

CFPB Issues Consent Order Against Regions Bank for Practices Related to Overdraft/APSN Fees

Our office periodically sends clients alerts relating to potential areas of risk, such as orders from regulatory agencies against financial institutions that may require a review and, if necessary, updates to their practices and corresponding disclosures provided to consumers. To that end, on September 28, 2022, the CFPB issued a consent order against Regions Bank (“Order”) related to “Authorize-Positive, Settle-Negative Overdraft Fees” or “APSN Overdraft Fees”. Specifically, the CFPB found that Regions acted unfairly and abusively in violation of the Consumer Financial Protection Act of 2010 when it charged overdraft fees on debit-card purchases and ATM withdrawals even though consumers had sufficient funds when Regions authorized the transaction, but then the transaction later settled with an insufficient balance, i.e., APSN Overdraft Fees.

The Order discussed in detail how Regions’ customers did not anticipate being charged APSN Overdraft Fees because they had sufficient funds at the time the transaction was authorized, even quoting customers and Regions’ employees who handled consumer complaints regarding APSN Overdraft Fees being charged even though the customers checked their balances before initiating the transaction and there were sufficient funds available at that time. The Order did not discuss at all whether Regions’ account disclosures disclosed its practice of charging APSN Overdraft Fees; however, based on a review of an online copy of Regions’ Deposit Agreement, it appears that Regions disclosed its practice as follows:

“If you wish to avoid overdrafts and the return of items due to insufficient funds and associated fees, you should not execute debit transactions that may be presented for payment when your account’s available balance is insufficient to cover the transactions. Overdraft and nonsufficient funds fees are determined when transactions are presented for payment.”

Notably, the Order did not mention Regions’ Deposit Agreement or disclosures as to its practices related charging APSN Overdraft Fees, which appear to disclose that overdrafts fees “are determined when transactions are presented for payment” (rather than at the time of authorization). Instead, the Order appeared to focus on Regions’ “counter-intuitive, complex practices that consumers did not understand or control and were contrary to consumers’ reasonable expectations”, and found such practices to be “unfair” and “abusive”; the CFPB Order did **not** state that such practices were “deceptive.”

The Order prohibited Regions from charging APSN Overdraft fees and required Regions to refund at least \$141 million in unlawful overdraft fees and pay a \$50 million civil money penalty.

Regulatory Background Regarding APSN Overdraft Fees

APSN Overdraft Fees have been on the federal regulators' radar for some time now. As early as 2015, the CFPB noted in its Supervisory Highlights "examiners found that the failure to properly disclose the practice of charging [APSN Overdraft Fees] in these circumstances was deceptive." The 2015 CFPB Supervisory Highlights further stated that consumers had no reason to anticipate such APSN Overdraft Fees, and thus could not reasonably avoid incurring APSN Overdraft Fees, because the practice "was not appropriately disclosed"; as a result, the CFPB found that those supervised entities engaged in such practice "acted unfairly." This is consistent with verbal guidance from the CFPB on an interagency webinar related to overdraft fees, where the CFPB representative stated that charging APSN Overdraft Fees was only an unfair and deceptive practice if the practice was not adequately disclosed.

In contrast, the Federal Reserve and the FDIC, have cautioned financial institutions against charging certain types of APSN Overdraft Fees. For example, in July 2018, the Federal Reserve in a supervisory bulletin observed that a bank engaged in unfair or deceptive acts or practices when it charged APSN Overdraft Fees and even explained that banks could identify and manage their legal risk by refraining from assessing APSN Overdraft fees. In a supervisory highlight published in June 2019, the FDIC gave examples of steps institutions had taken to mitigate overdraft risk, which included "when using an available balance method, ensuring that any transaction authorized against a positive available balance does not incur an overdraft fee, even if the transaction later settles against a negative available balance" – or in other words, refraining from charging APSN Overdraft Fees.

In summary, the Federal Reserve and FDIC seemed to consider charging APSN Overdraft Fees an unfair and deceptive practice, even if the practice was disclosed, while the CFPB's past position appeared to be that charging APSN Overdraft Fees was unfair and deceptive only if the practice was not adequately disclosed.

Based on the regulatory background surrounding the charging of APSN Overdraft Fees, it is arguable that the CFPB's Order and recent stance on APSN Overdraft Fees was inevitable. In fact, the CFPB even mentioned in its Order that Regions was aware that government agencies previously had found that one or more financial institutions violated the law when they charged these APSN Overdraft Fees but continued to charge these fees anyway, thereby seemingly placing more culpability on Regions.

While the CFPB appears to have joined the FDIC and Federal Reserve in their interpretation as to charging APSN Overdraft Fees, the NCUA has not yet publicly stated its position on this issue. However, we would anticipate that NCUA is unlikely to disagree with such interpretation, especially now that the CFPB appears to consider such practice to be "unfair" and "abusive."

What does the CFPB's Order Mean for Financial Institutions?

In short, the Order appears to have essentially banned the practice of charging APSN Overdraft Fees. Although the Order did not expressly ban the practice outright as it was confined to Regions

and its practices, the Order certainly seems to further telegraph the CFPB's position against APSN Overdraft Fees and financial institutions should take heed.

As a result of the Order, if applicable, financial institutions should revisit their overdraft practices and consider working with their software vendors to ensure that consumers are not charged APSN Overdraft Fees if a transaction is authorized with sufficient available funds, in line with the CFPB's recent Order. Due to the CFPB's Order, financial institutions that continue to charge APSN Overdraft Fees risk regulatory scrutiny and potential liability exposure for UDAAP violations, among other potential claims.

Given the risk posed by the CFPB's recent Order, here are SWM's suggested steps:

1. Review your practices and procedures related to the charging of APSN Overdraft Fees. Where such fees are charged, you should consider eliminating these fees altogether.
2. You should also alert your software vendors that provide core processing services about the recent Order. Ensure that these vendors work to implement changes to their software settings to ensure that APSN Overdraft Fees are no longer charged.
3. Review your account agreement and all related disclosures regarding the charging of APSN Overdraft Fees (including website, debit card agreement and periodic statements) as soon as possible.
4. Determine whether your institution has an enforceable arbitration agreement and class action waiver in place that would apply to the relevant products where APSN Overdraft Fees are charged. Although the arbitration agreement and class action waiver would not protect you from regulatory scrutiny, it is an effective tool for discouraging plaintiff's attorneys from filing class action lawsuits.
5. Ensure that your website, account agreement, and any other related agreements are consistent throughout regarding your overdraft policies and procedures and that there are no discrepancies amongst the agreements, as a whole.

Need additional assistance? Contact the experts at SW&M now!

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