



COMPLIANCE BRIEF

August 22, 2022



Today's Topics:

- [FIL-40-2022](#)
FDIC Supervisory
Guidance on
representments
- Issued August 18, 2022



Focus

- Highlight consumer compliance risks associated with assessing multiple NSF fees on represented items
- Share supervisory approach where violation of law is identified including full corrective action expected

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Risks of Multiple Representation NSF Fees

- **Risk #1: *Consumer Compliance Risk***
 - Heightened risk of UDAP violations
 - Based on specific facts and circumstances

“ . . . failure to disclose material information to customers about re-presentation 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.”

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Consumer Compliance Risk

- Deceptive Practices
 - Disclosures do not adequately advise customers of possibility of multiple fees on same item
 - Omission of this info is material
 - Results in violation of Section 5 of FTC Act
- Unfair Practices
 - Failure to adequately advise customer of representation fee practices may:
 - Result in substantial injury
 - Injury may not be reasonably avoidable
 - No countervailing benefits to either customer or competition

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Consumer Compliance Risk

Unfair Example:

- Assessing fee in short period of time without sufficient notice or opportunity to make deposit
- No ability to avoid subsequent fee

Take Note!
Don't stop with correcting disclosures.
Focus is also on timing and delivery of NSF fee notice to account owner!

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Third-Party Risk

- **Risk #2: *Third-Party Risk***
 - Consider role in processing payments, identifying and tracking represented items and providing systems for assessing fee (e.g., core processors)
 - Maintain adequate oversight
 - Review and understand risks of core processing system settings related to multiple NSF fees
 - Understand capabilities (e.g., identifying and tracking represented items and maintaining data)

Reminder:
Bank is
ultimately
responsible
for identifying
and
controlling
risks

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Litigation Risk

- **Risk #3: *Litigation Risk***
 - Class Action Lawsuits alleging breach of contract, etc. due to failure to adequately disclose representment NSF fee practices in account disclosures
 - Resulting in substantial settlements including customer restitution and legal fees

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Observed Risk Mitigation Practices

- Actions taken by some banks to reduce risk of consumer harm and avoid potential violations

Eliminating NSF Fees
Declining to charge more than one fee
Conducting comprehensive review of policies, practices and monitoring activities related to representments
Making appropriate changes/clarifications to disclosures
Providing updated disclosures to ALL existing and new customers
Clearly and conspicuously disclosing amount and timing of NSF fees
Reviewing customer notifications/alerts and timing related to NSF transactions

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Regulatory Expectations

- Take FULL corrective action **including restitution** to harmed customers
- Promptly correct NSF fee disclosures and account agreements and provide to new and existing customers (*Note: does not reference just consumers*)
- Consider if additional risk mitigation practices are needed
- Monitor ongoing activities and customer feedback

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FDIC Supervisory Approach

- Focus on identifying representment related issues
- Ensure corrective action of deficiencies is taken **including remediation to harmed customers**
- Will not “generally” cite UDAP violations if:
 - Bank has self-identified
 - Bank has **FULLY** corrected violations before start of exam
- Refers to [Page II-6.4](#) of the FDIC’s Consumer Compliance Exam Manual for more details

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FDIC Supervisory Approach

- Will consider bank’s record keeping practices and challenges in retrieving, and analyzing representment data (on a case-by-case basis) to determine time period for remediation
 - Footnote 4 indicates for accurate ACH data that is not readily accessible, may accept two year timeframe for restitution
- Failure to self-identify and fully correct the issue (including remediation) could result in supervisory or enforcement actions including CMPs

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Frequent Hotline Questions

- Q. If we updated our disclosures, can we take a wait and see approach on restitution?**
- A. Not according to this FIL. The FIL indicates the FDIC expects institutions to take corrective action ASAP, including restitution.

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Frequent Hotline Questions

- Q. If we provided a change in terms notice in 2020 using our vendor's suggested language, do we need to do anything else?**
- A. Possibly. Did you update both your T&C and Fee Schedule? Did you notify existing customers at that time? Did notify business customers if they received the same T&C and fee schedule?

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Frequent Hotline Questions

Q. When does our restitution timeframe start? From the FIL back to two years? What if we updated our T&C but did not send notice to existing customers?

- A. The FIL does not address restitution timeframes for all debits, only ACH – indicating two years from date of FIL if records are limited. FDIC may require a longer or shorter timeframe based on your bank's specific circumstances. It is best to consult with your FDIC EIC after your initial assessment of your disclosures, return and charging practices and impacted customers.

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Frequent Hotline Questions

Q. If my bank is Fed- or OCC-supervised, does this apply to us?

- A. While this FIL was not issued on an interagency basis, Section 5 of the FTCA (UDAP) applies to all banks regardless of regulator. Since the practices described in the FIL indicate they may be considered both deceptive and unfair, this is a good opportunity to review your bank's T&C, Fee disclosure, and fee assessment practices and take corrective action to minimize your regulatory and litigation risk.

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Frequent Hotline Questions

- Q. If we have additional questions, who can we ask?**
- A. Your best resource is your Examiner-in-Charge (EIC). Their expectations will depend on facts and circumstances specific to your bank.

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 - [Training](#)
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- Compliance Hotline
 - compliance@iowabankers.com
 - 844-REGS411 (or 844-734-7411)



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