



# GOT... JUNK FEES?

Wednesday, June 7, 2023

Cristina Miller, Partner | Raza Ali, Partner

# DISCLAIMER

These materials were prepared by the attorneys of Styskal, Wiese & Melchione, LLP. Although this presentation was prepared with care, it is not designed to be a complete or definitive analysis of the law in this area. SW&M's attorneys are licensed in 10 states, including California. The information contained in this presentation is not intended to constitute and should not be received as legal advice and does not in any way create an attorney-client relationship.



# Roadmap for Discussion

- Regulatory Scrutiny on Financial Institution Fees
- What is a “junk fee”?
- Defining “junk fees” through enforcement
- Credit Union implications
- Litigation Trends



# Regulatory Scrutiny

- CFPB junk fee inquiry – January 2022
  - Characterized financial institutions (FIs) as obscuring the true cost of their services by “luring consumers with enticing offers and then charging excessive junk fees”
  - Consumers increasingly charged “inflated and back-end fees”
    - Example: hotels and concert venues advertise rates, and add “resort fees” and “service fees” after the fact

# Regulatory Scrutiny

- CFPB reports on Overdraft practices
  - Overall market revenue (estimate) from Overdraft and NSF fees is \$15.47 billion for 2019
  - Credit Union Overdraft and NSF revenue (estimate) \$2.37 billion in 2019
  - Banks with assets less than \$1B – Overdraft and NSF revenue (estimate) \$1.13 billion in 2019



# What is a “Junk Fee”?

- CFPB requested consumers’ experiences with fees associated with accounts, loans, or payment transfers
  - Fees for things people believed were covered by the baseline price of a product or service
  - Unexpected fees for a product or service
  - Fees that seemed too high for the purported service
  - Fees where it was unclear why they were charged



# What is a “Junk Fee”?

- CFPB Request for Public Comment
  - Fees that far exceed the marginal cost of the service they purport to cover
    - Companies are not just shifting costs to consumers, but driving “excess profits”
    - Examples of “excessive” fees: “punitive” credit card late payment fees, nonsufficient fund (NSF) item fees
  - Companies using hidden “back-end fees” added at some point in the transaction after a consumer has chosen the product or service based on a front-end price
    - Examples of back-end fees: overdraft and NSF fees, convenience fees, “add-on” fees for prepaid accounts



# Defining “Junk Fees” Through Enforcement

- APSN transactions: the CFPB’s Regions Bank enforcement action
  - Bank charged “surprise” overdraft fees on debit card purchases and ATM withdrawals
    - Fees charged even if there were sufficient funds available when consumer initiated transaction, if there were insufficient funds at time of settlement – approved positive, settled negative (APSN)
    - Bank’s disclosures stated its practices relative to APSN
    - CFPB previously had considered charging overdraft fees for APSN transactions only a UDAAP violation if FI failed to clearly disclose its practices (see e.g., CFPB Winter 2015 Supervisory Highlights) – the FDIC and FRB had treated such practice as violating UDAP standards for a number of years



# Defining “Junk Fees” Through Enforcement

- CFPB classifies charging overdraft fees on APSN transactions an “unfair” practice
  - Circular 2022-06: overdraft fees assessed by FIs that a consumer would not reasonably anticipate may be unfair
    - If a transaction is authorized positive, consumers may reasonably expect that they will not be charged an overdraft fee in connection with that transaction
  - Winter 2023 Supervisory Highlights: FIs cited for charging overdraft fees on APSN transactions



# Defining “Junk Fees” Through Enforcement

- NSF fees: CFPB Winter 2023 Supervisory Highlights also targeted NSF fees practices
  - If a transaction is returned unpaid, a merchant may choose to represent that transaction, and if the consumer’s available balance is insufficient, the consumer could be charged multiple NSF fees for a single transaction
  - CFPB called this practice unfair, and stated that consumers cannot reasonably avoid injury even if the practice is disclosed



# Defining “Junk Fees” Through Enforcement

- NSF fees: CFPB Winter 2023 Supervisory Highlights
  - Prior FDIC guidance recommended mitigating UDAP risk related to multiple NSF fees being charged on a single transaction by disclosure of practices
  - CFPB directed FIs to refund consumers during examinations
  - “Virtually all” FIs examined discontinued all NSF fees



# Defining “Junk Fees” Through Enforcement

- Returned deposited items fees: CFPB Compliance Bulletin 2022-06
  - CFPB targeted fees charged when a consumer deposits a check that is returned because it could not be processed against the check originator’s account
  - Check depositor generally does not control whether the check will be returned
  - Blanket policy of charging returned deposited items fees to consumers for all returned transactions irrespective of the circumstances or patterns of behavior are likely “unfair”

# Defining “Junk Fees” Through Enforcement

- Convenience or “pay-to-pay” fees: CFPB Advisory Opinion
  - Fees charged to pay debt through a particular channel (e.g., phone) violate the federal Fair Debt Collection Practices Act unless expressly authorized by the loan agreement or expressly authorized by state law
    - The federal FDCPA inapplicable to lenders collecting their own debt
  - Does state law apply federal FDCPA standards to lenders?
  - Could convenience fees violate state or federal UDAAP standards?

# Defining “Junk Fees” Through Enforcement

- Other examples of “unfair” fees identified by the CFPB
  - Late fees charged on auto loans after loan balance was accelerated
  - “Estimated” repossession fees charged that far exceeded actual costs
  - Payment processing fees charged that far exceeded the servicer’s costs for processing payments
  - Fees charged to borrowers to recover personal property from repossessed vehicles
  - Fees charged in connection with reopening a consumer’s previously closed account



# CFPB Limiting Credit Card Fees

- Proposed rule on credit card late payment fees
- Regulation Z already addresses limits
  - Either issuer must charge fee that is “a reasonable proportion of the total costs incurred by the issuer for that type of violation” or fee that complies with safe harbor limit of \$30 for “penalty fees” including late fees; \$41 for subsequent violations within six months
    - Fees subject to inflation adjustment
  - Fee must not exceed dollar amount associated with the violation



# CFPB Limiting Credit Card Fees

- CFPB proposal
  - Lower safe harbor late fee amount to \$8
  - No longer able to charge higher fee for subsequent late payments
  - End inflation adjustment
  - Limit late fees to 25% of the late payment



# What fees could be targeted next by CFPB?

- “Futile” Overdrafts and Transfer Fees
  - Charge hits checking account and funds are insufficient to pay
  - Consumer has transfer from savings account to checking account set-up to cover this
  - There is a \$5 “Transfer Fee” charged
  - But, if savings account balance is not sufficient to cover the charge, then an overdraft fee is also charged
  - Could CFPB classify these fees as “unfair”?



# What fees could be targeted next by CFPB?

- Paper statement fees
  - Regulation E requires delivery of statements for deposit accounts
  - Regulation Z requires delivery of statements for open-end loans and mortgages
  - Statements include information regarding billing errors, dispute rights
  - Some FIs charge monthly fees for delivery of paper statements
  - Could CFPB classify these fees as “unfair”?



# Credit Union Implications

- CFPB supervisory authority extends to credit unions over \$10B in assets
- Under that asset size, NCUA/state regulator enforcement
  - NCUA 2023 Supervisory Priorities: focus on “unanticipated overdraft fees”
  - Will NCUA/state regulators follow CFPB’s lead on “junk fees”?
  - California DFPI annual reporting on state-chartered bank and credit union revenue from NSF and overdraft fees
- Litigation threat – class action attorneys targeting fees/practices classified as UDAAP or “junk fees”



# Litigation Trends

- Overdraft/NSF fees class actions still going strong!
  - Multiple re-presentation of NSF fees
  - APPSN – Approved Positive, Purportedly Settled Negative
  - “Available Balance” vs. “Ledger Balance”
  - Regulation E opt-in form cases



# Risk Mitigation

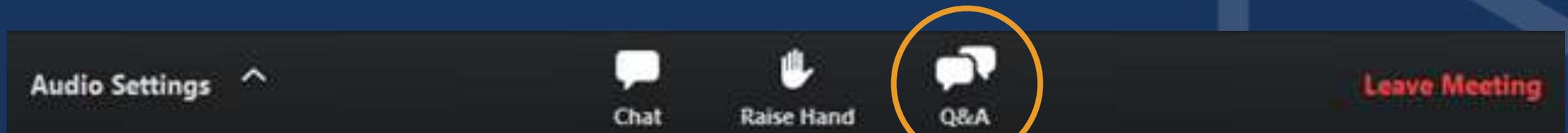
- Review of fees charged
  - Are amounts disproportionate compared to services/products involved?
  - What are fee amounts based on, and is the underlying analysis documented?
  - Are the fee amounts and how/when they are imposed clearly disclosed in account opening disclosures?
  - Are the fees charged consistent with disclosures and applicable law?



# QUESTIONS?

Please click the Q&A button on the bottom of your Zoom window to open the Q&A window;

Enter your question into the Q&A box, then click Send.



# CONTACT US



550 N. Brand Blvd., Ste. #550  
Glendale, CA 91203



[swm.info@swmlp.com](mailto:swm.info@swmlp.com)



(818) 241-0103



<https://swmlp.com>



**SW&M**  
FINANCIAL  
INSTITUTION  
ATTORNEYS

