

CRA; Reg B Amendments; Re-Presentation/NSF Fees

Maine Bankers Association
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Legal Disclaimer



The purpose of this presentation is to provide a **general overview** of its subject matter. It **does not** and is **not intended to provide legal or other professional advice** and must not be relied upon as such. You should **consult with a qualified legal professional** for specific questions and requirements.

CRA Update

Proposed Rule – FRB, FDIC and OCC

Issued 5/5/2022

Comment deadline 8/5/2022

> 375 Form Letters received (not published)

192 Published Comment Letters

Proposal requires regulator evaluation of bank performance across all activities and communities.

Provides for updated CRA assessment areas; include online and mobile banking, branchless banking, hybrids.

4 Tests:

Retail Lending

Retail Products and Services

Community Development Financing

Community Development Services



List of Preapproved CRA – eligible activities

Unified approach by Regulators



Proposed Rulemaking = 679 pages

No indication yet whether/how final rule will deviate from proposal - or when it will issue.

STAY TUNED!

Overview of Reg B Amendments

Final Rule issued 3/30/23

888 pages; 794 = Preamble

Adds Subpart B to Rule – 1002.101-14

Requires reporting of information regarding
small business credit applications

Purpose = facilitate enforcement of fair lending laws; enable communities/governmental entities/creditors to identify business/community development needs and opportunities for women-owned, minority-owned and small businesses.

“Covered credit transaction” = extension of
business credit OTHER THAN

Trade credit

HMDA reportable credit

Insurance premium financing

Public utilities credit

Securities credit

Incidental credit

“Covered financial institution” = originated at least 100 “covered credit transactions” for “small businesses” in each of the two preceding calendar years.

“Small business” = gross revenue for its preceding fiscal year \leq \$5 million; adjusts for inflation based on CPI.

Requires banks to compile and maintain 20 data points for “covered applications” from small businesses.



“Covered application” = oral or written request for a “covered credit transaction”.

Request must be made according to Bank’s procedures to trigger reporting requirements.

In general, can rely on
information provided by the
applicant.



FIREWALL:

Employees cannot be allowed to access any of the information collected if the employee is involved in any determination concerning the application.

Reports due on/before June 1 of each year.

Format prescribed by CFPB; CFPB must provide to banks a “Filing Instructions Guide” and make reported data generally available to the public.



Compliance Dates

≥ 2500 transactions in 2022 and 2023: 10/1/24

< 2500 , but ≥ 500 transactions: 4/1/25

< 500 , but ≥ 100 transactions: 1/1/26

Sample (Model) Data Collection Form – Appendix E

Re-Presentment/NSF Fees



FDIC Supervisory Guidance

Issued 8/22

Assessment of fee for same item when re-presented = “elevated risk of violations of law and harm to consumers”

Focus is on UDAAP

“failure to disclose material information . . . has the potential to mislead reasonable consumers . . . and may also present risk of unfairness . . .”





Disclosures: must be clear and conspicuous; otherwise are deceptive.

Multiple fees assessed in a short period of time without sufficient notice or opportunity to deposit funds = unfair – even if disclosures are compliant.

Risk mitigation

- eliminate NSF fees altogether
- stop charging more than one fee for the same re-presented item
- review policies, practices and activities and make appropriate changes including revised disclosures

Revised disclosures:

whether multiple fees will be assessed

frequency with which fees will be assessed

maximum number/amount of fees



Ensure customers have the ability to
avoid multiple fees.

Must provide restitution
for harmed consumers.

FDIC Exam Findings:

Updated Disclosures should include definition of “item” and explain that presentation of the same “item” on multiple occasions can cause multiple fees.

Provide restitution going back to least 2 years – for all fees charged.

Class Action Lawsuits

Allegations of UDAAAP violations

But: claims are for breach of Account Agreement, where agreement/Rate & Fee Schedule do not disclose fees for multiple presentments, including breach of covenant of good faith.

Damages – Restitution of fees paid

Actual & exemplary
damages

Costs and attorneys fees

Were fees actually paid by customers?

Is the account still overdrawn?

Was the account closed with a negative balance?

FDIC does not seem to care – will courts?



