You Don't Know What You Got 'Till It's Gone (...*And Your Customers Might Not Either*): FDIC Rescinds Guidance on Multiple Re-Presentment NSF Fees

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There has been a clear pattern lately of regulatory pullbacks that banks may be tempted to welcome as a return of discretion, flexibility – heck, maybe even *freedom*. Less guidance, less second-guessing, less pressure on practices that had come under increasing scrutiny. But there is, of course, an important distinction to make – flexibility and certainty aren't the same thing. When an agency rescinds a meaningful consumer-protection position without replacing it with a clear framework, banks might not actually get a safer runway – in fact, they arguably get a murkier one. And in an area like repeated NSF fees, where the unfairness and deception concerns never really went away (rather, in a sense, they're just constantly being reframed and passed around like a game of hot potato), that should be less reassuring than it may first appear, especially given how easily the regulatory pendulum could swing back and recast the same conduct as unfair all along.

Which brings us to the latest example. The FDIC has now done exactly what many expected from this leadership team, and has rescinded FIL-32-2023, the agency's 2023 guidance on multiple re-presentment NSF fees, effective immediately. In the rescission, the agency says the prior guidance was "overly broad in scope" and created uncertainty about when disclosures regarding re-presentments might still give rise to "unfairness" concerns under Section 5 of the FTC Act. In its place, the FDIC offers a far thinner admonition: institutions should ensure their disclosures accurately reflect their practices and comply with current law—essentially, the regulatory equivalent of removing the highway guardrails and then posting a sign that says, "*Drive Safely.*"

Again, banks (and industry advocates) can't be blamed for seeing this as a positive, tidy deregulatory move. One less piece of guidance to worry about, less supervisory friction, more room to lean on disclosure, and less danger that a clearly described practice will still be second-guessed as unfair. It also speaks to a longstanding objection - that banks may be the ones charging the fee, but they are not necessarily the ones deciding whether and when a declined payment is run through again (fair being fair, that is often up to the merchant or payee, which we'll touch in in just a moment).

But there's also simply no denying that this is a retreat. The underlying practice here is not hard to understand - a consumer attempts a payment, the bank declines it for insufficient funds, the merchant or payee submits the same item again, and the consumer may be charged another NSF fee on the same failed transaction. The FDIC's earlier guidance had warned that this practice presented heightened risk under Section 5, including not only deception concerns tied to disclosures, but also potential unfairness concerns, *even where disclosures existed*. The agency has now stepped

back from that position - not because repeated fee stacking has been shown to be harmless, but because the FDIC has decided the guidance itself went “too far.”

Starting to see the problem? A major issue with multiple re-presentment NSF fees was never just that banks might describe them poorly. It was that *consumers* often have very little practical control over whether the same item gets run again and, with it, whether another fee gets triggered. The Federal Reserve’s Consumer Compliance Outlook laid that logic out plainly in 2023: once a bank declines the transaction, the merchant controls the number and timing of representment, but the bank still decides whether to pay or decline the represented transaction, and whether to assess another NSF fee on it. Merchant control doesn’t make the problem go away; in fact, you *could* argue that it helps explain why consumers often cannot reasonably avoid the harm, while the bank still retains control over whether to convert that re-presentment into yet another charge. What’s worse is that the problem doesn’t disappear merely because an agency decides the old guidance was too broad.

That might be what makes the rescission feel so conspicuously one-directional. Here, the FDIC isn’t withdrawing a stale procedural memo or cleaning up some obscure, obsolete footnote. It is backing away from guidance aimed at a fee practice that had drawn sustained criticism precisely because of the way it can stack charges onto the same failed transaction. And it is doing so without replacing that guidance with anything remotely comparable. Instead, what remains is little more than a generic, broad reminder.

State regulators, meanwhile, are hardly all moving in the same direction. In January 2025, New York’s Governor and the Department of Financial Services announced proposed regulations aimed at what they described as exploitative overdraft and NSF practices. Among the proposed restrictions was a prohibition on charging multiple NSF or overdraft fees for the same transaction, including when a merchant resubmits a declined item. Now, this author isn’t naïve enough to think that New York speaks for every state – but NY’s premise here was fairly universal, and that premise wasn’t that the problem could be solved by polishing disclosures. It was that repeat-fee structures like these can themselves be abusive and harmful, particularly to vulnerable consumers, and that banks were expected to respond not just with clearer words, but with actual limits on fee practices and more timely notice to consumers.

So, yes – right now, the FDIC is framing this as a course correction against supervisory overbreadth and uncertainty. You could argue that this is also something else: a conscious decision to stop pressing on a fee practice that has been widely criticized as problematic precisely because disclosure alone may not cure the harm. After all, when the same failed transaction can generate fee after fee after fee, the question is not merely whether the account agreement was artfully drafted. It is whether the system is designed to keep charging for the same miss until the miss becomes profitable.

Many will treat this as a “pro-bank move,” and a deregulatory sigh of relief. But I’ll caution again – like so many similar federal actions of late, those same folks may want to be careful not to mistake the removal of guidance for the removal of risk. Multiple re-presentment NSF fees still live squarely in UDAAP territory, because the core criticisms of the practice have not changed: the harm can be substantial, the consumer often cannot reasonably avoid it, and disclosure alone may not solve either problem. What has changed is that the FDIC has chosen to step back without putting anything meaningful in its place, leaving institutions with more discretion, less certainty, and a cloudier supervisory line to navigate on their own. And when the regulatory pendulum swings back — as it always does — “*flexibility*” might look a lot like “*ambiguity deferred*.”