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FDIC and OCC Issue Guidance Relating to Certain Overdraft Practices

Notices Underscore Recent Regulatory Focus on Overdraft and Non-Sufficient Funds Fees and Identify “Authorize Positive, Settle Negative” Fees as Potentially Unlawful

SUMMARY

On April 26, 2023, the Federal Deposit Insurance Corporation (the “FDIC”) and the Office of the Comptroller of the Currency (the “OCC”) simultaneously issued new guidance to banks concerning Authorize Positive, Settle Negative (“APSN”) transactions and related overdraft and other fees. Many banks historically have assessed APSN overdraft fees when a transaction was authorized against a positive balance but later settled against a negative balance due to intervening transactions. In their respective notices, both agencies said that charging APSN fees may present a heightened risk of violating prohibitions on unfair or deceptive acts or practices under the Federal Trade Commission Act (the “FTC Act”) and Consumer Financial Protection Act of 2010 (the “CFPA” or the “Dodd-Frank Act”). Both agencies further indicated that, because of the complexity of account balance calculation methods and payment processing, customers are unlikely to be able to reasonably avoid APSN overdraft fees, even if banks disclose that they charge such fees. The OCC also raised similar concerns about representment fees and other overdraft practices. The new guidance echoes recent regulatory focus on overdraft-related practices and efforts by the White House to minimize “surprise” fees to consumers.

BACKGROUND

A. OCC BULLETIN

The OCC’s bulletin addressed the risks associated with overdraft protection programs, with a particular focus on APSN overdraft fees and similar practices identified as presenting a “heightened risk” of being deceptive or unfair in violation of federal laws.¹ The OCC acknowledged historical guidance relating to

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marketing, disclosure, and implementation of overdraft protection programs, as well as ongoing efforts in the financial services industry to mitigate risks posed by overdraft protection programs. The OCC then suggested that new guidance was warranted in light of further developments in the consumer banking landscape—including “the increased and more frequent use of overdrafts as, in effect, a form of short-term credit” and “overdraft protection programs resulting in consumers paying high costs relative to the face value of items being presented and to deposit amounts and average account balances.”²

With respect to this new guidance, the OCC first noted that, in some instances, it identified misleading overdraft-related disclosures that also “contributed to findings that the APSN practice was also unfair.”³ The bulletin explained that APSN overdraft fees may be unfair “even when disclosures described the circumstances under which consumers may incur overdraft fees,” because consumers are still “unlikely to be able to reasonably avoid injury[.]”⁴ The OCC also stated that compliance risks may arise when banks assess overdraft, including APSN, fees using either the ledger balance method (which only accounts for transactions settled during the relevant period) or the available balance method (which accounts for holds for pending, but not yet settled, transactions).⁵

The OCC then discussed the practice of assessing a non-sufficient funds (“NSF”) fee each time a third party resubmits the same transaction for payment after a bank returns the transaction due to insufficient funds, also known as “representment fees.”⁶ Specifically, the bulletin explained that representment fees may be deceptive where disclosures fail to clearly explain that multiple fees may result from multiple presentments of the same transaction.⁷ Similar to its guidance on APSN fees, the OCC also suggested that representment fees may be unfair regardless of disclosures, noting that because customers generally do not control when a merchant represents a transaction for payment and do not know whether they will have sufficient funds at the time of representment to cover the transaction and related fees, they cannot reasonably avoid such fees.⁸

The OCC also identified two other practices that present heightened risks: (i) high or no daily limits on the number of overdraft or NSF fees a customer can be assessed; and (ii) a fixed, periodic fee for failure to address a previous overdrawn balance.⁹ As with APSN overdraft and representation fees, the OCC did not say that these practices were *per se* unfair or deceptive, but rather that in some instances, they contributed to findings of unfairness or deception, particularly in the absence of sufficient disclosures.¹⁰

The OCC bulletin emphasized that banks should have oversight of overdraft protection programs appropriate for their size, complexity, and risk profiles.¹¹ The OCC stressed that a bank’s board of directors has ultimate responsibility for overseeing management’s implementation of an overdraft protection program, and that effective oversight by a board and management generally includes ongoing monitoring and ensuring proper and accurate customer disclosures, among other measures.¹² The OCC additionally outlined examples of specific overdraft-related risk management practices that banks may consider adopting, including but not limited to: (i) implementing overdraft limits and account agreement terms that

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promote fair treatment and fair access; (ii) ensuring that disclosures effectively explain overdraft policies and procedures and allow customers to make informed decisions; (iii) conducting periodic reviews of customers who use overdraft protection programs on a regular basis to ensure that they have sufficient information to manage their finances without relying on overdraft programs, and of accounts to assess for customers' overreliance on overdraft programs in order to manage overdraft limits; (iv) providing *de minimis* grace amounts for which no overdraft fee will be assessed on a specific transaction or account balance overage, and grace periods to allow customers additional time to address a potential or actual negative account balance; and (v) establishing maximum daily fees that are reasonably related to the costs of providing either overdraft protection or returned item for NSF services.¹³

Consistent with its prior statements on APSN and representment fees,¹⁴ as well as overdraft practices generally, the OCC likewise encouraged banks to consider offering low-cost accounts and other measures to assist customers with covering overdrafts.¹⁵

B. FDIC SUPERVISORY GUIDANCE

Narrower in scope than the OCC's bulletin, the FDIC's Supervisory Guidance is specifically focused on APSN transactions and stresses that the FDIC, like the OCC, has found the assessment of APSN fees to be unfair in certain circumstances.¹⁶ As part of that guidance, the FDIC explained that (i) APSN overdraft fees are "[u]nanticipated" and thus harmful to consumers; and (ii) consumers "cannot reasonably avoid" incurring these fees because of the "complicated nature of overdraft processing systems" and consumers' inability to "effectively control payment systems and overdraft processing systems practices."¹⁷

The Supervisory Guidance also discussed the comparative risks associated with using the ledger balance method versus the available balance method to determine whether to assess an overdraft fee. Specifically, while noting that risks of FTC Act and Dodd-Frank Act violations are presented by both balance methods, the FDIC said that the risk "may be more pronounced" when using the available balance.¹⁸ The agency said, for example, that the available balance method "may exacerbate the injury" to consumers because temporary authorization holds reflected in the available balance may result in the assessment of multiple overdraft fees—first on an intervening transaction that reduces an account's balance after the hold is placed, and second on the initial APSN transaction when it is posted to the consumer's account—even though customers may have reasonably expected only one overdraft fee.¹⁹

In addition to encouraging banks to review their overdraft practices and those of any third-party processors they have engaged, the FDIC's Supervisory Guidance also reiterates prior guidance that banks should ensure that their disclosures and account agreements "communicate[] [those practices] accurately, clearly, and consistently."²⁰ At the same time, the FDIC warned that "disclosures generally do not fully address [the legal] risks" presented by APSN transactions and overdraft fees, suggesting that disclosures may not be sufficient for customers to understand when fees will be assessed and how they may be avoided.²¹

The FDIC's Supervisory Guidance expands on the FDIC's June 2019 Consumer Compliance Supervisory Highlights, which noted that FDIC examiners had identified potentially unfair or deceptive practices where institutions using an available balance method assessed "more overdraft fees than were appropriate based on the consumer's actual spending or when institutions did not adequately describe how the available balance method works in connection with overdrafts."²² However, in contrast to the updated Supervisory Guidance, the June 2019 Supervisory Highlights also stated that institutions could mitigate the risk of such practices by providing "clear and conspicuous disclosures" relating to APSN fees and, "[w]hen using an available balance method, ensuring that any transaction authorized against a positive balance does not incur an overdraft fee, even if the transaction later settles against a negative available balance."²³

IMPLICATIONS

Overdraft practices have drawn increasing scrutiny from regulators in recent years, and the OCC and FDIC notices are the latest regulatory actions to highlight the risks of APSN overdraft and representment fees in particular. For example, in July 2022, the New York State Department of Financial Services (the "DFS") issued a notice identifying APSN overdraft and representment fees as potentially unfair or deceptive, and made explicit the DFS's expectations that financial institutions discontinue these practices.²⁴ In October 2022, the Consumer Financial Protection Bureau (the "CFPB") issued its own guidance, stating that APSN fees were "likely unfair[.]" even where an institution discloses its transaction processing and overdraft assessment policies.²⁵ That guidance was endorsed by the Biden administration, which has advocated for the reduction or elimination of "surprise overdraft fees[.]"²⁶ In March, the CFPB also warned that "examiners found unfair practices related to" representment fees, noting that the harm to consumers was not reasonably avoidable "regardless of account opening disclosures."²⁷ Although the Federal Reserve Board (the "FRB") has not recently discussed these issues, in July 2018, its staff published an article stating that examiners had identified an unfair practice where a bank imposed overdraft fees on an APSN transaction.²⁸ And in a March 2023 speech, FRB Governor Michelle Bowman characterized that publication as "explain[ing] [the FRB's] concerns that charging consumers overdraft fees based on APSN can constitute an unfair practice."²⁹

Last month's notices spotlight regulators' heightened focus on overdraft practices, and further emphasize the need for banks to review their disclosures, policies, and practices relating to overdraft and NSF fees. This latest guidance shows that regulators are finding overdraft, NSF, and similar fees to be unfair in a broader range of scenarios and expect banks—including their boards—to be assessing overdraft programs regularly in light of their risk profiles and evolving regulatory guidance. Some regulators have even taken action against financial institutions in recent months for assessing APSN overdraft fees, despite the

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absence of previous agency-adopted, specific guidance stating that banks could not mitigate risks through effective disclosures.³⁰ Additional regulatory supervisory and enforcement action in this area is likely.

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ENDNOTES

¹ OCC, Bulletin 2023-12, *Overdraft Protection Programs: Risk Management Practices* (Apr. 26, 2023), <https://occ.gov/news-issuances/bulletins/2023/bulletin-2023-12.html#ftn11>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See, e.g., Acting Comptroller of the Currency Michael J. Hsu Remarks at the NCRC's 2023 Just Economy Conference, *Elevating Fairness* (Mar. 30, 2023), <https://occ.gov/news-issuances/speeches/2023/pub-speech-2023-30.pdf>.

¹⁵ OCC, Bulletin 2023-12, *Overdraft Protection Programs: Risk Management Practices* (Apr. 26, 2023), <https://occ.gov/news-issuances/bulletins/2023/bulletin-2023-12.html#ftn11>.

¹⁶ FDIC, Supervisory Guidance on Charging Overdraft Fees for Authorize Positive, Settle Negative Transactions (Apr. 26, 2023), <https://www.fdic.gov/news/financial-institution-letters/2023/fil23019a.pdf>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² FDIC, *Consumer Compliance Supervisory Highlights 3* (June 2019), <https://www.fdic.gov/regulations/examinations/consumercompsupervisoryhighlights.pdf>.

²³ *Id.*

²⁴ DFS, Industry Letter, *Avoiding Improper Practices Related to Overdraft and Non-Sufficient Funds Fees* (July 12, 2022), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20220712_overdraft_nsf_fees#_ftn2.

ENDNOTES (CONTINUED)

²⁵ CFPB, Circular 2022-06, *Unanticipated Overdraft Fee Assessment Practices* (Oct. 26, 2022), https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf.

²⁶ White House, *Remarks by President Biden on Protecting American Consumers from Junk Fees* (Oct. 26, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/26/remarks-by-president-biden-on-protecting-american-consumers-from-junk-fees/>.

²⁷ CFPB, *Supervisory Highlights: Junk Fees Special Edition* (Mar. 2023), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf.

²⁸ FRB, *Consumer Compliance Supervision Bulletin* (July 2018), <https://www.federalreserve.gov/publications/files/201807-consumer-compliance-supervision-bulletin.pdf>.

²⁹ Governor Michelle W. Bowman's Remarks at the Independent Community Bankers of America ICBA Live 2023 Conference (Mar. 14, 2023), <https://www.federalreserve.gov/newsevents/speech/bowman20230314a.htm>.

³⁰ The CFPB has entered into consent orders with two financial institutions, Regions Bank and Wells Fargo Bank, N.A., related to APSN overdraft fees in October and December 2022, respectively. See *In re Regions Bank*, File No. 2022-CFPB-0008 (Sept. 28, 2022); *In re Wells Fargo Bank, N.A.*, File No. 2022-CFPB-0011 (Dec. 20, 2022).

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