



Financial Services & Products ADVISORY ■

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CFPB Signals Stricter Enforcement of “Unfair” Banking Fees

Building on a current governmental focus on banking overdraft practices, the Consumer Financial Protection Bureau (CFPB) has issued compliance [Bulletin 2022-06](#) regarding unfair returned deposited item fee assessment practices and [Circular 2022-06](#) regarding unanticipated overdraft fee assessment practices. Together, the bulletin and circular provide a view of the CFPB’s theory behind the recent increased regulatory scrutiny of deposit account-related fees.

CFPB Reproach of APSN Overdraft and Deposit Item Fees

The specific guidance in the bulletin and circular addresses two categories of fees that the CFPB claims come as surprises to consumers: returned item fees and authorize positive, settle negative (APSN) fees. Such fees, says the CFPB, may well be unavoidable to a customer and not outweighed by countervailing benefits or business considerations. Accordingly, the bulletin and circular state that these fees are “unfair” under the Consumer Financial Protection Act (CFPA).

Returned item fees

The bulletin addresses fees incurred when checks are deposited but do not clear, either in the form of a returned item fee on a depositor customer or a nonsufficient funds (NSF) fee on an originator customer. Specifically, the bulletin targets the fees that depositor customers incur if they attempt to deposit checks that cannot clear, either because there are insufficient funds to clear, because a stop payment order was issued by the originator’s depository institution, or because the originating account has been closed. The CFPB points out that depositor customers are unlikely to know that a check they attempt to deposit will not clear and also cannot verify with the originator’s depository institution whether the check will clear. In some factual scenarios, a returned item fee could be imposed more reasonably, such as when a depositor customer repeatedly deposits bad checks from the same originator or attempts to deposit unsigned checks. But according to the CFPB, “[b]lanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances of the transaction or patterns of behavior on the account are likely unfair.”

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APSN fees

The circular cherry-picks the APSN-specific overdraft fees for critique among all the overdraft-related fees. APSN fees occur when a bank authorizes a transaction at the time a customer's account balance is positive but the transaction settles at a later time when the account's balance is negative, triggering an overdraft fee. These situations arise based on the intertwined timing between customer transactions and a bank's posting order for processing and settling deposits, credits, checks, and other items in a customer's account. This leads to different available balances and ledger balances for an account. The CFPB's position in the circular is that overdraft fees should be assessed based on an account's available balance because doing otherwise is not reasonably calculable or foreseeable to a customer.

All overdraft fees have been lumped together in recent public discussions criticizing so-called "junk fees" that are charged by banks. The fees targeted by the bulletin and circular have already been under close scrutiny in compliance exams in recent years, as have other deposit-related fees such as NSF and non-APSN overdraft fees. Many banks have eliminated all their overdraft fees, while others have adopted more consumer-friendly overdraft practices that recognize the value to the customer of providing overdraft coverage and minimize unanticipated fees. As the circular notes, overdraft services were born out of the banking industry's ability to help depositors through courtesy programs, paying certain transactions despite a lack of funds. Other facets of overdraft programs that are growing in adoption—such as grace periods to bring account balances positive, caps on the number of fees charged per day, and covering de minimis transactions without triggering fees—are ignored by the circular but are still very much discussed by regulators during bank supervisory examinations.

This leaves banks wondering whether there is a spectrum of overdraft fees that are legal under the Truth in Lending Act and Regulation Z and the Electronic Fund Transfer Act and Regulation E but disfavored by the CFPB and other supervisory agencies. Banks are left to question whether their fee structure overall will be found to be too consumer-unfriendly, potentially constituting an unfair, deceptive, or abusive act or practice (UDAAP), or permissibly justified by countervailing benefits and business considerations.

Banks should prepare to discuss their fee structures and associated disclosures with their supervising regulators if they have not already. And beyond supervision, the enforcement divisions of federal and state banking agencies are also waiting in the wings.

Potential Agency Enforcement Paths

The bulletin and the circular together effectively put banks over the \$10 billion asset threshold on notice that their returned deposited item and overdraft fee practices will come under supervisory scrutiny from the CFPB and could land banks in hot water. Banks should expect the CFPB to request policy and procedure documents, copies of consumer complaints, and financial details on these fees as soon as their next exam cycle. Given the recent prominence of the fee issue—marked by a recent appearance by Director Rohit Chopra with President Biden announcing initiatives to address "junk fees"—and the publication of these issuances, the CFPB may be planning for a horizontal-style review of large and regional banks' fee practices. The CFPB may rely on its consumer complaint data to select individual banks for further scrutiny. Depending on what examiners learn during the exam process, the CFPB may tee up a more formal investigation that

could lead to an enforcement action against a bank. Under the agency's UDAAP authority, the CFPB has already issued consent orders against banks related to their overdraft practices that impose significant compliance requirements, assess civil money penalties, and require restitution to affected customers.

The bulletin and circular lay out the CFPB's legal analysis leading to its conclusion that practices related to returned deposited item fees and certain overdraft fees are "likely unfair" under the CFPA. Both the bulletin and circular reinforce the CFPB's view that monetary harm—even from small-dollar fee assessments—can constitute "substantial injury," a view based in part on the CFPB's assumption that such fees would affect a "large number" of customers. Both the bulletin and circular should be read holistically as an articulation of the CFPB's theory for finding violations of the CFPA, applicable to any bank when the facts fit the elements that make up the theory.

Interestingly, the bulletin notes that the CFPB does not intend to seek monetary relief for returned deposited item fees assessed before November 1, 2023 as a "matter of prosecutorial discretion." While this gives banks some measure of relief for their past practices, it can and should be read as a warning to eliminate the practices described in the bulletin as soon as possible.

The decision by the CFPB to discuss overdraft fee practices in a circular, rather than a bulletin, also has interesting enforcement implications. As described in the circular, the CFPB's position on this issue is intentionally being communicated to "all parties" with authority to enforce federal consumer financial law; as the CFPB enumerates, this includes state attorneys general, state regulators, the federal banking agencies, and other federal agencies, including the Federal Trade Commission and Department of Justice. Thus, on the topic of overdraft fees, the CFPB has intentionally signaled that banks that may be outside its statutory reach, including banks with less than \$10 billion in assets, are not entirely off the regulatory hook. In particular, the CFPB expressly signaled that the circular reflected the CFPB's "intended approach when cooperating in enforcement actions" with other state and federal agencies. This follows the CFPB's encouragement from earlier this year to state regulatory authorities to pursue companies and individuals for violations of federal consumer financial protection law.

How the CFPB's desire to pursue enforcement actions against banks will play out against the backdrop of [the Fifth Circuit's recent *Community Financial* ruling](#) holding its funding structure unconstitutional remains to be seen. Assuming that courts outside the Fifth Circuit do not stay, block, or dismiss CFPB enforcement actions until the Supreme Court has weighed in on the questions raised in the *Community Financial* decision, banks should prioritize a review of their policies and procedures around returned deposited item fees and overdraft fees to determine their potential exposure to the CFPB (or other regulators).

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