



COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF BANKS

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September 23, 2021

To the Chief Executive Officer Addressed:

RE: Supervisory Alert Regarding Charging Multiple Non-Sufficient Fund Fees (NSF) for Representment of Unpaid Transactions

This Supervisory Alert is to make the industry aware of a developing consumer protection issue related to the disclosure of representment non-sufficient funds (NSF) fees which may present possible legal risk and/or risk of regulatory scrutiny to financial institutions. The Division conducts comprehensive reviews of consumer protection laws and regulations and verifies that financial institutions provide consumer account disclosures which are clear and conspicuous. Regulation DD which implements the Truth-in-Savings Act,¹ Regulation E which implements the Electronic Fund Transfers Act,² Massachusetts General Laws chapter 93A section 2(a), and Section 5(a) of the Federal Trade Commission Act³ regarding Unfair or Deceptive Acts or Practices (UDAP) establish guidelines and business standards requiring product disclosures and terms to have sufficiently clear and conspicuous information for consumers to make reasonable and informed financial decisions. Financial institutions should clearly disclose the amount of any fees and how fees may be imposed in connection with deposit accounts to avoid possible confusion by consumers and potential for heightened risk of deceptive practices.

What is a Representment Fee?

Financial institutions commonly charge a NSF fee when a merchant transaction is presented for payment from a consumer account and declined due to the customer having insufficient funds to cover the transaction. A representment NSF fee may occur when a merchant attempts to present the same transaction again in an effort to obtain the declined funds. This type of repeated merchant payment transaction can trigger the assessment of multiple NSF fees by a depository institution if the transaction is presented more than once. For example, if an Automated Clearing Housing (ACH) or other item is presented for payment and declined due to insufficient funds and subsequently represented for payment and declined again due to insufficient funds, some financial institutions will charge a NSF fee for both the original presentment and each representment thereafter.

¹ 12 CFR Part 1030 - Truth in Savings (Regulation DD)

² 12 CFR Part 1005 - Electronic Fund Transfers (Regulation E)

³ 15 USC §45

Consumer protection risks associated with the representment of NSF fees

Recent class action lawsuits against financial institutions have alleged breach of contract due to the omission of important terms related to the assessment of representment fees. Some suits have eventually settled, resulting in customer reimbursements and legal fees.

Standard industry deposit account agreements and fee schedules supplied by vendors who provide payment processing software or services to financial institutions may not properly explain an institution's actual NSF fee practice as disclosed to the customer. While some disclosures and account agreements explain that one NSF fee will be charged "per item" or "per transaction," these commonly used forms may not consistently explain that the same processed item may trigger multiple NSF fees. In other words, when an item has already been declined one or more times and is represented again by the merchant seeking payment, multiple NSF fees may be triggered for the customer which may be an inconsistent practice with what was disclosed to the customer.

Additionally, deposit account disclosure and agreement practices are reviewed by state and federal financial regulators for unfair and/or deceptive acts or practices. Violations of state or federal UDAP laws may result in the payment of restitution and/or civil money penalties by financial institutions that charge representment fees.

We want to alert you of the potential legal, regulatory, and UDAP risks related to the relevant account disclosures and account agreements, and we strongly recommend that you review all applicable disclosures and processes to ensure that you are in compliance with the above referenced laws and regulations. Questions to consider are whether NSF fees are being charged as expected either through an internal system or third-party service provider. Furthermore, you may want to review deposit disclosures and contract language to ensure the manner in which NSF fees are charged is being communicated clearly and consistent to what a consumer could reasonably expect.

While regulatory policies around representment are under review and subject to further development, be advised that active and future examinations may require corrective measures based on examination findings. If you have questions about the Division's policy expectations regarding representment fees, please call Deputy Commissioner of Consumer Protection and Outreach, Mayté Rivera, at 617 956-1557 or at mayte.rivera@mass.gov.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Mary L. Gallagher". The signature is written in a cursive style.

Mary L. Gallagher
Commissioner of Banks