

## Cabinet News and Views

Informed analysis for the financial services industry



### OCC and FDIC Provide Supervisory Guidance on Certain Overdraft Practices



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The Office of the Comptroller of the Currency (“**OCC**”) and the Federal Deposit Insurance Corporation (“**FDIC**”) (collectively, the “Agencies”) provided supervisory guidance this week on certain overdraft practices. Of particular focus are “Authorize Positive, Settle Negative” (“**APSN**”) practices.

Prior to this guidance, banks were generally allowed to use their own judgment to ascertain when a particular overdraft charge would apply to transactions coming in, as long as they disclosed their methodology to consumers. However, many institutions have found – usually through customer complaints or lawsuits – that consumers are regularly confused by the methodology disclosures.

Accordingly, APSN transactions, as the name suggests, are transactions where a customer has sufficient account balances at the time the transaction is initiated (e.g., a debit card transaction at a point of sale), but as other transactions are processed, the authorized transaction settles against a negative balance. The guidance highlights that some institutions will assess an overdraft fee on the APSN transaction *and* the intervening transactions that exceed the customer’s account balance.

The agencies noted that they have “determined that certain overdraft practices related to APSN transactions were unfair” in their consumer compliance examinations. The Agencies went on to note that if a bank fails to take steps to avoid assessing overdraft fees for APSN transactions, then such failure “results in heightened risk of violations of the unfair, deceptive or abusive acts or practices (“**UDAAP**”) provisions of the Dodd-Frank Act, and the unfair and deceptive acts and practices (“**UDAP**”) provision of Section 5 of the Federal Trade Commission Act.

The Agencies encouraged institutions to review their overdraft practices for APSN charges. As this guidance indicates, many institutions have already made changes as a result of supervisory compliance examinations. In doing so, these institutions have had to employ a multi-pronged approach to identifying APSNs that includes human review, because it is not always obvious when they have occurred.

The Agencies also encouraged “review [of] disclosures and account agreements to ensure the financial institution’s practices for charging any fees on deposit accounts are communicated accurately, clearly, and consistently.” The Agencies concluded, however, that in their view, “disclosures generally do not fully address Dodd-Frank UDAAP and FTC UDAP risk associated with APSN transactions and related overdraft fees.”

As we go to press, the Federal Reserve Board (“FRB”) did not issue similar guidance this week. The FRB may yet issue similar guidance, or may feel they have already addressed the issue. As FRB Governor Michelle Bowman noted in a [speech last month](#), the FRB has focused on this issue since at least 2018.

The Consumer Financial Protection Bureau (“CFPB”) [issued a circular last year](#) indicating that they viewed APSN charges as likely to be an unfair act or practice for purposes of the Consumer Financial Protection Act. The circular provides an in-depth explanation of how overdraft fees tied to APSNs may end up being unfair to consumers.

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