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New York Moves to Vest DFS With Control Over Certain Deposit Charges

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Over the past year, there have been numerous efforts by federal regulators - in particular the Consumer Financial Protection Bureau - to rein in "junk fees." The CFPB defines a "junk fee" to be an unnecessary and unavoidable charge that inflates the cost of a product or service and provides little or no value to the consumer. While regulators have proceeded on a number of fronts to curtail junk fees, express limitations on fee amounts have, to date, been rare. However, a recent amendment to New York law may signal an effort to do just that.

The legislation in question (Chapter 556 of the 2023 Session Laws) was signed into law and became immediately effective on October 25th. It amends a recent Banking Law provision limiting how "banking organizations" (defined to include a number of New York depository institutions) may order checks presented for payment against consumer accounts. Chapter 556 authorizes the Department of Financial Services (DFS) to promulgate regulations to apply similar payment processing requirements to other debit and credit transactions on consumer accounts.

The new legislation also empowers the DFS to "prescribe by regulation" certain charges. First, the DFS is empowered to prescribe the charges imposed when a check (or other written order) or electronic fund transfer is presented for payment against consumer accounts with insufficient funds or uncollected balances, regardless of whether the item is paid. This language draws both overdraft and insufficient fund (NSF) charges within its scope. Similarly, Chapter 556 also empowers the DFS to prescribe the charges that may be imposed when a check (or other written order) is deposited into a consumer account, but is later returned unpaid. Charges imposed by the bank of deposit in this situation are commonly referred to as "returned deposited item fees."

Chapter 556 imposes guardrails on the DFS when drafting these regulations. The DFS is required, at a minimum, to consider the following:

- The cost incurred by the banking organization in providing any services associated with the charges;
- The competitive position of the banking organization; and
- The maintenance of a safe and sound banking organization that protects the public

interest.

These factors should sound familiar: they are found in the Office of the Comptroller of the Currency's regulations governing a national bank's determination of deposit account charges. More importantly, they are also found closer to home, in New York Banking Regulation Part 32. We will return to this regulation shortly.

While regulatory attention to deposit account charges (particularly unpopular ones) is not surprising, this legislation is curious for several reasons. For one, current market indicators suggest an exodus by larger institutions from overdraft and NSF charges. Indeed, the CFPB has reported in two recent data spotlights that larger institutions have begun to wean themselves from overdraft income (CFPB Data Spotlight: Overdraft/NSF Revenue Down Nearly 50% Versus Pre-Pandemic Levels (May 24, 2023)) and most are abandoning NSF charges altogether (CFPB Data Spotlight: Vast Majority of NSF Fees Have Been Eliminated, Savings Consumers Nearly $ 2 Billion Annually (October 11, 2023)). If the history of the rise of these charges is any guide, where larger institutions lead, many state-chartered community banks will follow.

More interesting, however, is the current drafting of New York Banking Regulation Part 32. This regulation imposes a $10 cap on the amount a New York bank may charge for a returned deposited item. For overdraft and NSF charges the regulation takes a less prescriptive approach. For these charges Part 32 states that the amount of these fees is a decision of the banking institution, subject to certain considerations. These considerations are the same as outlined in Chapter 556, plus an additional factor regarding the deterrence of customer misuse of the banking system.

It is at the intersection of the current language of Part 32, and the newly minted language found in Chapter 556 where we find a potentially significant change. Because Part 32 currently authorizes New York banks to establish the amounts of these fees, subject to the same considerations found in the new legislation, the most (and perhaps only) logical reading of Chapter 556 is that it authorizes the DFS to draft regulations to prescribe the amount of these fees. In short, the legislation appears to transfer the responsibility for setting the *amount* of overdraft and NSF charges from New York banks to the DFS. What this means for other provisions of New York law that touch on overdraft charges (including the overdraft protection parity provision found at 3 N.Y.C.R.R. § 6.8) is unclear.

In light of this change, New York banks should closely monitor DFS rulemaking efforts on this issue. If it is, in fact, a move toward a state-mandated maximum amounts of these fees it may hasten the current direction of the marketplace on these charges.

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