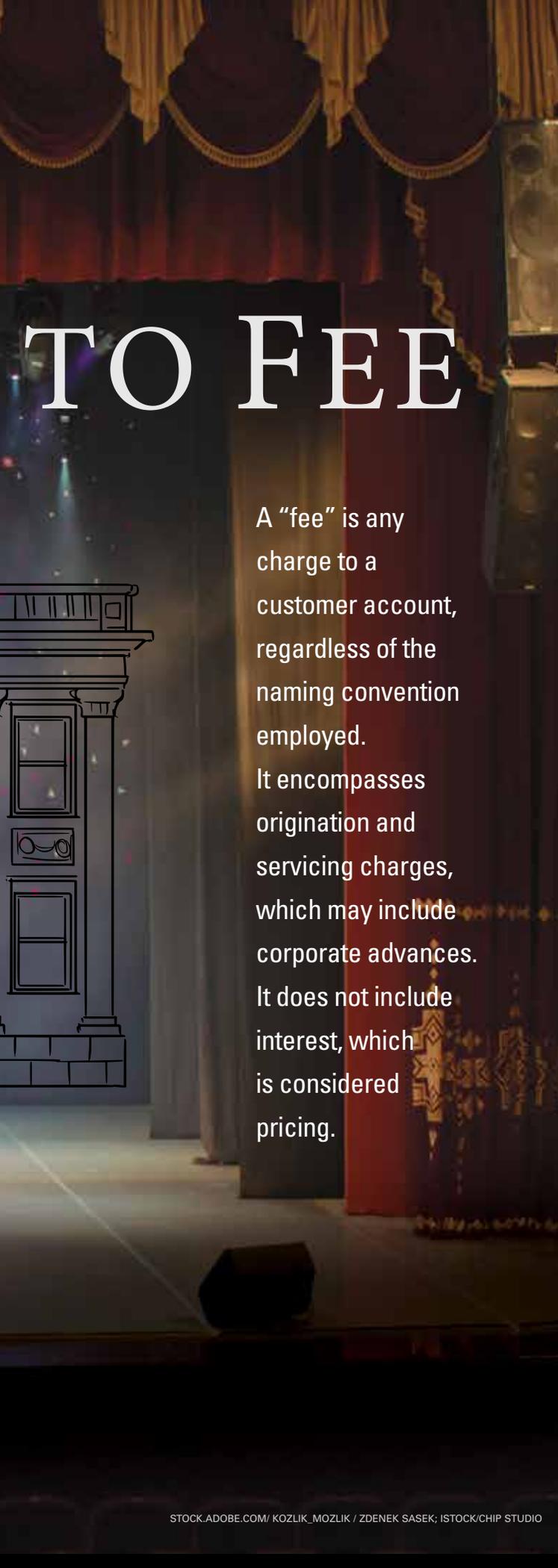


# TO FEE, OR NOT





# TO FEE

A “fee” is any charge to a customer account, regardless of the naming convention employed.

It encompasses origination and servicing charges, which may include corporate advances.

It does not include interest, which is considered pricing.

BY MEG SCZYRBA, CRCM

**T**O FEE, OR NOTTO FEE, that is the question many banks are asking themselves these days. Regular headlines tout institutions committing to remove or reduce various fees, particularly in the overdraft space. Regulators have also made the news by encouraging banks to continue the trend, implying that reputation risk may be at stake. The bureau has been particularly vocal in this arena, even requesting consumer feedback on which fees they found the most troublesome. [See the bureau’s Request for Information (RFI) Regarding Fees Imposed by Providers of Consumer Financial Products or Services here: [files.consumerfinance.gov/f/documents/cfpb\\_fees-imposed-by-providers-of-consumer-financial-products-services\\_rfi\\_2022-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_fees-imposed-by-providers-of-consumer-financial-products-services_rfi_2022-01.pdf). The CFPB has voiced the loudest concerns about overdraft fees ([www.consumerfinance.gov/about-us/blog/measuring-the-impact-of-financial-institution-overdraft-programs-on-consumers/](https://www.consumerfinance.gov/about-us/blog/measuring-the-impact-of-financial-institution-overdraft-programs-on-consumers/)) and credit card late fees ([www.consumerfinance.gov/about-us/newsroom/cfpb-initiates-review-of-credit-card-company-penalty-policies-costing-consumers-12-billion-each-year/](https://www.consumerfinance.gov/about-us/newsroom/cfpb-initiates-review-of-credit-card-company-penalty-policies-costing-consumers-12-billion-each-year/)). Industry trade groups and other spokespeople have rebutted some of these points, noting that banks operate in a highly competitive environment with tightly regulated disclosure requirements, which leaves little room for problems. For example, see the article, *The CFPB: A regulator gone rogue* in *American Banker* ([www.americanbanker.com/opinion/the-cfpb-a-regulator-gone-rogue?](https://www.americanbanker.com/opinion/the-cfpb-a-regulator-gone-rogue?)).

While the banking industry now grapples with the future of fees, compliance professionals have long understood that fee management is a key component in a solid Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) governance program. After all, our main goal is to allow customers to make an informed decision about products and services, and cost is a major factor they will want to consider. But with the current intense scrutiny on fees, compliance officers—from megabanks to community banks serving small hamlets—may want to consider formalizing their fee management governance structure. It may help prevent any future “woe is me” Shakespearian-level dramas.

### Though This Be Madness, There is a Method

At first, it may strike you that there is much ado about fees. But a comprehensive fee management program is the method that can stop the madness. This performance should play out in two acts, addressing both new /modified fees and ongoing fees.

To set the stage, fee management programs should define what it terms a “fee”. Compliance professionals should consider using the broadest definition possible, such as:

*A “fee” is any charge to a customer account, regardless of the naming convention employed. It encompasses origination and servicing charges, which may include corporate advances. It does not include interest, which is considered pricing.*

With everything in place, it’s time to raise the curtain to view the specific program elements that should be included.

### Act I: New or Modified Fees

The first act of a fee management program has likely been playing out for some time but may need to be formalized. Most banks have established protocols for reviewing new or modified products and services. And happily, these days Compliance typically has a seat at the table. During this review, compliance professionals should consider setting UDAAP standards for disclosures, reasonableness, discretionary practices, and fair banking.

#### Disclosures

Regulations Z and DD spell out expected disclosures for loans and deposits. Above and beyond that, UDAAP requires all product and service fees should be clearly disclosed to customers prior to consummation, including:

- The name and amount of the fee,
- When it will be charged, and
- Any actions a customer can take to avoid the fee.

Regulators have issued multiple UDAAP consent orders to companies for not providing this clear, upfront information that sets the stage for informed decision-making. For any new/modified products under review, you’ll want to ensure there is a process in place to provide the disclosures to the customer before they sign on the dotted line. You’ll also want to review the disclosures for clarity, particularly related to the key components bulleted above.

In addition, if the fee will be charged during product or service maintenance, it should be clearly labeled and disclosed in account statements. This can save the bank from future UDAAP tragedies such as situations where customers may not have understood what

they were being charged for. (Think about UDAAP’s “deceptive” and Regulation E implications on the deposit side which require customers to notify the bank within 60 days of an electronic fund transfer error on their periodic statement. If a charge is not clearly labeled, the bank may not be able to hold the customer to this general liability limiting rule.) If the fee has been modified, banks need to send a change in terms disclosure that should clearly state the amount of the new fee and any other adjustments taking place.

Because Compliance often establishes monitoring to ensure primary controls are working, it is a good idea to set up reporting to capture new fees as they are logged in the new product/services platform. This a great way to ensure you’re reviewing all new fees. And if one has slipped by, this process allows Compliance to delve into the problem so they can prevent any recurrences.

#### Reasonableness Review

UDAAP guidance tells us that fees should be reasonable, which can encompass several factors. First and foremost, compliance professionals must ensure that customers will never be in the position of paying for a benefit that has not yet begun or could cease to exist. For example, banks selling an add-on product that requires customer action to initiate should ensure that no fees will accrue until the customer has taken their required steps and is in fact receiving the service. Multiple consent orders have called out this requirement.

In addition, the amount of the fee should generally be in line with the expected value or benefit of the product or service as well as similar fees for similar products. The most obvious place to perform this check is when the fee is first introduced or modified. (Note that “value” may include intangibles such as being able to make a substantial purchase or knowing that funds are safe.) The business should also confirm that the fee is set in general proximity to industry norms. (If your bank’s fee is significantly higher, it should be a red flag that something may be rotten in the state of Denmark.) Compliance may also want to verify that the cost is in reasonable relation to the bank’s expenses. When making this determination, compliance professionals should account for back office work, hard costs such as postage and any risks, such as the risk of defaulted accounts.

All fees should also be state law-compliant. (Legal may need to weigh in on the state laws.) Finally, compliance professionals should ensure that no fee creates a barrier to obtaining account information or restricts the customer’s ability to utilize account funds. For example, customers should be able to access account balances for free in at least one universal channel such as mobile or online banking. Fees for making payments are also frowned upon by regulators.

#### Discretion

If bank employees will have any discretion as to whether the fee is charged or waived after it is assessed, the business line must develop procedures describing acceptable circumstances. This is important for both UDAAP compliance as well as fair lending. In addition, the procedures should establish limits on allowable discretion such as defining acceptable reasons for the waiver and aggregate caps for the percent of fees that may be waived in a given

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time period such as monthly. There should also be controls such as required approvals or documentation. Finally, the business line must ensure appropriate monitoring and reporting are in place to confirm that the procedures are followed.

### **Fair Banking**

Because the bureau has announced that it views the unfair arm of UDAAP as prohibiting “discrimination,” compliance professionals may want to consider whether the new fee could potentially be charged more frequently to a protected class. In cases where this unfair disparate impact appears possible, Compliance will want to address it proactively. For example, they should discuss alternatives with the business or whether the practice has “countervailing benefits to consumers and/or competition.” In an abundance of caution, compliance professionals may want to document why the change is necessary and had no presumably less discriminatory alternatives.

## **Act II. Ongoing Fees**

With the curtain closed on ensuring that fees are set up appropriately, it is time to move to the next act you should take. Compliance professionals will also need to incorporate plans for ongoing fees into their fee management program. At minimum, this will need to address how the fee is being charged and whether the fee continues to be reasonable.

### **Accurate changes**

One key element of UDAAP is ensuring that bank systems actually charge fees in the same amount as they were disclosed. The best way to do this is to perform periodic quality assurance testing on fees to ensure continuing accuracy. Assuming the bank has not received any customer complaints and previous monitoring proved the fee had been accurately charged, the sample size can be relatively small. Compliance professionals just need to ensure that no system tweak inadvertently caused a problem downstream. Monitoring should also include reviewing a small selection of periodic statements to ensure the charge is accurately labeled and reflected.

## **The Big Finale: Ongoing Reasonableness Review**

To close out the show, compliance professionals should regularly review higher risk fees to determine if they remain reasonable—or if any present an unusually high level of risk to the bank. The Fee Management program should define how often this should occur. For example, during periods with rapidly changing regulatory expectations (like we’re in right now), compliance professionals may want to review fees annually. Or, if not much is changing in the fee environment, perhaps every other year is more reasonable.

If the businesses under the compliance officer’s purview charge limited fees, it is likely judicious to review all fees to ensure reasonableness. However, where numerous fees exist, it may not be realistic to analyze each potential fee. In such cases, compliance professionals should take a risk-based approach to which fees they will review by focusing on fees that present a higher level of risk. For example, the program may want to segment out the types of fees the bureau called out in its RFI:

- Potentially higher risk fees such as those the regulators have specifically called out as theoretically problematic;
- Potentially excessive fees; and
- Potentially hidden fees.

For each higher risk fee type reviewed, compliance professionals will want to document relevant information about the fee and perform an assessment of the level of risk each presents to the bank. Let’s explore what each category might include.

### **Potentially High Risk Fees**

Compliance should note any fees specifically called out by regulators as potentially problematic. At the present, one current source is the bureau’s RFI, which includes a laundry list of fees by product type. See the sidebar for a listing of these fees. Compliance can also add any fee to this list that is of potential concern for any reason. For example, fees that often are the subject of consumer complaints or could be viewed as unfair under the new bureau definition that now includes discrimination. For the latter, the

In the CFPB’s recent RFI, it listed many fees that could be of particular concern. See list below. Note that bolded items received additional attention within that document.

<b>CFPB RFI Fees</b>		
<b>Product</b>	<b>CFPB Concern</b>	<b>Noted Fees</b>
<b>General</b>	Examples of penalty fees that may apply to multiple products	Fees for paper statements Account closure Fees to investigate fraud
<b>Deposits</b>	Back-end fees make up significant bank revenue but do not allow for competition	Overdraft NSF Account Maintenance Minimum Balance Savings transfer ATM ATM—out of network Other back end fees
<b>Payments</b>	“Convenience fees” are common but may be considered UDAAP	Payment transfers Returned item Stop payment Check image Online / Telephone bill pay ACH transfers Wire transfers International transfers
<b>Credit Cards</b>	Back end fees make up significant bank revenue but do not allow for competition; nearly all banks charge the same (safe harbor) amount	Late fees Card replacement Other back end fees
<b>Prepaid Accounts</b>	Disclosure—Fee structure makes it difficult for customers to determine true price	Transaction Fees Cash Reload Balance inquiry Inactivity Monthly service Card cancellation fee
<b>Mortgage Origination</b>	Disclosure and Amount—Expensive application fees and closing costs can be a barrier to homeownership and may strip equity	Title insurance Other closing costs
<b>Mortgage servicing</b>	Fees to make a payment may be unfair	Pay by phone / online Use of bill pay service
	Mortgage delinquency fees may be excessive for those struggling to make payments	Monthly property inspections New title fees Legal fees Appraisals and valuations Broker price opinions Force placed insurance Foreclosure Unspecified “corporate advances”
<b>Other Loans</b>	Broad category for loan origination and servicing for student loans, auto loans, installment loans, etc.	Payment date changes Make online payments Expedited loan proceeds



compliance professional should consider fees that are potentially being charged more to protected classes.

However it is derived, Compliance will want to capture consistent information for each fee it determines to be potentially high risk. For example:

- Whether the bank charges the fee;
- Fee data such as the amount of the fee and when it is charged;
- Disclosure information, especially where and when the fee is disclosed;
- Any other information that could assist with determining the level of risk the fee presents such as:
  - How often the fee may be charged;
  - Whether the fee is in line with industry peers;
  - How much revenue the fee generates;
  - If there is a likelihood that the fee may be charged more often to a protected class segment;
  - Whether the fee is dictated by state or federal law or
  - Whether it is strictly a pass through fee.

Once this pertinent information is captured, compliance professionals should risk rate each fee. Rating rationales should be fully documented. To promote consistency, it may be helpful to design general rating rules. The rules can be hard and fast or provide a starting point from which the risk can be reduced or increased based on the aggregate risk factors presented. For example:

Situation	Risk Rating
Bank does not charge the fee	No Risk
Fee is a pass through fee with no upcharge	Low Risk
Fee is required to be disclosed in the initial Truth in Lending Act or Truth in Savings Act disclosures or the Loan Estimate *	Moderate Risk
Fee is a small amount and logically connected to the bank's costs	Moderate Risk
Regulators have been particularly vocal about the fee (e.g., overdrafts or credit card late fees) *	High Risk

\* Risk rating should start here but can be adjusted up or down one level based on other risk factors listed.

### Potentially Excessive Fees

Another category of fees compliance professionals will want to explore are those that could be considered potentially excessive by either regulators or customers. There are several ways to gather this kind of data:

- Regulator Vantage: Exam manuals direct regulators to consider fees that drive high revenues, so we can glean their perspective by collecting a list of the top revenue-generating fees.
- Customer Perception: Customer complaints also inform regulator activity so compliance professionals will want to create their own list by searching customer complaints for fee references and then segregating those that reference the amount of the fee as the concern.

For each fee on this aggregated list of potentially excessive fees, compliance professionals should gather pertinent data so they can better understand the risks presented. This list may be somewhat different than what was collected for potentially higher risk fees. For example, the:

- Business line's stated purpose for the fee;
- Fee data such as the amount of the fee and when it is charged;
- Approximate bank costs for providing the service or processing the transaction;
- Perceived customer benefits;
- Disclosure information, especially where and when the fee is disclosed
- Any other pertinent risk factors such as:
  - The percent of customers that are annually charged the fee and the average number of annual fee charges this group accrues;
  - Whether the fee is in line with industry peers;
  - Whether the fee or service is optional; or
  - Whether the fee is waived for certain customers.

Once this information is captured, Compliance will again want to risk rate each fee to sift out those that present the highest risk. Rating rules for this category might look like this:

Situation	Risk Rating
Fee is a pass through fee with no upcharge	Low Risk
Bank costs are equal to or greater than the fee	Low Risk
Fee is dictated by state or federal law or within a protected safe harbor	Low Risk
Penalty fees must be rated at least Moderate	Moderate Risk
Penalty fees with no cap	High Risk

### Potentially Hidden Fees

A final category of fees that compliance professionals should consider in their ongoing reasonableness review is potentially hidden fees. UDAAP consent orders often bring such problems to light, exposing situations where customers are charged a fee that

was not previously disclosed. Although you may already feel the customers doth protest too much, methinks your best source for potentially hidden fees is again—customer complaints. Compliance professionals can refer back to the list of customer complaints on fees that were extracted to create the list of potentially excessive fees, but this time segregate those where the customers:

1. Referenced fees that were not expected; or
2. Indicated the item was thought to be covered by the base price of the product; or
3. Were otherwise unclear about why they were charged.

For each fee on the Potentially Hidden Fee list, Compliance will want to research and document data to facilitate a risk rating such as:

- Fee data, such as the amount of the fee and when it is charged;
- Disclosure information, especially where and when the fee is disclosed in time proximity to when it is charged;
- Any other pertinent risk factors such as:
  - How frequently customers complain about the fee;
  - If the level of complaints is consistent or could be a one-off situation; and
  - How often the fee may be charged.

Once this information is captured, compliance should risk rate each fee to determine which present the highest risk with rules like the following:

Situation	Risk Rating
Fee is disclosed prominently	Low Risk
Fee is disclosed in close proximity to the date the customer is charged	Low Risk
Fee is required to be disclosed in the initial TILA or TISA disclosures or the Loan Estimate starts at Moderate Risk	Moderate Risk

**Reasonableness Risk Assessment Conclusions**

Once Compliance has completed its individual fee reviews, it will want to compile the list of all those that presented the highest levels of risk. For example, all fees that were rated either High or Very High Risk should be gathered into a single location for

disposition. For each such fee, Compliance will want to provide information that will be relevant to senior leaders, such as:

- The amount of the fee;
- What category(s) triggered its review;
- The most current fiscal year revenue;
- Why the regulators care about this fee; and
- The rationale for its high risk rating spelled out in plain English.

It is appropriate at this point to re-evaluate the fees on the list to determine if each merits the very high or high risk rating or if any should be adjusted. For example, any fee on the list that stands out as less risky than most of the other fees should be reconsidered and potentially removed from the list. After all, by the time the review is entering its final stages, Compliance will be much more closely attuned to the level of risk presented.

Once the list is finalized, Compliance should present their findings to the bank’s senior management for disposition. Given the prominence of the ongoing public dialogue on fees, most industry executives are likely aware of the increased level of risk. However, it would be prudent to provide highlights of the regulatory environment to ensure leaders are making an informed decision about whether the fee should be eliminated, modified or further monitored.

**Good Night, Sweet UDAAP**

As the final curtain falls, it is time to put any UDAAP concerns to rest. Establishing your Fee Management program will allow you to play the starring role within your bank at this critical juncture, thus preventing a Shakespearian tragedy from playing out. And to thine own bank be true—ultimately we can each help our own institution determine whether to fee or not to fee. And given how heavily scrutinized this area is right now, you may even earn yourself a standing ovation for your performance.

**ABOUT THE AUTHOR**

**MEG SCZYRBA, CRCM**, has been involved in the compliance industry for over 25 years and currently chairs the ABA Bank Compliance magazine’s Editorial Advisory Board. She formerly chaired the ABA Compliance School and CRCM Advisory Boards and participated as a member of the Compliance Executive Committee. Meg has published numerous articles in ABA Bank Compliance on topics ranging from Reg AA /UDAAP to Reg O, and she authored the Training Room and What’s New with U(DAAP) columns. She also won the 2022 APEX Grand Award for her article, The Increasingly Hot Topic of Climate Change.

Meg is a frequent speaker at industry compliance conferences and schools and was honored as ABA’s 2011 Distinguished Service Award recipient. She graduated from the University of Missouri—Columbia with degrees in Psychology and Law. In her “spare time,” Meg is working toward a Masters degree in Conservation Biology and has founded Wildlife at Heart, a non-profit aimed at helping endangered species. She can be reached at [megalodon13@gmail.com](mailto:megalodon13@gmail.com).

*Any opinions expressed in this article are the author’s own and do not reflect the view of her employer.*

**ABA MEMBER RESOURCES**

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**Overdraft Banking Topic Page**  
[aba.com/banking-topics/consumer-banking/overdraft-protection](https://aba.com/banking-topics/consumer-banking/overdraft-protection)

**Recorded Webinar: Increased Regulatory Scrutiny of Overdraft—How Banks Can Respond**  
[aba.com/training-events/online-training/increased-regulatory-scrutiny-of-overdraft](https://aba.com/training-events/online-training/increased-regulatory-scrutiny-of-overdraft)