

# RISK Alert

ACTIONABLE INSIGHTS FOR BOND POLICYHOLDERS.



Alert Type

Awareness

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Warning

## CFPB Ramps Up Attack on Junk Fees

The CFPB recently issued a news release - Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts – which addresses “two junk fee practices that are likely unfair and unlawful under existing law,” including overdraft fees on certain debit card transactions and fees charged on returned deposited items. The CFPB indicates that charging these fees likely violates the Consumer Financial Protection (CFP) Act, which prohibits conduct that constitutes an unfair act or practice.

### Details

The CFPB’s recent news release, CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts, is the latest evidence that the CFPB intends to save households billions of dollars a year by reducing “exploitive junk fees.”

The guidance refers to “two junk fee practices that are likely unfair and unlawful under existing law,” including overdraft fees on certain debit card transactions and fees charged on returned deposited items. The CFPB indicated that charging these fees likely violates the Consumer Financial Protection (CFP) Act, which prohibits conduct that constitutes an unfair act or practice.

### Overdraft Fees on Certain Debit Card Transactions

The CFPB’s Consumer Financial Protection Circular 2022-06 (Unanticipated overdraft fee assessment practices) addresses the practice of assessing “surprise overdraft fees” on debit card transactions, referring to this practice as Authorize Positive, Settle Negative (APSN) overdraft fees. The CFPB stated assessing an overdraft fee on debit card transactions is unfair because consumers would not reasonably expect to be charged the fee when the debit card transaction settles since the account had sufficient available funds at the time the institution authorized the transaction.

### Returned Deposited Item Fees

The CFPB’s Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices indicated that a blanket policy of charging returned deposited item fees on returned checks irrespective of the circumstances or patterns of behavior on the account is likely unfair under the CFP Act. The CFPB noted that an institution would not likely violate the CFPB Act if the method in which returned deposited item fees assessed are tailored to only charge consumers who could reasonably avoid the injury created by charging this fee, and provided an example:

If a depository institution only charges consumers a fee if they repeatedly deposit bad checks from the same originator, or only charges consumers a fee when checks are unsigned, those fees would likely be reasonably avoidable.

A major concern with the CFPB’s actions is that they don’t consider whether institutions properly disclose how and when fees are assessed.

**Date:** November 22, 2022

**Risk Category:** Compliance; Litigation; Junk Fees; Debit Cards; Overdraft Fees; Returned Deposits

**States:** All

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For example, the Consumer Financial Protection Circular 2022-06 contained the following statement:

Though financial institutions may provide disclosures related to their transaction processing and overdraft assessment policies, these processes are extraordinarily complex, and evidence strongly suggests that, despite such disclosures, consumers face significant uncertainty about when transactions will be posted to their account and whether or not they will incur overdraft fees.

Similarly, in its consent order against Regions Bank regarding APSN overdraft fees, the CFPB did not indicate whether the bank's APSN practices were disclosed to the bank's customers. Lack of proper disclosure of APSN overdraft fees has been a major factor in class action litigation involving overdraft and NSF fees.

It is uncertain whether disclosing the mechanics of a debit card transaction, including APSN overdraft fee practices, in account agreements and other disclosures will mitigate this litigation risk.

In the face of continued litigation and increasing regulatory scrutiny, some credit unions have eliminated or reduced overdraft fees.

## Risk Mitigation

Credit unions should:

- Discuss their practices on APSN overdraft fees on debit card transactions and returned deposited item fees with legal counsel in light of the CFPB's recent guidance
- Determine if changes to your credit union practices are needed to mitigate the risk. Credit unions that charge a returned deposited item fee should review their processes to determine if the assessment of this fee can be tailored as suggested by the CFPB.

In the event the CFPB uses its rulemaking authority to limit or prohibit APSN overdraft fees, credit unions should be prepared to change their processes and fee structure accordingly.

## Risk Prevention Resources

Access CUNA Mutual Group's [Protection Resource Center](#) at [cunamutual.com](#) for exclusive risk and compliance resources to assist with your loss control efforts. The Protection Resource Center requires a User ID and password.

- RISK Alert: [CFPB Launches Initiative on Excessive Junk Fees](#) (02/08/2022)
- RISK Alert: [CFPB Focus on Credit Card Late Fees as Harmful to Low-Income Consumers](#) (05/31/2022)
- RISK Alert: [CFPB Enforcement Action Targets Overdraft Fees](#) (10/25/2022)
- Emerging Risks Outlook: [Overdraft / NSF Fee Litigation](#)
- [Consumer Financial Protection](#) – Circular 2022-06
- CFPB Release - [CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts](#)



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