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Insights

CFPB Announces Consent Order with Bank for "Authorized-Positive Overdraft Transactions"

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By: Brett J. Ashton

The Consumer Financial Protection Bureau (the "CFPB" or the "Bureau") announced yesterday that they had entered into a consent order (the "Consent Order") against a financial institution for "unfair" and "abusive" acts and practices in connection with their assessment of overdraft fees tied to so called "Authorized-Positive Overdraft Transactions." The Bureau defines an Authorized-Positive Overdraft Transaction to mean a transaction for which the customer's account had sufficient available funds for the transaction at the time the customer authorized the transaction, but lacked sufficient available funds when the transaction later settled. This occurs because the customer has other intervening transactions, like outstanding checks they may have written, that are presented for payment prior to the Authorized-Positive Overdraft Transaction being presented for payment.

CFPB pronouncements about excessive fees in the financial services industry are nothing new, but the Consent Order represents a significant development in the Bureau's campaign against overdraft fees. While the Federal Reserve and the FDIC have also made pronouncements about Authorized-Positive Overdraft Transactions, that guidance identified potential UDAP violations where consumer disclosures and contract terms failed to alert consumers to overdraft practices. In contrast, in the Consent Order the Bureau appears to assert that all Authorized-Positive Overdraft Transactions are a "UDAAP" violation under the Consumer Financial Protection Act, regardless of whether adequately disclosed to the consumer and appropriately contracted for.

The Consent Order prohibits the bank from charging overdraft fees as a result of Authorized-Positive Overdraft Transactions, and requires it to refund at least $141 million in unlawful overdraft fees and pay a $50 million civil money penalty. If your institution currently assesses overdraft fees on Authorized-Positive Overdraft Transactions you should carefully review your deposit account agreement and disclosures to ensure these fees are appropriately disclosed to, and agreed upon, by the consumer. While the CFPB's position in the Consent Order is not official guidance or an administrative rule, you should evaluate the potential regulatory risk in continuing to assess overdraft fees in this manner in light of the Bureau's position on these fees.

The Krieg DeVault Financial Institutions team is available to answer any questions you may have about this, or any other regulatory issue.

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