

ICBA Regulatory Update: Bank Fees

Topic/Issue: Overdraft fees and NSF/represented Item fees

Agencies: CFPB, FDIC, OCC, FRB,

Status:

➤ CFPB

- Advisory Opinion - Oct 2023
 - Requires large banks to provide certain information to customers free of charge, such as account balances, transaction history, and fees,
 - CFPB does not intend to seek monetary relief for potential violations that occurred prior to February 1, 2024.
- Supervisory Highlights Junk Fees Update Special Edition - Oct 2023
 - Covers so called “junk” fees in bank accounts, auto-loan servicing, and remittances identified during CFPB examinations between Feb and Aug 2023.
 - Asserts that core processors engaged in unfair act or practice by contributing to the assessment of fees on re-presented items by not allowing banks to avoid charging the fee.
 - Asserts that FIs engaged in unfair acts or practices by charging re-presentment fees without giving the consumer a meaningful opportunity to prevent the fee; FIs engaged in unfair acts or practices by charging Authorize-Positive Settle-Negative (APSN) overdraft fees; and FIs engaged in an unfair act or practice by assessing paper statement fees and returned mail fees for paper statements they did not print and deliver.
- Overdraft Lending: Very Large Financial Institutions Proposed Rule -Jan 2024
 - Would apply to banks over \$10 billion; changes to banks under \$10 billion is possible.
 - Banks over \$10 billion in assets could extend overdraft services if they treat these services as extensions of credit pursuant to federal lending laws
 - Banks could charge the amount that would allow the bank to break even on providing overdraft services, or charge between \$3 to \$14
- CFPB Proposes Rule to Stop New Junk Fees on Bank Accounts – Jan 2024
 - Proposed rule would prohibit NSF fees on transactions declined instantly.
 - Does not apply to transactions declined or rejected due to NSF's hours or days after; transactions authorized initially but later rejected at settlement due to NSF's; or checks and ACH transactions.
 - One-time debit card transactions that are not preauthorized, ATM transactions, and certain P2P transactions would be covered, assuming these payment mechanisms continue to be declined instantaneously or near instantaneously.

➤ FRB

- Compliance Spotlight - Supervisory Observations on Representment Fees – September 2023
 - Indicated that it cited banks for unfairness for charging multiple NSF fees on represented items.
- OCC
 - Guidance on Overdraft Protection Programs – April 2023
 - Warned that disclosures may be deceptive if they fail to clearly explain that multiple NSF fees may result from represented items.
 - Encouraged banks to consider offering low-cost accounts and low-cost alternatives for covering overdrafts, such as overdraft lines of credit and linked accounts.
- FDIC
 - FDIC Clarifying Supervisory Approach Regarding Supervisory Guidance on Multiple Re-Presentment NSF Fees - **Updated Guidance** – June 2023
 - The agency will not ask institutions to conduct a lookback review absent a likelihood of substantial consumer harm.

ICBA Position:

- We broadly oppose price controls and caps imposed by any regulatory agency, which only distorts market discipline and demand for delivery of products and services.
- ICBA strongly urge policymakers to cautiously consider the consequences of any future restrictive fee related legislation and regulations, which would have a negative ripple effect on customers who rely on these services.
- ICBA opposes any retroactive and punitive action on lawfully disclosed represented item fee practices, especially where those practices were never subject to examiner or regulatory scrutiny.
- We remain committed to pushing back and utilizing all resources available against the harmful rulemaking and rhetoric that mischaracterizes contractually negotiated and disclosed fees as “junk fees” in any form. In doing so, we will call for appropriate oversight, hearings, and other measures to hold the bureau accountable to comply with its mandate and governing rules.

Key Talking Points:

- Overdrafts & NSF Fees
 - Community banks are bound by law to disclose fees in a manner dictated by statute and regulations; to now call those disclosures, “illegal” or “surprising” is troubling.
 - ICBA has cited survey data from consumers that indicates an intentional decision for consumers’ use of overdraft services and demonstrates an aversion to regulatory restrictions that would curtail overdraft programs.
 - We will continue to push back and will respond to the rulemaking. We will also continue to try engaging the Bureau to educate them on the practical uses of overdraft services and continue educating underscoring that customers leverage these services as part of their normal financial planning activities.
- Represented Item Fee
 - ICBA and leadership bankers met with key senior personnel at the FDIC, OCC, and FRB. Our meetings focused on the lack of readiness of core service providers, the

structural and operational obstacles associated with accurately identifying and stopping fees from being assessed, the abruptness of the policy change on a practice that has existed for years, and the policy implications the position will have on consumers.

- We urged each agency to:
 - Refrain from levying any retroactive action.
 - Allow reasonable time for community banks to update disclosures and practices to allow them the opportunity to adhere to the guidance.
 - Allow banks the time needed to work with core service providers (or in house) to develop a system to identify and reject represented items.
 - Issue no findings, including UDAP violations, while banks update their disclosures and practices.
 - Refrain from issuing corrective actions or any other regulatory findings for at least one year.
 - Provide supervised institutions with the specific language the agencies deem is missing from disclosures.
 - Allow notice mechanisms that banks use to keep customers aware of their account status to automatically eliminate the threat of a UDAP violation.