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Insights

DECEPTIVE AND UNFAIR -- MULTIPLE NSF FEES ON REPRESENTMENTS OF THE SAME TRANSACTION

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SUMMARY

In guidance issued recently, the Federal Deposit Insurance Corporation ("FDIC") advised that charging multiple non-sufficient funds ("NSF") fees constitute "violations of law" when customer disclosures do not fully and clearly explain that the same unpaid transaction might result in multiple NSF fees if an item is presented more than once.[1]

Supervisory Guidance on Multiple Re-Presentment NSF Fees, Federal Deposit Insurance Corp. Financial Institutions Letter, August 18, 2022.

Targeted Financial Services Providers

The guidance is addressed to financial institutions insured and supervised by the FDIC. Section 5 of the Federal Trade Commission Act ("Section 5") prohibits "unfair and deceptive acts or practices in or affecting commerce,"[1] and applies to all persons engaged in commerce, including banks. The FDIC has authority under Section 8 of the Federal Deposit Insurance Act,[2] to take appropriate action against state non-member banks and institution-affiliated parties for violations of law, which includes Section 5.[3] Pursuant to Section 5, like banks, fintechs, such as "neobanks," that similarly charge or benefit from NSF fees could be held responsible by the Federal Trade Commission for failures to disclose to customers that, in connection with a transaction involving the assessment of a NSF fee, the re-presentment of the same transaction, even after it has already been rejected for non-sufficient funds, may result in additional NSF fees levied to customer accounts. Fintech's enforcement exposure arises from the FDIC guidance's observation that such inadequate disclosure practices "result in heighten risks of violations Section 5 of the Federal Trade Commission Act."[4] The FIL also expressly also calls out the responsibility of affected institutions to manage risks presented by practices and procedures of their core processors and other third parties service providers.

Although technically not binding on other federal and state regulatory authorities, this guidance from the FDIC raises the potential for adoption of this guidance by other bank supervisory regulators. Furthermore, the FDIC's guidance raises the potential for UDAAP enforcement by the Consumer Financial Protection Bureau ("CFPB") under its independent enforcement powers provided by the Dodd-Frank Wall Street Improvement and Consumer Protection Act of 2010 ("Dodd-Frank Act"), which includes non-bank financial service providers, such as neobanks.[5] The FIL points out that its view that "These practices may also violate Section 1036(a)(1)(B) of the [Dodd-Frank Act] (12 U.S.C. § 5536(a)(1)(B)) …"[6] The CFPB Director, Rohit Chopra, earlier this year discussed the CFPB's intention to address pro-actively practices that are considered harmful to consumers, calling out NSF fees as "junk fees," which do not relate to any consumer benefit.[7]

State laws that provide equal or greater protection for consumers are not pre-empted by the Dodd-Frank Act's UDAAP provisions.[8] In addition to enforcing state laws, the Dodd-Frank Act expressly empowers state attorneys general to bring civil actions to enforce the UDAAP provisions of the Dodd-Frank Act and the CFPB's regulations.[9] State consumer protection laws may also provide private rights of action to consumers, including class actions, for UDAAP violations.

Recommended Action

The guidance succinctly describes specific actions that supervised institutions might take to mitigate risks of consumer harm and avoid potential violations of law:[10]

- Eliminating NSF fees.
- Declining to charge more than one NSF fee for the same transaction, regardless of whether the item is re-presented.
- Conducting a comprehensive review of policies, practices, and monitoring activities related to re-presentments and making appropriate changes and clarifications, including providing revised disclosures to all existing and new customers.
- Clearly and conspicuously disclosing the amount of NSF fees to customers and when and how such fees will be imposed, including:
  - Information on whether multiple fees may be assessed in connection with a single transaction when a merchant submits the same transaction multiple times for payment;
  - The frequency with which such fees can be assessed; and
  - The maximum number of fees that can be assessed in connection with a single transaction.

- Reviewing customer notification or alert practices related to NSF transactions and the timing of fees to ensure customers are provided with an ability to effectively avoid multiple fees for re-presented items, including restoring their account balance to a sufficient amount before subsequent NSF fees are assessed.

The guidance goes on to prescribe specific actions that it expects of supervised institutions that "self-identify" re-presentment NSF issues:[11]

- Take full corrective action, including providing restitution to harmed customers, consistent with the restitution approach described in this guidance;
- Promptly correct NSF fee disclosures and account agreements for both existing and new customers, including providing revised disclosures and agreements to all customers;
- Consider whether additional risk mitigation practices are needed to reduce potential unfairness risks; and
- Monitor ongoing activities and customer feedback to ensure full and lasting corrective action.

Deceptive and Unfair Practices

The FDIC identified Section 5 violations in the course of a number of recent examinations of financial institutions under its supervision. The standards for unfairness and deception are independent of each other. While a specific act or practice may be both unfair and deceptive, an act or practice is prohibited by Section 5 if it is either unfair *or* deceptive.[12] The FDIC identified as a "deceptive" practice charging multiple NSF fees upon multiple presentments arising from the same customer transaction when the possibility of these multiple presentments and ensuing fees is not adequately disclosed to customers. In other words, the FDIC does not expect consumers to know, for example, that a merchant who accepts an ACH payment might present that item several times if the initial presentment is returned as NSF. Specifically, the FIL states that in a number of consumer compliance examinations: "The FDIC found that if this information is not disclosed clearly and conspicuously to customers, the material omission of this information is considered to be deceptive pursuant to Section 5 of the FTC Act."[13]

The FIL goes on to explain that revising consumer disclosures may not be enough to avoid charges of "unfairness." The FIL explains that failure to advise customers adequately of fee practices may result in substantial injuries to customers, which may not be reasonably avoidable and have no countervailing benefits to customers or to competition:

"In particular, 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."[14]

Third-Party Practices

The FDIC's guidance points out that insured financial institutions are responsible for oversight of the activities of third parties with which they contract for services, including core processors. While holding the insured financial institutions responsible for the actions of their core processors, the FDIC's guidance also encourages insured financial institutions to ensure that they utilize the capabilities offered by contracted third parties to implement compliant practices, such as capabilities to identify and track re-presented items and maintaining data on such transactions.

Notwithstanding an insured financial institution's oversight liability, neobanks and other fintechs for which insured financial institutions provide licensed banking activities may also be subject to penalties arising from the same fees, to the extent that such entities control the NSF fees charged on accounts held by the financial institution. Thus, while the FDIC might hold the sponsoring insured financial institution responsible for the NSF fees charged by or on behalf of neobanks or fintechs, on a theory that they are in effect providing services to the bank's depositors, the neobanks or fintechs that charge NSF fees or benefit contractually from such fees might face enforcement action directly from the FTC or CFPB. These exposures may also arise indirectly through contract obligations between the fintechs and the financial institutions, such as liability for indemnity for fees or penalties incurred or violations of representations and warranties of compliance with applicable law. While such contractual provisions may effectively allocate financial responsibility for compliance, they do not deflect the initial enforcement burdens, the financial institution's supervisory "black marks," or either party's reputational damage.

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1. 15 U.S.C. § 45(a).

2. 12 U.S.C. § 1818.

3. Id. *See also* 15 U.S.C. § 57a. In the case of insured depository institutions, the statute leaves enforcement of the FTC Act to the insured depository institutions' federal regulators.

4. Id. at p. 1.

5. See generally, 12 U.S.C. § 5531(a).

6. Supervisory Guidance, *supra*, at p. 1, fn 1.

7. *See* our blog post about Director Chopra's comments here. *See* the transcript of the Washington Post Live interview here: https://www.washingtonpost.com/washington-post-live/2022/02/10/transcript-path-forward-consumer-protection-with-rohit-chopra/

8. 12 U.S.C. § 5551(a).

9. 12 U.S.C. § 5552(a).

10. *Id.* at pp. 2-3.

11. *Id.* at p. 3 (emphasis added).

12. *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1367 (11thCir. 1988); *F.T.C. v. Cantkier*, 767 F. Supp. 2d 147,153 (D.D.C. 2011).

13. *Id.* at pp. 1-2.

14. *Id.* at p.2

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