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CFPB Issues Guidance on Bank Overdraft Fees and Returned Check Fees

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After months of public pronouncements calling into question bank overdraft fee practices, the Consumer Financial Protection Bureau (CFPB) has now issued guidance on the legality of so-called “surprise” overdraft fees, as well as the fees some banks charge for bounced checks. This follows recent supervisory guidance by the Federal Deposit Insurance Corporation (FDIC) regarding the propriety of banks charging multiple NSF fees on the re-presentation of the same unpaid transaction.

On October 26, 2022, the CFPB simultaneously issued a Consumer Financial Protection Circular addressing unanticipated overdraft fee assessment practices and a Compliance Bulletin directed at those banks with blanket policies of charging fees on all returned deposit items.

Overdraft Fees

The specific overdraft fees now targeted by the CFPB are those incurred on what’s known as “authorized positive, settled negative” (APSN) transactions. As outlined in the guidance, the CFPB considers such fees to be a “surprise” or “unanticipated” because the consumer’s available account balance appears to be sufficient to cover the debit transaction at the time it’s initiated. However, at the time the debit transaction settles, the consumer’s available balance may have been reduced, for example, by an earlier preauthorized ACH debit. According to the CFPB’s analysis, it is not reasonable under such circumstances for a consumer to understand and account for the delay between a transaction’s authorization and settlement or for the consumer to understand or control how their financial institution calculates balances or orders deposits and transactions for settlement.

The CFPB ultimately concludes the charging of unanticipated overdraft fees may be an unfair act or practice, enforceable under the CFPB’s unfair, deceptive, or abusive acts or practices (UDAAP) authority. The

guidance goes on to provide two examples of “potentially unfair” acts or practices resulting in overdraft fees. The first involves an APSN transaction in which a consumer enters into a debit card transaction with an available balance sufficient to cover the transaction. Subsequently, a preauthorized ACH debit settles, taking the account negative, and, accordingly, an overdraft fee is charged. Finally, the initial debit card transaction settles, resulting in another overdraft fee. The CFPB considers this second overdraft fee to be unanticipated and one of which the consumer would not reasonably expect. The second example offered by the guidance highlights how a bank’s use of a consumer’s available balance to make overdraft decisions, rather than the ledger balance, could result in additional overdraft fees unanticipated by the consumer.

Bounced Check Fees

In a separately issued Compliance Bulletin, the CFPB also addresses the legality of blanket policies in which fees are charged on all returned deposited items. Relying once again on its UDAAP enforcement authority, the CFPB takes the position that it is “likely” unfair for a bank to undertake a blanket policy of charging a returned deposited item fee for all returned transactions irrespective of the circumstances surrounding the transaction or the account patterns. In support of this posture, the bulletin asserts that consumers typically lack the control and knowledge needed to anticipate a deposited check will be returned, nor do they have the ability to confirm sufficient funds exist in a check originator’s bank account before depositing the check. However, if an institution, as an alternative, tailors its policies to only charge consumers who could reasonably avoid a bounced check, the CFPB bulletin states it is “unlikely” such a practice will be deemed unfair, e.g. a policy in which only consumers repeatedly depositing bad checks from the same originator are charged a fee.

Takeaways

Financial institutions should carefully review the CFPB Circular on unanticipated overdraft fees and compare it to their own overdraft policies and practices. Consumer Financial Protection Circulars not only put institutions on notice regarding CFPB enforcement priorities, they are also intended to inform all parties with the authority to enforce federal consumer financial law, such as state attorneys general and state regulators. The circular recommends all consumer financial enforcers closely scrutinize practices resulting in “unanticipated” overdraft fees. Given such enhanced regulatory scrutiny, financial institutions should pay particular attention to any overdraft fees charged on APSN transactions, as well as the category of balances considered for overdraft fees, e.g. ledger balance vs. available balance.

Institutions would be wise to undergo a similar analysis of their policies surrounding fees charged on returned deposited items to ensure they do not run afoul of the CFPB compliance bulletin. Blanket policies which charge fees on all returned deposited items are not likely to survive a challenge by the CFPB and should be rewritten to better comport with the compliance bulletin.