Supervisory Guidance on Multiple Re-Presentment NSF Fees

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The Federal Deposit Insurance Corporation (FDIC) is issuing guidance to ensure that supervised institutions are aware of the consumer compliance risks associated with assessing multiple non-sufficient funds (NSF) fees arising from the re-presentment of the same unpaid transaction. Additionally, the FDIC is sharing its supervisory approach where a violation of law is identified and full corrective action is expected.

Background

Many financial institutions charge NSF fees when checks or Automated Clearinghouse (ACH) transactions are presented for payment, but cannot be covered by the balance in a customer's transaction account. After receiving notice of declination, merchants may subsequently resubmit the transaction for payment. Some financial institutions charge additional NSF fees for the same transaction when a merchant re-presents a check or ACH transaction on more than one occasion after the initial unpaid transaction was declined. In these situations, there is an elevated risk of violations of law and harm to consumers.

During consumer compliance examinations, the FDIC has identified violations of law when financial institutions charged multiple NSF fees for the re-presentment of unpaid transactions. The FDIC found that some disclosures provided to customers did not fully or clearly describe the institution's re-presentment practice, including not explaining that the same unpaid transaction might result in multiple NSF fees if an item was presented more than once.

Potential Risks Arising from Multiple Re-Presentment NSF Fees

Consumer Compliance Risk: 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 (FTC) Act, which prohibits unfair or deceptive acts or practices (UDAP). While specific facts and circumstances ultimately determine whether a practice violates a law or regulation, the failure to disclose material information to customers about re-presentment and fee practices has the potential to mislead reasonable customers, and there are situations that may also present risk of unfairness if the customer is unable to avoid fees related to re-presented transactions.[1]

- Deceptive Practices: In a number of consumer compliance examinations, the FDIC determined that if a financial institution assesses multiple NSF fees arising from the same transaction, but disclosures do not adequately advise customers of this practice, the misrepresentation and omission of this information from the institution's disclosures is material. The FDIC found that if this information is not disclosed clearly and conspicuously

[1] These practices may also violate Section 1036(a)(1)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. § 5536(a)(1)(B)), which prohibits any covered person or service provider from engaging in, among other things, abusive acts or practices in connection with a consumer financial product or service.

to customers, the material omission of this information is considered to be deceptive pursuant to Section 5 of the FTC Act.

- Unfair Practices: In certain circumstances, a failure to adequately advise customers of fee practices for re-presentments raises unfairness concerns because the practices 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. In particular, a risk of unfairness may be present if multiple NSF fees are assessed for the same transaction in a short period of time without sufficient notice or opportunity for customers to bring their account to a positive balance in order to avoid the assessment of additional NSF fees. While revising disclosures may address the risk of deception, doing so may not fully address the unfairness risks.

Third-Party Risk: Third parties, including core processors, often play significant roles in processing payments, identifying and tracking re-presented items, and providing systems that determine when NSF fees are assessed. Such third-party arrangements may present risks if not properly managed. Institutions are expected to maintain adequate oversight of third-party activities and appropriate quality control over products and services provided through third-party arrangements.[2] In addition, institutions are responsible for identifying and controlling risks arising from third-party relationships to the same extent as if the third-party activity was handled within the institution. Institutions are encouraged to review and understand the risks presented from their core processing system settings related to multiple NSF fees, as well as understand the capabilities of their core processing system(s), such as identifying and tracking re-presented items and maintaining data on such transactions.

Litigation Risk: Multiple NSF fee practices may result in heightened litigation risk. Numerous financial institutions, including some FDIC-supervised institutions, have faced class action lawsuits alleging breach of contract and other claims because of the failure to adequately disclose re-presentment NSF fee practices in their account disclosures. Some of these cases have resulted in substantial settlements, including customer restitution and legal fees.

Risk Mitigation Practices

Institutions are encouraged to review their practices and disclosures regarding the charging of NSF fees for re-presented transactions. The FDIC has observed various risk-mitigating activities that financial institutions have taken to reduce the potential risk of consumer harm and avoid potential violations of law regarding multiple re-presentment NSF fee practices. These include:

- Eliminating NSF fees.

- Declining to charge more than one NSF fee for the same transaction, regardless of whether the item is re-presented.

[2] FIL-44-2008, "Guidance for Managing Third-Party Risk" (June 6, 2008).

- Conducting a comprehensive review of policies, practices, and monitoring activities related to re-presentments and making appropriate changes and clarifications, including providing revised disclosures to all existing and new customers.

- Clearly and conspicuously disclosing the amount of NSF fees to customers and when and how such fees will be imposed, including:
  - Information on whether multiple fees may be assessed in connection with a single transaction when a merchant submits the same transaction multiple times for payment;
  - The frequency with which such fees can be assessed; and
  - The maximum number of fees that can be assessed in connection with a single transaction.

- Reviewing customer notification or alert practices related to NSF transactions and the timing of fees to ensure customers are provided with an ability to effectively avoid multiple fees for re-presented items, including restoring their account balance to a sufficient amount before subsequent NSF fees are assessed.

If institutions self-identify re-presentment NSF fee issues, the FDIC expects supervised financial institutions to:

- Take full corrective action, including providing restitution to harmed customers, consistent with the restitution approach described in this guidance;

- Promptly correct NSF fee disclosures and account agreements for both existing and new customers, including providing revised disclosures and agreements to all customers;

- Consider whether additional risk mitigation practices are needed to reduce potential unfairness risks; and

- Monitor ongoing activities and customer feedback to ensure full and lasting corrective action.

FDIC's Supervisory Approach

When exercising supervisory and enforcement responsibilities regarding multiple representment NSF fee practices, the FDIC will take appropriate action to address consumer harm and violations of law. The FDIC's supervisory response will focus on identifying re-presentment related issues and ensuring correction of deficiencies and remediation to harmed customers.

In reviewing compliance management systems, the FDIC recognizes an institution's proactive efforts to self-identify and correct violations. Examiners will generally not cite UDAP violations that have been self-identified and fully corrected prior to the start of a consumer compliance examination.[3] In addition, in determining the scope of restitution, the FDIC will consider an institution's record keeping practices and any challenges an institution may have with retrieving, reviewing, and analyzing re-presentment data, on a case-by-case basis, when evaluating the time

[3] Page II-6.4 of the FDIC's Consumer Compliance Examination Manual.

period institutions utilized for customer remediation.[4] Failing to provide restitution for harmed customers when data on re-presentments is reasonably available will not be considered full corrective action.

If examiners identify violations of law due to re-presentment NSF fee practices that have not been self-identified and fully corrected prior to a consumer compliance examination, the FDIC will evaluate appropriate supervisory or enforcement actions, including civil money penalties and restitution, where appropriate.

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[4] In recent examinations, the FDIC has identified instances where institutions have been unable to reasonably access accurate ACH data for re-presented transactions beyond two years. In these cases, the FDIC has accepted a two-year lookback period for restitution. The FDIC expects supervised institutions to promptly address this issue. Institutions with challenges readily accessing accurate ACH data that self-correct this issue and provide restitution to harmed customers, as appropriate, for transactions occurring two years before the date of this Financial Institution Letter will generally be considered as having made full corrective action.