

Junk or a Value-Added Service? Federal Regulators and the Biden Administration Go After “Junk” Fees

October 17, 2023

On Wednesday, October 11, the White House — joined by the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB or Bureau) — announced new measures aimed at a variety of so-called “junk fees” charged to consumers by businesses, with particular focus on banks.¹

With the announcement, the FTC proposed a new administrative rule that, if finalized as proposed, would promulgate express prohibitions against businesses charging hidden or misleading fees to consumers and require businesses to improve their disclosures on the front-end of consumer transactions.²

The CFPB, on its part, issued a new advisory opinion advising large banks and credit unions to implement specific measures to provide consumers information about charges and other matters related to their accounts.³ The CFPB’s new advisory follows warnings from last year criticizing “pay-to-pay” fees and other “junk” fees charged by financial institutions to consumers.⁴ In an interview on CNBC on October 13, CFPB Director Rohit Chopra indicated that the Bureau intends to focus not only on whether fees are properly disclosed up front, but also on whether the business is providing real services in connection with the fee, and whether the fee is reasonable.

The more salient aspects of the FTC’s most recent rule proposal and the CFPB’s new advisory opinion are discussed in turn below.

The FTC’s Proposed Trade Regulation

The FTC’s proposed rule puts a big target on various industries that the government deems to engage in unfair or deceptive fee practices around the United States. The financial services industry is specifically noted.⁵ And the FTC cites concerns with the myriad fees often charged by banks and other financial institutions, including account maintenance fees, convenience fees, late payment fees, inactivity fees, NSF fees, overdraft fees and others.

¹ Biden Administration Announces Broad New Actions to Protect Consumers From Billions in Junk Fees, Press Release, The White House, *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees/> (published Oct. 11, 2023).

² FTC Proposes Rule to Ban Junk Fees, Press Release, Federal Trade Commission, *available at* <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-proposes-rule-ban-junk-fees> (published Oct. 11, 2023).

³ CFPB Issues Guidance to Halt Large Banks from Charging Illegal Junk Fees for Basic Customer Service, Press Release, Consumer Financial Protection Bureau, *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-halt-large-banks-from-charging-illegal-junk-fees-for-basic-customer-service/> (published Oct. 11, 2023).

⁴ Unanticipated overdraft fee assessment practices, Consumer Financial Protection Circular 2022-06, Consumer Financial Protection Bureau, *available at* <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2022-06-unanticipated-overdraft-fee-assessment-practices/> (published Oct. 26, 2022); CFPB Moves to Reduce Junk Fees Charged by Debt Collectors, Press Release, Consumer Financial Protection Bureau, *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/> (published June 29, 2022).

⁵ While the FTC’s proposed rule acknowledges that the FTC generally does not have jurisdiction over banks and federal credit unions for purposes of Section 5(a), other regulators are known to incorporate FTC rules into their regulatory oversight, particular with regard to Unfair or Deceptive Acts or Practices (UDAP). The FTC also has authority over other non-bank financial services entities.

The proposed rule addresses two forms of fees that the FTC deems to be unfair and deceptive trade practices: “hidden” fees and “misleading” fees.

Hidden Fees

To address concerns with hidden fees, the FTC’s proposed rule provides that an “individual, corporation, partnership, association, or any other entity that offers good and services” shall not “offer, display, or advertise an amount a consumer may pay without *Clearly and Conspicuously* disclosing” “the maximum total of all fees or charges a consumer must pay for a good or service and any mandatory [additional good(s) or service(s) offered to a consumer as part of the same transaction].” The proposed rule further enumerates specific requirements about how the pricing of any product or service must be clearly and conspicuously advertised or disclosed to the consumer, for example, by requiring that disclosures to consumers are prominently displayed and state total pricing information in easily understandable terms.

Misleading Fees

With respect to the prohibition on misleading fees, the FTC’s proposed rule provides that no business may “misrepresent the nature and purpose of any amount a consumer may pay, including the refundability of such fees and the identity of any good or service for which fees are charged.”

The FTC has requested comments on its rule proposal. It has provided a 60-day period following publication in the *Federal Register* for doing so. After reviewing those comments, the FTC can decide to finalize the proposed rule or engage in additional processes, including publishing a further revised rule for comment.

The CFPB’s Advisory Opinion

The CFPB’s new advisory opinion is premised on Section 1034(c) of the Consumer Financial Protection Act (CFPA).

Section 1034(c) relates to the requirement of large banks and credit unions (with over \$10 billion in assets) to “in a timely matter, comply with a consumer request for information . . . concerning the consumer financial product or service that the consumer obtained from [the bank or credit union].”

In interpreting this statutory provision, the CFPB’s advisory provides some notable guidance on various points, including that:

- Banks and credit unions must comply with Section 1034(c) even if a consumer does not expressly invoke the statute.
- Section 1034(c) does not apply to a consumer’s request for information unrelated to the consumer’s account, for example, regarding a large bank or credit union’s internal operating procedures, financial performance, marketing strategy or employee training programs.
- Section 1034(c) does not require banks or credit unions to respond in any particular format to a customer information request. The response can be made in writing, orally or electronically.
- Banks and credit unions may not impose conditions or requirements on a consumer’s information request that will unreasonably impede the consumer’s ability to request or receive information. For example, the CFPB suggests in most instances it would be unreasonable to charge a fee to a consumer for requesting account information. However, the CFPB recognizes that there may be some instances in which imposing a fee or charge is acceptable. That could include instances in which a consumer has repeatedly requested and received multiple copies of the same information regarding one of its accounts, and a fee is charged for making duplicative copies.

- Banks and credit unions should not create conditions or obstacles that unreasonably impede a consumer’s ability to make an information request. Examples of potentially problematic practices include a bank or credit union making consumers endure excessively long wait times to make a request to a customer service representative, requiring consumers to submit the same request multiple times, or forcing consumers to engage with a chatbot that is unable to adequately respond to and address a consumer’s informational requests.
- Banks may impose reasonable conditions on consumers’ information requests including, for example, requiring consumers to verify their identities, identifying their bank accounts and complying with reasonable data security measures.
- Banks and credit unions should act timely in responding to consumers’ information requests. The CFPB expects large banks and credit unions to have policies and procedure in place to do so.
- The CFPB believes a bank or credit union may violate Section 1034(c) by providing incomplete or inaccurate information in response to a consumer’s informational request.

The CFPB notably states in its advisory opinion that, “[a]s a matter of prosecutorial discretion, the CFPB does not intend to seek monetary relief for potential violations of section 1034(c) that occur prior to February 1, 2024.” In other words, large banks and credit unions subject to Section 1034(c) have more than three months to review their policies and procedures and determine whether additional programming and other revisions are necessary to ensure the CFPB’s requirements are satisfied.

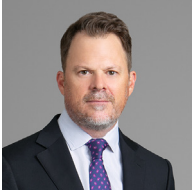
Conclusion

The White House, in conjunction with the FTC and CFPB, have issued a clear directive against certain fees and the sufficiency of disclosures provided by banks and other financial institutions about certain fees charged. But there still remains a small window during which impacted entities can address any potential compliance gaps. The FTC’s proposed rule will not be final for some time, and the CFPB has provided a prosecutorial stopgap to allow banks and financial institutions to conform their practices.

Whether the fees are convenience fees, overdraft fees, resort fees or tire recycling fees, or another form of fee assessed to the consumer, banks and other covered parties should begin the process of: (1) identifying all fees charged; (2) assessing whether the fees are reasonable and tied to a corresponding cost or service provided by the business; and (3) assessing whether the fees are properly disclosed.

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