



As we are all aware, the FDIC originally issued supervisory guidance on multiple re-presentment NSF fees in August 2022, suggesting a two-year lookback and possible restitution. This month, the FDIC has issued a revision to this supervisory guidance.

What is the risk?

Banks commonly charge a non-sufficient funds (NSF) fee when a charge is presented for payment but cannot be covered by the balance in the account. In addition, Banks charge an additional NSF fee for the same transaction when a merchant re-presents an automated clearinghouse (ACH) payment or check on more than one occasion after the transaction was declined. These re-presentment practices, which cover both business and consumer accounts, have recently been highlighted in regulatory statements and lawsuits as violations of Section 5 of the FTC Act. The lawsuits allege that these re-presented transactions are a breach of contract due to the omission of key terms related to the assessment of representment fees.

What has changed?

If the FDIC recognizes a Bank's proactive actions to identify and correct violations, UDAAP violations will not generally be cited. However, the FDIC is considering a revised approach regarding restitution. The FDIC has generally recommended a two-year lookback period for restitution of NSF fees until recently.

Now, the FDIC will first determine the likelihood of 'substantial consumer harm' and the Bank's record-keeping practices, along with the challenges of a Bank on retrieving, reviewing, and analyzing transaction data frequency and timing of re-presentment fees prior to requesting restitution. This is based on the ongoing and extensive challenges observed in accurately identifying re-presented transactions through core processing systems.

It is regrettable that this revised supervisory guidance came after numerous banks spent many hours analyzing transaction data to identify NSF Fees to be reimbursed.

You can find the Revised Guidance [here](#).