



October 12, 2023

CFPB RELEASES ADVISORY OPINION AND SUPERVISORY HIGHLIGHTS IN EFFORT TO PROTECT CONSUMERS FROM “JUNK FEES” ON SAME DAY FTC ISSUES NOTICE OF PROPOSED RULEMAKING REGARDING “JUNK FEES”

The Consumer Financial Protection Bureau (CFPB) released additional guidance in an Advisory Opinion regarding Section 1034(c) of the Consumer Financial Protection Act (CFPA) on October 11, 2023. Section 1034(c) requires large banks and credit unions to respond timely to consumer requests for information regarding their accounts. The CFPB states in the guidance that the average consumer is often forced to interact with large banks and credit unions through digital channels, including navigating phone trees, searching through websites or interacting with a chatbot, rather than through human interaction. The CFPB states that large banks and credit unions cannot unreasonably impede consumers' exercise of their right to obtain information about their accounts. The CFPB acknowledged that reasonable security measures are allowed, but states that charging fees to respond to a consumer's information request would generally be an unreasonable impediment and could violate Section 1034(c). The CFPB noted that the following fees would likely be unreasonable:

- (1) Fees for responding to consumer inquiries regarding deposit account balances;
- (2) Fees for responding to consumer inquiries regarding the amount necessary to pay a loan balance;
- (3) Fees for responding to a consumer request for a specific type of supporting document (including a check image or original account agreement); and
- (4) Fees for time spent on consumer inquiries seeking information and supporting documents regarding an account.

However, the CFPB noted that it may be reasonable to charge a fee to a consumer in certain situations, such as a consumer who repeatedly requested and received the same information. The CFPB Advisory Opinion also cites forcing unreasonably long wait times to speak with a customer service representative; requiring consumers to interact with inadequate chatbots; or forcing a consumer to request

information multiple times or through a third-party as other behaviors that could “unreasonably impede” consumers' exercise of their rights. The CFPB states that the Advisory Opinion is an interpretative rule in part and a general statement of policy in part. While directed at large banks and credit unions, other creditors of all sizes and types should consider the applicability of such criticism and guidance for their own fees under broad unfair, deceptive or abusive principles.

The CFPB also released on October 11, 2023 Supervisory Highlights detailing its examinations earlier this year into junk fees associated with bank account deposits, auto loan servicing and remittances. The CFPB reported that institutions are charging multiple non-sufficient funds (NSF) fees for the same transaction. Examiners found that some of the core processor platforms used by financial institutions did not allow a financial institution to only charge one NSF fee per item without discontinuing NSF fees completely or manually waiving fees. According to the CFPB, consumers did not have a reasonable method to avoid these additional NSF fees. The CFPB noted in October 2022 that many financial institutions do not take into consideration the circumstances for the returned instrument before assessing NSF fees.

The CFPB announced that as a result of the recent examinations and failures surrounding junk fees, financial institutions are refunding \$140 million to consumers for unanticipated overdraft fees and unfair NSF fees through the supervisory work completed by the CFPB.

In addition to the CFPB's recent work regarding junk fees, the FTC released a notice of proposed rulemaking relating to “junk fees” on October 11, 2023. The notice indicated that the FTC is commencing rulemaking to promulgate a rule would prohibit unfair or deceptive practices relating to fees for goods or services, specifically, misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees. The FTC had previously requested comments on “junk fees”; including financial services fees in relation to bank accounts, credit cards and other financial services. According to the FTC some commenters stated that financial service fees are “excessive,” not disclosed and can be particularly burdensome to vulnerable demographics. Industry commenters explained that financial service fees are for legitimate products and services and that financial services fees are already regulated by state and federal laws. Industry commenters noted also that there

Darrell L. Dreher
ddreher@dtlaw.com

Elizabeth L. Anstaett
eanstaett@dtlaw.com

Mercedes C. Ramsey
mramsey@dtlaw.com

Susan L. Ostrander
sostrander@dtlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DTLAW.COM

To see previously sent ALERTS, visit our website at www.dtlaw.com

To decline future ALERTS, please contact us at ALERTS@DTLAW.COM.
This ALERT has been prepared for informational purposes only. It does not constitute legal advice and does not create an attorney-client relationship.

Michael C. Tomkies
mtomkies@dtlaw.com

Judith M. Scheiderer
jscheiderer@dtlaw.com

Robin R. De Leo
robin@deher-la.com



are often legitimate reasons for disclosing fees at a later date that are unique to the financial services sector.

The CFPB and the FTC actions regarding “junk fees” were supported by President Biden who made a statement regarding efforts to crack down on “junk fees” and bring down costs for American consumers. The industry responded by explaining that banks operate in one of the most highly regulated and competitive markets in the world. Many in the industry believe that the administration is using rhetoric that fails to reflect the regulatory environment in which banks operate and mischaracterizes an industry that strengthens the financial well-being of millions of Americans.

Although financial service fees are regulated at the state and federal level and subject to disclosure laws, the industry can expect increased scrutiny of fees and disclosures. New disclosures and restrictions related to financial service fees may be imposed in the future and fees and disclosures that comply with existing law may still be subject to scrutiny under UDAP and other theories. The implications of such scrutiny of fees extends beyond mere amount, purpose and frequency, but extends to marketing, positioning and corporate policies establishing when such fees may (or may not) be imposed (or waived). We are happy to work with clients on their broader fees strategy, to review and comment on marketing, relevant arguments and internal policies in light of continuing regulatory and political pressure. One size regulation does not fit (or make sense) for all. Corporate appetite for risk and business objectives matter.

In addition, the CFPB's final rule amending Regulation Z to adjust the safe harbor dollar amount for credit card late fees to \$8 is expected this Fall. We will continue to monitor state and federal regulation of financial service fees as the area develops and advise on compliance obligations. Let us help you!

✧ *Michael Tomkies, Elizabeth Anstaett and Kim Tomkies*

LOOKING FOR A STATE LAW CREDIT CARD COMPLIANCE RESOURCE? We publish an easy-to-use online reference that summarizes state consumer lending and other consumer protection laws. Our CREDIT CARD DIGEST is organized topically, covers laws applicable to credit card programs of federally and state-chartered financial institutions from an out-of-state issuer perspective and includes an analysis of statute applicability. Card issuers, marketers, servicers and merchants should find this an invaluable resource for program development and regulatory compliance. **Contact us for details.**