

## ICBA Regulatory Update: Bank Fees

**Topic/Issue:** Overdraft fees and NSF/represented Item fees

**Agencies:** CFPB, FDIC, OCC, FRB,

**Status:**

➤ CFPB

- CFPB Circular on Overdraft Fees – October 2022
- Remarks by President Biden on Protecting American Consumers from Junk Fees – October 2022
- Advisory Opinion - Oct 2023
  - Requires large banks to provide certain information to customers free of charge, such as account balances, transaction history, and fees,
  - States that under the law, consumers have the right to request and receive certain information about their accounts, including statements, transaction records, and account terms.
  - CFPB does not intend to seek monetary relief for potential violations that occurred prior to February 1, 2024.
  - While it applies only to large banks for all FIs should take heed
- Supervisory Highlights Junk Fees Update Special Edition - Oct 2023
  - Covers so called “junk” fees in bank accounts, auto-loan servicing, and remittances identified during CFPB examinations between Feb and Aug 2023.
  - The CFPB claims to have recovered and is refunding \$140 million back to impacted customers.
  - Asserts that core processors engaged in unfair act or practice by contributing to the assessment of fees on re-presented items by not allowing banks to avoid charging the fee.
  - Asserts that FIs engaged in unfair acts or practices by charging re-presentment fees without giving the consumer a meaningful opportunity to prevent the fee; FIs engaged in unfair acts or practices by charging Authorize-Positive Settle-Negative (APSN) overdraft fees; and FIs engaged in an unfair act or practice by assessing paper statement fees and returned mail fees for paper statements they did not print and deliver.
- Overdraft Lending: Very Large Financial Institutions Proposed Rule -Jan 2024
  - Would apply to banks over \$10 billion; the CFPB will monitor the market to determine whether it should amend the regulatory landscape for banks under \$10 billion.
  - Banks over \$10 billion in assets could extend overdraft services if they treat these services as extensions of credit pursuant to federal lending laws, including disclosing any applicable interest rate.
  - Banks could charge the amount that would allow the bank to break even on providing overdraft services, or

- Alternatively, these institutions could charge a fee at an established benchmark—ranging from \$3 to \$14
  - CFPB Proposes Rule to Stop New Junk Fees on Bank Accounts – Jan 2024
    - Proposed rule would prohibit NSF fees on transactions declined right at the swipe, tap, or click
    - The CFPB considers charging NSF fees in these circumstances constitutes an abusive practice under the Consumer Financial Protection Act
    - Applies only to transactions that are instantaneously or near-instantaneously declined due to insufficient funds.
    - Transactions declined or rejected due to insufficient funds hours or days after the consumer’s attempt would not be covered by the proposal.
    - Transactions authorized in the first instance, even if they are later rejected or fail to settle due to insufficient funds, also would not be covered by the proposal.
    - Checks and ACH transactions would not be covered.
    - One-time debit card transactions that are not preauthorized, ATM transactions, and certain P2P transactions would be covered, assuming these payment mechanisms continue to be declined instantaneously or near instantaneously.
- FRB
  - Compliance Spotlight - Supervisory Observations on Representment Fees – September 2023
- OCC
  - Guidance on Overdraft Protection Programs – April 2023
- FDIC
  - Supervisory Guidance on Multiple Re-Presentment NSF Fee– August 2022
  - FDIC Clarifying Supervisory Approach Regarding Supervisory Guidance on Multiple Re-Presentment NSF Fees - **Updated Guidance** – June 2023
    - The agency will not ask institutions to conduct a lookback review absent a likelihood of substantial consumer harm.

### ICBA Position:

- We broadly oppose price controls and caps imposed by any regulatory agency, which only distorts market discipline and demand for delivery of products and services.
- ICBA strongly urge policymakers to cautiously consider the consequences of any future restrictive fee related legislation and regulations, which would have a negative ripple effect on customers who rely on these services.
- ICBA opposes any retroactive and punitive action on lawfully disclosed represented item fee practices, especially where those practices were never subject to examiner or regulatory scrutiny.
- We remain committed to pushing back and utilizing all resources available against the harmful rulemaking and rhetoric that mischaracterizes contractually negotiated and disclosed fees as “junk fees” in any form. In doing so, we will call for appropriate oversight, hearings, and other measures to hold the bureau accountable to comply with its mandate and governing rules.

## Key Talking Points:

- Overdrafts Fees
  - Community banks are bound by law to disclose fees in a manner dictated by statute and regulations; to now call those disclosures, “illegal” or “surprising” is troubling.
  - ICBA has cited survey data from consumers that indicates an intentional decision for consumers’ use of overdraft services and demonstrates an aversion to regulatory restrictions that would curtail overdraft programs.
  - We will continue to push back and will respond to the rulemaking. We will also continue to try engaging the Bureau to educate them on the practical uses of overdraft services and continue educating underscoring that customers leverage these services as part of their normal financial planning activities.
  
- Represented Item Fee
  - ICBA and its members are troubled by UDAP threats, look-back requirements, and restitution on practices previously examined and without prior scrutiny, criticism, warnings, or findings.
  - ICBA and leadership bankers have met with key senior personnel at the FDIC, OCC, and FRB. Our meetings focused on the lack of readiness of core service providers, the structural and operational obstacles associated with accurately identifying and stopping fees from being assessed, the abruptness of the policy change on a practice that has existed for years, and the policy implications the position will have on consumers.
  - We urged each agency to:
    - Refrain from levying any retroactive action.
    - Allow reasonable time for community banks to update disclosures and practices to allow them the opportunity to adhere to the guidance.
    - Allow banks the time needed to work with core service providers (or in house) to develop a system to identify and reject represented items.
    - Issue no findings, including UDAP violations, while banks update their disclosures and practices.
    - Refrain from issuing corrective actions or any other regulatory findings for at least one year.
    - Provide supervised institutions with the specific language the agencies deem is missing from disclosures.
    - Allow notice mechanisms that banks use to keep customers aware of their account status to automatically eliminate the threat of a UDAP violation.