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# Unanticipated Overdraft and Depositor Fees

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The Consumer Financial Protection Bureau ("CFPB") has issued Circular 2022-06 ("Circular") alerting financial institutions to avoid conducting business in a manner that subjects consumers to surprise overdraft fees and unexpected depositor fees for bounced checks. An institution that operates in such a manner may be found to be committing an unfair and unlawful practice. The Circular is available here. This is the latest of a series of publications in which the CFPB provided guidance regarding the imposition of fees and the risk of regulatory violations by imposing excessive or unreasonable fees that harm consumers. [1] In its latest Circular, the agency emphasizes that the Consumer Financial Protection Act ("CFP Act") prohibits the imposition of unfair fees that are unavoidable to customers.

The CFPB does not want financial institutions to impose overdraft fees that are seen as catching consumers off guard when they do not reasonably expect that their actions will incur a fee. For example, such fees can arise unexpectedly when a consumer confirms that they have enough money in their checking account to cover a debit charge at the time the financial institution authorizes it, but the consumer is then charged an overdraft fee because other charges are posted against the account before the debit charge is presented for payment and settles. When a financial institution processes transactions in this manner it is sometimes referred to as "authorize positive, settle negative" or APSN and is a practice that is specifically criticized by the agency in the Circular. The CFPB includes practical examples about the impact of APSN processing where an institution bases its overdraft decision on the consumer's available balance and the ledger balance, which illustrates how using the ledger balance to determine overdraft charges helps avoid or reduce overdraft fees.

The CFP Act prohibits covered persons from engaging in unfair acts or practices. The Circular articulates the agency's position that it is an unfair act or practice where unanticipated overdraft fees are likely to impose substantial and unavoidable injury to consumers and that such burden is not outweighed by countervailing benefits to consumers or competition. The Circular continues the trend whereby the CFPB and other regulatory agencies are taking a dim view of many overdraft practices by banks and credit unions.

According to the CFPB, the popularity of purchases using debit cards and the use of automated processes to impose account fees caused a spike in fee income for financial institutions. This enabled institutions to begin offering accounts as "free" or with "no monthly fees" while the increased opportunities for overdrafts could result in significant fees being incurred in purportedly no-fee accounts. The shift to fees based on the evaluation of complex transaction activity that consumers are often unable to understand and anticipate does not give them a reasonable basis to avoid fees being assessed against their account, which can cause such fees to be deemed unfair.

The CFPB has also released Compliance Bulletin 2022-06 addressing Unfair Returned Deposited Item Fee Assessment Practices ("Bulletin"), which is available here. The Bulletin addresses fees pertaining to deposits, such as may occur when a consumer deposits a check and it bounces. The agency takes the position that a consumer often has no idea or control over whether a check that they deposit will clear and in certain cases the depositor is actually the victim of check fraud. The CFPB thus takes the position that charging a fee to the depositor of the check penalizes the person who could not anticipate that it would bounce, which does nothing to deter the issuer from writing additional bad checks. The CFPB is discouraging institutions from indiscriminately charging these depositor fees regardless of the circumstances, which the agency indicates would likely violate the CFP Act. Financial institutions are advised that adopting more tailored fee policies that impose depositor fees only in situations where a depositor could have avoided the fee, such as when a depositor repeatedly deposits bad checks from the same originator, is more in accordance with the CFPB's reading of the statute.

These comments are consistent with the CFPB's recent efforts to scrutinize so-called back-end junk fees, which includes the publication of a request for information on the topic in January 2022. The agency reports that these efforts have already caused institutions to begin including fees as a competitive factor for their product offerings, including the recent announcements by several banks that they were eliminating overdraft fees and otherwise making their fee policies more consumer friendly, as well as the announcements by certain large banks that they are eliminating non-sufficient fund fees on their checking accounts. The CFPB estimates that these changes could result in $3 billion in savings for consumers.

This guidance warrants close attention by financial institutions that charge fees that could be characterized as unanticipated. Fee policies and disclosures should be evaluated now and regularly to ensure they are supported by business justifications and satisfy legal standards. Banks and credit unions that derive significant revenue from overdraft or depositor fees may face the greatest legal risk, as the CFPB intends to direct supervision and enforcement resources toward such institutions.

Please note that this advisory is a general overview of the CFPB's guidance and is not intended as legal advice.

If you have any questions regarding the CFPB or the guidance on the above-mentioned fees, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@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] CFPB, Study of Overdraft Programs: A White Paper of Initial Data Findings, at 16 (June 2013): http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraftpractices.pdf ; CFPB Supervisory Highlights, Winter 2015, at 8-9: https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf ; CFPB, Consumer voices on overdraft programs (Nov. 2017): https://files.consumerfinance.gov/f/documents/cfpb_consumer-voices-on-overdraft-programs_report_112017.pdf ; CFPB, "Comparing overdraft fees and policies across banks" (Feb. 10, 2022): https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/

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