1100 Walnut St.
Suite 2100
Kansas City, MO
64106

# Fees Associated with Extended Overdrafts

Numerous changes have occurred since the issuance of the FFIEC's 2005 Guidance on overdraft programs. The FDIC has issued multiple types of guidance, and Regulations E and DD have been amended to require additional disclosures related to overdraft services. As a result of these changes and in a desire to preserve noninterest income, bank products and services have changed. Compliance Examiners are seeing a number of institutions adopt or increase continuous (or extended) overdraft or negative balance fees. These fees are sometimes charged every day the account is overdrawn or once every few days the account stays overdrawn depending on how the program is set up.

In some circumstances, banks have been cited for violations of Section 5 of the Federal Trade Commission Act (Section 5), which prohibits unfair or deceptive acts or practices (UDAP). A bank's disclosures and practices relating to continuous overdraft fees may give rise to Section 5 violations. Bankers are encouraged to review the information provided to consumers concerning overdraft services, particularly any extended overdraft and negative balance fees, and conduct transactional testing to ensure that the bank is charging these fees as disclosed from a reasonable consumer's perspective.

Banks should also review how these fees are assessed. If the bank assesses a fee based on calendar days, but a customer can only cure the overdraft on business days, this could be problematic if the bank's disclosures indicate that the consumer has a certain number of days to cure his or her overdraft before a fee will be assessed. For example, if a bank charges a continuous overdraft fee after three days, and an overdraft occurs on Thursday, the third calendar day "after" the overdraft is Sunday. Because Sunday is likely a non-processing day, if the bank charges the fee the prior Friday, this will provide the consumer only one day to cure the overdraft, not three. Such practices have been cited as unfair, in violation of Section 5. In order to avoid such issues, banks should review how these types of fees are assessed in light of the claims made in the bank's disclosures.

Bankers should not only focus on the required disclosures under Regulations E and DD but ask the question, "As a customer, would I know enough about how the fee is assessed to prevent myself from incurring it, should I accidentally overdraw my account?"

When reviewing bank products and transactions, consider the following:

- Does the system use business or calendar days when calculating when a fee will be assessed, and is this distinction clearly disclosed to consumers? Are all relevant disclosures consistent through all communication methods? Is the number of days to cure the overdraft disclosed correctly? Where disclosures provide that fees may be charged "after" a certain number of days, does the system ensure that these fees will not be charged on or before the indicated day?
- If the fee is assessed on calendar days, how does the institution handle continuous overdraft situations that occur over a weekend or holiday period (e.g., where the final day of the "cure" period falls on a non-business day)? Does the bank have a policy addressing how weekend deposits are applied? Are fees assessed on days when the customer is not able to cure the overdraft? Are consumers clearly informed of the bank's policies regarding continuous overdraft and negative balance fees and how these fees are applied?
- Is the fee assessed *before* the decision to pay or return an item? If so, and the subsequent decision is to return the item, then no overdraft has occurred. Without an overdraft, it is improper to charge an overdraft fee.
- After a system conversion, upgrade, or other change, bank officials should consider testing to see that fees are being assessed as intended, consistent with the disclosures.
- Can the assessment of bank service charges or fees cause an extended negative balance fee to be assessed? If so, is the consumer told that other fees can lead to a negative balance, which can lead to additional fees?
- How much time is provided between when a notice of overdraft is provided to the consumer and when the continuous overdraft or negative balance fee is assessed? A best practice would be to give the customer a reasonable time to cure the overdraft prior to assessing any fee.
- How does the bank notify a customer that an overdraft has occurred? If text message, email notice, or other real time communications are available, a best practice would be to amend default messages to include when the continuous overdraft fee will be assessed.

If discrepancies are found between what the bank discloses and what fees are assessed, bank management should consider issuing new disclosures and making voluntary restitution to customers. A review of

depositor accounts for potential restitution should be conducted back to the date when customers were assessed fees in excess of what should have been charged. Correcting such issues, including making full restitution, will be considered by the FDIC in reviewing the bank's disclosures and practices.

## Director Resource Videos

The Technical Assistance Video Program is a series of educational videos designed to provide useful information to bank directors, officers and employees on areas of supervisory focus and regulatory changes.

This first installment of six videos is designed to provide new bank directors with information to prepare them for their important fiduciary role. Three of the videos address the roles and responsibilities of a director and the other three videos provide information about the FDIC's Risk Management and Compliance Examination processes.

A second series of videos, added on June 28, 2013, is a virtual version of the FDIC's Directors' College Program that regional offices deliver throughout the year. The initial training program consists of six modules with videos on interest rate risk, third-party risk, corporate governance, the Community Reinvestment Act, information technology and the Bank Secrecy Act.

http://www.fdic.gov/regulations/resources/director/

## Community Development: Finding Opportunity in Unexpected Places

*Meeting the needs of LMI populations in some communities seems easy – while other communities require creative thinking and innovative solutions.*

The purpose of this article is to stimulate you, the banker, to take a deeper dive into exploring and understanding efforts designed to meet the community credit and investment needs within reservation boundaries. More often than not, these efforts are unorthodox when it comes to encouraging the utilization of public/private partnerships that fuse resources among financial institutions, tribal governments, local community organizations, and city, state and federal agencies. However, when

thoughtful approaches combine with undeniable tenacity of organizations within the reservation boundaries, the opportunity arises to create sustainable, long-term revitalization.

Major challenges persist when it comes to attracting lending and investment on reservations. Local residents and organizations face seemingly impossible barriers regarding access to capital, adequate housing, infrastructure, a developed workforce and financial education. These impediments impose their will daily; however, credible organizations are ready to do the best they can with available resources.

One example comes in the form of a Native Community Development Financial Institution (NCDFI). NCDFIs are a crucial component/resource when reaching low- to-moderate income individuals and geographies. Through their various missions (e.g., housing, small business, products/services, financial education), NCDFIs continue to "punch the clock" in footprints that are unfamiliar and at times uncomfortable to many financial institutions. Using an intermediary, such as a NCDFI, to delve into those footprints that are unfamiliar and uncomfortable demonstrates an institution's willingness to meet the credit needs of the community. Institutional appetite for lending and community development investment on reservations may prove to be worthwhile and noticed through positive consideration during your CRA assessment.

We recognize that one organization does not have all the answers, but through the sharing of knowledge and resources, and creating meaningful collaborations, financial institutions, ultimately, could provide the keys to long-term stability in underserved communities.

The FDIC's Community Affairs staff work to bring financial institutions together with potential partners. Contact Community Affairs Officer Teresa Perez, 816-234-8151, tperez@fdic.gov, if you need assistance or have questions about reaching target populations in your assessment area.

For more information on CDFIs and the CDFI Fund, refer to the December 2013 issue of this newsletter. Look for Part II of this series, Finding Opportunity in Unexpected Places, in the next newsletter.

Kansas City Regional Office Compliance Management Team

Regional Director: James D. LaPierre

Deputy Regional Director: Todd L. Hendrickson

Assistant Regional Director: Marianne L. Hartman

Assistant Regional Director: Janet R. Kincaid

**March, 2014**