Continuity User Group Q2 Q&A

Answers to the questions asked during Continuity's User Group Q2 Webinar:

Do we anticipate other regulators to follow after FDIC changes their signage ruling?

As this largely pertains to advertising FDIC insurance, Banks regulated by other Agencies would generally be subject to the same requirements. This is because both the OCC and FRB banks are also "Member FDIC." So, we may not directly see issuances from other Regulators on this topic, but it's possible.

Are there going to be RegControls over Appraisal Bias or existing Reg Controls updated for this?

We have questions regarding discrimination within Accept/Reject a Residential Real Estate Appraisal, Accept/Reject a Real Estate Evaluation, Review a Real Estate Appraisal, and Review a Real Estate Evaluation in our RegControls product. We also have an article regarding fair lending and appraisals/evaluations: https://support.continuity.net/hc/en-us/articles/5158990379667.

The regulators are all part of the PAVE Action Plan, https://support.continuity.net/hc/en-us/articles/5157567732243-ESG-PAVE-Action-Plan, and when they issue anything more regarding appraisal bias, we will determine whether we need to develop a new, or review, RegControls.

Reg E cites related to TPSP

We mentioned that 12 CFR 1005.14 deals with exemptions from Reg. E Error Resolution for the account holding financial institution when a third-party service provider (TPSP) actually sends the EFT. However, this is only the case if the TPSP has no agreement with the FI for the service. In pretty much every P2P scenario, an agreement is deemed to exist. We also mentioned the CFPB Reg. E Q & A/Compliance Aid. These can be found at the following website: https://www.consumerfinance.gov/compliance/compliance-resources/deposit-accounts-resources/electronic-fund-transfers/electronic-fund-transfers-faqs/

FDIC Representment Focus/Overdraft Fees

Several institutions are seeing increased scrutiny from Regulators, especially the FDIC, when it comes to Overdraft and NSF Fees. One thing that makes this discussion confusing is that NSF and Overdraft Fee are often used in an interchangeable way. But, to technically define terms, an Overdraft Fee is always a form of NSF Fee, but an NSF Fee can be something other than an Overdraft Fee.

An Overdraft Fee is when the Bank charges a fee for an account going negative and paying the item associated with the transaction. An NSF that is not an Overdraft is generally when a transaction is rejected due to insufficient funds and the institution did not cover the transaction and take the account negative.

Institutions are being taken to task under UDAAP for not clearly disclosing how the fees will be assessed, including when an item is presented multiple times with a fee assessed on each occurrence. Disclosures saying "per item" are being called Deceptive, as what is really happening is a "per presentment" charge. The FDIC has also mentioned follow-up or communication with the customer that could help them avoid getting multiple fees assessed, which indicates ongoing monitoring and communication for each impacted customer is expected. Although the specific guidance does not cover non-FDIC regulated institutions, the UDAAP concepts involved are largely valid across all institutions.

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.

Risk mitigation practices, such as eliminating fees or putting a cap per item, are mentioned in the FIL. Here is a write-up on NSF, outside of the specific FDIC FIL-40-2022:

If you are asking about situations where you charge an NSF and don't cover the charge, i.e. no Overdraft takes place, then there isn't as much specific guidance that mentions this (disclosure) as a recommendation, though the OCC UDAAP booklet could be seen as such. However, there is clear guidance regarding Overdraft programs that state disclosures should be clear on how fees are assessed. And, Overdraft and NSF may often be seen as going hand-in-hand by examiners, such that the Guidance that applies to Overdraft programs would extend, in essence, to NSF fees.

This scenario is not specifically addressed in the Regulation anywhere (charging multiple times for representation), but Banks often do charge such fees as there is no specific prohibition against doing so. However, the various pieces of guidance that the Regulatory Agencies have issued regarding Overdraft Programs and UDAAP discourage such practices, especially if they have not been clearly disclosed to the consumer. It will be a risk/internal policy and procedure decision on your end. A customer got hit with 3 charges of $35 each for the same item being presented 3 times via ACH and the Bank never "covered" the merchant payment.

The majority of Banks (70-80%) are paying such items as part of an Overdraft Protection Program or on an ad hoc basis. Only a small percentage of financial institutions are returning items and charging an NSF Fee, which is similar in effect to the "Returned Item" Fee here. I am not aware of any lawsuits or enforcement actions specific to Returned Item Fees, but I wouldn't be surprised if at least one exists. Again, not necessarily specific to ACH Returned Item fees, but similar concepts are discussed in many of the issuances related to Overdraft Programs as far as the view that Regulators take to charging fees multiple times in a day or for the same transaction. I would consider the UDAAP risk Moderate to High for such a practice, and most likely the latter, i.e. "High," if it is not clearly disclosed how such fees would be assessed. You may want to consider having the charges covered and then having a singular Overdraft fee associated, or having a cap on multiple fees for the same returned item. The following pieces of guidance are more focused on Overdraft programs, but you will see NSF fees discussed as well, which can give an understanding about multiple charges for the same item.

These CFPB Whitepapers show some of the data around Overdrafts and NSF and help provide some information on what Banks are generally doing in these regards, as far as assessing fees, covering items vs. returning, etc.

You can also check out the recent OCC publication on UDAAP. You can use "Find" with the word "multiple" to see that examiners are looking at products that can assess multiple charges in a short time or for a single item when assessing UDAAP risk.

Products structured in ways that could trigger multiple charges or fees in a short time frame or for single occurrences, such as a fee charged to process a late payment (in addition to any standard late fee charged) or fees charged for credit card transactions that exceed an available credit limit.

Even basic NSF fees where the transaction is rejected (without even more damage from multiple presentments) have actually been frowned upon, so to speak, for many years. You can see this here:

As far as charging a rejected/declined transaction fee (NSF Fee when not providing an overdraft), then there is no requirement to opt-in before assessing such a charge. And, if a customer opted-out of the Overdraft program, a rejected/declined transaction is not an Overdraft. So, "yes," you can technically do so without violating Reg. E; however, the Federal Reserve's Consumer Compliance Outlook Q & A basically mentions that it would be a high UDAAP risk to do so.

The final rule does not address declined transaction fees. However, the supplementary information discussion in the Federal Register notice for the final rule notes that such fees could raise significant fairness issues under the FTC Act because the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction.

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Can you please provide some regulatory information on NSF and Overdraft Fees?

Please see the following links for almost everything any Regulatory Agency has posted concerning Overdrafts:

- https://www.fdic.gov/news/financial-institution-letters/2022/fil22040a.pdf
- https://www.federalreserve.gov/boarddocs/press/bcreg/2005/20050218/attachment.pdf
- https://www.fdic.gov/news/news/financial/2010/fil10081.pdf
- https://www.fdic.gov/news/conferences/overdraft/faq.html
- https://consumercomplianceoutlook.org/outlook-live/2016/interagency-overdraft-services-consumer-compliance-discussion/
- https://www.federalreserve.gov/publications/files/201807-consumer-compliance-supervision-bulletin.pdf
- https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf
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