BANKS TAKE NOTICE: FDIC CONTINUES REGULATORY SCRUTINY OF FEES CHARGED TO CONSUMERS

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U.S. Financial Institutions and Services Litigation Alert

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New guidance from the Federal Deposit Insurance Corporation (FDIC), released on 18 August 2022, regarding multiple re-presentment nonsufficient funds (NSF) fees, suggests that banks eliminate the fees altogether and continues the recent onslaught of challenges by federal and state regulators, as well as private class actions, directed at a variety of consumer fees charged by financial institutions.[1] Companies should regularly review the business reasons for, and disclosures related to, fees charged to consumers, and make appropriate adjustments for legal or risk-tolerance reasons, ensuring documentation is appropriate to defend legitimate policies.

In January 2022, the Consumer Financial Protection Bureau (CFPB) launched an initiative to challenge what it believes to be “junk fees” charged to consumers by financial institutions.[2] Attacking what the CFPB calls a new “fee economy,” the agency cited “punitive late fees” and NSF fees as examples. In late June 2022, the CFPB also expressed concerns regarding “convenience fees” charged to consumers for making payments online or by phone.[3] Much of the regulatory focus has been on NSF fees, with the CFPB citing studies it performed that appear to show that NSF and overdraft fees made up nearly two-thirds of banks' reported fee revenue.[4] The CFPB's research indicates that overdraft fee revenue is earned from a concentrated population of consumers: Nearly 80% of all overdraft revenue came from less than 9% of consumer accounts paying 10 or more overdraft fees per year.

State financial regulators in New York[5] and Massachusetts[6] have also notified regulated institutions that they stand ready to challenge what they believe to be improper fees. The focus, including in private consumer class actions filed in federal court, has been on the “re-presentment NSF” fees, where a consumer can incur multiple NSF fees if the consumer, or merchant, repeatedly attempts a transaction when sufficient funds are not available. However, banks, especially smaller banks, may face operational or technological challenges in distinguishing re-presentment fees from multiple unique attempted transactions.

Historically, regulatory guidance on overdraft and NSF issues focused on ensuring proper consumer disclosures so customers understood the consequences of attempting transactions when funds are unavailable.[7] Adequate disclosures help mitigate the risk of claims that fees are deceptive. While reiterating the importance of proper disclosures, the FDIC now suggests that re-presentment NSF fees might trigger a legal claim of unfairness, even if they are not deceptive. The unfairness prong of the Federal Trade Commission Act, as well as similar provisions of the Dodd-Frank Act, focuses on injury to consumers, with the standard being whether (1) the injury is reasonably avoidable by the consumer, and (2) there are no countervailing benefits to either consumers or competition. It might be argued, of course, that consumers can reasonably avoid NSF fees by not attempting to

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make payments in amounts that exceed the funds available in their accounts. Also, NSF fees (like late fees on mortgage or credit card obligations) advance the goal of financially responsible consumers—an economic system where consumers could miss payments or overdraw accounts without consequence would be much different from the system in place today.

The recent FDIC guidance recognizes that much of the challenge with the re-presentment issues traces back to relationships with vendors, including core processors, but the agency also holds financial institutions responsible for proper third-party oversight. A beneficial aspect of the FDIC guidance for banks is that "[e]xaminers will generally not cite [Unfair or Deceptive Acts or Practices] UDAP violations that have been self-identified and fully corrected prior to the start of a consumer compliance examination." The agency also recognized the difficulty in obtaining accurate historical information on re-presentments and stated that it "has accepted a two-year lookback period for restitution."

This regulatory enforcement trend warrants close attention by financial institutions that charge consumer fees. Fee policies and disclosures should be evaluated now and regularly to ensure they are supported by business justifications and satisfy legal standards. Banks that derive significant revenue from NSF or overdraft fees may face the greatest legal risk, as the CFPB has said they will direct supervision and enforcement resources toward such institutions.

FOOTNOTES

[1] THE FEDERAL DEPOSIT INSURANCE CORPORATION, FIL-40-2022, SUPERVISORY GUIDANCE ON MULTIPLE RE-PRESENTMENT NSF FEES (AUG. 2022), https://www.fdic.gov/news/financial-institution-letters/2022/fil22040a.pdf.

[2] The Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees, Agency Seeks Public Input on Fees on Bank Accounts, Credit Cards, and Other Financial Products, (Jan. 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/.

[3] Debt Collection Practices (Regulation F); Pay-to-Pay Fees, 87 Fed. Reg. 39733 (proposed Jul. 5, 2022) (to be codified at 12 CFR Pt. 1006), https://files.consumerfinance.gov/f/documents/cfpb_convenience-fees_advisory-opinion_2022-06.pdf.

[4] The Consumer Financial Protection Bureau, CFPB Research Shows Banks' Deep Dependence on Overdraft Fees Overdraft and Non-Sufficient Fund Penalties Made up Two-Third of Reported Fee Revenue, (Dec. 01, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/.

[5] The New York State Department of Financial Services, Industry Letter: Avoiding Improper Practices Related to Overdraft and Non-Sufficient Funds Fees, (Jul. 12, 2022), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20220712_overdraft_nsf_fees.

[6] Mary L. Gallagher, Supervisory Alert Letter: Representment Issue Supervisory Alert Regarding Charging Multiple Non-Sufficient Fund Fees (NSF) for Representment of Unpaid Transactions, The Massachusetts State

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Division of Banks, (Sep. 23, 2021), https://www.mass.gov/info-details/supervisory-alert-letter-representment-issue.

[7] THE FEDERAL DEPOSIT INSURANCE CORPORATION, FIL-81-2010, OVERDRAFT PAYMENT PROGRAMS AND CONSUMER PROTECTION FINAL OVERDRAFT PAYMENT SUPERVISORY GUIDANCE (Nov. 2010), https://www.fdic.gov/news/events/overdraft/faq.html.

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