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## **NSF FEES FOR RE-PRESENTMENT – DISCLOSURE CLARIFICATION**

### **I. INTRODUCTION**

The NBA has recently received numerous inquiries regarding increased scrutiny of overdraft practices by regulatory agencies, including multiple fees imposed on re-presented items. Banks have been criticized by their regulators for not accurately disclosing their fees and processes, and in some cases have been ordered to submit “Restitution Plans” to reimburse customers for overdraft fees. Independent litigation and class action lawsuits have challenged banks’ overdraft practices.

### **II. RE-PRESENTED ITEMS**

When an ACH transaction or check is presented against the customer’s account without sufficient funds to cover the item presented, banks typically charge a non-sufficient funds (NSF) fee. The fees are commonly disclosed in the account agreement as being charged on a “per item” or “per transaction” basis.

Is not uncommon for a merchant, after an ACH transaction or check is declined, to re-present the item. NACHA rules allowed two re-presentments following the initial return of an ACH transaction. While re-presentment checks are not limited, it is not unusual for a check to be re-presented multiple times. It is standard practice for banks to charge NSF fees for each re-presentment of these items. Until recently, this practice has not been questioned and federal regulations contain no express prohibition against charging NSF fees for re-presentments.

In scrutinizing banks’ practices, the regulators have focused on whether account agreements have clearly indicated that a separate NSF fee may be charged for each re-presented item. If not, the bank may be alleged to be in breach of contract, the language could be alleged to constitute a deceptive practice, or the practice of charging multiple NSF fees for the same transaction may be considered an inherently unfair practice.

### **III. OPERATIONAL CONCERNS**

Member banks have expressed significant operational concerns with the regulatory interpretations. The manner in which a transaction is coded may effectively prevent a bank from being able to identify if a re-presented item has been previously presented for payment. In addition, most banks are not equipped to conduct an automated search to identify re-presented checks, dictating a manual search to identify transactions for which multiple NSF fees may have been charged for re-presentments.

### **IV. UPDATING DISCLOSURES**

In response to regulatory criticism, banks may be reviewing their disclosures to ensure that they clearly explain how and when overdraft fees may be imposed. If banks elect to update their disclosures, it is recommended that any such changes be disclosed to existing customers as a **CLARIFICATION**. The bank does **NOT** want to provide the updated language as a **CHANGE IN TERMS**. Casting the revisions as a change in terms could imply that the existing disclosures do not authorize the bank to charge multiple NSF fees on re-presented items and could result in the regulators requiring reimbursement for overdraft fees previously charged to customers.

Banks electing to update their disclosures may provide the clarification through a notice on their periodic statements sent to customers. Because this would not constitute a change in terms to existing accounts, there is no waiting period involved.

The foregoing Compliance Update is for informational purposes only, and does not constitute legal advice. As a reminder, the NBA general counsel is the attorney for the Nebraska Bankers Association, not its member banks. The general counsel is available to assist members with finding resources to help answer their questions. However, for specific legal advice about specific situations, members must consult and retain their own attorney.