



Community Bankers of Michigan Regulatory Dispatch

May 3, 2023

*Timely news and resources community bankers can use
to better stay on top of a rapidly changing world.*

FDIC GUIDANCE ON CHARGING OVERDRAFT FEES FOR AUTHORIZE POSITIVE, SETTLE NEGATIVE TRANSACTIONS

The FDIC is issuing supervisory guidance to its supervised institutions to ensure that supervised institutions are aware of the consumer compliance risks associated with assessing overdraft fees on a transaction that was authorized against a positive balance but settled against a negative balance (APSN).

Statement of Applicability: The contents of, and material referenced in, this FIL apply to all FDIC-supervised financial institutions.

Highlights:

- The guidance expands on an FDIC 2019 Supervisory Highlights article titled “Overdraft Programs: Debit Card Holds and Transaction Processing” by discussing the FDIC’s concerns with both the available and ledger balance methods used by institutions when assessing overdraft fees.
- FDIC supervised institutions should be aware of heightened risks of violations of Section 1036(a)(1)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and Section 5 of the Federal Trade Commission (FTC) Act when assessing overdraft-related fees on APSN transactions.
- Unanticipated and unavoidable overdraft fees can cause substantial injury to consumers. Due to the complicated nature of overdraft processing systems and payment system complexities outside the consumer’s control, consumers may be unable to avoid injury.
- Institutions are encouraged to review their practices regarding the charging of overdraft fees on APSN transactions to ensure customers are not charged overdraft fees for transactions consumers may not anticipate or avoid.
- Institutions should ensure overdraft programs provided by third parties are compliant with all applicable laws and regulations.

[Supervisory Guidance on Charging Overdraft Fees for Authorize Positive, Settle Negative Transactions](#)

Comment: Both the OCC and the FDIC issued separate advisories warning against the risks associated with overdraft fees, particularly those associated with “Authorize Positive, Settle Negative” (APSN) transactions.

Items of Interest

Bank Management

CSBS [Did Community Banker Sentiment Falter Further After the March 2023 Bank Closures?](#)

(04/25/2023) - Last month's high-tech bank runs, liquidity complications and subsequent closure of three high-profile banks surprised many bankers and investors. While the FDIC and the Federal Reserve acted quickly to maintain confidence by providing a higher backstop for depositors and creating greater lending capacity for all financial institutions through the Fed's Bank Term Funding Program, community banker sentiment fell further from an already record-low. Following the March 9 events, community banker sentiment was driven lower mainly from expectations that the industry's regulatory environment could become more burdensome and that economic and financial conditions could worsen.

The first quarter 2023 Community Bank Sentiment Index (CBSI), released on April 4, showed that community bankers are more pessimistic now than at any time since the survey's inception in 2019. The overall index was 83, where 100 is considered the neutral level, values above 100 indicate expansion and those below 100 signal contraction. The quarterly CBSI averaged 122 in 2019, dropped significantly to 94 in 2020 with the pandemic/economic lockdowns, rose to 107 in 2021 as the economy began recovering and then fell again to 89 in 2022 as high inflation and weak economic growth persisted.

Because the CBSI survey was open to community bankers throughout March, we can investigate the responses before and after the banking problems that were exposed on March 9 to uncover any differences in sentiment.

Comment: Those that responded to the survey after the collapse of SVB and Signature Bank were significantly more pessimistic.

FDIC [Stipulated Orders and Written Agreements](#) (03/08/2023) - The FDIC considered the matter and determined, and the Bank neither admits or denies, that it engaged in the unsafe or unsound banking practices related to its compliance with applicable fair lending laws and regulations by failing to establish and maintain internal controls, information systems, and prudent credit underwriting practices in conformance with the Safety and Soundness Standards contained in Appendix A of 12 C.F.R. Part 364, or the violations of the Equal Credit Opportunity Act, 15 U.S.C. § 1691, et seq., as implemented by Regulation B, 12 C.F.R. Part 1002, and the Truth-in-Lending Act, 15 U.S.C. § 1601, et seq., as implemented by Regulation Z, 12 C.F.R. Part 1026, as described in the May 3, 2021 Consumer Compliance Report of Examination (2021 ROE).

Comment: While we don't normally include enforcement actions in this publication, this one is worth reading if your bank is considering or is going to get involved with FinTech. The telling phrase the FDIC used is 'assume responsibility' which serves as a reminder that banks remain responsible for compliance and risk management when engaging third-party service providers.

BSA / AML

FinCEN [Statement of FinCEN Acting Director Himamauli Das before the House Committee on Financial Services](#) (04/27/2023) - I will highlight three key areas on which we at FinCEN are focused, in addition to implementing the beneficial ownership regulatory regime and accompanying database, which I know looms large in all of our minds. Those three areas are: protecting the data that we collect; building a roadmap to enhance the AML/CFT framework; and fostering accountability through enforcement.

Comment: Its always worth reading what FinCEN identifies as its successes and challenges in the BSA / AML framework.

Deposit / Retail Operations

OCC [Issues Guidance on Overdraft Protection Programs](#) (04/26/2023) - The Office of the Comptroller of the Currency (OCC) issued guidance to address the risks associated with bank overdraft protection programs.

The guidance provides background information on overdraft protection programs and identifies certain practices that may result in heightened risk exposure. These practices include assessing overdraft fees on “authorize positive, settle negative” transactions and assessing a fee each time an item is presented for payment after it was returned for non-sufficient funds (representation fees). The guidance also describes several practices that may help banks control risks associated with overdraft protection programs, as well as compliance with section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices.

The OCC recognizes that some banks have announced changes to their overdraft protection programs consistent with appropriate risk management practices. When supported by appropriate risk management practices, overdraft protection programs may assist some consumers in meeting short-term liquidity and cash-flow needs. The OCC also encourages banks to explore offering low-cost accounts, as well as other lower cost alternatives for covering overdrafts, such as overdraft lines of credit and linked accounts.

The guidance is consistent with the OCC’s mission to ensure that banks operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations.

Related Links

- [OCC Bulletin 2023-12, “Overdraft Protection Programs”](#)
- [OCC Bulletin 2010-15, “Overdraft Protection: Opt-In Requirements and Related Marketing Issues”](#)
- [OCC Bulletin 2005-9, “Overdraft Protection Programs: Interagency Guidance”](#)

Comment: This guidance (and the FDIC release mentioned above) follows similar guidance issued by the Consumer Financial Protection Bureau in October, 2022, wherein the CFPB indicated that certain “unanticipated” overdraft fee assessment practices may violate UDAAP. This release by the OCC further aligns that agency with the FDIC and CFPB.

Human Resources

No news to report this week.

Lending

CFPB [Issues Advisory Opinion on Time-Barred Mortgage Debt Collection](#) (04/26/2023) - The CFPB issued an Advisory Opinion related to time-barred debts.

	<p>The Advisory Opinion affirms that the FDCPA and the Debt Collection Rule prohibit FDCPA-covered debt collectors from suing or threatening to sue to collect a time-barred debt. The Advisory Opinion also affirms that this prohibition may apply to debt collectors that bring state-court mortgage foreclosure actions to collect on time-barred mortgage debt.</p> <p>You can access the Advisory Opinion here: www.consumerfinance.gov/compliance/advisory-opinion-program/.</p> <p><i>Comment: Likely does not impact community banks, but it remains a cautionary reminder to banks and debt collectors. Any debt collector using threats of foreclosure or other tactics to collect on ‘zombie second mortgages’ are subject to the FDCPA and ECOA and could face CFPB enforcement actions or lawsuits from consumers or state attorneys general if the debt is time-barred under state law. The prohibition applies even when a collector doesn’t know the debt is time-barred, according to the advisory opinion.</i></p>
	<p>Joint Statement on Completing the LIBOR Transition (04/26/2023) - The Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), and the Consumer Financial Protection Bureau (CFPB) in conjunction with the state bank and state credit union regulators (collectively, agencies) are jointly issuing this statement to remind supervised institutions that U.S. dollar (USD) London Inter-Bank Offered Rate (LIBOR) panels will end on June 30, 2023. The agencies also reiterate their expectations that institutions with USD LIBOR exposure should complete their transition of remaining LIBOR contracts as soon as practicable. As noted in prior interagency statements, failure to adequately prepare for LIBOR’s discontinuance could undermine financial stability and institutions’ safety and soundness and create litigation, operational, and consumer protection risks.</p> <p>STATEMENT OF APPLICABILITY: The contents of, and material referenced in, this FIL apply to all FDIC-insured financial institutions.</p>

Technology / Security

	No news to report this week.
--	------------------------------

[Selected federal rules – proposed](#)

Proposed rules are included only when community banks may want to comment. Date posted may not be the same as the Federal Register Date.

PROPOSED RULE WITH REQUEST FOR PUBLIC COMMENT