
CRYPTO EXCHANGE: CONVENIENCE FEES: WHY YOU SHOULD BE PAYING ATTENTION? JULY 6, 2022

Ethan Ostroff:

Welcome to another episode of The Crypto Exchange, a Troutman Pepper podcast, focusing on the world of digital assets and payments. As longtime leaders in the intersecting worlds of law, business, and government regulations, our lawyers can go beyond the buzzwords and headlines to make sense of the emerging legal and regulatory frameworks for operating in the digital asset and payments industries. I'm Ethan Ostroff, one of the hosts of the podcasts and a partner at Troutman Pepper.

Before we jump into today's episode, let me remind you to visit and subscribe to our blogs, consumerfinancialserviceslawmonitor.com and regulatoryoversight.com. And don't forget to check out our other podcasts on troutman.com/podcast. We have episodes that focus on trends that drive enforcement activity, consumer financial services, the Fair Credit Reporting Act, cybersecurity, and more. Make sure to subscribe to hear the latest episodes. Today, I'm joined by my colleagues, Keith Barnett and Carlin McCrory, to discuss convenience fees. Keith and Carlin, I'm looking forward to the discussion today. There's been a lot in the news recently on convenience fees. Keith, do you want to give us a few updates first?

Keith Barnett:

Sure, Ethan. Thank you. On June 29th of 2022, the CFPB released an advisory opinion on convenience fees, which the CFPB decided they wanted to call them junk fees. Now, this is not the first time that the CFPB under Rohit Chopra has addressed the issue of junk fees or used that word in the regulatory context. Earlier this year on January 26th, the CFPB launched an initiative whereby it sought input from the public concerning what it called junk fees. The bureau used the specific examples of late fees charged by credit card companies and insufficient fund fees charged by banks. Now, interestingly here on June 29th, this advisory opinion does not focus on credit card charges or bank charges. Rather, the advisory opinion focuses on debt collectors and states that a debt collector receiving a convenience fee or any portion of a convenience fee violates the Fair Debt Collections Practices Act unless expressly authorized by the underlying agreement between the creditor and debtor or otherwise permitted by law.

The CFPB, in this advisory opinion, acknowledged that some courts have held that pay to pay fees do not violate the FDCPA, at least section 8081 in particular, because the fees are not incidental to the principal obligation. However, this reading does not align with the CFPB's interpretation of that same section, 8081. The advisory opinion, to be clear is limited to debt collectors. It does not say anything about convenience fees charged by creditors. Creditors are not subject to the Fair Debt Collections Practices Act. As some of you know, my practice is a payments practice, so I will focus on the one paragraph regarding payment processors. The advisory opinion states that it is a prohibited practice under the CFPB's interpretation of the FDCPA for payment processors to collect a convenience fee and then remit that fee to the debt collector. Actually, any portion of that fee, whether it's an installment or in a lump sum.

So to be clear, the CFPB does not appear to have any issues with the payment processor collecting a convenience fee and keeping it for itself. In that respect, the CFPB advisory opinion is somewhat at odds with the state of Maryland. What I'm referring to here is in May of this year, the Maryland Department of Labor released a notice to lenders and servicers regarding

convenience fees. Not only does the notice confirm that a creditor may not charge a convenience fee, at least as Maryland interprets it, unless that it's provided for in the underlying loan documents, but Maryland also states that payment processors collecting a fee also are in violation of Maryland law. The other interesting thing here is that the Department of Labor noted that requiring consumers to amend their loan agreements for the purposes of inserting such fees could also violate Maryland law.

So, the lesson learned here for payment processors, money transmitters, and even loan servicers is to be sure that you are aware of the state in which the debtor or borrower resides if you are inclined to charge a convenience fee, because you do not want to run afoul of the state's acts of providing greater consumer protections than the CFPB. And by way of background, before I close this out, is that this release from the Maryland Department of Labor comes on the heels of a private litigation involving a plaintiff who had alleged that a mortgage loan servicer violated the FDCPA by charging borrowers a convenience fee. The issue there was whether a loan servicer was a debt collector under the FDCPA, and the fourth circuit court of appeals held that it was. I think that sums it up, at least the update in a nutshell.

Ethan Ostroff:

So Keith, just backing up a minute. I know the CFPB issued an advisory opinion. What does it mean when the CFPB sends out an advisory opinion and how should that be viewed by folks in the payments industry?

Keith Barnett:

The CFPB, when it sends out an advisory opinion, it is telling everyone within the industry what it is thinking with respect to the interpretation of a statute. So even though it is not codified law, it should be taken as guidance by participants in the industry.

Ethan Ostroff:

State and federal agencies have really been cracking down on consumer fairness topics recently. Keith, wondering if you could share with our listeners a little bit more about the interplay of convenience fees with the FDCPA and the impact on payment processors.

Keith Barnett:

First, the plain language of section 1692F does not apply to payment processors. Nowhere is the term, name, phrase, however you want to call it, payment processors mentioned in the statute. Instead section 1692F prohibits a debt collector from collecting any amount, including any interest fee, charge or expense incidental to the principal obligation, unless such amount is expressly authorized by the agreement creating the debt or permitted by law. But second, the CFPB, as many of us know, has the sole authority to prescribe the rules with respect to collection of debt by debt collectors. The bureau has suggested that section 1692F does not prohibit a payment processor from charging a convenience fee when processing a payment on behalf of a debt collector, and as I said earlier, if that fee is not shared or split with the debt collector.

Backing up a little bit, in November of 2013, the CFPB issued an advanced notice of proposed rulemaking. In that advanced notice of proposed rulemaking, the CFPB suggested that it intended to adopt debt collection rules under the FDCPA. And then in July 2016, so almost three years later, the CFPB published an outline of the proposals under consideration. That outline expressly stated that the CFPB was considering clarifying that section 1692F does not prohibit a payment processor from charging a convenience fee when processing a payment on behalf of a

debt collector if the fee is not shared or split with the debt collector. The bureau never implemented any opinion regarding payment processors, but this is still indicative of the CFPB's intent, as evidenced also by the July 29th advisory opinion.

Ethan Ostroff:

Thanks, Keith. That's really interesting and helpful background for understanding how we got to the current circumstance. Carlin, how do the card network rules play into this analysis?

Carlin McCrory:

The card network rules go into the differences between a convenience fee and a surcharge, whereas the state laws don't necessarily go into that amount of detail. So, a convenience fee is a charge passed onto the customer for the privilege of paying through an alternative payment method that's not standard for the business. So for example, a business that traditionally accepts checks for free can also offer payment via credit card and charge a convenience fee for making that credit card payment channel available. So the convenience fee isn't charged for the method of payment, but rather the privilege of using a certain type of payment. In opposition, a surcharge is a charge assessed by the business to offset any credit card fees associated with the transaction, and at least according to the card network rules, is always a percentage of the value of the sale. A surcharge can be applied to all credit card payments for a specific card type or to specific categories of credit card products.

But the caveat here is in order to charge a surcharge, the business must notify Visa and MasterCard, those card networks, before they can begin surcharging. Generally speaking, those surcharges can't exceed 4%. Also of note, surcharges aren't permitted on debit card transactions, where generally, at least again according to the card network rules, it's perfectly fine to charge a convenience fee for a debit card payment. There are a host of additional rules and restrictions for imposing surcharges, but based on this, we often see that most of our clients opt to charge convenience fees rather than surcharges based off these requirements. The card network rules also state that merchants are only permitted to charge convenience fees and they prohibit third parties from charging those convenience fees. There's also a whole list within the Visa rules about the requirements to charge convenience fees. A couple examples of these rules are the fee can only be charged in a card absent environment and the fee has to be applicable to all forms of payment accepted in the payment channel.

Ethan Ostroff:

Carlin, I know you mentioned a distinction between the method of payment and the form of payment. Could you talk a little bit more about how to differentiate those two?

Carlin McCrory:

So, the method of payment here is anything that's, again like I said, not standard, which nine times out of 10, almost always it's a check is the method of payment. Whereas the form of payment for a surcharge is basically the privilege of offering that credit card service. The surcharge is only related to the costs incurred for the merchant to provide the credit card as a service.

Ethan Ostroff:

Carlin, how do the card network rules mesh with state laws?

Carlin McCrory:

This is interesting because oftentimes the state laws conflict with the card network rules. The state laws typically don't distinguish between a surcharge and a convenience fee. It's basically any charge that's incurred for offering a payment method falls under the state law rules. Some statutes, actually in contradiction to the Visa rules, state that a charge shouldn't be more than a certain percentage of the transaction, whereas the Visa rules require a flat fee.

Ethan Ostroff:

Can you give us an update on some of the state laws, Carlin?

Carlin McCrory:

July 1st of this year, 2022, Colorado recently amended their law, which is great for our merchants and payment processors out there. Colorado's law previously prohibited sellers or lessors from imposing convenience fees in transactions. The new law actually allows convenience fees to be charged to these buyers or lessees that elect to use a credit or charge card in lieu of payment by cash, check or another means. There are specific disclosure requirements along with the fee restrictions, so you need to be very careful in reviewing Colorado's new law. Colorado also made clear that a fee cannot be charged for the use of debit card payments.

Connecticut also recently amended its law. For Connecticut, they really didn't change what they're doing. Convenience fees still remain prohibited. But they added several more definitions to the statutes to show that basically convenience fees are not permitted in any circumstance. So, no person, which includes businesses, may charge any fee for the privilege of using a particular form of payment on any transaction. Transaction wasn't previously defined, and now it's defined. I think they were really just doing this to hammer down that these fees aren't allowed almost in any circumstance, at least for our payment processors out there.

We've also seen several states, New York, Florida, and a handful of others, have some case law out there regarding anti surcharge statutes. So what this means is generally these statutes prohibit charging a surcharge for the use of credit card instead of cash, check or another method of payment. Well, so some courts out there have decided that the anti surcharge statutes regulate free speech, and therefore are unconstitutional.

Ethan Ostroff:

Thanks, Carlin. That's pretty interesting and really helpful to understand. Ultimately, what are y'all's thoughts on the bottom line with respect to convenience fees in the current regulatory atmosphere?

Keith Barnett:

Four things. First, payment processors should not share any portion of convenience fees with debt collectors. The second thing is payment processors should have extensive disclosures to comply with card network rules and with state laws, especially since certain states have disclosure requirements. Third, a free payment option should be offered, such as mailing in a check. That should always be provided to consumers of any type of free option. And then fourth, we strongly recommend that any convenience fee charged is reasonable in light of the amount of the payment.

Ethan Ostroff:

Great. Thanks so much, Carlin and Keith, for joining everyone today. Thank you to our audience for listening to today's episode. Don't forget to visit our blogs, consumerfinancialserviceslawmonitor.com and regulatoryoversight.com, and subscribe so you can get the latest updates. Please make sure to also subscribe to this podcast via Apple Podcast, Google Play, Stitcher or whatever platform you use. We look forward to seeing you next time.

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