If your credit union assesses overdraft fees based on available balance rather than actual balance, include a description of how certain transactions, such as debit card preauthorization holds and check holds, impact the available balance as well as including examples of each.

- Ensure your marketing and compliance materials explain the posting order of transactions. Based on past litigation, you should avoid sequencing debit transactions from highest dollar items to lowest dollar items.

- Confirm you are in compliance with Reg E’s opt-in requirements for ATM and one-time debit card transactions by obtaining members’ affirmative consent before assessing overdraft fees for these transactions.

Credit unions using account agreements from **LOANLINER® Compliance Solutions** will receive a communication with further action steps for updating the agreements.

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’s Third Party Litigation team.

**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. The Protection Resource Center requires a User ID and password. Review this resource to learn more:

- **RISK Alert: Overdraft Fee Lawsuits Target CUs**

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Interested in learning more about emerging risks?

Contact CUNA Mutual Group’s Risk & Compliance Solutions at 800.637.2676 or by email at riskconsultant@cunamutual.com for additional risk insights.