Financial Institutions Law Update

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CFPB Report Indicates Impending Regulation of Overdraft Practices

On June 11, the Consumer Financial Protection Bureau ("CFPB") issued its anticipated white paper on its study of bank overdraft programs. The 72-page Report: (1) discusses the recent Regulation E amendments and case law restricting overdraft procedures; (2) provides statistical information about bank overdraft programs; and (3) sets forth a rather complete description about how various bank overdraft programs actually operate and the various methods banks use in making funds available to consumers and in debiting consumers' accounts. In the Report, CFPB Director Richard Cordray is quoted about overdraft programs, stating: "Overdrafts can provide consumers with access to funds, but the growing costs of overdraft protection have the capacity to inflict serious economic harm."

The Report concludes by stating that the CFPB will continue to study overdraft programs, including through the analysis of account-level data, to examine the extent to which particular policies "magnify risks to consumers." The likelihood that the CFPB will move to restrict practices in this area is highlighted in the press release and factsheet that the CFPB issued in conjunction with the Report. Both documents strongly emphasize that overdraft and non-sufficient funds ("NSF") fees account for 61 percent of the total consumer deposit account service charges in 2011 among the banks studied in the CFPB Report.

The explanatory material issued by the CFPB about the Report failed, however, to note some of the other important facts discussed in the Report itself. First, it appears that about 40 percent of all accounts are linked either to a credit facility or another deposit account in order to avoid any unintended overdraft. Moreover, while it appears that 26 percent of the consumer accounts had an overdraft or NSF transaction in any particular year, only 9 percent of the accountholders accounted for 84 percent of all overdraft and NSF fees charged. Not surprisingly, the banks apparently closed, without consumer consent, about 6 percent of their accounts in the year examined (2011), primarily for consumers retaining negative account balances.

It is also worth noting that only service fees are discussed in the Report. Thus, other fees that banks assess and, importantly, the return from float derived from larger accounts were not evaluated. Notwithstanding that, the Report stated: "the study raised concerns that consumers from potentially vulnerable groups may shoulder a disproportionate share of NSF and overdraft fees and checking account costs." This potentially raises a fundamental question concerning the economic and demographic background of the consumers who overdraw their accounts, and the possibility that the CFPB could again be raising issues of "pricing disparities on the basis of race, national origin, and potentially other prohibited bases," as discussed in CFPB Bulletin 2013-02 (March 21, 2013), concerning indirect auto lending.

However, if the CFPB applies tight restrictions on deposit account fees, it could lead to either unprofitable deposit accounts for depository institutions and/or more unbanked Americans. Neither alternative is a good result as a matter of public policy.

There will certainly be much more that will appear about this issue in the coming days and months, and it is important that banks and other financial institutions follow these developments closely and comment on proposals when relevant.

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