

REGULATORY UPDATE

Have You Reviewed Your Courtesy Overdraft Protection Program Lately?

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As the financial industry slowly recovers from the many operational effects of the Covid pandemic, we continue to experience new hurdles with a changing economy and the way consumers interact with their financial institution. Many consumers now rely far less on bricks and mortar branches and traditional checks, and more on electronic banking, ACH transactions, debit cards, and mobile banking apps on their cell phones. They expect faster systems that show real time balances and more transparency in fees.

Pressure to reduce overdraft fees continues to come from many directions, including lawmakers, regulators, and consumers; however, there have been no new regulations covering overdrafts for several years.

What we do see is a continuation of the same class action lawsuits and regulatory actions involving what is considered unfair and deceptive practices, as they interpret disclosures and practices under existing UDAP rules.

Most recently the FDIC sent out a Financial institution Letter "[FIL-40-2022 Supervisory Guidance on Multiple Re-Presentation NSF Fees.](#)" In the FIL, the FDIC reiterated the message provided earlier in their "[FDIC Consumer Compliance Supervisory Highlights for March 2022](#)". Both FDIC documents cite the practice of **charging successive return item fees** on the same electronic item that has been returned and successively resubmitted as excessive, and possibly citable as a UDAP violation, unless clearly and transparently disclosed. Pinnacle has provided earlier guidance and suggested language for its Overdraft program, and the subject has been covered in more detail in the "[Pinnacle Fall 2019 Regulatory Update.](#)" When reviewing disclosures for compliance, it is important to review all documents for all accounts, including the FI's own deposit agreements and schedule of fees.

In our "[Pinnacle Fall 2019 Regulatory Update](#)" we also advised that there have been numerous class action suits being brought against FIs that **use the Available Balance rather than the Ledger Balance for calculating overdraft fees**. We cite both CFPB and FDIC documents that deem this to be a possible violation of UDAP if not properly disclosed. In our "[Fall 2020 Regulatory Update](#)" we provided additional information that the 11th Federal Circuit Court of Appeals had deemed the standard A-9 disclosure inadequate in providing transparent disclosures when silent on the method of calculating fees when using the available balance. This clearly broke a long-time assumption that the use of the model form provided a safe harbor disclosure.

The court held that a financial institution strays beyond the safe harbor when communications within its overdraft disclosure (the A-9) inadequately informs the consumer of the overdraft policy that the institution follows. More recently, the United States District Court for the District of Delaware made a similar ruling, which is being appealed to the 3rd Federal Circuit Court of Appeals. More than likely, this court will follow the precedent set forth by the 11th circuit given

the similar circumstances of the ruling. Pinnacle has provided clients with revised disclosure recommendations for the A-9 based on these rulings.

While the current defense for these practices is to provide clear and accurate disclosures, there is continued pressure to revise programs to be more consumer friendly, especially when it comes to overly high and excessive fees for the services provided. We note both the suggestions made in the aforementioned FDIC FIL, as well as remarks made by the Acting Comptroller of the Currency Michael J. Hsu on December 8, 2021; "[Reforming Overdraft Programs to Empower and Promote Financial Health.](#)"

While recognizing the role the payment of overdrafts plays, he stressed the need for reform, and like the FDIC, proposed numerous recommendations that FIs may make to improve their overdraft programs.

While accurate disclosures may for now protect the FI from violations and class actions, the more prudent advice to FIs is to curtail their use of available balance when calculating fees, and to not charge for re-presentment items. Unfortunately, these operational decisions are often driven by the FI's core capabilities and not all core processors have similar functionality. Given the increased scrutiny in these two specific areas, FIs should at a minimum review their core functionality and document their considerations, core capability, and decisioning for examiner review.

As many institutions continue to try to meet the growing competition from non-banks and more closely match the position of many of the big banks that have eliminated all overdraft fees entirely, we are seeing many smaller institutions reducing their overdraft fees and eliminating return item fees altogether. While this creates an obvious initial drop in revenue to the institution, we do see the subsequent usage increasing with the perceived higher value benefit by the consumer, with the revenues beginning to follow. We welcome any and all discussions with our clients and are available to assist in modifying program documentation with any changes the FI is willing to make to continue to serve their customer base and their community with an overdraft program that meets the current expectations of these mostly digital users. Please contact your Client Services Manager or email us at clientcare@pinnstrat.com for additional information.