Payments Pros – The Payments Law Podcast: Decoding the CFPB's Recent Report: An Examination of "Junk Fees" and Their Impact on Consumers
Hosts: Keith Barnett and Carlin McCrory

Keith Barnett:

Welcome to another episode of *Payments Pros*, a Troutman Pepper podcast focusing on the highly regulated and ever evolving payment processing industry. This podcast features insights from members of our FinTech and payments practice, as well as guest commentary from business leaders and regulatory experts in the payments industry. My name is Keith Barnett and I'm one of the hosts of the podcast. Before we jump into today's episode, let me remind you to visit and subscribe to our blog, ConsumerFinancialServicesLawMonitor.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, digital assets, consumer financial services and more. Make sure to subscribe to hear the latest episodes.

Today, it is just Carlin and me. And Carlin is here to discuss the CFPB's recent fall supervisory highlights, junk fees update special edition. The findings in the report cover examinations in the areas of deposits, auto servicing, and remittances that generally were completed between February 2023 and August 2023. Carlin, I'm looking forward to our discussion today. I will start this off by just asking a preliminary question. The CFPB has been using this term junk fees a lot since Rohit Chopra became the director, and this is not the first time the Bureau has said something about junk fees this year. Can you give the audience some background on that and what's happened this year?

Carlin McCrory:

Yeah, Chopra has mentioned junk fees a ton this year, and President Biden as well has mentioned junk fees. These range from everything from financial institution fees that are being charged, some of which we're going to discuss today, but even fees tacked on to your hotel room stay and other sorts of fees that you may incur. The last time the CFPB published a junk fee special edition of its supervisory highlights was back in March of this year. The CFPB notes in the report that it just released, that in total for the topics covered in this October report that their work has resulted in institutions refunding over $140 million to consumers. The report predominantly focuses on deposits as an area of supervisory observations, and that'll be the focus of our discussion today is on the deposit side, but we will cover all of the topics that the report covers as well.

Keith Barnett:

One of those observations concerns multiple NSF fees for the same transaction. Can you tell the listeners about that?

Carlin McCrory:

The report discusses multiple NSF fees for the same transaction, but breaks it down between the different types of entities involved, such as core processors and financial institutions. But to back up a little bit, this has been and continues to be a large focus for the CFPB, these multiple

NSF fees. So a representment occurs when after declining a transaction because of insufficient funds and assessing an NSF fee for that transaction, the consumer's financial institution returns the transaction to the merchant's institution, but then the merchant represents that same transaction to the consumer's financial institution for payment again. And in some instances when the consumer's account remains insufficient to pay for the represented transaction, the financial institution charges a second NSF fee for the representment without providing consumers any reasonable sort of opportunity to prevent another fee after the first failed presentment attempt. The report then goes on to specifically discuss core processors.

The CFPB examine core processors in their capacity as service providers to covered persons providing deposit services. Examiners concluded that in the offering and providing of core service platforms that these core processors engaged in unfair acts or practices by contributing to the assessment of unfair SF fees on these represented items. To address these findings, the core processors enhance their systems that they provide to the financial institutions to facilitate their implementation of policies to eliminate these NSF representment fees. We all know that the financial institutions are reliant on their core processors, so it's really important this meshing here that the core processors are allowing the financial institutions to determine when a transaction is represented such that they can make the affirmative decision not to charge that NSF fee a second time. Additionally, the CFPB intends to review the practices of financial institutions seeking payment from the consumer's financial institution, which is typically the ODFI, the originating depository financial institutions, to ensure that these represented transactions are coded properly to enable the systems to identify when the transaction has been represented so that the NSF fee won't be charged twice for the same transaction.

Keith Barnett:

Were there specific findings for the financial institution practices?

Carlin McCrory:

The report goes on to specifically discuss the financial institution practices here and the CFPB found that financial institutions also engaged in unfair acts or practices by charging consumers representment NSF fees without affording the consumer a meaningful opportunity to prevent another fee after the first failed represent attempt. Many of these financial institutions came up with plans to reimburse consumers for multiple representment fees, which was required by the CFPB. However, some financial institutions used incomplete reports that only captured certain representment NSF fees charged to consumers and the CFPB found fault with that. The examiners found that the reports captured consumer accounts that were charged NSF fees on checks only or on both checks and ACH transactions. Yet they admitted consumer accounts that were assessed NSF fees solely on ACH transactions. So the CFPB is really looking for a fulsome report here of when consumers were charged multiple representment fees and ensuring that those consumers are properly reimbursed.

And the report noted that in total the institutions are refunding over $22 million to consumers in response to these directives. And the last thing I want to note here on NSF fees, we've seen this time and time again, but the CFPB has been really harsh on NSF fees specifically and has really made a push for institutions to eliminate NSF fees. Not only are they saying that an NSF fee is charged and there is no service being provided to the consumer, but also that the fees

themselves are just too high if you are charging them, something to think about if you're a FI and still charging NSF fees.

Keith Barnett:

Another topic that the CFPB addressed was unanticipated overdraft fees. Can you tell the audience about that?

Carlin McCrory:

Yeah, so I definitely want to talk about overdraft fees because this was in the news. I think yesterday was the first time we were really seeing some more speculation on this. Bloomberg Law came out with an article that the CFPB possibly intends to release a ruling or some regulations on overdraft fees prior to the end of the year, and it's been hush, hush for a while, although many folks have speculated that there may be something coming out. So keep that on your radar either prior to the end of the year or possibly early next year for something being issued by the CFPB as it relates to overdraft fees. Jumping back to the report, the CFPB found that institutions continue to charge authorize positive, settle negative, APSN overdraft fees. Again, this is something the CFPB has continued to harp on for some time and there have been plenty of enforcement actions on this.

First off, what are APSN overdraft fees? Well, these occur when financial institutions assess overdraft fees for debit card or ATM transactions where the consumer had a sufficient available balance at the time the consumer authorized the transaction. Given the delay between the authorization and the settlement, the consumer's account's balance is then insufficient at the time of settlement. The change in balance can occur for a host of different reasons, such as intervening authorizations resulting in holds, settlement of other transactions, timing of presentment of the transaction for settlement, and other complex practices relating to transaction processing order. To remedy these violations, the institution ceased charging APSN overdraft fees and will conduct a lookback to issue remediation to injured consumers. Again, the CFPB claims that financial institutions are refunding over $98 million to consumers since this work began in 2022.

Keith Barnett:

The Bureau also noted that it had received data on NSF and overdraft related fees along the lines of what you've been discussing, but can you talk a little bit more about that, along with the bureau's findings on pandemic relief benefits?

Carlin McCrory:

We definitely want to discuss this, so you know where your institution may fall as it relates to charging overdraft fees. The CFPB obtained data from several different institutions related to the fees assessed over the course of 2022, and this included the per item overdraft and NSF fees, sustained overdraft fees and transfer fees. Again, these amounts mentioned in the report could be insightful for your institution. So the CFPB notes that the relevant institutions charge per item overdraft fees that range from $15 per item to $36 per item. The report notes that the amount of overdraft coverage provided for consumer transactions on which the fees were charged was often disproportionately small. So it uses, as an example in the data sets, the

median amount of overdraft coverage extended on a one-time debit card and ATM transactions range from 14 to $30. So this is really worth keeping an eye on for potential further supervision when the dollar amount of an overdraft fee may exceed the cost of the actual overdraft itself.

If you're charging a $36 overdraft fee, but the overdraft was only $5, you may just watch out for things like that. Also, in 2022, in the dataset, overdraft and NSF fees comprised 53% of all fees that the institutions charge to consumer checking accounts and nearly three quarters of all fees charged to lower balance accounts and the CFPB defines those lower balance accounts as an average balance of $500 or less. These were the types of accounts that were opted into overdraft services. While account holders overall each paid approximately $65 per year in overdraft and NSF fees on average, these opted in accounts and lower balance account holders paid over 165 and $220 in overdraft in NSF fees on average per year respectively.

So again, what they're getting at is the people who opt in and the people who maintain a lower balance are incurring significantly more overdraft fees. And then across all institutions in the aggregate that were part of this survey, one fifth of accounts were an average balance of $500 or less, but this one fifth paid 68% of per item overdraft fees assessed and 77% of the per item NSF fees again. So to me, the CFPB here is looking at somewhat of a disproportionate impact on these lower balance accounts.

Keith Barnett:

What other kinds of fees that they also talk about? I mean, they've been saying a lot publicly about people being charged fees for requesting statements and other things of that nature. Did they say anything about that?

Carlin McCrory:

Yeah, so the report mentions unfair statement fees and surprise depositor fees and pandemic relief benefits. So we'll get to those in turn. But first, diving into the unfair statement fees. The CFPB found that institutions charge fees for the printing and delivery of paper statements including additional fees when they mailed a statement that was returned undelivered. However, the CFPB found that institutions engaged in unfair acts or practices by assessing these paper statement fees and return mail fees for paper statements that they didn't even attempt to print and deliver. So that's some fairly common sense there that if you're not even attempting to print and deliver the statements, you probably shouldn't be charging a fee. Surprise to depositor fees, also known as return deposit item fees, are fees assessed to consumers when an institution returns as an unprocessed, a check that the consumer attempted to deposit into his or her checking account. And an institution might return a check for several different reasons, including insufficient funds in the originator's account, a stop payment order, or problems with the information on the check.

So back in October of 2022, the CFPB issued a compliance bulletin stating that it's likely an unfair actor practice for an institution to have a blanket policy of charging return deposit item fees anytime that a check is returned unpaid, irrespective of the circumstances or patterns of behavior on the account. At this time, the CFPB hasn't sought to obtain monetary relief for return deposit item fees assessed prior to November 1st, 2023, but the CFPB said in its report that it will continue to monitor the relevant practices for compliance with the law and may start to direct remediation for these institutions that continue to charge these fees. And the main thing

here is that if someone's trying to deposit a check, they're not going to know if there are sufficient funds in the originator's account. It's very possible that they don't know that there are sufficient funds in the originator's account, in which case it would be unfair to charge a return deposit item fee.

And then lastly, I mentioned pandemic relief benefits. The CFPB performed a broad assessment centered on whether consumers may have lost access to pandemic relief benefits, namely those economic impact payments and unemployment insurance benefits as a result of financial institutions garnishment or set off practices. Further follow-up reviews from the CFPB identified many supervised institutions that risk committing unfair acts or practices in violation of the CFPA in connection with their treatment of pandemic relief benefits, which resulted in consumers being charged improper fees.

In response to these findings, the institutions did three things. The first is that they refunded protected economic impact payments taken from consumers to set off fees or amounts owed to the institution. Secondly, they refunded garnishment related fees assessed to consumers for improper garnishment of economic impact payments. And lastly, they reviewed, updated and implemented policies and procedures to ensure that the institution complies with applicable state and territorial protections regarding set off and garnishment practices. To date, the CFPB identified over a million dollars in consumer injury in response to these examination findings with institutions providing redress to over 6,000 customers. Just thus far, supervised institutions have provided redress of approximately $685,000 to consumers for improper set off of economic impact payments and approximately $315,000 just for improper garnishment related fees.

Keith Barnett:

Thanks Carlin. I'm going to shift gears a little bit here because another thing that the Bureau also discussed was auto servicing and its highlights, and I found that part to be interesting because it looked like it was a confluence of consumer protection related issues, both from the CFPB's past and present. As some of you may recall, the very first CFPB enforcement action concerned credit card add-on products, and this time, the Bureau is talking about auto servicing add-on products along with lending. And so I just thought that was really interesting. Could you expand a little bit on that?

Carlin McCrory:

Yeah, sure. The CFPB continues to identify unfair acts or practices related to auto servicers' handling of refunds and add-on products after loans terminate early. Specifically, the CFPB said that some servicers failed to ensure that consumers receive refunds while others did so, but they miscalculated the refund amounts. So the first topic within the report is overcharging for add-on products after early loan termination. In these cases, examiners continued to review servicer practices related to add-on product charges were loans terminated early through payoff or through repossession. When the loans terminated early, certain products no longer offer any possible benefit to the consumers. Whether a product offers a benefit depends on the type of product and also the reason for early termination. The CFPB cites that vehicle service contracts continue to provide value after payoff, but services like gap and credit life insurance won't. As such, the examiners found that auto servicers engaged in unfair practices when servicers failed to ensure that the consumers received refunds for these add-on products following early loan termination.

And the servicers are remediating impacted consumers more than $20 million in implementing processes to ensure consumers receive refunds for add-on products that no longer offer any possible benefit to consumers. The second prong that we wanted to discuss is miscalculating refunds for add-on products after early termination. In addition to just not making any sort of refund, the examiners also continued to identify problems with the calculation of unearned fee amounts after loan termination. The examiners found that servicers engaged in unfair acts or practices when they miscalculated add-on product refund amounts after the loans terminated early.

These servicers had a policy to obtain add-on product refunds and relied on service providers to calculate the refund amounts. The service providers miscalculated the refunds due either because they use the wrong amount for the price of the add-on product or because they deducted fees such as cancellation fees that weren't authorized under the add-on product contract. So then by using these service providers, the servicers then use the miscalculated refund amounts. So in response to these findings, the servicers are remediating impacted consumers and improving monitoring of their service providers, and that's always been important is to make sure you're monitoring your service providers and ensuring that they are doing what they say they will do under their contracts, whether it's in the case of auto loans here or whether you're a financial institution using third party service providers.

Keith Barnett:

Speaking of making sure that people are doing what they say under their contracts or even under the rules, the CFPB also discussed the remittance rule under Reg E and disclosures related to that. Could you expand upon that a little bit please?

Carlin McCrory:

The examiners also reviewed activities of remittance transfer providers to ensure that the fees are disclosed and charged consistent with Reg E's remittance rule. These examinations found that certain providers have violated regulations by failing to appropriately disclose the fees or failing to refund fees in certain circumstances because of an error. So as background, the remittance rule requires that remittance transfer providers disclose any transfer fees imposed by the provider, and these recent examinations have found that the remittance providers have failed to disclose the fees imposed by their agents at the time of the transfer.

What this does is this reduces the total wire amount that the recipients received as compared to the amount that had been disclosed. Additionally, in the case of an error for failure to make the funds available to a recipient by the date of availability, the remittance rule states that if the remittance transfer provider determines an error occurred, that provider shall refund to the sender any fees imposed, and to the extent not prohibited by law, any taxes collected on the remittance transfer. Examiners also found that certain providers failed to correct errors by refunding to the sender the fees imposed on the transfer within the specified timeframe where the recipients did not receive the transfers by the promise date. In response to these findings, the supervised institutions implementing corrective action to prevent future violations and provided remediation to consumers charge fees in violation of regulatory requirements.

Keith Barnett:

One more thing before we wrap up, Carlin, the Bureau also discussed fees related to student meal accounts, and it appears that the bureau is expressing a need to reflect that some children receive free or reduced lunch and they want that reflected in the payment processing as well. Can you talk about that?

Carlin McCrory:

I thought it was really interesting that the CFPB mentioned this to me, a very niche and specified area, but probably also a good point out and call out on their part. The report states that some kindergarten through 12th grade school systems contract with companies that run these online platforms that allow parents or guardians to manage their student meal accounts. In most cases, families using these online platforms pay a per transaction fee to add funds to the meal accounts, and any school district that participates in federal school meal programs and contracts with fee-based online platforms are required to also provide free options for adding money to student meal accounts.

So as a result, families can avoid the transaction fee by adding funds using one of the alternative methods such as making a payment directly to the school or to the district. But the CFPB learned of covered persons that maintain these online payment platforms where consumers may have paid fees that they would not have paid if they would've known of the existence of some of these free options for adding meal funds to their students' account because consumers didn't know their options, they incurred transaction fees that they could have avoided.

As the fees were assessed on a per transaction basis, the CFPB also notes that the fees likely disproportionately affected lower income families that had to add smaller dollar amounts more frequently, which thereby incurred more transaction fees than higher income users that can deposit larger amounts less frequently. Again, this kind of dovetails on the CFPB's focus on disproportionate impact as well. That's probably why they noted it in the report. To wrap up here, the CFPB noted that covered persons may not be complying with consumer financial protection laws when free options are not advertised and possibly this disproportionate impact as well.

Keith Barnett:

Thanks, Carlin. Well, that has been a lot to unpack. Thank you very much for succinctly stating everything for our audience and thank you to our audience for listening to today's episode. Do not forget to visit our blog, ConsumerFinancialServicesLawMonitor.com and subscribe so you can get the latest updates. Please make sure you also subscribe to this podcast via Apple Podcast, Google Play, Stitcher, or whatever platform you use. We look forward to the next time.

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