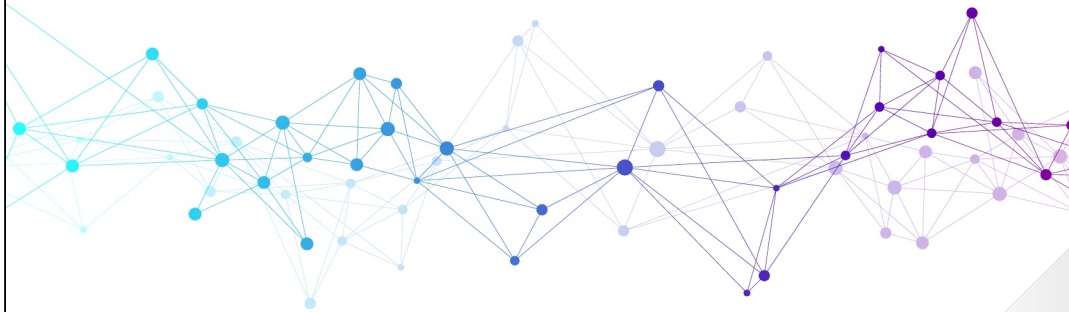


# Compliance Essentials

## Overdrafts and Courtesy Pay



# Truth In Savings



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## TISA: Account Opening Disclosures

- Credit unions must specify in account-opening disclosures the categories of transactions an overdraft fee may be imposed on ([See model language](#)) and the amount of any overdraft fee.
- (List overdraft fees in the fee schedule)

# TISA: Advertising Disclosures

## What is an “Advertisement”

- Any promotion of overdrafts on Internet websites, telephone response systems, e-mails or other marketing materials
- Stating the available overdraft limit or the amount of funds available on a periodic statement

## Exceptions to the Advertisement rule

- Providing educational materials
- Responding to member-initiated inquiries about overdrafts or deposit accounts
- Notifying a member about a specific overdraft on their account
- ATM receipts
- Broadcast media (television, radio, billboards)

# TISA: Advertising Disclosures

Credit unions that promote the payment of overdrafts are required to include the following disclosures in their advertisements for overdraft services:

- The applicable fee or charge
- The categories of transactions that are covered
- The time period members have to repay or cover the overdraft (immediately, on demand or within x number of days)
- The circumstances when the credit union would not pay an overdraft

# TISA: Advertising Disclosures

## Limited Advertising Disclosures

- For advertisements on ATM screens and telephone response machines, disclose only the amount of the fee and the period of repayment.
- For advertisements on indoor signs indicate that fees may apply, and that the member should contact an employee for further information about fees and terms.

# TISA: Periodic Statement Disclosures

Disclose a total dollar amount for all overdraft fees and returned item (NSF) fees imposed on a member's account:

- Disclose separate totals for the statement period and for the calendar year-to-date.
- The total dollar amount includes per-item fees as well as interest charges, daily or other periodic fees, or fees charged for maintaining an account in overdraft status, whether the overdraft is by check or by other means.
- It does not include fees for transferring funds from another member account to avoid an overdraft, or fees related to overdraft lines of credit subject to Regulation Z.
- Include all fees charged to the account for dishonoring or returning checks or other items drawn on the account.
- Make the disclosure in a tabular format and place near the other itemized fees (see sample).

# TISA: Periodic Statement Disclosures

- The fee disclosure does not have to be provided if no fees have been charged whatsoever.
- If a fee is waived in a later periodic statement period, the credit union may (but is not required to) show that adjustment in the year-to-date total on that later statement.
- If the fee is assessed and waived during the same statement period, the credit union may at its option show the adjustment in both the year-to-date total and the total for that statement period.

B-12 AGGREGATE OVERDRAFT AND RETURNED ITEM FEES SAMPLE FORM

	Total for this period	Total year-to-date
Total overdraft fees	\$60.00	\$150.00
Total returned item fees	\$0.00	\$30.00





# TISA: Prohibitions on Misleading Advertisements

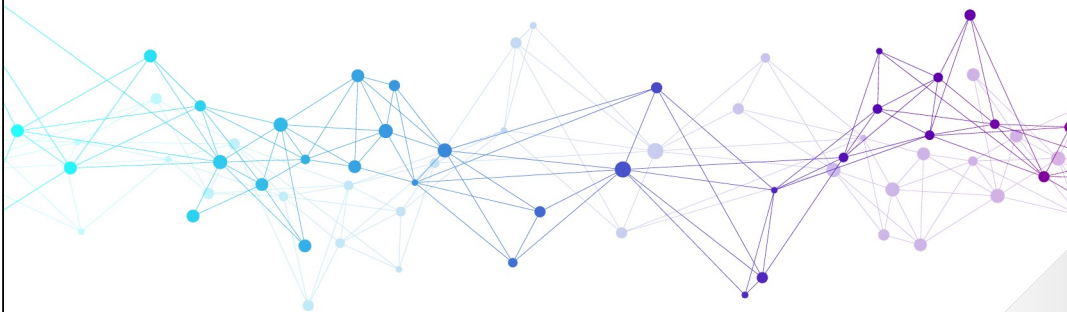
TISA prohibits advertisements, announcements, or solicitations that are misleading or misrepresent the deposit contract. The following are examples of misleading advertisements:

- Representing an overdraft service as a “line of credit.”
- Representing that the credit union will honor all checks or transactions when the credit union has discretion to not honor a transaction.
- Representing that members with an overdrawn account are allowed to maintain a negative balance when the terms of the overdraft service require the member to promptly return the account to a positive balance.
- Describing the overdraft service solely as protection against bounced share drafts when the credit union also permits overdrafts in connection with ATM withdrawals or other electronic fund transfers.
- Describing the account as “free” or “no cost” in an advertisement that also promotes a service in which there is a fee, such as an overdraft service, unless the advertisement for the account clearly indicates that there is a cost for this service.

## TISA: ATM Disclosure of Account Balances

- When displaying available balance information on an ATM screen do not include any additional amounts that may be provided through overdraft protection plans, lines of credit, or through transfers from other accounts.
- The credit union may choose to display a second balance that includes amounts available through an overdraft protection plan, as long as it prominently discloses that this second balance includes the additional amount.

# Regulation E: Opt-in Notice for ATM and One Time Debit Card Overdrafts



# Overdraft Opt-In

## Coverage

Credit Unions are required to provide an opt-in notice and obtain the member's affirmative consent before charging any fees for paying ATM and one-time debit card overdrafts.

## Exemptions

The rule does not apply to:

- Overdrafts related to check, ACH, or recurring debit transactions.
- The payment of overdrafts via a line of credit subject to Reg Z, including transfers from a credit card account, home equity line of credit, or overdraft line of credit.
- The transfer of funds from another account held individually or jointly by the member, such as a savings account, to cover overdrafts

# Overdraft Opt-In

## Four Step Opt-in Requirement

A credit union cannot charge a fee on a member's account for paying an ATM or one-time debit card overdraft, unless the credit union:

1. Provides the member with a notice in writing (or electronically, if the member agrees) segregated from all other information, describing the credit union's overdraft service(s).
2. Provides a reasonable opportunity for the member to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions. A credit union can provide methods to opt-in in the following ways:
  - Provide a form to fill out and return in person or mail back to the credit union
  - Provide a readily available telephone line that members can call
  - For members who have agreed to do business electronically, provide a Web-based form where members can click on a check box and then click a button to confirm their choice.

# Overdraft Opt-In

## Four Step Opt-in Requirement

3. Obtains the member's affirmative consent, or opt-in, to the credit union's payment of ATM or one-time debit card transactions. Note that the consent must be obtained separately from other consents or acknowledgements, including the consent to receive disclosures electronically.
4. Provides the member with confirmation of this consent in writing (or electronically, if they agree), which includes a statement informing the member of the right to revoke such consent. The confirmation notice can be sent via the following methods:
  - Provide a copy of the completed opt-in form to the member
  - Send a separate letter acknowledging that the member has elected to opt into the overdraft service

**\*\*Note:** Credit unions cannot charge a fee for paying covered overdrafts until all four opt-in steps are completed.

# Overdraft Opt-In

## **Affirmative Consent and Revocation**

- The member may affirmatively consent to the credit union's overdraft service at any time in the manner described in the opt-in notice and may revoke consent at any time in the same manner used to provide consent.
- The member's affirmative consent to the credit union's overdraft service is effective until revoked by the member (unless the credit union terminates the service).
- The credit union must implement the member's revocation of consent as soon as "reasonably practicable."
- For joint accounts, the credit union may treat the affirmative consent of any of the joint account owners as affirmative consent for that account. Similarly, the credit union must treat a revocation of affirmative consent by any of the joint account owners as revocation of consent for that account.

# Overdraft Opt-In

## Opt-in Notice

Reg E contains specific content and format requirements for the consumer opt-in notice. The notice must be substantially similar to the [Model Form A-9](#) set forth in Appendix A of the regulation.

## Opt-in Notice Contents

- A brief description of the credit union's overdraft service and the types of transactions covered by the service, including ATM and one-time debit card transactions
- The dollar amount of any fees or charges assessed by the credit union for paying ATM or one-time debit card transactions
- The maximum number of overdraft fees or charges that may be assessed per day, or, if applicable, that there is no limit
- An explanation of the member's right to opt-in to the credit union's overdraft service for the payment of ATM and one-time debit card transactions, including the methods by which the member may consent to the service; and
- Any alternative plans for covering overdrafts if available.
- Indicate that the member has the right to opt-in to, or opt-out of, the payment of overdrafts under the institution's overdraft service for other types of transactions
- Provide a means for the member to exercise this choice; and
- Disclose the associated returned item fee and that additional merchant fees may apply.
- Disclose the member's right to revoke consent.





# Overdraft Opt-In

## Opt-in Notice Modifications

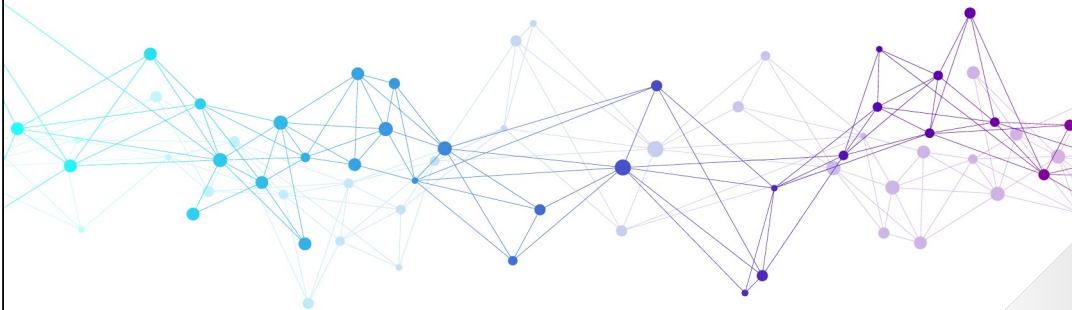
- The credit union may tailor Model Form A-9 to whatever methods it offers members to opt-in to the service.
- The credit union may use any reasonable method to identify the account for which the member submits the opt-in notice.

# Overdraft Opt-In

## Prohibitions

- Credit unions cannot require the member to opt-in to the overdraft service for ATM/debit card transactions in order to have checks, ACH and other types of transactions paid.
- Credit unions cannot decline to pay check, ACH and other transactions because the member hasn't opted in to the ATM/debit card overdraft service.
- Credit unions must provide members who don't opt-in with the same account terms, conditions and features as provided to consumers who do opt in.

# Risk to Fee Income



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## Risk to Fee Income

Overdraft fee programs are shaping up to be a top risk for credit unions. Any credit union that maintains an overdraft protection (courtesy pay) program should be familiar with the current risk environment. This is especially critical if the credit union relies heavily on overdraft fee income in their profit model,

# Regulatory Risk

- On [December 1, 2021](#), The Consumer Financial Protection Bureau (CFPB) released a report on financial institutions' reliance on overdraft fees.
- According to the agency, revenues reached an estimated \$15.47 billion in 2019.
- This quote from CFPB director Rohit Chopra is not at all subtle regarding how the CFPB views overdraft fees:  
"Rather than competing on quality service and attractive interest rates, many banks have become hooked on overdraft fees to feed their profit model. . . We will be taking action to restore meaningful competition to this market."

# Regulatory Risk

- On October 26, 2022 the CFPB Issued "[Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts](#)"
- Overdraft fees, especially "Approved Positive, Settled Negative" POS transactions were described as potentially "unintelligible or manipulative."

*"Today's Consumer Financial Protection Circular explains that when financial institutions charge surprise overdraft fees, sometimes as much as \$36, they may be breaking the law. The circular provides some examples of potentially unlawful surprise overdraft fees, including charging penalties on purchases made with a positive balance. These overdraft fees occur when a bank displays that a customer has sufficient available funds to complete a debit card purchase at the time of the transaction, but the consumer is later charged an overdraft fee. Often, the financial institution relies on complex back-office practices to justify charging the fee. For instance, after the bank allows one debit card transaction when there is sufficient money in the account, it nonetheless charges a fee on that transaction later because of intervening transactions."*

- CUNA Mutual (TruStage) issued a [risk alert](#) regarding this CFPB guidance
- The Risk Alert has a list of to-do items for credit unions to mitigate risk from APSN transactions
- In particular, an explanation in deposit account agreement of how overdrafts are charged is encouraged (although even a good explanation may not be enough to avoid regulatory and legal scrutiny)

# Regulatory Risk

The [CFPB has indicated](#) overdraft fees are on their 2023 list for possible rulemaking.

# Regulatory Risk

- The CFPB's issuances regarding overdrafts fees is part of a wider pre-occupation with what it calls "Junk Fees"
- Junk fees are defined as "unnecessary, unavoidable, or surprise charges that inflate prices while adding little to no value."
- The [CFPB has an entire page](#) devoted "junk fees." Overdraft fees are included.



# Competition

- [Many banks and credit unions](#) have reduced or eliminated overdraft fees.
- The [CFPB has been keeping tabs](#) on reduced fee overdraft related fee income banks and credit unions have seen as they revise their practices.

# Legal Risk

CUNA Mutual Group third-party litigation team [reports](#) they have handled on average two new overdraft/NSF Fee class action matters a week during 2021.

These lawsuits allege credit union members were improperly assessed overdraft and/or NSF fees. The allegations include:

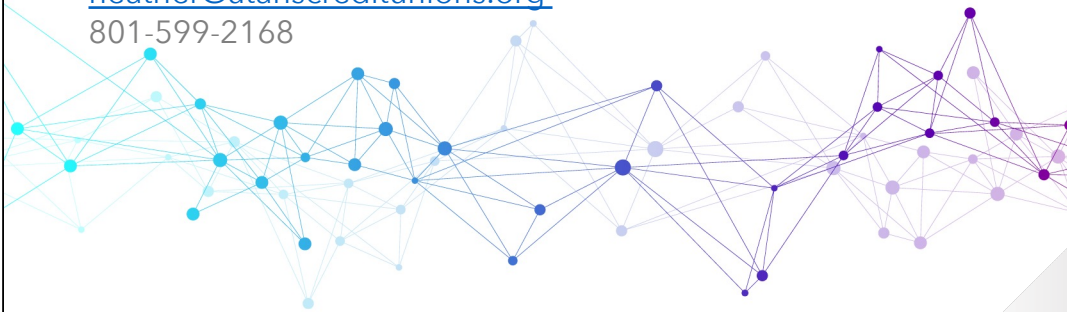
- Improperly charged multiple NSF fees on the same transactions (refers to incoming debits to member accounts that are returned multiple times by credit unions)
- Improperly assessed overdraft fees on debit card transactions posting to member accounts when funds were previously set aside when preauthorization holds were placed
- Overdraft fees were improperly assessed using the “available” balance rather than the “actual” or ledger balance and that credit union failed to accurately describe this in agreements / disclosures

# Questions?

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# Coming Soon

- **Compliance Essentials Class #: Opening Accounts for Non-US Citizens**
- **July 20, 2023, 10:00 AM – 12:00 PM**
- [Register here](#)