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Is it Time to Eliminate Overdraft and NSF Fees?

The House Financial Services Committee recently held a hearing to discuss efforts to improve overdraft and NSF fees charged by financial institutions. Such efforts primarily focused on enhancing disclosures to consumers, placing caps on fees, reducing the cost of each fee, and encouraging financial institutions to offer small-dollar loans with streamlined underwriting and affordable interest rates or repayment plans to provide alternative options for consumers.

Some banks, primarily large banks, have taken steps to curtail overdraft and NSF fees by eliminating or reducing such fees or offering alternative assistance programs. The scale of these larger institutions makes them less reliant on fee income, and with the beginning of increasing interest margins, the era of fee reliance may be able to come to a close. If such trends continue, financial institutions may need to consider adjustments to their overdraft protection programs to remain competitive—the challenge will be whether the industry can make sufficient adjustments to keep legislative or regulatory action from forcing change on everyone.

LIBOR Act Offers Safe Harbor to Lenders

President Biden recently signed the Adjustable Rate Interest Rate Act (LIBOR Act), which provides avenues for lenders to transition contracts away from the LIBOR index to the extent that their contracts do not contain sufficient provisions to handle the transition. The LIBOR Act provides that the FRB identified replacement, which will be based on the Secured Overnight Financing Rate (SOFR), will be the benchmark replacement for such contracts. The LIBOR Act also provides a safe harbor that protects anyone from liability for selecting or using an FRB selected benchmark replacement, implementing benchmark replacement conforming changes, or, for commercial loans, the determination of benchmark replacement conforming changes.

An important element of the LIBOR Act is that it does not require any federally regulated and examined institutions, including credit unions, to use the FRB named replacement to LIBOR and regulators are prohibited from taking punitive action against a regulated entity based solely on the entity's failure to use the FRB named replacement. The LIBOR Act will not affect contracts that already include fallback provisions that identify a replacement index not based on the LIBOR index or to any contract where the borrower has agreed to modify their loan to avoid use of a LIBOR based index. We will provide more information as it becomes available.

First Opinion on the CCPA's "Right to Know" Request

In its first formal opinion, the Attorney General's Office broadly interpreted the consumer's "right to know" request under the CCPA to include inferences internally generated by a business about the consumer. The analysis consisted of a two-part test: (1) the inference must be drawn from Personal Information, and (2) the inference must be used to "create a profile about a consumer."

With respect to the first prong, the AG shows no deference to the exemption for public records as they relate to the use of such public records to develop inferences and concludes that the inferences themselves become personal information whether they have been generated internally or by another source. As to the second prong, the AG limits the inferences businesses must disclose, essentially stating that only those inferences used to predict, target, or affect consumer behavior are disclosable.

Businesses attempting to deny a request due to the information being 'trade secrets' or 'proprietary information' must provide an explanation of the nature of the information and the basis for its denial. In light of the AG's broad interpretation, businesses that develop inferences internally may need to adjust their procedures for responding to consumer requests to include such inferences.

FDIC – Consumer Compliance Supervisory Highlights

The FDIC issued its Consumer Compliance Supervisory Highlights on March 31, 2022. These Supervisory Highlights are informative for financial institutions of all charter types as to what regulators may be concerned about incoming exams. The most frequently cited violations identified by the FDIC were violations under TILA, FDPA, EFTA, TISA, and RESPA. Importantly, the FDIC noted that "consumer account disclosures cannot limit the protections provided for in the regulation," which further confirms that financial institutions must be fully aware and adept at applying the liability protections offered under the EFTA (among other rules).

The Supervisory Highlights also discussed automated overdraft programs and re-presentment of unpaid transactions and the importance of having clear consumer disclosures to allow the consumer to make informed decisions regarding these services. The FDIC noted that the failure to properly disclose the charging of multiple NSF fees for the same transaction upon re-presentment resulted in a heightened risk of violations. Lastly, and among others, the FDIC provided helpful fair lending review insights.

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Cal/OSHA ETS: Round 3

On April 21, 2022, Cal/OSHA approved the third readoption of the COVID-19 Emergency Temporary Standard (ETS). The current version of the ETS expires on May 5, 2022, with the third readoption set to take effect on May 6, 2022, through December 31, 2022. The third readoption of the Cal/OSHA ETS makes, in part, the following non-exhaustive changes:

1. Regarding COVID-19 testing for an employee to return to work, Cal/OSHA eases the requirements to permit a self-administered test only if another means of independent verification of the results can be provided (e.g., a time-stamped photograph of the results).
2. Revised the definition of "face-covering" to remove the requirement that fabric face-coverings must not let light pass through when held up to a light source.
3. Removed required cleaning and disinfecting procedures.

While California has eased COVID-19 requirements, California employers are still required to comply with the ETS. Cal/OSHA indicated that updated FAQs would be available soon.

California's Biometric Information Privacy Act

Under SB 1189, California is considering additions to the CPRA that will require businesses to provide added protections for a person's biometric information. The definition of biometric information includes, in part, fingerprints, faceprints, and retina images. If enacted, SB 1189 will require businesses to: (1) establish a schedule for the retention and permanent destruction of biometric information; and (2) make the schedule publicly available. SB 1189 will restrict the collection of biometric information without the subject's request or authorization unless required for a valid business purpose. Further, before collecting the biometric information, businesses will be required to inform the subject, in writing, of what biometric information is being collected, stored, or used, the purpose, and the length of time for its use.

SB 1189 is similar to the Illinois Biometric Information Privacy Act of 2008. SB 1189, like the Illinois law, includes a private right of action for consumers. In Illinois, courts have seen hundreds of private and class action lawsuits against companies out of compliance, including a technical violation by Six Flags resulting in a $36 million dollar settlement. If passed, SB 1189 will go into effect on September 1, 2023.

Consolidated Appropriations Act

President Biden recently signed the 2022 Consolidated Appropriations Act containing the Cyber Incident Reporting for Critical Infrastructure Act of 2022 (the Act). The Act requires covered entities to report cybersecurity incidents within 72 hours, and ransomware payments within 24 hours to CISA.

Reporting requirements to CISA for a cyber incident must, at a minimum, describe the affected systems, the unauthorized access, the impact on operations, and the estimated date range of the incident. Entities might also be required to provide a description of the vulnerabilities exploited, the defenses in place, the information that may have been accessed by the unauthorized person, and general contact information. For ransomware attacks, CISA may also require information about actors believed to be responsible.

The reporting requirements of the Act will not go into effect until the final rules are promulgated by CISA. Presently, the law directs CISA, with other federal agencies, to publish proposed rulemaking within 24 months of the Act's enactment date.

Ninth Circuit Ruling on Online Arbitration Agreements

The Ninth Circuit recently affirmed a district court's decision denying a motion to compel arbitration for TCPA violations where the defendants' website did not conspicuously notify users of its online terms and conditions.

The websites in question contained a notice in fine print stating, "I understand and agree to the Terms & Conditions, which includes mandatory arbitration." The underlined phrases "Terms & Conditions" and "Privacy Policy" were hyperlinks, but they appeared in the same gray font as the rest of the sentence. The district court denied the defendants' motion to compel arbitration, concluding that the webpages did not conspicuously indicate to users that they were agreeing to the terms and conditions by clicking on the 'continue' button.

On appeal, the Ninth Circuit agreed with the district court, finding that the website did not contain a reasonably conspicuous notice of its terms and conditions and that such notice must be expressly displayed in a font size and format where it can be deemed that a reasonable Internet visitor saw it and was aware of it. The Ninth Circuit also held that, while it is permissible to disclose terms and conditions through a hyperlink, the hyperlink must be readily apparent. This emphasizes that workflows for entering into disclosures and agreements are a key part of compliance.

Impending Further Changes at California DFPI

The sudden retirement of Portfolio Manager Les Thompson in December left a number of California credit unions without a relationship with their examination team. Now, it appears that another long-time employee, Portfolio Manager Marie "Carol" Paredes is planning her retirement. Credit unions should look for changes on the DFPI website, as well as make sure to reach out and form relationships with their portfolio managers this summer. Such relationships help ease applications, as well as smooth examination issues.

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