

Insights

President Biden Weighs in on Financial Services “Junk Fees”

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On the heels of the Consumer Financial Protection Bureau (the “CFPB” or the “Bureau”) consent order with Regions Bank last week in connection with alleged unfair and deceptive overdraft practices (the “Regions Consent Order” discussed in our earlier Client Alert), CFPB Director Rohit Chopra was joined by President Biden and the chair of the Federal Trade Commission (“FTC”), Lina Khan at the White House this week to announce the President’s Initiative on Junk Fees and Related Pricing Practices (the “Initiative”). The Initiative includes CFPB Operating Circular 2022-06 (“Circular 2022-06”) addressing “surprise overdraft fees,” and CFPB Compliance Bulletin 2022-06 (“Bulletin 2022-06”) addressing returned deposited items. Also included within the Initiative is the FTC Advance Notice of Proposed Rulemaking on Junk Fees that was approved by the FTC Commissioners last week.

While the scope of the Initiative extends beyond the financial services industry, the more immediate issues all financial institutions should carefully evaluate are the impact on their existing overdraft and non-sufficient funds practices in light of Circular 2022-06 and Bulletin 2022-06. A brief description of the issues addressed in Circular 2022-06 and Bulletin 2022-06 follows.

CFPB Circular 2022-06: Unanticipated Overdraft Fees

Circular 2022-06 reinforces the Bureau’s position on authorized positive or “surprise overdraft fees” in the Regions Consent Order. President Biden, speaking to the issue of “surprise overdraft fees” in connection with the Initiative, commented,

Surprise overdraft fees are illegal. Listen to how those fees work. And some of - you all know this - I mean, because you know from your everyday lives. But you pay a bill, and you double check your bank account to make sure, before you write the check, that you have enough in your account to cover it. You’ve gotten the money, so you go ahead and you pay. Then it turns out your balance wasn’t up to date because your bank was slow in processing other charges. And by the time the bank gets around to setting - settling the transaction, you’ve overdrawn your account. You’re charged an overdraft fee that runs around \$35 each time. It’s not your fault. The bank screwed up. You didn’t; the bank did. You had a positive balance when you paid the bill. It’s just simply wrong. And today, my administration is making clear it’s also illegal.

Circular 2022-06 refers to “unanticipated overdraft fees” when describing potential unlawful practices that may be considered unfair under the Consumer Financial Protection Act (the “CFPA”). Circular 2022-06 provides,

[a]n unanticipated overdraft fee occurs when financial institutions assess overdraft fees on transactions that a consumer would not reasonably expect would give rise to such fees. Charging an unanticipated overdraft fee may generally be an unfair act or practice. Unanticipated overdraft fees can occur on “authorize positive, settle negative” or APSN transactions, when financial institutions assess an overdraft fee for a debit card transaction where the consumer had sufficient available balance in their account to cover the transaction at the time the consumer initiated the transaction and the financial institution authorized it, but due to intervening

authorizations, settlement of other transactions (including the ordering in which transactions are settled), or other complex processes, the financial institution determined that the consumer's balance was insufficient at the time of settlement. These unanticipated overdraft fees are assessed on consumers who are opted in to overdraft coverage for one-time debit card and ATM transactions, but they likely did not expect overdraft fees for these transactions.

CFPB Compliance Bulletin 2022-06: Unfair Returned Deposit Item Fee Assessment Practices

Bulletin 2022-06 puts financial institutions on notice that the CFPB views the practice of charging consumers a non-sufficient funds fee for the return of a deposited check as an unfair act or practice that likely violates the CFPA. President Biden also spoke to this issue when discussing the Initiative, commenting,

First, imagine this: Your child outgrows his bicycle, and you decide to sell it online, and someone pays you a check. Pays you 30 bucks for the bicycle or something. Days later, that check that you got paid with, that you deposited into your bank, it bounces. You didn't know it was bad, but you get charged 15 bucks. You get charged 15 bucks. It's wrong. It's ridiculous. It's unfair. And my administration is making clear today it's illegal as well

Bulletin 2022-06 defines a "Returned Deposited Item" as, "a check that a consumer deposits into their checking account that is returned to the consumer because the check could not be processed against the check originator's account." The Bureau asserts that "[b]lanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances or patterns of behavior on the account are likely unfair under the CFPA."

Bulletin 2022-06 also notes that oftentimes the reason for the return of the deposited item will be unknown to the consumer until after they have incurred the fee for the return, and generally consumers will be unable to recoup these fees from the party who wrote the check in the first instance. Reasons cited by the Bureau in connection with a Returned Deposited Item include stop payment orders by the check originator, or the check is written against a closed account. Notably, the CFPB comments that the practice of limiting non-sufficient funds fees in connection with Returned Deposited Items to instances in which a consumer continually deposits bad checks from the same originator, or when checks are unsigned, may not be considered unfair under the CFPA. However, Bulletin does not contain any reference to how the Bureau would treat a Returned Deposited Item in connection with fraud.

Conclusion

Financial institutions should carefully review their current overdraft practices in connection with debit card transactions (including recurring debit card transactions), in light of Circular 2022-06. Further, while both Circular 2022-06 and the Regions Consent Order issued last week appear to assert contractual provisions addressing "surprise overdraft transactions" are irrelevant when evaluating CFPA compliance, financial institutions should carefully examine their account agreements to ensure that their documents reflect the manner in which they provide all services to consumers. Financial Institutions currently assessing non-sufficient funds fees in connection with returned deposited checks should also carefully examine the contents of Bulletin 2022-06 to assess their fee practices in connection with Returned Deposited Items in the future.

The **Krieg DeVault Financial Institutions** team is available to answer any questions you may have about these most recent releases by the CFPB and the administration, or any other financial services regulatory issues you may need assistance with.

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