

Regulatory Scrutiny of NSF and Overdraft Fees

Alert

11.04.2022

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On September 8, 2022, the Consumer Financial Protection Bureau (CFPB) issued a consent order requiring a bank to pay a \$50 million penalty and to refund at least \$141 million to consumers allegedly harmed by the [bank's overdraft practices](#). The bank's overdraft fees, referred to by the CFPB as "authorized-positive" fees, were charged on transactions that were authorized with a positive balance in the account but settled without sufficient funds to cover the transaction, resulting in an overdraft. Weeks later on October 26, 2022, the CFPB issued a circular to the other federal banking regulators making the case that such "authorized-positive" fees constitute an [unfair act or practice](#).

The CFPB seems to be announcing that such fees are illegal, regardless of the extent to which the practice is disclosed in deposit account agreements. The CFPB's actions follow the market trend of increased regulatory scrutiny of overdraft and non-sufficient fund (NSF) fees charged by financial institutions to their deposit customers.

The CFPB's order and circular follow both the CFPB's running series of blogs and studies of banks' overdraft and [NSF fee practices](#) and the FDIC's recently updated guidance regarding multiple non-sufficient funds (NSF) charges on [re-presentment transactions](#). The CFPB reports that revenue from overdraft and NSF fees remains an important element of overall bank revenue for both small and large banks, and that there is a concentration of charging such fees to a low percentage of bank customers. The blogs have highlighted the fact that small banks, to a greater extent than mid-sized to large banks, are recovering such fee revenue to pre-pandemic levels after a decline during the pandemic. The CFPB stated that its bank examination priorities are impacted by the extent to which financial institutions are charging such fees.

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The CFPB indicates that it will review settlement and funds availability procedures, the amount of such fees in comparison to costs incurred in overdraft and NSF scenarios, and whether the financial institution is implementing policies to limit such fees. In sum, the CFPB is reviewing not only disclosure practices but also substantive policies on such fees. Its recent circular suggests that “authorized-positive” overdraft fees are generally illegal. In other recent publications, the CFPB also is generally referring to certain kinds of fees in the consumer financial market as “junk” fees.

To avoid the growing risk of litigation and regulatory issues, at a minimum, financial institutions should conduct a thorough review of their internal and third-party NSF and overdraft programs and customer-facing disclosures to gauge compliance with the current regulatory climate. The focus of such a review should ensure disclosures are sufficient, including regarding multiple fees, frequency and maximum number of fees charged.

Another compliance element is the transparency necessary for notifying customers of when to expect that such a fee will be charged. Financial institutions should consider how to provide their customers with the opportunity to restore their account to a positive balance to avoid such fees.

Financial institutions may need to self-identify and correct certain practices before their next examination. This may include looking back at payment- and fee-related data and making a decision on the best course of action going forward. Financial institutions also should examine their policies and practices regarding such fees to see if any changes can be made. This does not appear to be a litigation and regulatory issue that will subside any time soon.

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