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OCC and FDIC Issue Guidance on Overdraft Fees

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The Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC") have each issued separate advisories addressing risks associated with overdraft fees, particularly those associated with "Authorize Positive, Settle Negative" ("APSN") transactions.

The OCC's Bulletin ("Bulletin") discusses certain practices that may present a heightened risk of violating prohibitions against unfair or deceptive acts or practices ("UDAAP") and describes practices that may assist banks [1] with managing overdraft protection program risks. The FDIC's Supervisory Guidance ("Supervisory Guidance"), issued to all FDIC-supervised financial institutions, expands on the agency's 2019 Supervisory Highlights[2] article by discussing the FDIC's concerns with both the available and ledger balance methods used by institutions when assessing overdraft fees.

The guidance by both agencies follows similar guidance issued by the Consumer Financial Protection Bureau on October 26, 2022 and an Industry Letter issued by the New York State Department of Financial Services on July 12, 2022.

I. OCC Bulletin

The Bulletin highlights several overdraft practices that could result in violations of the Consumer Financial Protection Act of 2010,[3] as well as Section 5 of the Federal Trade Commission Act ("Section 5").[4]

APSN and Representment Practices

The Bulletin identifies specific practices that may present heightened risks. The first is APSN practices in which a bank assesses overdraft fees on debit card transactions that are authorized when a consumer's available account balance is positive but later post to the account when the available balance is negative. The second is the assessment of representment fees, in which a bank assesses an additional fee each time a third party resubmits the same transaction for payment after the bank has returned the transaction for non-sufficient funds.

While conducting examinations in recent years, the OCC found that account materials provided to customers regarding the abovementioned practices were deceptive or misleading. The Bulletin notes that even when the disclosures of a bank's practices are accurate, the practices themselves may be unfair for purposes of Section 5 if consumers are still unlikely to be able to reasonably avoid injury or harm.

The Bulletin also highlights other practices that may present heightened risk, including high limits or lack of daily limits on the number of fees assessed or the use of sustained overdraft fees in which a bank charges a fixed, periodic fee for failure to cure an overdrawn balance.

Risk Management Practices

The Bulletin encourages banks to assess and analyze the risks posed by their overdraft protection program activities, adjust their risk management practices, and incorporate oversight of overdraft protection programs into their compliance management system.

Board and Management Oversight

The Bulletin also states that a bank's board of directors has ultimate responsibility for overseeing management's implementation of an overdraft protection program. The Bulletin provides a list of practices a bank's board should follow to ensure effective board and management oversight.

New Activities Processes and Third-Party Risk Management

The Bulletin advises banks to have processes in place to manage the risks associated with offering new, modified, or expanded products or services, including new overdraft protection programs or changes to existing overdraft protection programs.

Policies, Processes, and Control Systems

The Bulletin also provides a list of risk management practices that banks may consider adopting, including:

- Consumer disclosures that support informed decision making with regard to overdraft protection programs and their related costs;
- Periodic reviews of customer accounts who use overdraft protection programs on a regular basis to confirm they are not incurring disproportionate costs;
- Grace amounts from fees that are based on transaction size or the magnitude of the overdrawn balance;
- Grace periods that provide additional time before the assessment of fees for customers to address a potential or actual negative account balance;
- Alerts in real or near real time to allow consumers to address negative balances or items being presented for settlement to avoid fees;
- Single daily fee assessments that are reasonably related to the costs of providing either overdraft protection or non-sufficient funds services; and
- Collecting fees related to overdraft protection or non-sufficient fund services from the next deposit only after all other appropriately presented items have cleared to ensure that a greater amount of the consumers' deposited funds is available for consumer use.

Please note that the OCC encourages banks to review their overdraft protection programs and related practices to ensure that they comply with Section 5 and other applicable laws and regulations and take corrective action as appropriate.

II. FDIC Supervisory Guidance

Similar to the OCC's Bulletin, the FDIC's Supervisory Guidance also highlights several overdraft practices that could result in violations of the Dodd-Frank Wall Street Reform and Consumer Protection Act, as well as Section 5.

Potential Risks

The Supervisory Guidance highlights how unanticipated and unavoidable overdraft fees can cause substantial injury to consumers. The FDIC explains that a consumer is likely to suffer injury when charged more in overdraft fees than may have been anticipated based on the consumer's actual spending. The agency noted that while not all overdraft fees may be attributable to APSN transactions, the likely presence of intervening transactions may cause additional injury.

Risk Mitigation Practices

The Supervisory Guidance also encourages FDIC-supervised financial institutions to:

- Review their practices regarding the charging of overdraft fees on APSN transactions to ensure customers are not charged overdraft fees for transactions consumers may not anticipate or avoid;
- Ensure overdraft programs provided by third parties are compliant with all applicable laws and regulations; and
- Review disclosures and account agreements to ensure the financial institution's practices for charging any fees on deposit accounts are communicated accurately, clearly, and consistently. However, institutions are warned that disclosures alone do not mitigate the risks associated with APSN transactions.

III. Conclusion

The issuance of new guidance by two regulatory agencies demonstrates that the heightened regulatory focus on overdraft programs is not receding. Institutions must be aware of the ever-evolving guidance on overdraft practices, as the regulatory agencies are increasingly focused on practices that are perceived as unfair or deceptive.

This advisory is a general overview of the OCC's Bulletin and the FDIC's Supervisory Guidance and is not intended as legal advice. The agencies' guidance is very detailed and must be reviewed in their totality.

If you have any questions about overdraft programs, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at **jsimon@cullenllp.com**, Kevin Patterson at (516) 296-9196 or via email at **kpatterson@cullenllp.com** , Elizabeth A. Murphy at (516) 296-9154, or via email at **emurphy@cullenllp.com**, or Gabriela Morales at (516) 357-3850 or via email at **gmorales@cullenllp.com**.

Footnotes

[1] "Banks" refers collectively to national banks, federal savings associations, covered savings associations, and federal branches and agencies of foreign banking organizations.

[2] Consumer Compliance Supervisory Highlights (June 2019).

[3] Refer to 12 USC 5536.

[4] Refer to 15 USC 45(a)(1).

Practices

- Banking and Financial Services
- Regulatory and Compliance

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