REGULATORY OVERSIGHT PODCAST / THE CONSUMER FINANCE PODCAST

STATE ATTORNEYS GENERAL CALL ON FINANCIAL GIANTS TO ELIMINATE OVERDRAFT FEES

Stephen Piepgrass: Welcome to another episode of Regulatory Oversight, a podcast that provides expert perspective on trends that drive enforcement activity. I'm one of the hosts of the podcast, Stephen Piepgrass, a partner at Troutman Pepper. The podcast features insights from members of the firm's regulatory practice group, including its nationally ranked state AG's practice and guest commentary from business leaders, regulatory experts, and current and former government officials on a range of topics affecting businesses that operate in highly regulated areas. From time to time, we will be sharing episodes from other podcasts, from other areas of the firm that touch on issues we think you, our listeners, will enjoy. Today, we're pleased to share an episode from our Consumer Finance Podcast on the AG report on overdraft fees, which includes a conversation with one of our own regulatory group members, Chris Carlson. We hope you enjoy.

Chris Willis: Welcome to the Consumer Finance Podcast. I'm your host, Chris Willis, the co-practice leader of Troutman Pepper's Consumer Financial Services Regulatory Group, and welcome to today's podcast where we're going to be talking about a recent multi-state attorney general announcement about bank overdraft fees. But before we jump into that topic, let me remind you about our blog, consumerfinancialserviceslawmonitor.com, where we post new material daily about all important happenings in the consumer financial services industry. And don't forget to check out our other podcast, FCRA Focus, which as the name suggests is all about the Fair Credit Reporting Act and it's released monthly on all popular podcast platforms.

And if you like this podcast, be sure to let us know, leave us a review on any of the popular podcast platforms where you might be getting our podcast. Now, as I said today, we're going to be talking about a recent statement by a number of state attorneys general about bank overdraft fees. And joining me to talk about this are two of our most rising star associates. First, we have Susan Nikdel, who's one of our consumer financial services associates in our Orange County office. And then we also have Chris Carlson, who's an associate in our nationally renowned state attorney general group. And Chris is based in Richmond. So first of all, Susan, Chris, thanks for joining me on the podcast today.

Susan Nikdel: Thanks, Chris. Excited to join.

Chris Willis: So Susan, let me start with you and just ask you, like tell the audience what has happened here? What have the state attorneys general done? And in fact, what state attorney generals were involved?

Susan Nikdel: Sure. So earlier this month on April 4th, the New York Attorney General Letitia James led a multi-state coalition of attorney generals to call on the nation's largest banks to eliminate overdraft fees. There was a letter that actually went out to the CEOs of JPMorgan Chase, Bank of America, US Bank, and Wells Fargo, in which the attorney general urged each bank to eliminate overdraft fees by this summer. As many of you likely know, late last year, Capital One committed to ending all overdraft and non-sufficient fund fees for its customers. And then in February of 2022, Citibank followed Capital One's lead and announced that it too would eliminate overdraft fees by this summer. So in this letter, led by Attorney General Letitia James, the 17 attorney generals are now urging the four other financial giants to follow their peers lead and eliminate these fees.

Chris Willis: Thanks, Susan. And so Chris, just give us a little bit of background here. What are overdraft fees and what is the controversy surrounding them?

Chris Carlson: Chris, thanks again for having me on the Consumer Finance Podcast. Overdraft fees are incurred when a consumer spends more money than they have available in their bank account. The state's letter sites to a study, but run by the Center for Responsible Lending, showing that US consumers paid an estimated $11 billion in overdraft fees in 2019. I will note that that study was pre-pandemic, but the states note that there's an expectation that this amount will rise due to the pandemic. They also emphasize that the financial burden disproportionately falls on low-income consumers and consumers of color. Specifically, the study concluded that 84% of those fees assessed to consumers occurred with those with the lowest account balances. But I think it's important that we hear actually from Tish James's statement, because I think that was telling. Susan, do you want to remark on that a little bit?

Susan Nikdel: Sure, I'd love to share a direct quote from Attorney General James, in which she stated, and I quote, "For too long excessive overdraft fees have hurt the most financially vulnerable New Yorkers. Working families and low-income New Yorkers cannot afford to continue to be harmed by this unfair and punitive practice, while banks reap big profits. I'm calling on the largest consumer banks in the nation to do the right thing and remove overdraft fees. We need a fairer and more inclusive banking system that supports all New Yorkers."

Chris Willis: And this rhetoric about overdraft fees from the New York Attorney General is strongly reminiscent of a lot of statements that we've seen from other regulators, including most particularly the Consumer Financial Protection Bureau, where the director, Director Chopra has made a number of comments over the past several months about overdraft fees and has applied a lot of pressure to banks to eliminate them similar, I think to what the state attorneys general are getting on as well. And so Susan, this has become an issue obviously for a lot of regulators. And can you tell us... You mentioned that there were 17 attorneys general joining this letter. Can you tell us who the other states were that were involved?

Susan Nikdel: Of course, joining Attorney General James in sending this letter are the attorney generals of California, Connecticut, District of Columbia, Delaware, Hawaii, along with the Hawaii office of consumer protection, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Carolina, who signed all except Bank of America, which we'll touch on later, Oregon, Pennsylvania, and Washington.

Chris Willis: Thanks. And so Chris, you and your colleagues are always watching the state attorneys general and what they're doing because your practice revolves around dealing with them all the time. From your standpoint, what are some of the initial takeaways that the industry should have from this joint letter that we've been talking about?

Chris Carlson: Chris, that's a good question. And anytime we see these comment letters, we can't just tick through the states and just say, oh, this is a group of 18. I think each state needs to be looked at individually. And the number matters and the 18 attorneys general and the political party of the participating AGs matter. Just as background, there are 56 state and territorial attorneys general and they represent their citizens. And as such, they often have distinct priorities and perspectives that don't simply follow political lines. So when I looked at the letter, they caught my eye that the AG sent the letter directly to the banks. They could have made the decision to send it to an agency. They could have made a decision just simply to issue a press release, but they did this... And of quite interesting note. And I think Susan's going to talk a little bit about this. They did this despite the CFPB currently receding comments on various fees imposed by consumers. Susan, you want to talk a little bit about that?

Susan Nikdel: Yeah, sure. So many of these same AGs that we just mentioned also took the opportunity to send letters to mortgage servicers. In fact, in July of 2019, many of the same state AGs sent a letter to the CFPB regarding the CFPB's debit card overdraft fee rule. There, the state AGs stated that they recommend that these fees be proportionate to the amounts banks pay to cover overdraft transactions. And also interestingly, within that letter to the CFPB, these state attorney generals, didn't forget to mention their issue with the banks in general stating, and I quote, "We note that recent announcements from some financial institutions concerning their reduction or elimination of overdraft fees and insufficient fund fees, and believe that these highlight additional example of harmful junk fees," as they characterized it.

Chris Willis: So, Chris, when we think about the messaging here that we're hearing from the state AGs, what do you think the purpose is? What was the endgame of the multiple state attorneys general who joined these letters to the various banks?

Chris Carlson: Thanks, Chris, and that's a really good question. I really like your language of endgame because I think this is the start of a clear directive to the financial services industry, generally. First, the comment letter demonstrates the policies of certain and state attorneys general and it does so through a public outreach. Not all state AGs have the authority to issue regulations, and instead all are required to enforce a general statutory framework. That framework mandates that state AGs prohibit unfair and deceptive acts of practices. That framework of unfair and deceptive practices is often undefined. And as a result, these letters allow state AGs to make clear what business practices they're scrutinizing and evaluating.

But as it relates specifically to this letter, this comment letter put the financial services industry on notice by making the decisive and purposeful decision to send letters to the leading market players and these banks. It gets the attention of not just those banks and those CEOs that received the letter, but to the entire industry. State AGs took that same approach during COVID's infancy, sending letters to the three largest credit reporting agencies, emphasizing compliance with federal and state reporting act requirements in light of the CARES Act. [00:10:00] This method, I know just from experience got the attention of the entire credit reporting industry and we expect the same to happen here. But I know we talked a little bit about endgame, Susan, what do you expect in terms of next steps?

Susan Nikdel: I do think that traditionally these sign-on letters, as you mentioned, are meant to give notice to an industry. And then they're often followed by state attorney general investigations and subsequent enforcement actions for companies that failed to take action to comply with such policy. And so over the past 10 years, state attorney generals have adopted a policy through enforcement actions, and such actions, as Chris noted, were taken under state unfair and deceptive practice laws, which as we all know, carry very strong civil penalty provisions. So if companies are fail to act in wake of proceeding these letters, I think that is a bad idea, because there could be some investigations and subsequent enforcement actions coming down the pipeline.

And another thing that I think is important to note is who did not sign on to these letters. As we mentioned, we went through the list of who did, but there were 18 democratic attorney generals who signed onto the letter led by New York and then of the 51 states and DC, all 27 Republican AGs did not join the letter. Six democratic AGs also did not join the letter and that includes Colorado, Maine, New Mexico, Rhode Island, Vermont and Wisconsin. We don't want to read too much into the tea leaves here and assume that just because a state did not join a letter, that means AG is a not in favor of or supports a business's practices, because state AGs do take responsibility very seriously and want to ensure that the policy positions that they're taking accurately are reflected in a comment letter, such as this one. For instance, we're aware of some state AGs not joining a multi-page letter based on disagreement with just a single sentence or a single phrase.

That being said, though, we did want to highlight North Carolina AG Josh Stein, who joined all the letters except Bank of America, interestingly. Now Bank of America is headquartered in North Carolina where Josh Stein serves. According to recent public statements, Bank of America did announce in January of 2020 that it was lowering fees for overdrafts from $35 to $10 starting in May of 2020. So that is a move in the right direction in the eyes of these attorney generals. But we do have to assume that the North Carolina AG probably has a working relationship with the business and chose not to join the Bank of America comment letter for some reason.

Chris Carlson: I think that's a really good point, Susan, and circling back to not reading the tea leaves. It does just based on my experience, it takes a lot of energy to get 18 AGs to join any letter. And I think it's important that we take this comment letter seriously because of the fact that once you have 18 AGs agreeing on something, you have this automatic development of a multi-state, you have 18 AGs that are on the same policy framework, and they have an agreement on a policy perspective they want to move forward. And I think quite honestly, as we've discussed a multi-states generally, that is a very impressive force that we need to take in account, and we should be expecting them to take actions as over the next few months.

Chris Willis: Well, Chris, thank you for that. And Susan, thank you for your comments on this podcast too. It's really a proud moment for me to see two of our rising stars participate in the podcast this way, and it shows you just what a bright future our consumer financial services group has in serving the industry here at Troutman Pepper. So I want to thank the two of you for being on the podcast today. And of course, thank our audience for listening to the podcast as] well. Don't forget to visit our blog, consumerfinancialserviceslawmonitor.com and subscribe to it, so you'll get all the updates of the content that we post there almost every day, and add yourself to our email list for our alerts and webinar invitations. You can add yourself at our blog, consumerfinancialserviceslawmonitor.com or at troutman.com and stay tuned for a great new episode of this podcast every Thursday. Thank you all for listening.