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Expert Analysis: What To Expect From CFPB's Overdraft Rule Review

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On May 15, 2019, the Consumer Financial Protection Bureau announced plans to conduct a review of the 2009 overdraft rule¹ under Section 610 of the Regulatory Flexibility Act, which requires agencies to conduct reviews of certain rules every 10 years.² The CFPB published a request for comments to determine whether the overdraft rule should continue as is, or be amended or rescinded.³ The responses received by the CFPB varied significantly.

For example, on July 1, 2019, the attorneys general of 25 states submitted a joint comment letter urging the CFPB to not only continue enforcing the overdraft rule, but further expand the overdraft rule to include checking and automated clearing house transactions and to require that fees be proportionate to the amounts banks pay to cover overdraft transactions.⁴

In contrast, the Independent Community Bankers of America urged the CFPB not to impose any additional regulatory requirements in its July 1, 2019, comment letter given the significant compliance costs to financial institutions offering overdraft services and, in particular, the economic impact on small entities.⁵

However, even if the CFPB scales back the overdraft rule, the extensive regulatory guidance issued by federal banking regulators nevertheless imposes a number of significant hurdles to financial institutions offering overdraft programs.⁶ Institutions must also ensure overdraft practices comply with Regulation DD, the implementing regulation of the Truth in Savings Act, notwithstanding the fate of the overdraft rule.⁷

The 2009 Overdraft Rule

In November 2009, the board of governors of the Federal Reserve System published a final rule amending Regulation E, which implements the Electronic Fund Transfer Act, limiting the ability of financial institutions to assess overdraft fees for paying automated teller machine and one-time debit card transactions that overdraw consumers' accounts.⁸ In 2011, the CFPB recodified Regulation E, including the amendments made by the overdraft rule, when it assumed rulemaking responsibility under the EFTA pursuant to the Dodd-Frank Act.⁹

At the core of the overdraft rule is that financial institutions cannot assess a fee or charge on a consumer's account for paying an ATM or one-time debit card overdraft transaction, unless the institution, among other

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things, obtains the consumer's affirmative consent, or opt in, to the institution's payment of overdrafts for these transactions.¹⁰ In contrast, financial institutions are not required to obtain such consent from the consumer before extending fee-based overdrafts to cover check payments, ACH transactions or recurring debit card transactions.

Establishing affirmative consent under the overdraft rule is multilayered and complex. Before a consumer may affirmatively consent, the overdraft rule requires an institution to: (1) provide the consumer with a notice in writing (or if the consumer agrees, electronically), segregated from all other information, describing the institution's overdraft service; (2) provide a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions; (3) obtain the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions; and (4) provide the consumer with confirmation of the consumer's consent in writing (or if the consumer agrees, electronically), which includes a statement informing the consumer of the right to revoke such consent.¹¹

The content of the notice is strictly regulated by the overdraft rule and must include: (1) a brief description of the overdraft service and the types of transactions for which a fee or charge for paying an overdraft may be imposed; (2) the dollar amount of any fees or charges; (3) the maximum number of fees or charges that may be imposed (or an indication there is no limit); (4) an explanation of the consumer's right to consent to the bank's payment of overdrafts for debit purchases or ATM transactions, (5) any alternative plans for covering overdrafts; and (6) any applicable modifications to overdraft services.¹²

The overdraft rule cautions that the notice must be "substantially similar" to Model Form A-9 set forth in Appendix A of Regulation E.¹³ Given the complexity of the notice requirements, any deviation from the model form has often resulted in regulatory scrutiny.

In addition to these strict consent and notice requirements, the overdraft rule prohibits institutions from conditioning the payment of any overdrafts for checks, ACH transactions and other types of transactions on whether the consumer opted into the ATM/debit card overdraft service.¹⁴ Financial institutions must also provide to consumers who do not affirmatively consent to the ATM/one-time debit transaction overdraft service the same account terms, conditions and features as consumers who opt into the service, including interest rates and fees, the type of ATM or debit card provided, minimum balance requirements or other online account features (such as online bill pay).¹⁵

The CFPB's Plan for Review

Consistent with Section 610 of the RFA, the CFPB stated it will consider the following criteria in reviewing the overdraft rule: the (1) continued need for the rule; (2) nature of public complaints or comments on the rule; (3) complexity of the rule; (4) extent to which the rule overlaps, duplicates or conflicts with federal, state or other rules; and (5) time since the rule was evaluated or the degree to which technology, market conditions or other factors have changed the relevant market.¹⁶

In connection with its review, the CFPB requests comments, including: (1) the nature and extent of the economic impacts of the rule as a whole and of its major components on small entities, including impacts

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of the reporting, recordkeeping and other compliance requirements of the overdraft rule, as well as benefits of the Rule; (2) whether and how the Bureau by rule could reduce the costs of the overdraft rule on small entities, consistent with the stated objectives of EFTA and the overdraft rule; and (3) any other information relevant to the factors that the bureau considers in completing a Section 610 Review under the Regulatory Flexibility Act, as described above.¹⁷

The CFPB stated that since the issuance of the overdraft rule, it has observed several changes in the overdraft practices of financial institutions, including changes in the order in which different categories of transactions are posted, which has resulted in a diminution in the number of overdraft transactions; limits on the number of overdraft fees that some financial institutions may charge in a single business day; and “cushions” which preclude assessing overdraft fees on de minimis amounts.¹⁸ Notably, the CFPB stated it does not have reason to believe that these changes are attributable to the overdraft rule.

In addition, the CFPB stated it has conducted research relevant to the overdraft rule.¹⁹ In 2012, the CFPB launched an inquiry into overdrafts, paralleling work that the bureau was undertaking to examine other types of short-term credit products.²⁰ In 2015, the CFPB obtained de-identified information related to overdraft practices and consumer outcomes from core processors of 4,091 financial institutions for a single 12-month period around 2014, and the vast majority of the financial institutions were “small” (defined by the Small Business Administration as having assets less than \$550 million).²¹

The CFPB previously sought input from the public on the overdraft rule, including the impact of overdraft programs on consumers. In February 2012, the CFPB published a request for information on the overdraft rule and received more than 1,000 comments from trade groups, financial institutions, consumer advocates, individual consumers and others.²² In August 2017, the CFPB announced it conducted consumer testing on potential updates and improvements to the Model Form A-9, and released four alternative versions of a revised opt-in model form with the request for feedback on these alternatives, including whether the alternative forms more clearly disclose the costs and benefits of overdraft services and what transactions might cause an overdraft fee.²³

Additionally, in response to the CFPB's 2018 Call for Evidence Initiative, which included requesting input on all inherited regulations and rulemaking authorities, the CFPB received approximately 10 comments that included information about checking account overdrafts generally, addressing the overall cost of overdraft, the treatment of overdrafts under the Truth in Lending Act and potential modifications to the current Model Form A-9.²⁴

Through these and other outreach efforts, the CFPB expressed it has heard concerns by some financial institutions and trade groups regarding the requirements that the opt-in notice be substantially similar to Model Form A-9, and that the notice may not contain any information not specified in or otherwise permitted by the regulation. Some of these financial institutions have expressed a desire to add additional information to the notice that they believe may be relevant to the consumer's decision, such as an institution's policies for making overdraft and balance-related calculations.²⁵

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Takeaways

Although the CFPB has been researching overdraft programs and requesting information on overdraft practices since 2012, the overdraft rule has remained unchanged since its implementation in 2009. Nonetheless, the purpose of the RFA review is to minimize the economic impact of the overdraft rule on small entities. The CFPB has thus opened the door for potential regulatory relief in connection with the rule that has continued to provide compliance hurdles for financial institutions for almost a decade.

Notwithstanding, as noted by the CFPB, many changes in the overdraft practices of financial institutions have stemmed from the extensive supervisory guidance issued by the federal banking regulators, not the overdraft rule itself.²⁶ This guidance has focused on the processes and methodologies of overdraft programs and the disclosures provided to consumers in connection with such programs, with a particular emphasis on minimizing consumer confusion and avoiding UDAAPs.

For example, because the order in which an institution processes transactions can determine the number of overdraft fees assessed, federal banking regulators have advised banks to avoid reordering transactions in a way that would take advantage of consumers. In that same vein, regulators have scrutinized the balance calculation methods used by banks in connection with overdraft programs, including ledger-balance versus available-balance methods.²⁷

In addition to processing order and balance calculation disclosures, federal banking regulators have set forth a number of best practices aimed at ensuring that the customer is fully apprised of the terms and conditions of overdraft protection programs, including account eligibility standards, the consequences of extensive use, dollar limits and opt-out rights, among others.

The guidance also sets forth a number of general best practice recommendations for banks to manage overdraft program risks, including but not limited to: monitoring excessive and chronic usage, limiting the number of transactions subject to a fee, and implementing a de minimus threshold in which a fee will not be assessed.

Thus, while the CFPB's review may provide welcome relief under the overdraft rule, financial institutions must not ignore the broader regulatory framework that can apply to overdraft products, including the disclosure and advertising requirements for overdraft fees set forth in Regulation DD, and related commentary, and the extensive regulatory guidance noted above.

Accordingly, it is critical that financial institutions continue to carefully evaluate their overdraft programs under this broader regulatory lens and retain counsel that is well-versed in wading through this regulatory framework.

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Notes

¹ See <https://www.federalregister.gov/documents/2019/05/15/2019-09812/overdraft-rule-review-pursuant-to-the-regulatory-flexibility-act>.

² 5 U.S.C. § 610. Section 610 provides that the purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. *Id.*

³ Comments regarding the Overdraft Rule must have been received by July 1, 2019. See <https://www.federalregister.gov/documents/2019/05/15/2019-09812/overdraft-rule-review-pursuant-to-the-regulatory-flexibility-act>.

⁴ See <https://ncdoj.gov/Files/News/Attorneys-General-Comment-on-CFPB-Overdraft-Rule.aspx>.

⁵ See https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/19-07-02_overdraftcl.pdf?sfvrsn=184b5b17_0.

⁶ For example, in 2005, the Federal Reserve, Office of the Comptroller of the Currency, National Credit Union Administration, and FDIC issued interagency supervisory guidance for overdraft protection programs, noting general concerns in the marketing, disclosure, and implementation of some overdraft protection programs, available at: www.federalreserve.gov/boarddocs/SRLETTERS/2005/SR0503a1.pdf. In 2010, the FDIC issued supervisory guidance on overdrafts, noting that institutions must closely monitor and oversee any overdraft payment programs offered to consumers, including taking appropriate measures to mitigate risks, incorporating the best practices in the 2005 Joint Guidance on Overdraft Programs, and effectively managing third-party arrangements, available at: <https://www.fdic.gov/news/news/financial/2010/fil10081.pdf>. In 2015, the CFPB addressed overdraft programs in its Supervisory Highlights, with a particular emphasis on ledger-balance versus available-balance methods, available at: https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf. In 2018, the Federal Reserve issued a publication addressing potential unfair, deceptive, or abusive acts or practices (“UDAAP”) in the context of overdrafts, available at: <https://www.federalreserve.gov/publications/2018-july-consumer-compliance-supervision-bulletin.htm>. In June 2019, the FDIC issued a publication identifying some of the most salient compliance issues identified during the 2018 consumer compliance examinations, including Overdraft Programs, available

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at: <https://www.fdic.gov/regulations/examinations/consumercompsupervisoryhighlights.pdf>.

⁷ 12 C.F.R. pt. 1030.

⁸ <https://www.federalregister.gov/documents/2009/11/17/E9-27474/electronic-fund-transfers>. The Board of Governors of the Federal Reserve System stated the intent of the Overdraft Rule is to carry out the express purposes of the EFTA by: (a) establishing notice requirements to help consumers better understand the cost of overdraft services for certain electronic fund transfers; and (b) providing consumers with a choice as to whether they want overdraft services for ATM and one-time debit card transactions in light of the costs associated with those services. *Id.*

⁹ See generally, <https://www.federalregister.gov/documents/2011/12/27/2011-31725/electronic-fund-transfers-regulation-e>.

¹⁰ 12 C.F.R. § 1005.17(b)(1).

¹¹ *Id.*

¹² 12 C.F.R. § 1005.17(d).

¹³ 12 C.F.R. § 1005.17(b)(2).

¹⁴ 12 C.F.R. § 1005.17(b)(3).

¹⁵ *Id.*

¹⁶ <https://www.federalregister.gov/documents/2019/05/15/2019-09812/overdraft-rule-review-pursuant-to-the-regulatory-flexibility-act>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ As part of this inquiry, the CFPB obtained aggregate and anonymized account-level data from large banks. The CFPB shared some of its findings through a June 2013 White Paper, July 2014 Data Point, and August 2017 Data Point. See, CFPB Study of Overdraft Programs: A White Paper of Initial Data Findings (June 2013), available at http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf; CFPB, Data Point: Checking account overdraft (July 2014), available at http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf; CFPB, Data Point: Frequent Overdrafters (Aug. 2017), available at https://www.consumerfinance.gov/documents/5126/201708_cfpb_data-point_frequent-overdrafters.pdf.

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²¹ <https://www.federalregister.gov/documents/2019/05/15/2019-09812/overdraft-rule-review-pursuant-to-the-regulatory-flexibility-act>.

²² See <https://www.federalregister.gov/documents/2012/02/28/2012-4576/impacts-of-overdraft-programs-on-consumers>. The CFPB posed questions grouped into six broad categories: (1) lower cost alternatives to overdraft protection programs offered by financial institutions, (2) consumer alerts and information provided regarding balances and overdraft triggers, (3) impact of changes to Regulation DD and Regulation E and overdraft opt-in rates, (4) impact of changes in financial institutions' operating policies, (5) the economics of overdraft programs, and (6) the long-term impact of overdraft programs on consumers.

²³ See <https://www.consumerfinance.gov/about-us/blog/know-you-owe-we-are-designing-new-overdraft-disclosure-forms/>.

²⁴ <https://www.federalregister.gov/documents/2019/05/15/2019-09812/overdraft-rule-review-pursuant-to-the-regulatory-flexibility-act>; see also <https://www.federalregister.gov/documents/2018/03/26/2018-06027/request-for-information-regarding-the-bureaus-inherited-regulations-and-inherited-rulemaking>.

²⁵ <https://www.federalregister.gov/documents/2019/05/15/2019-09812/overdraft-rule-review-pursuant-to-the-regulatory-flexibility-act>.

²⁶ See footnote 5, *supra*.

²⁷ See Winter 2015 CFPB Supervisory Highlights, footnote 5, *supra*.

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