

FDIC Issues Supervisory Guidance on Re-Presentation NSF Fees

Related Attorneys

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CLIENT ALERT | 8.29.2022

On August 18, 2022, the Federal Deposit Insurance Corporation (FDIC) issued [supervisory guidance](#) to its supervised institutions, drawing attention to the potential risks associated with charging multiple non-sufficient funds (NSF) fees for the re-presentation of the same unpaid transaction. The guidance addresses the practice whereby a financial institution charges additional NSF fees for the same transaction after a merchant resubmits a check or ACH transaction multiple times after the initial unpaid transaction was declined. According to the guidance, this practice can lead to elevated risks for banks, particularly as to consumer compliance risk, third-party risk, and litigation risk.

Specific to consumer compliance risk, the guidance states that the practice of charging multiple NSF fees arising from the same unpaid transaction might be seen as an unfair or deceptive act or practice (UDAP) in violation of Section 5 of the Federal Trade Commission (FTC) Act, as well as an abusive act or practice under the Dodd-Frank Act. Further breaking down this potential risk, the guidance describes how disclosures which do not clearly and conspicuously describe a bank's practice of charging multiple NSF fees stemming from the same transaction might be considered a deceptive practice. Inadequate disclosures might similarly be deemed an unfair practice to consumers under the FTC Act's UDAP analysis. In fact, the guidance states "a risk of unfairness may be present if multiple NSF fees are assessed for the same transaction in a short period of time without sufficient notice or opportunity for customers to bring their account to a positive balance in order to avoid the assessment of additional NSF fees".

In the area of third-party NSF risk, the expectation conveyed in the guidance is that banks will manage and oversee these relationships just as they would for any other product or service provided by a third-party. To better quantify these risks, the guidance encourages institutions to review and understand the role third-parties, such as core processors, play in the charging of NSF fees or the tracking of re-presented items. Concluding the discussion on risk, the guidance highlights how increased litigation risk also exists from re-presentation NSF fee practices and how related inadequate disclosures can, and have led to class action lawsuits.

The guidance concludes by describing a series of risk mitigation practices banks should consider implementing based upon their re-presentment NSF fee practices. Such risk mitigating activities include even the decision to eliminate NSF fees entirely or declining to charge more than one NSF fee per transaction, regardless of whether an item is re-presented. Also of importance, the guidance makes it clear that if an institution self-identifies re-presentment NSF fee “issues”, the FDIC expects that institution to take full corrective action, including providing customer restitution, along with several other steps.

Finally, the guidance details the FDIC’s supervisory approach to multiple re-presentment NSF fee practices, most notably that the issue will be an examination focus for the agency, and that an institution’s proactive efforts to self-identify and correct violations will be recognized. Specifically, the guidance states that FDIC examiners will generally not cite those violations which have been self-identified and fully corrected prior to the start of a consumer compliance exam. However, if examiners uncover violations of law due to re-presentment NSF fee practices which have not been self-identified and fully corrected by the bank, appropriate enforcement action will be contemplated.

Conclusions

After considering the FDIC guidance on potential risks, banks choosing to continue the practice of charging NSF fees for re-presented transactions should carefully review their related disclosures to ensure they accurately reflect the bank’s practice and account for the considerations set forth in the guidance. As noted above, disclosure should be clear and conspicuous as it pertains to the amount of NSF fees and specific as to when and how often they will be assessed. If revisions to the disclosures are necessary, these should be provided to all existing and new customers going forward. Finally, self-identifying and correcting any NSF fee issues is paramount to limiting adverse regulatory actions.

Contact your Vorys lawyer if you have questions about the supervisory guidance or its potential impact to your institution.