

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB-2019-0023]

Overdraft Rule Review Pursuant to the Regulatory Flexibility Act

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of section 610 review and request for comments

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is conducting a review of the Overdraft Rule consistent with section 610 of the Regulatory Flexibility Act. As part of this review, the Bureau is seeking comment on the economic impact of the Overdraft Rule on small entities. These comments may assist the Bureau in determining whether the Overdraft Rule should be continued without change, or amended or rescinded to minimize any significant economic impact of the rules upon a substantial number of such small entities, consistent with the stated objectives of applicable statutes.

DATES: Comments must be received by **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit responsive information and other comments, identified by Docket No. CFPB-2019-0023, by any of the following methods:

- *Electronic:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* 2019-Notice-RFAReviewOverdraft@cfpb.gov. Include Docket No. CFPB-2019-0023 in the subject line of the message.
- *Mail:* Comment Intake, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

- *Hand Delivery/Courier:* Comment Intake, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Instructions: The Bureau encourages the early submission of comments. All submissions must include the document title and docket number. Please note the specific rule or topic on which you are commenting at the top of each response (you do not need to address all rules or topics). Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. eastern time. You can make an appointment to inspect the documents by telephoning 202-435-7275.

All submissions in response to this request for information, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Joseph Baressi and Gregory Evans, Senior Counsels, Office of Regulations, at 202-435-7700. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

The Regulatory Flexibility Act¹ (RFA) requires each agency to consider the effect on small entities for certain rules it promulgates.² Specifically, section 610 of the RFA³ provides that each agency shall publish in the *Federal Register* a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities.

The Bureau is publishing such a plan separately in this issue of the *Federal Register*. 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.⁴ As also set forth in section 610, in each review agencies must consider several factors:

1. The continued need for the rule;
2. The nature of public complaints or comments on the rule;
3. The complexity of the rule;
4. The extent to which the rule overlaps, duplicates, or conflicts with Federal, State, or other rules; and
5. The time since the rule was evaluated or the degree to which technology, market conditions, or other factors have changed the relevant market.⁵

The following section lists and briefly describes the rule that the Bureau plans to review

¹ Public Law 96-354, 94 Stat. 1164.

² The term “small entity” is defined in the RFA. *See* 5 U.S.C. 601(6).

³ 5 U.S.C. 610(a).

⁴ 5 U.S.C. 610(a).

⁵ 5 U.S.C. 610(b).

in 2019 under the criteria described by section 610 of the RFA and pursuant to the review plan published separately in this issue of the *Federal Register*. The Bureau expects to publish a notice in summer 2019 identifying the rules that will be the subject of section 610 reviews in 2020.

I. List of Rules for Review

This section lists and briefly describes the rule that the Bureau plans to review in 2019 under the criteria described by section 610 of the RFA and pursuant to the Bureau's review plan.

A. Federal Reserve Board Overdraft Rule

i. The Rule

In November 2009, to address overdraft practices, the Board of Governors of the Federal Reserve System (Board) published a final rule amending Regulation E, which implements the Electronic Fund Transfer Act⁶ (EFTA), and the official staff commentary to the regulation, which interprets the requirements of Regulation E.⁷ Specifically, pursuant to its authority under EFTA sections 904(a), (b), (c), and 905,⁸ the Board issued a rule (Overdraft Rule or Rule) that limits the ability of financial institutions to assess overdraft fees for paying automated teller machine (ATM) and one-time debit card transactions that overdraw consumers' accounts.⁹ The Board stated that the Overdraft Rule is intended 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

⁶ 15 U.S.C. 1693 *et seq.*

⁷ 74 FR 59033 (Nov. 17, 2009). *See also* clarifications that the Board published in June 2010. 75 FR 31665 (June 4, 2010).

⁸ 15 U.S.C. 1693b(a), (b), (c), 1693c.

⁹ *See* 74 FR 59033, 59037 (Nov. 17, 2009).

the costs associated with those services.¹⁰ Under the Rule, financial institutions must not 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 things, obtains the consumer's affirmative consent, or opt-in, to the institution's payment of overdrafts for these transactions.¹¹ Under the Overdraft Rule, before a consumer may affirmatively consent, the financial institution must "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."¹² This notice must include specific information, such as the fees imposed for paying such overdrafts, and the notice must also be "substantially similar" to a model form set forth in appendix A of the regulation (Model Form A-9).¹³ The Bureau recodified Regulation E, including the amendments made by the Overdraft Rule, in 2011 when the Bureau assumed rulemaking responsibility under EFTA.¹⁴ The Overdraft Rule is now set forth within Subpart A of the Bureau's Regulation E, 12 CFR part 1005.¹⁵

ii. The Market

Consumers with checking accounts sometimes attempt transactions for amounts that exceed their account balance. Financial institutions that offer checking accounts may decide whether to allow such transactions to go through (an overdraft) and whether to charge fees in connection with the overdraft (subject to some restrictions). These decisions depend on a

¹⁰ *Id.*

¹¹ *See* 12 CFR 1005.17(b)(1)(iii).

¹² *See* 12 CFR 1005.17(b)(1)(i).

¹³ *See* 12 CFR 1005.17(d).

¹⁴ 76 FR 81019 (Dec. 27, 2011).

¹⁵ *See generally* 12 CFR 1005.17. These provisions were originally adopted by the Board in 12 CFR part 205 but, upon transfer of authority by the Dodd-Frank Act to implement EFTA to the Bureau, were renumbered as 12 CFR part 1005. 76 FR 81020 (Dec. 27, 2011).

number of factors, including the type of transaction, the financial institution's policies, procedures, and technological systems, and regulatory requirements. In the case of a check or an Automated Clearing House (ACH) transaction, the financial institution may either return a transaction attempt that exceeds a consumer's account balance unpaid for non-sufficient funds (NSF), or process the transaction, in which case an overdraft occurs. If a consumer attempts a one-time debit card transaction or an ATM withdrawal, the financial institution either authorizes or declines the transaction within seconds of the consumer's request. A declined transaction does not result in a fee. If the transaction is authorized, the financial institution will later settle the transaction, which might occur on the same day, or as long as three business days later.

The Bureau believes that the majority of financial institutions offering checking account overdraft services chose to offer consumers the opportunity to opt-in to those services. Some financial institutions, however, chose not to implement an opt-in regime. Of those financial institutions, some may have elected to provide overdraft services for ATM and one-time debit card transactions, but not charge a fee. Other financial institutions that chose not to offer opt-in elected generally to decline ATM and one-time debit card transactions that would overdraw the account, although certain authorized transactions may nonetheless have resulted in an overdraft later at settlement. Bureau research suggests that a transaction authorizing with a sufficient balance, but later settling with a negative balance is a common occurrence for frequent overdrafters who have not opted in.¹⁶

¹⁶ CFPB, *Data Point: Frequent Overdrafters* (Aug. 2017) at 28, available at https://www.consumerfinance.gov/documents/5126/201708_cfpb_data-point_frequent-overdrafters.pdf.

The Bureau has found that the share of consumers who have opted in varies widely by institution, but in general it is considerably less than half.¹⁷ This underscores the variation among financial institutions and their customers in their desire to offer or use overdraft on card-based transactions. The Bureau has estimated in 2013 that the rule led to a material decrease in the amount of overdraft fees paid by consumers.¹⁸

With regard to the type of transactions taking place, there has been substantial growth in debit card-based transactions both due to more consumers using debit cards and those with debit cards using them more. There have been technological changes making debit card acceptance more ubiquitous, such as the introduction of tablet and smartphone-based point of sale terminals and a growing number of online and mobile marketplaces, retailers, and service providers. There has also been a growing comfort among consumers in making electronic payments.

Since the issuance of the Overdraft Rule, the Bureau has observed several changes in overdraft practices at a number of financial institutions. These include: (i) changes in the order in which different categories of transactions are posted, which has resulted in a diminution in the number of overdraft transactions; (ii) limits on the number of overdraft fees that some financial institutions may charge in a single business day; and (iii) “cushions” which preclude assessing overdraft fees on *de minimis* amounts. The Bureau does not have reason to believe that these changes are attributable to the Rule.

¹⁷ CFPB, *CFPB Study of Overdraft Programs: A White Paper of Initial Data Findings* (June 2013) at 29, available at http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf. This report covers a number of larger banks. The Bureau has obtained data with respect to practices at smaller banks and credit unions which is consistent with the Bureau’s finding. The Bureau will consider those data in connection with this review.

¹⁸ CFPB, *CFPB Study of Overdraft Programs: A White Paper of Initial Data Findings* (June 2013) at 39, available at http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.

iii. Bureau Resources and Analysis

The Bureau has conducted research relevant to the Overdraft Rule. In 2012, the Bureau launched an inquiry into overdraft, paralleling work that the Bureau was undertaking to examine other types of short-term credit products. The Bureau obtained aggregate and anonymized account-level data from large banks as part of this inquiry, which Bureau researchers extensively analyzed. The Bureau shared some of its findings through a June 2013 White Paper, July 2014 Data Point, and August 2017 Data Point.¹⁹

In 2015, the Bureau obtained de-identified information from core processors on 4,091 financial institutions for a single 12-month period around 2014. The vast majority of these financial institutions were small, as defined by the Small Business Administration as having assets less than \$550 million.²⁰ The acquired information related to overdraft practices (whether the financial institution offered overdraft and opt-in, its policies for making overdraft and balance-related decisions, transaction processing methods, and overdraft and NSF fees charged) and consumer outcomes (share of accounts opted-in, overdraft and NSF fee revenue per account, and distribution of fees across accounts).

iv. Previous Input to the Bureau

In February 2012, the Bureau published a request for information, seeking input from the public on the impact of overdraft programs on consumers, including information on the impact

¹⁹ CFPB, *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.

²⁰ “A financial institution’s assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” 13 CFR 121.201. Assets for the purposes of this size standard means the assets defined according to the Federal Financial Institutions Examination Council 041 call report form for NAICS Codes 522110, 522120, 522190, and 522210 and the National Credit Union Administration 5300 call report form for NAICS code 522130.

of the Overdraft Rule.²¹ The Bureau received more than one thousand comments from trade groups, financial institutions, consumer advocates, individual consumers, and others.

In August 2017, the Bureau announced that it had conducted consumer testing on potential updates and improvements to the Model Form A-9 promulgated by the Board. The Bureau released four alternative versions of a revised opt-in model form and invited feedback on these alternatives, while noting that the current Model Form A-9 remains effective under Regulation E.²² The Bureau received more than forty comments in response to the release.

In response to the Bureau's 2018 Call for Evidence Initiative, which included requesting input on all inherited regulations and rulemaking authorities, the Bureau received approximately ten comments that included information about checking account overdrafts generally.²³ These comments came from trade groups, financial institutions, and consumer advocates. The comments addressed a wide variety of topics including 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.

Through these and other outreach efforts, the Bureau has heard concerns expressed 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.

²¹ 77 FR 12031 (Feb. 28, 2012).

²² <https://www.consumerfinance.gov/about-us/blog/know-you-owe-we-are-designing-new-overdraft-disclosure-forms/>.

²³ 83 FR 12881 (March 26, 2018).

Finally, the Bureau's experience suggests there is little overlap, duplication, or conflict between the Overdraft Rule and Federal, State, or other rules. The Bureau has not received any requests for a determination that the Overdraft Rule preempts State law. In October 2015, the Department of Education also issued a final rule that generally prohibits overdraft fees on students' checking accounts if the financial institution offering the account partners with an entity that handles the school's financial aid disbursement process.²⁴

II. Request for Comment

Consistent with the review plan, the Bureau asks the public to comment on the Overdraft Rule, including the following topics:

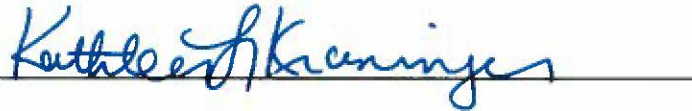
- (1) The nature and extent of the economic impacts of the Rule as a whole and of its major components on small entities, including impacts of the reporting, recordkeeping, and other compliance requirements of the Overdraft Rule, as well as benefits of the Rule.
- (2) Whether and how the Bureau by rule could reduce the costs of the Overdraft Rule on small entities, consistent with the stated objectives of EFTA and the Overdraft Rule.
- (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.

Where possible, please submit detailed comments, data, and other information to support any submitted positions.

²⁴ See 34 CFR 668.164.

**[THIS SIGNATURE PAGE PERTAINS TO THE PUBLICATION TITLED
“OVERDRAFT RULE REVIEW PURSUANT
TO THE REGULATORY FLEXIBILITY ACT”].**

Dated: May 6 2019.

A handwritten signature in blue ink, reading "Kathleen L. Kraninger", is written over a solid horizontal line.

Kathleen L. Kraninger,

Director, Bureau of Consumer Financial Protection.