



Aldrich & Bonnefin, PLC
Counsel to Bankers' Compliance Group® presents

Junk Fees & The CFPB: An Overview Of The Regulators' Latest UDAP Traps

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INTRODUCTION



Introduction

- April 2023 White House circular
 - “Unnecessary, unavoidable, or surprise charges that inflate prices while adding little to no value”
- CFPB
 - “These unavoidable or surprise charges are often hidden or disclosed only at a later stage in the consumer’s purchasing process or sometimes not at all”



Introduction

- Two special editions of CFPB Supervisory Highlights
- FDIC and OCC overdraft related guidance
- Proposed federal, recently-enacted CA “junk fee” laws



Introduction

- Regulatory focus on “junk fees” may be seen as a re-branding of the concept of UDAP/UDAAP
- Uncertainty surrounding the definition of a “junk fee”
- New world of junk fee regulation is ambiguous and concerning



BACKGROUND



CFPB Junk Fee Initiative

- CFPB junk fee initiative
- CFPB Director referred to certain fees charged by financial institutions, such as overdraft fees as
 - “Exploitative junk fees that can quickly drain a family’s bank account”



CFPB Junk Fee Initiative

- What is a “junk fee”?
 - “Exploitative, back-end, hidden, or excessive fees”
 - Overdraft and NSF fees
- Cited concert ticket fees and resort fees
- According to CFPB, these fees
 - “Aren’t included in the sticker price so people don’t have a meaningful way to shop around for services based on price”



CFPB Junk Fee Initiative

- CFPB RFI
 - Public comment on “junk fees”
- Intends to
 - Craft rules
 - Issue industry guidance
 - Focus supervision
 - Enforcement resources



CFPB Junk Fee Initiative

- Intended respondents
 - Older consumers
 - Students
 - Servicemembers
 - Consumers of color
 - Lower-income consumers
 - Social services organizations
 - Consumer rights and advocacy organizations
 - Legal aid attorneys
 - Academics and researchers
 - Small businesses
 - Financial institutions
 - State and local government officials



CFPB Junk Fee Initiative

- RFI requested consumers to submit responses to the following:
 - Baseline price coverage
 - Unexpected fees
 - Fee proportionality
 - Unclear fees



CFPB Junk Fee Initiative

- The RFI also requests feedback on:
 - Types of fees that obscure true cost of the product
 - Fees that exceed the cost that the fee purports to cover
 - ID-ing companies that obtain significant revenue from backend fees



CFPB Junk Fee Initiative

- Any obstacles to building fees into upfront prices
- Whether data exists on how consumers consider back-end fees
- Whether data exists that suggests that consumers do (or do not) understand fee structures disclosed in fine-print or boilerplate contracts



CFPB Junk Fee Initiative

- Whether data exists that suggests that consumers do (or do not) make decisions based on fees, even if well disclosed and understood
- Oversight or policy tools the CFPB should use to address the escalation of excessive fees



CFPB Junk Fee Initiative

- Analysis
 - Institutions could use the RFI's queries as a checklist to assess whether their fees, policies or practices raise red flags
 - CFPB intends to issue overdraft guidance or rulemaking



- UDAP
 - Unlawful for any person to engage in unfair or deceptive acts or practices
 - FTC Act was characterized as an antitrust law
 - Enacted to serve in conjunction with other antitrust legislation such as the Sherman Act and the Clayton Act



- **FTC Act Section 5**
 - Prohibited businesses from engaging in “any . . . unfair competition”
- **Purpose**
 - Protect both consumers and businesses alike from unsavory practices that could stifle competitor businesses and harm consumers



- Roosevelt-era amendments
 - Prohibition against “any . . . unfair or deceptive acts or practices”
- Historically
 - FTC Act Section 5 has been viewed as prohibiting UDAPs with regard to both consumers and businesses



- Consequences
 - FTC Act does not provide for a private right of action
- Regulatory enforcement can result in
 - Substantial civil money penalties
 - Restitution orders
 - Reputational damage



- Jurisdiction
 - Banking agencies (except CFPB) have UDAP supervisory and enforcement authority over the entities they supervise
 - CFPB does not have supervisory or enforcement authority over the FTC Act's Section 5 UDAP provisions



- Unfair -- defined as an act or practice is “unfair” where it:
 - Causes or is likely to cause substantial injury to consumers
 - Cannot be reasonably avoided by consumers
 - Is not outweighed by countervailing benefits to consumers or to competition



- Deception -- Omission or practice is deceptive if:
 - Misleads or is likely to mislead the consumer
 - Consumer's interpretation must be reasonable
 - Misleading statement must be material



- Four “Ps” test
 - Statement is **prominent** enough for the consumer to notice
 - Information is **presented** easy-to-understand format
 - **Placement** of the information is located where consumers can be expected to look or hear
 - The information is in close **proximity** to the claim it qualifies



UDAAP

- **CFPA**
 - Unlawful for any provider of consumer financial products or services to engage in any Unfair, Deceptive, or Abusive Act or Practice
- CFPB has exclusive rulemaking authority over UDAAP and enforcement authority with regard to institutions with > \$10 billion in assets



- Abusive act or practice:
 - Materially interferes with the ability of a consumer to understand a term or condition
 - Lack of understanding on the part of the consumer of the material risks, costs or conditions of the product
 - Inability of the consumer to protect his or her interests in selecting or using the financial product
 - Reasonable reliance by the consumer on a covered person to act in the interests of the consumer



- CFPB's Policy Statement on Abusive Acts or Practices
 - “An entity's provision of a product or service may interfere with consumers' ability to understand if the product or service is so complicated that material information about it cannot be sufficiently explained”



California UCL

- “Unfair competition” defined
 - Unlawful, unfair or fraudulent business acts or practices
 - Unfair, deceptive, untrue or misleading advertising
 - Violations of the California False Advertising Law, California Business & Professions Code



California UCL

- Provides private right of action for both consumer and business plaintiffs
- Plaintiff can recover its damages, restitution and injunctive relief
- To assert UCL claim
 - Defendant committed an unfair, unlawful, or fraudulent business act or practice, or put forth a deceptive, false, or misleading advertisement
 - Plaintiff suffered economic injury because of the defendant's act



California UCL

- California attorney general, any district attorney, county counsel, city attorney, or city prosecutor may bring a civil action for alleged UCL violations
- Recover civil money penalties of up to \$2,500 per violation



California UCL

- DFPI is charged with the authority to enforce Section 17200 vis-à-vis depository institutions
- AB 1864 reaffirmed the DFPI's power to sue a state-chartered depository institution to enforce the UDAAP prohibition under the CFPA and the CFPB's implementing regulations



California UCL

- Note:
 - Dodd-Frank has always allowed a state regulator to bring a civil action or other appropriate proceeding to enforce the CFPA and the CFPB's implementing regulations against state-chartered depository institutions



New California UUDAAP

- AB 1864 also includes CCFPL
- Expands the scope of the DFPI's powers
 - Regulatory supervision
 - Enforcement with regard to UUDAAP



New California UUDAAP

- AB 1864 applies to entities that previously were not formally licensed and supervised in California
 - Financial technology companies, commonly referred to as fintechs
 - National and state-chartered depository institutions are exempt from the CCFPL



New California UUDAAP

- CCFPL requires the DFPI
 - Interpret “unfair” and “deceptive” consistent with Section 17200 of the UCL and its case law thereunder



Identifying Potential UDAPs/UDAAPs

- Standard subjective due to its reliance on the standard of “reasonableness”
- Identifying may be challenging
- Evaluate supervisory expectations as outlined in applicable rules, guidance, and case law



Identifying Potential UDAPs/UDAAPs

- Customer complaints can play a key role in UDAAP detection
- An essential source of information for examinations, enforcement and rulemaking for regulators
- Complaints can indicate weaknesses in elements of an institution's compliance management system, such as training, internal controls, and monitoring



Identifying Potential UDAPs/UDAAPs

- UDAAP section of the CFPB Examination Manual provides that
 - “Even a single substantive complaint may raise serious concerns that would warrant further review”
- For purposes of evaluating UDAP/UDAAP-related issues
 - Institution may also wish to monitor and analyze consumer complaints it receives in order to identify trends or patterns in complaints



Identifying Potential UDAPs/UDAAPs

- CFPB's April 2023 Policy Statement on Abusive Acts or Practices provides
 - “An entity’s provision of a product or service may interfere with consumers’ ability to understand if the product or service is so complicated that material information about it cannot be sufficiently explained.”
- CFPB criticized certain institutions for lack of staff understanding regarding product or service terms and conditions
- Lack of adequate staff training also presents heightened UDAP/UDAAP risk



CFPB “JUNK FEES” SUPERVISORY HIGHLIGHTS SPECIAL EDITIONS



Introduction

- CFPB issued two special editions of its Supervisory Highlights publication
 - First special edition provided an overview of its “junk fee”-related actions that occurred between July 1, 2022, and February 1, 2023
 - Second special edition provided an overview of its “junk fee”-related actions that occurred between February 2023 and August 2023
- Below is an overview of the CFPB’s “junk fee”-related findings from these two Supervisory Highlights publications



Consumer Lending-related Junk Fees

- Mortgage loan servicing
 - Late fees greater than the late fee cap provided for in the loan agreement
 - Late fee even where the consumer's periodic statement listed a \$0 late fee
 - Property inspection fees for visits to wrong sites
 - PMI premiums incorrectly applied



Consumer Lending-related Junk Fees

- Auto loan servicing
 - Inaccurate late fees
 - Repossession fees
 - Certain payment processing fees
 - Failure to refund certain fees



Consumer Lending-related Junk Fees

- Payday loan servicing
 - Resulting in the consumer incurring multiple overdrafts and overdraft fees
- Student loan servicing
 - Caused consumers to become delinquent on their accounts and incur late fees, negative credit reporting, and additional accrued interest



Deposit Account-related Fees

- “APSN fees” are overdraft fees charged for ATM or debit card transactions
- At the time of authorization consumer had sufficient funds in their account to cover the transaction but insufficient funds at the time of settlement



Deposit Account-related Fees

- “These processes are extraordinarily complex, and evidence strongly suggests that, despite such disclosures, consumers face significant uncertainty about when transactions will be posted to their account and whether or not they will incur overdraft fees”
- Inherently unfair



Deposit Account-related Fees

- Examiners identified inadequate compliance management systems
- These institutions
 - “Did not maintain adequate transaction records to prevent overdraft fees from being assessed”



Deposit Account-related Fees

- Multiple NSF fees
 - Re-presentment of declined transactions which if re-presented by the merchant and declined more than once by the institution can result in multiple NSF fees being charged to the customer for a single transaction



Deposit Account-related Fees

- Several class action suits filed claiming that charging Multiple NSF Fees constitutes a UDAP
- In 2021 several large financial institutions announced they would eliminate all NSF fees



Deposit Account-related Fees

- FDIC published supervisory guidance on the compliance risks associated with Multiple NSF Fees
- New York Department of Financial Institutions also issued guidance that it expects the institutions it regulates to eventually eliminate Multiple NSF Fees



Deposit Account-related Fees

- Supervisory Highlights
 - “These injuries were not reasonably avoidable by consumers, regardless of account opening disclosures”
 - “Regardless of account opening disclosures”
 - Examiners may cite for UDAAP



Deposit Account-related Fees

- CFPB also stated that its examiners cited certain institutions for UDAPs when charging consumers Multiple NSF Fees
 - “Without affording the consumer a meaningful opportunity to prevent another fee after the first failed representment attempt”
 - These injuries were not reasonably avoidable by consumers



Deposit Account-related Fees

- Faulty lookback practices
 - Failure to capture all transactions subject to reimbursement during restitution-based lookbacks
 - Institutions failed to capture ACH transactions that were subject to Multiple NSF Fees and should have been included as part of the lookback



Deposit Account-related Fees

- Additional considerations for APSN and Multiple NSF Fees
 - “Self-assess [their] compliance with Federal consumer financial law, self-report to the Bureau when [they identify] likely violations, remediate the harm resulting from these likely violations, and cooperate above and beyond what is required by law”



Deposit Account-related Fees

- Division of Supervision, Enforcement, and Fair Lending makes determinations of whether violations should be resolved through non-public supervisory action or a possible public enforcement action
- Institutions “meaningfully engag[ing] in responsible conduct” were more likely to “resolve violations non-publicly through the supervisory process”



Deposit Account-related Fees

- Nearly \$100 million in APSN overdraft fees have been refunded to consumers
- Self-reporting institutions have agreed to cease charging APSN overdraft fees
- Institutions that charge these fees may wish to consider
 - Eliminating them
 - Conduct a risk-benefit analysis of the pros and cons



Deposit Account-related Fees

- Unfair statement fees
 - Fees for the printing
 - Delivery of paper statements
 - Additional fees when they mailed a statement that was returned undelivered



Deposit Account-related Fees

- Treatment of pandemic relief benefits
 - Economic Impact Payments
 - Unemployment insurance benefits
- Consumers being charged improper fees
 - Over \$1 million in consumer injury in response to these examination findings



OTHER RECENT CFPB JUNK FEE-RELATED PUBLICATIONS



CFPB Request for Information on Mortgage Loan Closing Costs

- CFPB published a RFI on May 30, 2024 regarding residential mortgage loan transaction closing costs
- CFPB characterized the RFI as its latest effort in combating so-called "junk fees"



CFPB Request for Information on Mortgage Loan Closing Costs

- According to CFPB between 2021 and 2023 median home purchase loan closing costs increased by over 36% percent
- 2022 median total closing cost dollar amount was nearly \$6,000 per transaction



CFPB Request for Information on Mortgage Loan Closing Costs

- Many of these closing costs are fixed and do not change based on loan size
- Resulting in a greater impact on "borrowers with smaller mortgages, such as lower income or first-time homebuyers"



CFPB Request for Information on Mortgage Loan Closing Costs

- CFPB specifically cited
 - Origination fees
 - Settlement service
 - Title insurance fees
- As typically the largest disclosed borrower closing costs and credit report fees as having significantly risen over the past few years



CFPB Request for Information on Mortgage Loan Closing Costs

- Topics to be addressed
 - Identifying any fees that are concerning
 - Providing information on the extent to which consumers compare different lenders closing costs
 - Explaining how closing fees are currently set
 - Identifying which closing costs have increased the most over the past few years



CFPB Request for Information on Mortgage Loan Closing Costs

- Topics to be addressed
 - Explaining the reasons for recent price increases of credit reports and credit scores
 - Whether lenders would be more effective at negotiating closing costs than consumers
 - Identifying studies or data that measures the potential impact closing costs may have on overall costs, housing affordability, access to homeownership, or home equity



CFPB Request for Information on Mortgage Loan Closing Costs

- Since many of the CFPB's queries focus on origination, settlement, title and credit report fees
- This may indicate which types of closing costs the CFPB may view with heightened scrutiny or that may be addressed in future CFPB rulemaking or guidance
- CFPB accepted comments in response to the RFI until August 2, 2024



CFPB Report on Complex Fee Structures

- On April 30, 2024 the CFPB published a report entitled *Price Complexity in Laboratory Markets*
- Bureau highlighted how pricing structures may impact the amount a consumer pays for a good or service
- CFPB concluded that consumers tend to pay more when prices are broken into sub-parts and when the pricing is more complex than when a product has one all-inclusive price



CFPB Report on Complex Fee Structures

- CFPB's report highlighted price complexities across certain financial products and services
- Each of the CFPB's findings set forth below may indicate areas of heightened "junk fee"/UDAAP risk



CFPB Report on Complex Fee Structures

- Including the following:
 - Credit Cards
 - Deposit Accounts
 - Mortgage Lending Products
 - Auto Lending



CFPB Report on Health Savings Account UDAAP Risks

- May 2024 the CFPB published a report on UDAAP-related risks associated with HSAs
- According to the CFPB the prevalence of HSAs among consumers has surged in recent years with approximately 36 million open HSAs reported in 2023



CFPB Report on Health Savings Account UDAAP Risks

- In its report entitled *Issue Spotlight: Health Savings Accounts*
- Stated that it has received numerous consumer complaints regarding a range of HSA-related concerns
- Including complaints regarding high costs, lack of choice in service providers, surprise (i.e., "junk") fees, lack of fund portability, and low-yield interest rates
- CFPB stated that its HSA report is part of its ongoing efforts to combat "junk fees"



CFPB Report on Health Savings Account UDAAP Risks

- CFPB's report detailed the following HSA-related areas of UDAAP risk:
 - "Junk Fees"
 - Complex fee structures
 - HSA exit fees
 - Paper statement fees
 - Low interest yields
 - Pressure to acquire HSAs



CFPB Advisory Opinion on Fees for Requests for Information

- CFPB requires financial institutions subject to primary CFPB supervision authority to comply in a timely manner with a consumer's request for information
- Not required to provide information in any particular manner or means



CFPB Advisory Opinion on Fees for Requests for Information

- Advisory opinion states that if a covered institution charges fees to respond to an information request
- Such fees would generally be seen as unreasonably impeding consumers' exercise of their rights
- Does not intend to seek monetary relief for potential violations that occur prior to February 1, 2024



CFPB Overdraft, NSF Fee Proposed Rules

- January 17, 2024 CFPB issued NPRM
 - Apply to financial institutions with more than \$10 billion in assets
 - Amend Regulation Z so that it would apply to previously exempted overdraft services provided by very large financial institutions who operate outside of the rule's exception options



CFPB Overdraft, NSF Fee Proposed Rules

- General Rule:
 - For very large institutions that operate outside of one of the two below-stated exceptions
 - Consumer overdraft services including their consumer automated discretionary overdraft services would be required to comply with certain provisions of TILA and Regulation Z



CFPB Overdraft, NSF Fee Proposed Rules

- General Rule:
 - Required to provide consumers with TILA-required loan disclosures
 - Including account-opening disclosures and periodic statements in connection with their covered overdraft credit offerings
 - Reg Z rules applicable to traditional credit cards including the ability-to-repay rule



CFPB Overdraft, NSF Fee Proposed Rules

- General Rule:
 - Overdraft credit would be required to be maintained in a separate account
 - Rule would also amend Regulation E to prohibit auto-debit repayment of overdrafts.
 - As a result of this change covered overdraft credit offered by very large financial institutions could not be conditioned on consumers agreeing to automatic debits from their checking account
 - Consumers could still opt into automatic payments on a periodic basis if offered by their financial institution
 - Rule would provide consumers with the right to repay overdraft credit manually



CFPB Overdraft, NSF Fee Proposed Rules

- Exception Options
 - Avoid Reg Z coverage of their covered overdraft credit by either
 - Calculating their own overdraft fee using a "breakeven standard"
 - Setting their overdraft fee by relying on a "benchmark fee" established by the CFPB



CFPB Overdraft, NSF Fee Proposed Rules

- Breakeven Standard Exception
- Benchmark Fee Exception
- If finalized to go into effect on October 1, 2025
- CFPB accepted comments on the proposal until April 1, 2024



CFPB Overdraft, NSF Fee Proposed Rules

- NSF Fee Proposal:
 - “Preliminarily identify the assessment of NSF fees in certain circumstances as UDAAP under Consumer Financial Protection Act
 - Impose requirements to prevent such UDAAPs
 - On January 24, 2024 the CFPB published its NSF fee proposed rule
 - If finalized would prohibit NSF fees charged in real-time on certain consumer transactions



CFPB Overdraft, NSF Fee Proposed Rules

- NSF Fee Proposal
 - Charging NSF fees on transactions that are declined instantaneously would be UDAAP per se
 - Explicitly states that NSF fees charged on returned checks and ACH transactions would not be covered
 - CFPB accepted comments on its NSF fee proposal until March 25, 2024



CFPB Bulletin on Returned Deposited Item Fees

- “Returned Deposited Item” is 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
- UDAAP-related issues



CFPB Bulletin on Returned Deposited Item Fees

- It is unlikely that an institution will violate the prohibition if the method in which fees are imposed are tailored to only charge consumers who could reasonably avoid the injury
- CFPB does not intend to seek monetary relief for potential unfair practices regarding Returned Deposited Item fees assessed prior to November 1, 2023



CFPB Bulletin on Returned Deposited Item Fees

- Supervisory Highlights publication
 - CFPB examiners have evaluated a number of institutions' returned deposit item fee practices
 - Institutions have advised the CFPB that they have either eliminated returned deposit item fees entirely or are in the process of doing so



CFPB Advisory Opinion on “Pay-to-Pay” Fees

- FDCPA Section 808(1) prohibits debt collectors 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”



CFPB Advisory Opinion on “Pay-to-Pay” Fees

- Bureau affirmed that FDCPA Section 808(1) prohibits
 - Debt collectors from collecting pay-to-pay or “convenience” fees, such as fees imposed for making a payment online or by phone, when those fees are not expressly authorized by the agreement creating the debt or expressly authorized by law
 - Also when the debt collector collects pay-to-pay fees through a third-party payment processor



CFPB Advisory Opinion on “Pay-to-Pay” Fees

- California Rosenthal applies to both first and third-party debt collectors and requires compliance with most provisions of the federal FDCPA
- Recommended that California institutions collecting debts on their own behalf also take note of this “pay-to-pay” advisory



CFPB Proposed Rule on Credit Card Late Fees

- Regulation Z provides a safe harbor for credit card issuers if they impose penalty fees that do not exceed certain dollar limits
 - In 2022 those limits were:
 - \$30
 - \$41
 - If the card issuer previously imposed a fee for the first violation of the same type during the same billing cycle and the next six billing cycles



CFPB Proposed Rule on Credit Card Late Fees

- Proposal rule
 - Cap Regulation Z's safe harbor dollar amount for late fees at \$8
 - Eliminate a higher safe harbor dollar amount for late fees for subsequent violations of the same type
 - Annual inflation adjustments for the safe harbor dollar amounts would not apply to the late fee safe harbor amount
 - Provide that late fee amounts must not exceed 25 percent of the required payment



CFPB Proposed Rule on Credit Card Late Fees

- Final rule
 - Amending Regulation Z's credit card penalty fee provisions
 - Became effective May 14, 2024
 - Closely follows the proposal
 - Except that the above-stated \$8 late fee cap under the final rule only applies to Larger Card Issuers



CFPB Proposed Rule on Credit Card Late Fees

- Pursuant to the final rule Large Credit Issuers' late fees will be subject to
 - Repeal of the current above-stated safe harbor threshold amounts in Reg Z Section adoption of the \$8 late fee safe harbor threshold amount
 - Elimination of a higher late fee safe harbor dollar amount for subsequent violations



CFPB Proposed Rule on Credit Card Late Fees

- Elimination of the annual adjustments for the safe harbor threshold dollar amounts
- Also amends the regulation's commentary and Appendix G sample forms to revise current examples of late fee amounts to be consistent with the \$8 safe harbor late fee amount
- CFPB stated that it chose not to adopt the "25% of the minimum payment" late fee cap set forth in the proposal



CFPB Proposed Rule on Credit Card Late Fees

- Does not apply to “Smaller Card Issuers” as defined in new Reg Z
- “Larger Card Issuers” are card issuers that together with their affiliates have one million or more open credit card accounts
- Final rule revises the safe harbor threshold amounts in Reg Z
 - \$32 and \$43 for subsequent violations of the same type that occur during the same billing cycle
 - Or in one of the next six billing cycles
 - Applies to all card issuers



CFPB Proposed Rule on Credit Card Late Fees

- Impact on California financial institutions
 - Creditors did not care much
 - Creditors who meet the definition of a “Larger Card Issuer”
 - Impose the \$10 / \$15 late fee California permits need to consider the impact of Reg Z’s new caps



CFPB Proposed Rule on Credit Card Late Fees

- Litigation
 - American Bankers Association and a number of other trade organizations jointly filed suit
 - Preliminary injunction against the rule
 - Court granted the CFPB's motion to transfer the case to the D.C. federal district
 - Court granted the plaintiffs' motion for a preliminary injunction
 - CFPB filed a motion to dismiss
 - Remains ongoing



RECENT CFPB JUNK FEE ENFORCEMENT ACTIONS



Atlantic Union Bank Consent Order

- CFPB entered into a consent order
- Allegations that the Bank's consumer overdraft opt-in practices constituted both Regulation E violations and UDAAPs
- Efforts to combat “junk fees”



Atlantic Union Bank Consent Order

- Reg E requires the institution to take the following steps
 - Provide the consumer with written notice describing the institution's overdraft service
 - Provide the consumer with a reasonable opportunity to opt to overdraft coverage of ATM and one-time debit card transactions
 - Obtain the consumer's opt-in
 - Provide the consumer with confirmation of the consumer's consent in writing



Atlantic Union Bank Consent Order

- CFPB had issued a \$5 million restitution order and \$1.2 million civil money penalty
- Bank had engaged in the following
 - Reg E violations
 - UDAAP violations
 - Unlawful actions resulted in its "harvesting" of millions of dollars in illegal overdraft fees



Bank of America Consent Orders

- CFPB and OCC jointly issued UDAP/UDAAP-related consent orders
- “Junk fees” related to their credit card products and overdraft services
- Civil money penalties of \$150 million and \$60 million



Bank of America Consent Orders

- First consent order on Multiple NSF Fees
- CFPB alleged BofA did not adequately disclose their policies
 - Failure to explicitly state in disclosures
- OCC cited the Bank for violations of FTC Act Section 5
 - Prohibits UDAPs against both consumer and business customers



Bank of America Consent Orders

- Second consent order alleged BofA committed UDAAPs
 - Unauthorized consumer credit card accounts
 - Deceptively advertising certain credit card-related rewards
 - Obtained consumer credit reports without a permissible purpose



Bank of America Consent Orders

- CFPB also alleged that BofA committed UDAAPs
 - BofA's web ads for certain rewards credit card sign-up bonuses were allegedly deceptive
 - Due to employee errors certain consumers did not receive their promised rewards credit card sign-up bonus



USAAF Servicing Action

- *CFPB v. USASF Servicing, LLC*
- Engaged in a host of illegal practices
 - Wrongfully disabling borrowers' vehicles
 - Wrongfully activating late payment warning tones
 - Improperly repossessing vehicles
 - Double-billing borrowers for insurance premiums
 - Misallocating consumer payments
 - Failing to return millions of dollars in unearned GAP premiums to consumers
- Seeking redress for consumers, civil money penalties, and to stop any future violations



Wells Fargo Consent Order

- CFPB issued a consent order against Wells Fargo Bank, N.A.
- Resulting in a \$1.7 billion penalty and \$2 billion in restitution
 - UDAAP violations with its provision of automobile loan and home mortgage servicing and deposit account services
 - Unfairly charging APSN fees to certain customers



Wells Fargo Consent Order

- Deposit account-related issues
- Overdraft fees
 - Unfair practices by charging APSN fees
 - Ordered to pay \$205 million in customer restitution



Wells Fargo Consent Order

- Fee waivers
 - Deceptive practices on MSFs on certain deposit accounts
 - Denied MSF waivers to more than 4 million accountholders
 - Ordered to pay \$141 million in restitution



Wells Fargo Consent Order

- Automobile loan servicing
 - Unfair practices with its automobile loan servicing activities
 - Actual practices for applying payments differed from customer-facing disclosures
 - Wrongful repossessions
 - GAP fee refunds
- Over \$1.3 billion in restitution to redress injuries caused by these auto loan servicing practices



Wells Fargo Consent Order

- Home mortgage servicing
 - Wrongfully assessed fees
 - Consumers paid off a mortgage that had been subject to a foreclosure judgment
 - Bank did not pay the appropriate amount of property taxes in a timely manner
 - Miscalculated the interest rate on certain adjustable rate mortgages after a loan modification ended
 - Failed to provide certain consumers with complete information about their ability to stop paying for private mortgage insurance



Action Against ACTIVE Network, LLC

- CFPB alleged ACTIVE engaged in deceptive and abusive practices by enrolling consumers in and charging them for discount club memberships
- “Without their knowledge, consent, or a full understanding of the material terms of the transaction”



Regions Bank Consent Order

- CFPB assessed \$50 million penalty
- Overdraft policies related to APSN fees
- In addition was required to pay \$141 million in customer restitution
- Policy regarding APSN fees was abusive
- “Took unreasonable advantage of [the] lack of [consumer] understanding” about the bank’s “counter-intuitive, complex transaction processing”
 - Lack of understanding
 - Disclosure issues



JPay Consent Order

- JPay issues prepaid cards to prison inmates
- CFPB alleged deceptive practices
- Prepaid card carried significant fees
- No “reasonably available mechanism by which consumers could close their prepaid card account and obtain the balance of their cards without paying a fee”



RECENT FTC “JUNK FEE” PROPOSALS



FTC Proposal Rule on Unfair or Deceptive Fees

- Would prohibit:
 - Misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices
 - Misrepresenting the nature and purpose of fees
- Background
 - RFI spurred 12,000+ comments
 - Commenters cited examples of hidden fees or deceptive advertising
 - Bait-and-switch pricing tactics



FTC Proposal Rule on Unfair or Deceptive Fees

- Recent financial services-related advertising examples:
 - LendingClub Corp. advertised loans with “no hidden fees”
 - U.S. Mortgage Funding, Inc. misrepresented that large upfront fees charged to homeowners to negotiate loan modifications would be refunded if a modification was not obtained



FTC Proposal Rule on Unfair or Deceptive Fees

- “Several other rules or laws contain requirements regarding the disclosure of pricing information in specific industries or in connection with specific transactions”
- TILA, RESPA, TISA and EFTA



FTC Proposal on Unfair or Deceptive Fees

- Definitions
 - “Business” defined as an individual, corporation, partnership, association, or any other entity that offers goods or services, including, but not limited to, online, in mobile applications, and in physical locations
 - “Clear(ly) and Conspicuous(ly) defined as a required disclosure that is difficult to miss and easily understandable



FTC Proposal on Unfair or Deceptive Fees

- Clear(ly) and Conspicuous(ly)
 - Disclosure must be made through the same means through which the communication is presented
 - Visual
 - Audible
 - Interactive electronic medium
 - Use diction and syntax
 - Comply with requirements
 - Not be contradicted or mitigated
- “Total Price” defined as “the maximum total of all fees or charges a consumer must pay for a good or service...”



FTC Proposal on Unfair or Deceptive Fees

- Hidden fees prohibited
 - “Offer, display, or advertise an amount a consumer may pay without clearly and conspicuously disclosing the total price”
- Misleading fees prohibited
 - “The nature and purpose of any amount a consumer may pay that is excluded from the total price, including the refundability of such fees and the identity of any good or service for which fees are charged”
- FTC has yet to publish a final rule



FTC “Click to Cancel” Rule

- Require businesses offering subscription services to provide consumers with certain subscription cancellation mechanisms intended to ease the cancellation process
- Cancellation mechanisms for online subscriptions to mirror the sign-up process



FTC “Click to Cancel” Rule

- Negative option rule
 - Require businesses offering negative option subscriptions for products and services other than physical goods to send an annual notice reminder to subscribers
- Another source of UDAP/UDAAP risk guidance



RECENT SUPERVISORY OVERDRAFT GUIDANCE



FDIC Supervisory Guidance

- APSN Fees
- May indicate APSN fees are UDAP *per se*
- APSN-related UDAP risk exists both in “available balance” or “ledger balance” methods of assessing overdraft fees
- “Available balance” account balance calculation method more risky



FDIC Supervisory Guidance

- Noteworthy statements
 - UDAP (single “a”) risks associated with charging APSN fees
 - Applies to both consumer and business customers



Multiple NSF Fee Supervisory Guidance

- Compliance risks associated with assessing Multiple NSF Fees after the re-presentation of the same unpaid transaction
- Risk mitigation techniques for institutions to consider



Multiple NSF Fee Supervisory Guidance

- Consumer compliance risks
 - Deception on Multiple NSF Fees arising from the same transaction
 - Disclosures do not adequately advise customers of practice
 - Not disclosed clearly and conspicuously
 - Without clear definitions and no explanation
 - Unfairness
 - Without sufficient notice or opportunity for customers to bring their account to a positive balance in order to avoid the assessment of additional NSF fees



Multiple NSF Fee Supervisory Guidance

– Third-party risk

- Importance of an institution's strong third-party oversight
- Understand core processing system's capabilities
- Detecting and tracking



Multiple NSF Fee Supervisory Guidance

- Risk mitigation practices
 - Eliminating NSF fees altogether
 - Choosing to charge no more than one NSF fee for the same transaction
 - Performing comprehensive review of policies, practices, and monitoring activities related to re-presentments
 - Clear and conspicuous disclosure of NSF fees to customers
 - Self-identified issues



June 2023 update

- FDIC updated Supervisory Guidance to reflect the agency's current approach
 - *The FDIC has generally accepted a two-year lookback period for restitution in instances where institutions have been unable to reasonably access accurate ACH data for re-presented transactions. In addition, based on the ongoing and extensive challenges observed in accurately identifying re-presented transactions through core processing systems, the FDIC does not intend to request an institution to conduct a lookback review absent a likelihood of substantial consumer harm*
- FDIC might liberally interpret what constitutes “substantial” harm



FDIC Consumer Compliance Supervisory Highlights

- Publication covered FDIC examination findings during 2022
- Multiple NSF Fees was its most-cited UDAP violation
- Did not fully or clearly describe the financial institution's
 - “Re-presentment practice, including not explaining that the same unpaid transaction might result in multiple NSF fees if an item was presented more than once”
- FTC Act Section 5 UDAP applies to both consumer and business customers



OCC Overdraft Bulletin

- “Overdraft Payment Programs: Risk Management Practices”
- Echoes the FDIC and CFPB’s concerns regarding APSN fees; indicates such fees may be UDAP *per se*
- “A bank’s practice of assessing fees on each representment may also be [a UDAP] if consumers cannot reasonably avoid the harm and the other factors for establishing unfairness . . . are met”



California Attorney General Issues Letter Warning of Overdraft Fee UDAP Risk

- AG followed suit in a letter which warned California financial institutions that:
 - Charging overdraft fees on APSN transactions and
 - Returned deposited item fees may be UDAP per se under the California Unfair Competition Law



California Attorney General Issues Letter Warning of Overdraft Fee UDAP Risk

- AG agreed on APSN transactions
 - “The practice of charging surprise overdraft fees that cannot be reasonably anticipated by a consumer—such as fees assessed on APSN transactions—likely is an unfair business practice that violates the UCL”
 - Applies to both consumer and business customers



California Attorney General Issues Letter Warning of Overdraft Fee UDAP Risk

- Returned Deposited Item Fees
 - CFPB’s Bulletin 2022-06
 - Reasoned that charging returned deposited item fees under certain circumstances may not be UDAAP
 - CA AG’s letter did not contain such nuances
 - CA institutions charging returned deposited item fees are urged to proceed with caution



JUNK FEE LEGISLATION



Introduction

- Federal and California legislatures have introduced their own “junk fee” legislation
- Federal Junk Fee Prevention Act



Federal Junk fee Prevention Act

- U.S. Senators Blumenthal and Whitehouse introduced Senate Bill 916
- Require covered entities to clearly and conspicuously disclose in ads the total price of the good or service provided by the covered entity, including any mandatory fees
- Charging any mandatory fees that are “excessive or deceptive for any good or service offered”
- Also provide the FTC with rulemaking authority pursuant to its UDAP powers under the FTC Act



Federal Junk fee Prevention Act

- Define “mandatory fees” as:
 - Any fee or surcharge that a consumer is required to pay to purchase a good being advertised
 - Fee or surcharge that is not reasonably avoidable
 - Fee or surcharge for a good or service that a reasonable consumer would not expect to be included with the purchase of the good being advertised
 - Any other fee or surcharge the FTC through rulemaking defines as covered by its regulations



Federal Junk fee Prevention Act

- Legislative analysis
 - Financial institutions are NOT the focus of this bill
 - Covered entities are short-term lodging providers, ticket services providers
- Similarities to CFPB junk fee analysis
- FDI Act authority
- Junk Fee Prevention Act not yet enacted



California False Advertising Bill

- California Senate Bill (SB) 478
- Becomes effective on January 1, 2024 and has an operative date of July 1, 2024
- Amends California's false advertising statute
- Advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges, other than taxes imposed by the government, would constitute a violation of the California UCL



California False Advertising Bill

- SB 478 does not specifically define “mandatory fees or charges” for this purpose
- Impacts UDAP analysis of advertisements that include price information



California False Advertising Bill

- Specifies that a financial institution that is required to provide disclosures in compliance with any of the following federal or state acts or regulations with respect to a financial transaction
- Is exempt from the new advertising rule for purposes of that financial transaction:



California False Advertising Bill

- Truth in Savings Act
- Electronic Fund Transfer Act
- Section 19 of the Federal Reserve Act
- Truth in Lending Act
- Real Estate Settlement Procedures Act
- Home Ownership and Equity Protection Act
- California Financing Law
- California Residential Mortgage Lending Act
- Real Estate Law



RECOMMENDATIONS



Review Your Current Fee Structures

- Ensure that fee structures are consistent with current (and evolving) regulatory expectations
- May involve evaluating an institution's third-party relationships as well



Ensure Fee-related Disclosures Match Actual Practices

- Ensure that disclosures match actual practices; fee structures and other important terms are clearly, accurately disclosed
- Institutions are encouraged to conduct transaction testing



Re-evaluate Fee Amounts

- Revisit fee amounts to ensure fees are consistent with current regulatory expectations
- Stay apprised of this evolving area of consumer protection
- Recent exams inquiring whether fees are “reasonable and proportionate” to the services covered



Consider Impact of Recent Changes by Other Institutions

- Consider other institution's recent fee structure changes and how they might impact an institution's own practices and fee structures
- It is possible that today's revolutionary changes (such as elimination of NSF fees by some institutions) will become tomorrow's standard of commercial reasonableness



Assess Whether Institution Charges APSN fees or Multiple NSF Fees

- Determine whether (including through transaction testing) your institution charges APSN fees or Multiple NSF Fees
- With at least three regulatory agencies implying that these fees may be inherently UDAP/UDAAP
- Institutions that charge APSN fees or Multiple NSF Fees are strongly encouraged to consider eliminating these fees



CONCLUSION



We're adjourned!

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