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# The CFPB and FTC's War on Junk Fees and What You Need to Know



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## Agenda

- What is a Junk Fee?
- FTC's Junk Fee Rulemaking
- CFPB's Credit Card Late Fees Rulemaking
- Deposit Account Fees
- Other Fees
- Takeaways
- Questions

# WHAT IS A JUNK FEE?

# What is a “Junk Fee”?

- CFPB Junk Fee RFI:
  - “hidden back-end fees – which are mandatory or quasi-mandatory fees added at some point in the transaction after a consumer has chosen the product or service based on a front-end price”
  - “fees that far exceed the marginal cost of the service they purport to cover, implying that companies are not just shifting costs to consumers, but rather, taking advantage of a captive relationship with the consumer to drive excess profits”
- FTC Junk Fee ANPR:
  - “unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price”
  - “also encompasses ‘hidden fees,’ which are fees for goods or services that are deceptive or unfair, including because they are disclosed only at a later stage in the consumer’s purchasing process or not at all”

# FTC'S JUNK FEE RULEMAKING

# FTC Junk Fee Rulemaking – Background

- FTC is traditionally enforcement-focused
- Cases involving unlawful fees generally brought under Section 5 of the FTC Act (unfair & deceptive practices) or other disclosure statute under specific circumstances
  - TILA (consumer credit)
  - ROSCA (negative options sold over the internet)
  - TSR (telemarketing)
- 2021 *AMG* Supreme Court decision upends enforcement program for Section 5-only cases
- FTC rulemaking provides avenue to regain ability to obtain money penalties
  - New rulemaking section of OGC
  - Many prominent rulemakings (*e.g.*, commercial surveillance & non-compete ban)

# FTC Junk Fee Rulemaking – The ANPR

- October 2022, FTC releases Advanced Notice of Proposed Rulemaking (ANPR)
  - Not a proposed rule; first step in long Mag-Moss Rulemaking Process
- Addresses “Junk Fees”:
  - Unfair/deceptive fees that have little to no value
  - Hidden fees disclosed only later in the process
- Discussion identifies as examples:
  - Ancillary products in connection with loans or other complicated/expensive transaction
  - “Resort fees” or other mandatory fees not disclosed in the overall price
  - Drip pricing
- Posed 21 questions for public comment, giving hints at focus



# FTC Junk Fee Rulemaking – Next Steps

- Comments closed in February; more than 6k comments
- Next steps in the rulemaking process
  - Proposed rule, indicating why FTC believes the specific practices are “prevalent”
  - If there are disputed facts, hold hearing where third parties can cross-examine FTC evidence
  - Final rule
  - Everybody sues!
- FTC also moving forward on other adjacent rules on fees
  - March 2023 Proposed Rule overhauling Negative Option Rule

# CFPB'S CREDIT CARD LATE FEES RULEMAKING

# CFPB Credit Card Late Fees Proposed Rule - Background

- CARD Act: penalty fees must be “reasonable and proportional” to omission or violation
- Reg Z:
  - “reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation,” re-evaluated every 12 months
  - Safe harbor:
    - \$30 generally; \$41 for subsequent violations within six months; inflation adjusted
  - Not to exceed dollar amount associated with violation

# CFPB Credit Card Late Fees Proposed Rule - Proposal

- Proposed:
  - Lower safe harbor late fee amount to \$8
  - No higher fee for subsequent late payments
  - Cap fees at 25% of minimum payment
  - End inflation adjustment
  - Higher penalty allowed if cost calculation completed
- Request for comment:
  - 15-day courtesy period?
  - Require autopay or notification to benefit from safe harbor?
  - Apply changes to all fees (e.g., overlimit)?
  - Eliminate safe harbor?

# CFPB Credit Card Late Fees Proposed Rule - Rationale

- Fee amount
  - No issuers relying on cost analysis; all relying on safe harbor
  - Fees that are too high could interfere with consumers' ability to make future payments
  - Issuers may be disincentivized to lower fees given revenue and consumers not shopping on fee amounts
  - Y-14M data 2012-2022: BHC > \$50B in assets
    - Total late fee income ÷ pre-charge-off collection costs = ~5
    - Therefore, fees should be capped at 20% of current \$41 cap
  - \$8 still a deterrent given other costs of paying late; may increase repayment, esp. subprime
- Inflation adjustments not reflective of how costs of late payment change over time (varied change)
- 25% limitation covers contingency costs of pre-charge-off collections

# CFPB Credit Card Late Fees Proposed Rule - Critiques

- Comment period closes May 3
- Arguments raised to date:
  - SBREFA – applies if “significant economic impact on a substantial number of small entities”
  - Y-14 data only represents larger issuers
  - Nature of Bureau’s simplistic analysis: costs of late payments are higher than \$8
  - Failure to properly account for deterrence
  - Lower safe harbor will harm consumers: higher rates; tighter credit limits

# DEPOSIT ACCOUNT FEES





## NSF and Overdraft Fees

- It's no secret that the CFPB dislikes non-sufficient funds ("NSF") fees and overdraft fees.
  - NSF Fees. Fee charged if the consumer's financial institution returns a transaction unpaid because the consumer does not have sufficient funds to cover the transaction
  - Overdraft Fees. Fee charged when a consumer's financial institution covers a transaction that exceeds the consumer's account balance
- According to the CFPB:
  - Overdraft and NSF fees hinder competition
  - Consumers receive "no service at all" in exchange for NSF fees and the marginal cost to financial institutions to return a payment is likely exceedingly low
- CFPB using bully pulpit to discourage these fees



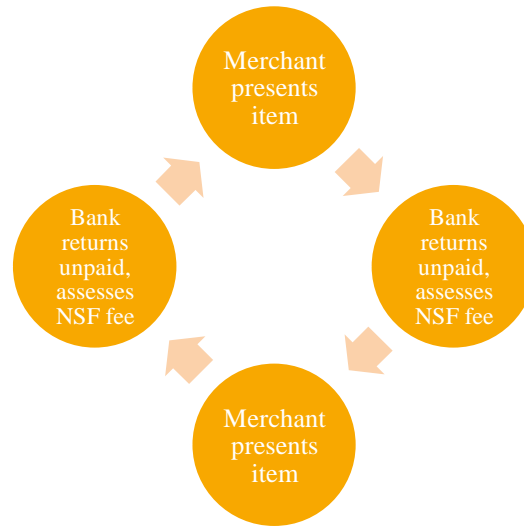
# NSF and Overdraft Fees

The CFPB has publicly released information about the overdraft and NSF fees entities charge – below is an excerpt of a chart the CFPB released in December 2022.

Bank	Overdraft/NSF Revenue Reported for 2021	No overdraft fees on any transactions <sup>1</sup>	No NSF fees	No overdraft fees on debit card purchases <sup>2</sup>	No overdraft fees on ATM withdrawals	No extended/sustained overdraft fees	Size of overdraft and/or NSF fee <sup>3</sup>	Daily limit on number of overdraft/NSF fees <sup>4</sup>	Cushion before overdraft fee is charged <sup>5</sup>	Extended grace period
	\$1.414 billion		✓			✓	\$35	3 (\$105)	\$5	next day
	\$1.211 billion		✓		✓	✓	\$34	3 (\$102)	\$50	next day
	\$1.135 billion		✓	✓	✓	✓	\$10	2 (\$20)	\$1	--
	\$477 million		✓			✓	\$35	3 (\$105)	\$50	next day

## NSF Fees Charged on Representments

- If a transaction is returned unpaid, a merchant may choose to represent the transaction. If the consumer's balance is insufficient to cover the represented transaction, the consumer may be charged multiple NSF fees in connection with the same transaction.
  - Absent restrictions on representments or on assessments of NSF fees, this cycle can occur multiple times.



## NSF Fees Charged on Representments

- In the winter 2023 edition of *Supervisory Highlights*, the CFPB publicly stated for the first time that charging multiple NSF fees on the same transaction may be an unfair practice.
  - “The assessment of multiple NSF fees for the same transaction caused substantial monetary harm to consumers, totaling millions of dollars. These injuries were not reasonably avoidable by consumers, regardless of account opening disclosures.”
  - CFPB directed institutions at issue to refund consumers.
  - CFPB further stated that “virtually all” institutions Supervision engaged with on this issue planned to eliminate NSF fees entirely.

# Overdraft Fees on APSN Transactions

- According to the CFPB:
  - Overdraft practices are “extraordinarily complex” and difficult for many consumers to understand
  - It can be an unfair practice for a financial institution to assess an overdraft fee on transactions that a consumer would not reasonably expect to give rise to those fees
- “Authorize Positive, Settle Negative” – or APSN – transactions are transactions for which the consumer had sufficient funds to cover the transaction at the time it was authorized, but for which the consumer does not have sufficient funds at the time it settles.
- APSN transactions are addressed in the winter 2015 edition of *Supervisory Highlights* and *Consumer Financial Protection Circular 2022-06*.

## Overdraft Fees on APSN Transactions

Transaction processing and overdraft fee assessment can be complex for several reasons: available vs. ledger balance; order and timing of transaction settlement. Below is a hypothetical example:

<u>Event</u>	<u>Available Balance</u>	<u>Notes</u>
<b>April 1: Starting Balance</b>	\$1,000	
<b>April 2: Transaction Authorization – Hold of \$500</b>	\$500	Authorized Positive
<b>April 3: Hold Released</b>	\$1,000	
<b>April 4: POS Transaction of \$600</b>	\$400	
<b>April 5: Transaction Originally Authorized on April 2 Settled for \$500</b>	-\$100	Settled Negative

## APSN: *In Re Regions Bank* (2022-CFPB-0008)

- Facts: Regions Bank allegedly charged consumers overdraft fees on debit-card purchases and ATM withdrawals even when consumers had enough money in their accounts at the time they made those purchases or withdrawals if the transaction later settled with insufficient funds due to the timing and ordering of the settlements.
- Claims:
  - Assessing overdraft fees on transactions where consumers had sufficient funds when they executed the transactions was unfair.
  - The assessment of the fees caused substantial injury, in total \$141 million.
  - Consumers could not reasonably avoid the fees because they were caused by counter-intuitive, complex processes that consumers did not understand or control and were contrary to consumers' reasonable expectations.

## Return Deposit Item Fee

- Return deposit item fees are fees charged when a check that a consumer deposits is returned to the consumer because the check could not be processed against the check originator's account.
- Addressed in CFPB Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices
  - Check depositor generally has no control over whether the deposited check will be returned and generally has limited ability to recoup fees.
  - “Blanket policies of charging Returned Deposited Items fees to consumers for all returned transactions irrespective of the circumstances or patterns of behavior on the account are likely unfair under the CFPB.” (emphasis added)

# OTHER FEES



## Other “Junk Fees”

- Convenience or “pay-to-pay” fees Advisory Opinion
  - Fees to make debt collection payment through a particular channel violate the FDCPA unless expressly authorized by agreement creating the debt or expressly authorized by state law
  - Are “pay-to-pay” fees also unfair or abusive?
- Unfair fees
  - Late fees in excess of contract amount
  - Late fees after acceleration and repossession
  - Repossession fees higher than average repossession cost
  - Fees that should have been waived by law (per HUD loss mitigation requirements)
- Abusive and unfair fees: payment processing fees that far exceeded servicers’ costs for processing payments

# TAKEAWAYS

# Takeaways

- Are fees properly and prominently disclosed?
  - Including at account opening
- Are fees authorized by the underlying contract?
- Do fees far exceed the cost of the service provided?
  - Are fees a profit center?
  - How would you defend against a claim of unfairness?
- Are fee rationales documented?
- Are fees regularly reviewed
  - What are fees being charged for?
  - What are the fee amounts based on?

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