



August 22, 2022

FDIC ISSUES GUIDANCE REGARDING MULTIPLE RE-PRESENTMENT NSF FEES

On August 18, 2022, the FDIC issued guidance for financial institutions regarding the practice of charging multiple re-presentment NSF fees. According to the FDIC, through compliance examinations, the FDIC identified violations of law when financial institutions charged multiple NSF fees for the re-presentment of unpaid transactions. The FDIC stated in the guidance that disclosures given to consumers did not fully and clearly disclose multiple re-presentment NSF fee policies. Specifically, financial institutions failed to sufficiently explain how an item being presented more than once could result in multiple NSF fees.

The FDIC's guidance notes that practices involving the charging of multiple NSF fees arising from the same unpaid transaction results in heightened risks of violations of Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices (UDAP). Not clearly and conspicuously disclosing material information to consumers about re-presentment practices could be considered misleading or deceptive under UDAP. The FDIC also indicated that assessing several re-presentment NSF fees in a short time without adequate notice to a consumer may result in substantial injuries to customers; the injury may not be reasonably avoidable; and there may be no countervailing benefits to either customers or competition and, thus, could be considered unfair under UDAP.

The FDIC also noted third party oversight risks and litigation risks related to multiple NSF fee practices.

The FDIC's guidance provides the following methods to mitigate the risk of UDAP violations related to multiple NSF fees: eliminate NSF fees; decline to charge more than one NSF fee per transaction; review policies, procedures and monitoring activities related to re-presentments and make appropriate changes and clarifications; ensure disclosures are clear and conspicuous regarding the amount of NSF fees and when and how such fees will be imposed; and review customer alert systems related to NSF transactions.

Additionally, the FDIC stated that it intends to take appropriate action to address consumer harm regarding multiple re-presentment NSF fees. According to the guidance, examiners of financial institutions generally will not cite UDAP violations regarding multiple re-presentment NSF fees when the possible violations are

self-identified and properly corrected before an examination begins.

It is important to consider this guidance to assess the risk associated with current multiple re-presentment NSF fee practices. Many larger banks have eliminated NSF fees or reduced NSF fee amounts. This is in part in response to competition, but also to regulator scrutiny and consumer complaints. Smaller institutions or those partnering with small banks may not be as able to eliminate NSF fees, but should still examine the policies related to NSF fees and consider eliminating multiple fees for a single transaction.

Even if a financial institution is charging NSF fees as allowed under applicable law, it is important to consider how and when an NSF fee is charged given the heightened regulatory scrutiny surrounding NSF fees. □

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