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FDIC Issues Guidance on NSF Fees for Multiple Re-Presentments

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On August 18, the Federal Deposit Insurance Corporation ("FDIC") issued Financial Institutions Letter 40-2022 ("FIL 40-2022"), which provided supervisory guidance for state non-member banks and multiple non-sufficient funds ("NSF") fees. FIL 40-2022 and its attached guidance is similar in content to an issue the FDIC highlighted in its March Consumer Compliance Supervisory Highlights.

The FDIC stated that it is issuing the guidance because of its observations in consumer compliance exams where consumers are charged multiple NSF fees for the same transaction when a merchant resubmits the transaction for payment. The FDIC has also observed that some institutions' disclosures did not adequately describe the institution's re-presentment practice. The FDIC stated that such practices could result in being deemed a violation of law in exams as an unfair and/or deceptive practice in violation of Section 5 of the FTC Act.

The FDIC's guidance encouraged institutions to consider implementing the following practices to mitigate the risks noted in the guidance:

- Eliminating NSF fees.
- Declining to charge more than one NSF fee for the same transaction, regardless of whether the item is re-presented.
- Conducting a comprehensive review of policies, practices, and monitoring activities related to re-presentments and making appropriate changes and clarifications, including providing revised disclosures to all existing and new customers.
- Clearly and conspicuously disclosing the amount of NSF fees to customers and when and how such fees will be imposed, including:

    - information on whether multiple fees may be assessed in connection with a single transaction when a merchant submits the same transaction multiple times for payment;
    - the frequency with which such fees can be assessed; and
    - the maximum number of fees that can be assessed in connection with a single transaction.
- Reviewing customer notification or alert practices related to NSF transactions and the timing of fees to ensure customers are provided with an ability to effectively avoid multiple fees for re-presented items, including restoring their account balance to a sufficient amount before subsequent NSF fees are assessed.

This guidance from the FDIC is fairly broad, and, interestingly, is not presented as interagency guidance. Arguably, it might have been more likely to see such guidance from the Consumer Financial Protection Bureau or the Federal Trade Commission. The FIL 40-2022 guidance also seems to toe the line (if not go beyond the line) of the federal banking agencies' so-called 2018 Guidance on Guidance by seemingly giving a list of requirements for state non-member banks under the guide of encouragement. The Guidance on Guidance was codified as a final rule in 2021. For the FDIC, this rule can be found at 12 C.F.R. Part 302.
