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CFPB Takes Another Swipe at "Junk" Fees

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On March 8, the Consumer Financial Protection Bureau (CFPB) published a special edition of its *Supervisory Highlights* report that focused on back-end fees charged to consumers in connection with deposits, auto servicing, mortgage servicing, payday and small-dollar lending, and student loan servicing. In the CFPB's view, nearly all the fee practices highlighted in the report constitute unfair, deceptive, or abusive acts or practices (UDAAPs) in violation of federal law. The *Supervisory Highlights* report is another attempt by the CFPB to pressure financial services providers to reform fee practices involving so-called "junk" fees.

Highlighted fee practices

The CFPB noted several problematic practices in the *Supervisory Highlights* report. These problematic practices mainly involve fees that were charged for transactions or events that occurred after account opening. In the report, the CFPB asserted that many of these fee practices are UDAAPs. Specifically, the CFPB observed the following problematic fee practices in examinations of financial services providers between July 1, 2022, and February 1, 2023:

Deposits: The CFPB focused on overdraft fee and non-sufficient funds (NSF) fee practices that have already been subject to substantial scrutiny by the CFPB and bank regulators. During exams, the CFPB found instances where institutions assessed overdraft fees in situations where a consumer's balance was positive when a debit or ATM transaction was authorized, but by the time the transaction settled, the consumer had a negative account balance, causing an overdraft. The CFPB also observed institutions assessing multiple NSF fees for a single transaction that failed for non-sufficient funds and was represented multiple times for payment. Notably, in both scenarios, the CFPB said that "consumers could not reasonably avoid the substantial injury, *irrespective of account-opening disclosures*." In other words, from the CFPB's perspective, upfront fee disclosures did not eliminate the unfairness risk with these fee practices. The CFPB warned that its supervision team will engage in further follow up on both multiple NSF fees and account positive, settlement negative overdraft fee issues.

Auto Servicing: The CFPB focused on late fees, repossession fees, and pay-to-pay fees. The CFPB highlighted instances where a servicer charged late fees in a manner inconsistent with the terms of a loan agreement, including in situations where a loan balance was accelerated, and the vehicle was repossessed. The CFPB also took issue with an auto servicer requiring a consumer to pay a high *estimated* repossession fee to recover a vehicle and pay off a loan balance. Once the auto servicer received the invoice for the actual repossession costs, the auto servicer would refund the excess amount paid by the consumer. Even though the servicer refunded the excess amount, the CFPB found it problematic to require a consumer to pay a "significantly higher" estimated repossession fee. The CFPB characterized a $1,000 estimated repossession fee as "significantly higher" than the average repossession cost, which the CFPB said is generally around $350. According to the CFPB, a consumer could still experience harm by being deprived of those excess funds for a short period of time and by potentially being dissuaded from recovering her vehicle because of the high estimated repossession fee. The report did not indicate whether it was possible in certain circumstances for a consumer's actual repossession cost to equal the estimated repossession fee charged by the auto servicer, which would explain why the servicer charged a higher estimated fee and refunded the excess.

Although noted with auto servicing, the CFPB scrutinized a fee practice related to loan repayment that is relevant to other types of loans as well. The CFPB criticized a servicer that provided two free repayment options (recurring ACHs and mailed check) and charged pay-to-pay fees for other optional repayment methods. The CFPB noted that the free repayment methods are available only to consumers with banks accounts. The CFPB found that approximately 90% of payments made by consumers used a repayment option with a pay-to-pay fee. The CFPB viewed charging a fee with the most commonly used repayment methods as an unfair or abusive practice because a consumer does not get to choose the servicer of its loan and does not bargain for the pay-to-pay fees. The report does not discuss the costs to servicers to support various repayment methods and did not quantify how many borrowers are unable to use the free repayment options.

Mortgage Servicing: The problematic fee practices by mortgage servicers appear less controversial than some other fee practices in the *Supervisory Highlights* report. The CFPB observed instances where mortgage servicers (i) misrepresented the amount of the late fee owed, (ii) charged late fees inconsistent with the loan agreement, (iii) failed to waive fees when the Department of Housing and Urban Development required waiver, (iv) charged consumers repeated fees for unnecessary property inspections, and (v) charged premiums for PMI insurance after PMI insurance should have been removed.

Payday and Small Dollar Lending: Rather than taking issue with a specific fee assessment practice by a lender, the CFPB discussed a lender practice that led consumers to incur fees with other institutions. Specifically, the CFPB found that lenders split missed payments into smaller payments and nearly simultaneously represented them to a consumer's bank for payment via a debit card after the lender's initial unsuccessful attempt to debit the account. The CFPB claimed that a consumer had not given the lender authorization to re-present split payments simultaneously to the consumer's bank account. The CFPB said the split payment and representment practices led consumers to incur overdraft fees and indirect follow-up fees as well as led to the unauthorized loss of funds and the inability to prioritize payment decisions.

Student Loan Servicing: Similar to the section on payday and small-dollar lending, the CFPB focused on conduct that led a consumer to incur fees from third parties instead of a specific fee assessment practice by a lender. The CFPB observed that a student loan servicer erroneously accepted credit card payments for student loans in violation of the servicer's policy. The servicer reversed the credit card payments but did not notify consumers of the reversed payments or the opportunity to make a payment through another acceptable repayment method. As a result, the consumers incurred late fees and experienced other negative consequences from a late payment.

Takeaways from the report

Before the *Supervisory Highlights* report, the CFPB had already made it clear that evaluating fees charged to consumers is a top priority for the CFPB; however, the *Supervisory Highlights* report demonstrates the degree to which the CFPB may scrutinize fee practices and allege that such practices are UDAAPs. The report also evidences that the CFPB is examining not only direct fee assessment practices, but also practices that could indirectly lead to a consumer incurring fees from third parties. For example, the report indicates that the CFPB may scrutinize repayment methods or channels that have an increased likelihood of causing consumers to incur overdraft fees.

What this means to you

The CFPB has engaged in a number of initiatives to reduce so-called "junk" fees, including, but not limited to, blog posts, charts comparing fee practices, data reports, enforcement actions, and interpretative guidance. Rulemaking efforts to curb certain fees are also underway. The CFPB published a proposed rule in February to drastically reduce the amount of the credit card late fee safe harbor in Regulation Z. In its Fall 2022 rulemaking agenda, the CFPB shared that it is working on rules to revise the treatment of overdraft fees under Regulation Z and to address certain NSF fee practices.

Other federal and state regulators have increased their attention on fees as well. For example, in late 2022, the Federal Trade Commission issued an advance notice of proposed rulemaking to identify certain "junk" fee practices as unfair or deceptive. The New York Department of Financial Services circulated an industry letter to regulated depository institutions alerting them that the Department will evaluate whether institutions are engaged in deceptive or unfair practices with respect to overdraft and NSF fees. The fact that multiple regulators are scrutinizing fees is significant because one regulator's view that a certain fee practice is a UDAAP could influence how other regulators with UDAAP enforcement authority view the fee practice.

Contact us

If you have questions about the regulatory risk with charging certain fees or want to discuss a fee practice more generally, please reach out to Susan Seaman, Catherine Albrecht-Wiese, or your Husch Blackwell attorney.