
How to Reduce the Risk of Penalties from the FDIC's New Approach to Re-presented Transactions

In recent months, some community banks have been surprised by the FDIC's new approach to how banks treat single items that are repeatedly rejected for insufficient funds. To help community banks avoid examination penalties from the agency's change in direction, ICBA compiled the following guidance.

Re-presentation of Unpaid Transactions

As the FDIC lays out in its Spring 2022 [Consumer Compliance Supervisory Highlights](#), financial institutions commonly charge a non-sufficient-funds fee when an item is presented for payment but cannot be covered by the balance in the account. Some institutions charge additional NSF fees for the same transaction when a merchant re-presents an ACH payment or check more than once after the transaction has been declined.

With these fees under increased scrutiny by the FDIC and other regulators, community banks are reporting that the agency is now threatening or imposing violations even on banks that are compliant with fee disclosure requirements and despite bank-initiated measures preceding the exams. Penalties include Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) violations, multiple-year lookback requirements, and remediation requirements.

Heightened Scrutiny

The FDIC indicates in [Supervisory Highlights](#) that it is ramping up scrutiny in part due to several recent class-action lawsuits focused on these re-presentation fees. These lawsuits—some of which have been settled for customer restitution and legal fee reimbursements—generally allege breach of contract due to the omission in account agreements of key terms related to the assessment of these fees.

In the section titled “Re-presentation of Unpaid Transactions: Heightened Risk for Section 5 Violations,” the FDIC says disclosures and account agreements that explained that one NSF fee would be charged “per item” or “per transaction” did not clearly define these terms or explain that the same item might result in multiple NSF fees if re-presented.

The FDIC indicates that the failure to disclose material information about re-presentation practices and fees can be deceptive and potentially unfair. The agency also notes that it has required banks to provide additional restitution beyond what was agreed to in class-action settlements.

Avoid “Gotcha” Moments

While community banks are relationship bankers committed to ensuring their customers are not harmed, compliance with all fee and disclosure requirements is not enough to avoid pressure from some states, plaintiff’s attorneys, and now the FDIC.

Given the FDIC’s heightened sensitivity to these fees, community banks can avoid these “gotcha” experiences with their examiners with the following tips:

- Review the FDIC’s “Re-presentation of Unpaid Transactions: Heightened Risk for Section 5 Violations” article on pages 8-9 of its Spring 2022 [Consumer Compliance Supervisory Highlights](#). The article provides recommendations, including:
 - Disclosing the amount of NSF fees and how they will be imposed.
 - Informing customers that multiple fees may be assessed in connection with a single transaction if it is presented more than once.
 - Conducting a comprehensive review of policies, practices, and disclosures related to re-presentments to ensure the way NSF fees are charged is communicated clearly and consistently.
 - Working with service providers to retain comprehensive records so re-presented items can be identified.
- Re-familiarize your bank with the FDIC’s [Consumer Compliance Examination Manual](#).
- For community banks that have taken the initiative to update their disclosures, the FDIC may look for “full corrective action,” which may include remediation.
- Work closely with your core service provider to ensure its practices of receiving items do not place the bank in harm’s way.
- Tune in to what is happening at the state level.
- Do not overlook commercial customers.

ICBA is communicating with the FDIC on this issue and seeking a reasonable solution that preserves consumer protections while protecting community banks from examination findings while they work to update their disclosures.