French Hill
2nd District, Arkansas

Committee on Financial Services

Ranking Member
Subcommittee on Housing,
Community Development and Insurance

Subcommittee on Investor Protection,
Entrepreneurship, and Capital
Markets

Subcommittee on National Security,
International Development and
Monetary Policy

CARES Act Congressional Oversight Commission
Commissioner

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November 16, 2022

The Honorable Martin Gruenberg
Director and Acting Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Dear Director Gruenberg:

I am writing to express concern with the Federal Deposit Insurance Corporation's (FDIC) supervisory practices with respect to banks that impose multiple nonsufficient funds (NSF) fees when a check or Automated Clearing House (ACH) transaction is represented for payment against insufficient funds in an account.

For background, when a merchant submits a check or ACH transaction initiated by a customer and the customer's account does not have sufficient funds to cover the payment, the bank may return the item to the merchant and charge an NSF fee. The fee covers the cost to process the return and serves as a penalty to encourage responsible deposit account management. Frequently, the merchant will resubmit the transaction to the bank with the expectation that the customer will have money in his account so that the transaction will be paid. If the account balance remains insufficient to pay the transaction, the bank may return it a second time and charge another NSF fee. The bank has no control over whether, or when, the merchant resubmits the transaction. And most banks cannot identify these transactions as resubmissions because of inadequacies in the technology provided by third-party core service providers.

A bank's decision to return a transaction when the customer has insufficient funds in his account, and to charge a fee, is legal. I am unaware of previous FDIC criticism of the practice of charging an NSF fee for represented transactions. However, in or around 2021, examiners—without warning—began scrutinizing account disclosures to determine whether they adequately (in the judgement of the examiner/agency) informed consumers that they could be charged multiple NSF fees for represented transactions. If not, banks have been cited for a "deceptive" act or practice under section 5 of the Federal Trade Commission Act (FTC Act). Moreover, in an August 18, 2022 Financial Institution Letter (FIL), the FDIC directed banks to "self-identif[y]" allegedly flawed customer agreements and to provide restitution to impacted customers.[1]

[1] Fed. Deposit Ins. Corp., Supervisory Guidance on Multiple Re-Presentment NSF Fees 3 (2022), https://www.fdic.gov/news/financial-institution-letters/2022/fil22040a.pdf.

The FIL and the FDIC's March 2022 Consumer Compliance Supervisory Highlights[2] suggest that the practice could also be "unfair" if multiple NSF fees are assessed "in a short period of time without sufficient notice or opportunity for customers to bring their account to a positive balance" before the second or subsequent NSF fee is assessed.[3] I am particularly concerned with the FDIC's conclusion that charging multiple NSF fees for represented transactions is unfair under the FTC Act, which requires a finding that the act or practice "is not reasonably avoidable by consumers."[4] Customers have ample opportunities to avoid multiple NSF fees. Banks notify their customers whenever an NSF fee is assessed and give customers multiple options to check account balances through online banking and text alerts, so customers can replenish their accounts and avoid receiving multiple NSF fees. I urge the FDIC to reconsider its conclusion that financial institutions are committing an unfair act by charging multiple NSF fees for represented transactions.

I also have heard from banks in my district that dispute the FDIC's conclusion that the bank's disclosure regarding NSF fees was "deceptive" under section 5 of the FTC Act. These banks reported to me that they are subject to regular examination, and examiners never raised concern with these disclosures in the past. **In essence, the FDIC is establishing new disclosure standards for NSF fees without warning and without rulemaking.**

When the FDIC cites a bank for unfairness or deception, it has significant adverse consequences for the bank and its customers. A violation can result in the downgrade of the bank's Community Reinvestment Act (CRA) rating, which can result in limitations on mergers and acquisitions and reputational damage. A UDAP violation also invites class action litigation against the bank, which increases the bank's costs and distracts the bank from its core duty to serve its customers. The FDIC should reserve UDAP findings for clear violations of previously announced rules. Further, pursuing this effort by the FDIC also ignores the technological challenge faced by many banks.

I ask that you answer the following questions by November 30, 2022:

1. How is charging multiple NSF fees for represented transactions not "reasonably avoidable by consumers" (a standard that must be met for an "unfairness" UDAP finding)? As I described above, banks notify their customers whenever an NSF fee is assessed and give customers multiple options to check account balances through online banking and text alerts, so customers can replenish their accounts and avoid receiving multiple NSF fees.

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[2] *Id.*, Consumer Compliance Supervisory Highlights 8-9 (2022), https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2022.pdf.
[3] Fed. Deposit Ins. Corp., Supervisory Guidance on Multiple Re-Presentment NSF Fees, *supra* note 1, at 2.
[4] 15 U.S.C. § 45(n).

2. Does the agency intend to initiate rulemaking to establish new disclosure standards for NSF fees? As I stated above, through its conclusion that certain bank disclosures regarding NSF fees are "deceptive," the FDIC has implicitly established new disclosure standards for NSF fees without warning and without rulemaking.

Thank you for your attention to this matter.

Sincerely,

French Hill
Ranking Member on the
Subcommittee on Housing,
Community Development,
and Insurance