Consumer Finance Monitor (Season 5, Episode 10): The CFPB's Inquiry Into "Junk Fees": What It Means For Consumer Financial Services Providers

Speakers: Alan Kaplinsky, Rich Andreano, John Culhane, and Ron Vaske

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean to your company and what they mean to consumers. I'm Alan Kaplinsky, senior council at Ballard Spahr and formerly the chair of our Consumer Financial Services Group. I'm very please that you've downloaded our podcast today, which is based on a very popular webcast, which we recently produced, pertaining to what I consider to be one of the most outlandish, most outrageous initiatives of the CFPB that I have seen since it got created in July of 2011. And for those of you who follow the CFPB closely you'll know, I'm referring to their initiative pertaining to so-called junk fees. What they have done is that they have issued a request for information, or it's sometimes colloquially referred to as an RFI, that takes aim at what the CFPB labels "excessive and exploitative" fees charged by consumer financial services providers.

Alan Kaplinsky:

The RFI could protend greater scrutiny of ancillary fees by the CFPB in examinations, possible enforcement actions targeting such fees, and possibly, although I think unlikely, new regulatory proposals. By shining a spotlight on these ancillary fees, which is how I prefer to call them, rather than using the pejorative term junk fees. The RFI also increases the likelihood that state regulators, state attorneys general, and plaintiff's attorneys will pay particular attention as well to these fees. So, what we're going to do today is, we're going to discuss the types of fees that are being targeted by the RFI, the issues that CFPB inquires about in the RFI, sources of the CFPBs authority to address fees it considers "excessive or exploitative." Possible short term and long-term actions the CFPB could take to address these so-called excessive or exploitative fees. As well as fees that are current targets of enforcement actions or private lawsuits.

Alan Kaplinsky:

And, most importantly, the steps that we are recommending that providers should take to prepare for greater scrutiny of fees and possible legal challenges. Well, you probably want to know why at the very beginning of my remarks, I referred to this initiative as one of the most outlandish and outrageous initiatives of the CFPB, it's because, the CFPB decided rather than to use a scalpel to get rid of certain fees that are being unfairly charged, it used a meat cleaver, and basically decided that any ancillary fee is unlawful. And let me give you an example of what I'm talking about. The CFPB didn't even focus on the fees over which it has jurisdiction. It expressed outrage at fees that are being charged by hotels. And, all of us who've been to a hotel know about those fees. There could be fees for using their wifi system, fees for parking, fees for using recreational facilities.

Alan Kaplinsky:

Well, I'd like to know how the CFPB gets jurisdiction over hotels. What's the consumer financial service that a hotel is offering, unless you take the really extreme position that because most people pay for a hotel with a credit card, not all of them of course, but some of them do, that, that's the connection to consumer finance. And I see say, "Well, come on now, let's be real." So, that's one thing. But the other thing is that, you will find out through our presenters today, many of the fees being attacked by the CFPB are expressly, believe it or not, authorized by the CFPB and other regulations, or authorized by other federal government agencies, or authorized by state law of one sort or another. In other words, in drafting this initiative, they paid scant if any attention to whether these fees that they were attacking are fees that are actually authorized by themselves and other federal and state agencies. And I say again, come on CFPB, let's get real here.

Alan Kaplinsky:

So, what we've done in order to try to separate the wheat from the chaff, within a few days of the CFPB announcing the scrutiny of junk fees, our Consumer Financial Services Group launched a special CFPB readiness review, which we're now offering to all of our Consumer Financial Services clients, both banks and non-banks. And in this review, we scrutinize all the fees being charged by the company or the bank, to consumers, to the extent such fees are subject to CFPB jurisdiction. Now, we are not looking at hotel fees, I can assure you of that. And at the completion of our review we'll give you our opinion as to whether the fees that you were charging are clearly authorized and properly disclosed under applicable federal and state law. If any of your fees are not clearly authorized or disclosed, we'll let you know that, as well as recommend changes that you should consider making.

Alan Kaplinsky:

If you want further information about this review, please feel free to contact me or any of our presenters. So, let me now introduce our presenters. We're going to lead off today with John Culhane, who is a senior partner in our Consumer Financial Services Group, based out of our Philadelphia office. And John is going to provide a general overview of the CFPB initiative. We're then going to go to Rich Andreano. Rich is the chair of our mortgage banking group. And, Rich is going to talk specifically about mortgage related so-called junk fees. Then, we're going to go to Ron Vaske, who is a partner in our Consumer Financial Services Group located in Minneapolis. And Ron, is going to talk very specifically about how this initiative relates to other things that the CFPB has done regarding bank overdraft fees. And then finally, we'll come back to myself and I will drill down a bit more on this CFPB readiness review that we are doing for clients regarding the junk fee initiative. So, without further ado, let me now turn the program over to John Culhane.

John Culhane:

Thanks, Alan. So I'm going to start with some general comments and observations about what's going on here. We all know that the CFPB has announced that it is launching an initiative, whatever an initiative is, to save Americans billions of dollars in junk fees. And so, I'm going to refer just this once to that initiative as the junk fee RFI. And, what I'm going to do is what I think we always see the CFPB doing. I'm going to try to change the context in which we're talking about these fees. So, I'm not going to refer to them in the way the CFPB did. I'm going to refer to misconduct fees, because a lot of these fees are assessed for conduct that is inconsistent with the requirements that consumers have agreed to.

John Culhane:

I'm going to refer to enhancement fees, which are fees for additional services that were not part of the basic package that the consumer agreed to. And I'm going to refer to... What I hope Rich will agree with me when he gets to the mortgage area, that is, quality assurance fees. So, let's change the vocabulary here, let's talk about misconduct fees, enhancement fees, and quality assurance fees. So, what's going on? Well, we saw the announcement, big press release, blog post, notice in the federal register. The CFPB is seeking comments on fees that it asserts are not subject to the competitive process. There's a lot of rhetoric here, a lot of talk about how impossible it is for consumers to discern the true price of products, a little big at the credit card industry for $14 billion allegedly in credit card late fees. I'm going to come back to that in a moment. And of course, the standard dig about overdraft and NSF fees, $15 billion in overdraft and NSF fees.

John Culhane:

Seemingly, this is focused on certain specific products and markets. There's quite a bit of drilling down on deposit accounts, credit cards, remittance, and payment processing, prepaid accounts, and mortgages. Those are highlighted and addressed multiple times in the press release, and then in the RFI. What's missing from the RFI is the entire past of regulation in this space. The CFPB has basically ignored current disclosure requirements, referring to these fees as if they are somehow hidden. It's ignored substantive limitations on these fees that exist both under federal and state law. And, it's pejoratively said that although they are nominally voluntary, they're not meaningfully avoidable or negotiable in the moment. Like, well, if you park your car and the meter expires and the meter person is there, your ticket is not meaningfully avoidable or negotiable, but so what? One other point I want to make here is that, in addition to ignoring the disclosure requirements and substantive limitations, the CFPB has ignored its own prior reports when it is to its benefit to do so.

John Culhane:

So, if you look at the CARD Act report from 2021, the most recent report on credit card activity, that CARD Act report emphasizes the fact at fees in the credit card arena are lower overall, declined in 2020. Certainly there's the suggestion that late fee revenue declined in large part because of the pandemic. But then, there's also the observation that other fees in the credit card space have steadily declined in prevalence since 2008. That is not because of the pandemic. So, if you ignore disclosure requirements, you ignore substantive limitations, and you ignore your own prior reporting, you can cast dispersions on the fees that are assessed on products by consumer financial service providers.

John Culhane:

And you can key up some obviously biased questions in your survey. For example, suggesting that these fees are only disclosed in fine print in boiler plate contracts, ignoring all of the application disclosures and other disclosures provided under the Truth in Lending Act, the Truth in Savings Act, the Electronic Funds Transfer Act. And there's this suggestion that somehow fees that are assessed that were somehow beyond what you believed should be provided by the baseline price. There are no questions at all about what the basis for that belief is. You can simply assert that you believe that if you signed up for something and you ignored all your disclosures, that you were surprised to get assessed other fees.

John Culhane:

Okay. Enough about that. Where's this all coming from, in terms of the Bureau's authority? Well, that's a really good question. The bureau does not have antitrust authority. It is not the Department of Justice, is not the Federal Trade Commission. Its authority to impose price controls is completely absent from the statute. There have been congressional grants to authorize agencies to impose price controls in the past. Most notably, the Federal Reserve board, the CFPB, in fact, is specifically prohibited from apposing a national interest rate ceiling, and in some respect, it seems to be venturing into safety and soundness issues, when it goes and looks at fees that are intended to discourage delinquencies and default on loans and credit products.

John Culhane:

The CFPB starts out by observing that it's... Or purporting to observe that it's a general purpose allows it to act broadly in this area, saying that, it's authorized to act to ensure that consumers have access to markets, and that markets for consumer financial products and services are fair, transparent, and competitive. Sorry, I wanted to read that to be sure I got it correctly. That's not what it's authorized to do, where in fact, its general purpose is, to implement and where applicable in force federal consumer financial law consistently, that's its general purpose. Enforce the law consistently, but not weighed into the antitrust space. This really doesn't come out of its general statement of objectives that are authorized by Dodd-Frank.

John Culhane:

Maybe you could stretch here and say that it is in fact, acting consistently with those objectives since they include making sure that consumers get timely and understandable information, but that throws out all of the prior disclosure regimes. What it seems to be doing is stretching one of its designated functions here. And, that's the ability to monitor the function of markets to identify risks to consumers. But again, there's a lot of rhetoric here and very little discussion about how we're really focusing on risks to consumers. What this really seems to be is just basic jawboning. Remember jawboning, attempting to persuade or pressure by the force of one's position or authority. For example, no loan interest rates should exceed 36%, and no loan fees should be assessed. And maybe we've also got some shunning campaigns coming up because it seems like there's going to be an endeavor here to publicize and make a lot out of institutions that assess these fees.

John Culhane:

Let's talk a little bit more about what really seems to be the nature of the authority the CFPB would have to rely on. It seems like it's really got to make the case that these fees for misconduct, or fees for enhancements, or fees for quality assurance are really somehow unfair, deceptive, or abusive. They don't fit very well in any of these definitions, given all of the disclosures and substantive limitations that exist. The CFPB suggests that if a consumer can't avoid a fee at the last possible instant or millisecond, then the fee is not reasonably avoidable, but that's not the law. The suggestion that somehow there are representations, omissions, or practices here that are likely to mislead consumers, again, ignores the disclosures that are provided, the agreements that are provided, and basically blesses consumer approach here that is, "I don't have to read any of the materials I've been provided to tell me about the pricing of my products."

John Culhane:

And certainly, it's hard to say that there's anything going on here that's really abusive. There's no actions being taken to interfere with the ability of consumers to understand the terms of their products or services. Again, this information is disclosed, it's available. There's not really any abusive tactics going on here. But that's not going to stop the CFPB, they're just going to declare that these practices, assessing these fees... Or there's the risk that they are going to declare that assessing these fees is somehow unfair, deceptive, or abusive. So, where can they go? You would think, given the way they've keyed this up, that they might revise the disclosure rules of existing regulations, maybe elevating the prominence of some of these fees, although there's only so much you can do on the disclosures and placement of fees and disclosures has been pretty carefully discussed in the past.

John Culhane:

Maybe they could change the circumstances under which some of these fees can be assessed. Maybe they could take the CARD Act restrictions on the assessment of payment processing fees and try to push them across to other marketplaces, other products, it's possible. And, you would think from the rhetoric that this might be where they would be going, that they might adopt new model disclosures. They have very broad authority to adopt disclosures, to ensure that there's a full, accurate, and effective disclosure in the marketplace. So possibly, that's where they're intending to go. Remember they jumped into this space at one point using this authority to devise disclosures for prepaid cards sold at retail locations.

John Culhane:

Now, it's possible, but it seems extremely unlikely that they're going to wade through the rule making process and adopt a specific UDAP rule governing these fees. They certainly haven't put it in their regulatory agenda. It's a long drawn out process. Now, it's possible. I mean, what they've done in the past is they've had a history of starting with these requests for information. Then they produce a report about what they were told, then they write a summary of the report or they observe practices in the industry that are inconsistent with the report. And then they cite their report and their observations in supervisory actions as the basis for some rulemaking proceeding that they want to engage in. What seems more likely frankly is, there will be an effort to initiate investigations for the purpose of ascertaining whether any consumer financial services provider assessing these fees is somehow engaged in unfair, deceptive, or abuse of conduct. Maybe there's some marketing that distracts from the disclosure of the fees, or suggests that fees won't be assessed, or that certain pricing terms cover the entire cost of a product. That's a possibility.

John Culhane:

And, where there're investigations by the CFPB, CSUN desist actions, enforcement actions, or even lawsuits can certainly follow. But again, right now, it seems like a lot of this is simply jawboning with maybe some shaming or shunning down the road. And, hard to believe that the groundwork has been laid. Although, I guess it could possibly be laid for rule making process, but model disclosures might be another story. Although, we have plenty of disclosures here. So, it's hard to tell where that might go. Let me turn it to Ron, to talk of about the potential impact in another product area. So, Ron, take it from here.

Ron Vaske:

Yeah. Thanks John. I'm primarily going to focus my comments today on deposit products and overdraft in particular as well. But before I do that, I want to talk a little bit about where I think this is coming from. After first reading this, and first reading the press release, and Director Chopra's comments, and statements, and whatnot. You scratch your head and think, "Where is this? What is their authority? What are they trying to accomplish?" It's pretty instructive, I think, when you look at the first two footnotes in the RFI. And they are, first, this Huck and Wallace study that came out in October of 2015, it talks about this problem of consumers making purchase decisions on the basis of the nominal price, the advertised price. And then, there are fees that are tacked onto that they don't pay so much attention to. They don't really see at the time they make the decision. And then, by the time they do see them, it's already too late in the process. They're not as likely to decide to quit and not make the purchase.

Ron Vaske:

So, that's identifying what they see as the issue. Fits very well into a lot of the things that they've talked about a lot. Hotel prices, where there are fees added on resorts, tickets that you have fees that are added on, that the advertise is one thing, but then by the time you're done buying it's a much different price. That's really, I think, the focus of where they really are looking at junk fees, but a lot of the things in consumer financial services don't fit very well into that. Second footnote in the RFI is this 2016 report by the Obama administration, the National Economic Council, that really focuses on that whole problem that's identified in the Huck and Wallace report, that consumers make their decisions based on these nominal prices and don't pay attention to, what they refer to as, hidden fees.

Ron Vaske:

And in that, they talk a lot about airlines. They talk a lot about tickets. They talk a lot about hotels and resorts and that sort of thing. And a little bit about financial services. And so, they do identify the problem there and identify it as really an issue that they can deal with in a couple of ways. One, by regulation of the fee amount. The study goes on to talk about how that's not really practical in so many ways. And in this case, as John mentioned, whether the CFPB even has authority to do that is doubtful at best.

Ron Vaske:

And then, they also talk about disclosure and they really identify the best disclosure as an all in-pricing scheme. And that's true. And that works very well in some cases, the tickets, for example, the airline tickets, the concert tickets, hotels, and so forth, you could make that work. In consumer financial services, in some ways it works, in some ways, it doesn't. For the most part, it doesn't. It works in the case of closed-end APR disclosures. You can have an all in-price, and that's what the Truth in Lending Act is for in that respect. You can have an all in-price that shows you the yield on savings, and that's done under the Truth in Savings Act. But then, when you have open accounts, and fees related to open accounts that are dependent on how the consumer uses their account, it's really difficult to have all in-pricing. And it's really difficult to apply what this historic junk fees analysis has been in that context.

Ron Vaske:

Lastly, last summer, there was an executive order by President Biden that was issued, that dealt with or addressed competitive issues in the economy generally. Part of it, dealt with this issue, and in particular about hidden fees. Make suggestions to the Department of Transportation to do things about that, and the Department of Commerce to do things about that. And then also suggest to the CFPB, that they should look at their authority for enforcement under UDAP in taking action, in that regard.

Ron Vaske:

So in the case of deposit accounts, I think, in all fees really, you have to take a look at this on a case by case basis. And there are different approaches that you have to take with different fees. There are truly mandatory fees. These fees are your monthly service fees, account closure fees which are another thing, prepaid load fees, all of these things, these are fees that are going to be charged no matter what, no matter how the consumer uses the account. These are disclosable. They're pretty easy to understand. It's pretty easy to decide when they need to be disclosed, certainly on the front end. And so, these really don't seem to be part of the problem.

Ron Vaske:

What they're focused more on are, what they call, fees not meaningfully negotiable in the moment. Fees such as minimum balance and minimum transaction fees, ATM fees, purchase fees, foreign transaction fees, remote deposit fees, paper statement fees, telephone and in-person service fees. These things are fees that the consumer probably doesn't think about at the point of making the account decision of whether or not to open the account. They're all fully disclosed under prepaid rule in particular, they're specifically identified how to disclose them and with the intention that they will not be misleading, that the consumer will see them and it will be a meaningful disclosure. And then there are fees for optional features and services. And, those are different, but I think they don't really fit into the junk fees category very well, with respect to those, in reality, yes, they have to be disclosed. They have to be disclosed at a meaningful point in time. At the time they're assessed, to give the consumer an option to say yes or no. And in many cases disclosed also at the front end, but it's more of a timing disclosure than anything with respect to that.

Ron Vaske:

But it comes down to with those, whether the consumer is really receiving adequate value for what the fees are. And, disclosure notwithstanding that's probably what drives a lot of this. Thinking about that, I think, the credit card ban on enforcements from a few years back are probably good examples of how that would be approached.

Ron Vaske:

Talking specifically about the overdraft and NSF fees, it's no secret, it's pretty obvious that the CFPB and certainly Director Chopra is not a big fan of these. They don't really fit into the junk fees category though. They talk about it a lot in the RFI. And, the director talks about it a lot in general. But they're not fees that you could possibly put into the all in disclosure category, because they're dependent on what the customer does. I think the biggest problem that the CFPB has and that people in general have with it, is that, they are fees that are dependent on the customer's misuse of the product. And so, the Bureau's approach to this and in thinking of them as junk fees, is that, because these accounts are only profitable when the consumer misuses the product, rather than when the consumer uses the product, they're a hidden fee that is embedded in the total cost that could be dealt with in a better way. I don't know what that would be, but I think that's the big problem they have with it.

Ron Vaske:

With these fees, I think, obviously you have to think about how to disclose them, when and how? Think about practices and policies that you have. Are there ways that could help consumers avoid these fees? Such as, could you give a grace period, and then give the customer a warning that the fee will be assessed if they don't correct the balance situation by a certain date. And then finally, as always, I tell clients, they need to consider who their market is. And, if your product really is dependent on customers misusing it as part of your business model, then you have to think about whether you are really offering an appropriate product for them. And, when you think about it in that way, you can avoid a lot of UDAP issues, if you're really focused on delivering the right product, the right service to the right customer and who you're targeting. For some consumers, it may be more appropriate than others.

Ron Vaske:

Finally, I wanted to talk about an example, and specifically an example that was cited in the 2016 study by the Obama White House. And, this is probably an example of how the CFPB could take enforcement on the junk fee theory. And this was in October of 2014 case enforcement action brought against M&T Bank, where they advertised a free checking account. And then, the advertising didn't sufficiently disclose that there was minimum transactions, maybe minimum balance amounts, and so forth, in order to qualify for the free checking account. It's not saying that it didn't include it in the terms and conditions or the required disclosures, but that the advertising didn't include it. And, the consumer makes the decision based on the advertised price. And by the time they get to the fine print, it's too late. They don't back out. They're not likely to back out. And I talk about that, because it's cited in, what I would consider largely, the impetus for all of this, is that 2016 study by the Obama administration. Turn it over to Rich now to talk more about mortgage side fees.

Rich Andreano:

Thank you very much, Ron, and good day, everyone. Well, as we've seen a lot of the bureau state were over the top. In the mortgage origination area, though, they're a bit puzzling as we'll see, given the restrictions that apply, and don't particularly cast the bureau in a very good light, as a lot of their statements simply don't comport with reality. Starting off, one of them, priced into most mortgages are thousands of dollar and application fees and closing costs, which few people are well-positioned to shop on. Now, that raises a question, is the bureau unaware of its own TILA-RESPA integrated disclosure or TRID rule, perhaps. Or, is it concluded the rule fails in its goal to allow consumers to shop for a loan?

Rich Andreano:

Well, first of all, it recently conducted assessment of the trade rule. So, I'm pretty sure it knows about the rule. And second, it concluded that the rule is doing well in enabling consumers to shop for a loan. So, one must assume a third purpose, which is, as John referred to jawboning, they're simply trying to jawbone lenders into charging less fees. One thing I must say though, if you go way back, there were a lot of miscellaneous fees for a variety of reasons, including difficulty and compliance with state law and such. A lot of the disclosures now, the loan estimates at the time of application and the closing disclosure at the time of closing, the lender fees are pretty minimal, and some have none at all, just having often some third-party fees. And, those are fees that are required in connection with the loan and not really something the lenders adding as a so-called junk fee.

Rich Andreano:

Now importantly, before a consumer can be charged any fee other than a bonafide and reasonable credit report fee, and some lenders don't even charge that, they have to have received a loan estimate that details all the fees based on the best information reasonably available to the creditor. And then, affirmatively agreed to move forward with that loan. That was the purpose of the loan estimate, without very much ties to a transaction, give the consumer a complete disclosure and then enable the consumer to shop based on that. And then, key, the changes the creditor can make to the charges in that niche disclosure are highly regulated as to what they can do. And so, again, first of all, the disclosure in the first place has to be based on the best information reasonably available. And the creditor has to engage in reasonable diligence. If they don't, then they can be sanctioned for not properly disclosing fees, and could be ordered to give a refund to extend a fee exceeded and the amount disclosed.

Rich Andreano:

Then, once they're disclosed, very limited circumstances, basically something changes. It was either the information that was provided to the creditor was inaccurate, such as the borrower gave information indicating the property would be one that qualified for a standard appraisal. Appraiser goes out and visits the property, it's going to require a complex appraisal, that would allow an increase to the appraisal fee. Again, nothing the creditor did wrong there. Or, the borrower asks for a change. Borrower wants perhaps a revision to the loan product. Something that's going to require more work, or trigger a fee, very limited cases in which they can add fees during the process. So, that shopping document is really true, strong shopping document. So, house they're saying, they're not really well-positioned to shop for these various mortgage fees is quite peculiar.

Rich Andreano:

Now, also let's look at some of other things affecting overall fees in the mortgage area. There is the ability to repay rule, where for qualified mortgages... And most loans are qualified mortgages, because they have special legal protections from the severe penalties under the rule. For most loans, it's a 3% limit on points and other fees, that severely drives down the total costs of loans. Also, keeping the finance charge, particularly the APR, which consumers do compare low is important to creditors, and under Regulation Z a lot of these third-party real-estate related charges, your appraisal, your title, credit report, notary fees, they can be excluded only to the extent they're bonafide and reasonable in amount. Next, states and a lot of agencies, FHA/VA for instance, limit the amount of fees that can be imposed on borrowers, either with express limits or with reasonableness limits.

Rich Andreano:

And, in the market, there is robust competition. It is hard to go out there and not see ads for many, many mortgage companies. And, a lot of times my clients, they're dealing with a consumer, many times that consumer comes in with a competing offer that's better from another company and they have to meet or beat that. A lot of competition that keeps fees low. And, another factor here, though, there are significant regulatory requirements. The regulations resulting from the Dodd-Frank Act clearly increase the cost of originating loans significantly. If the bureau wants to reduce the cost of mortgage lending, perhaps it should reconsider the regulatory burden, which right now is frankly a crushing, crushing burden on the industry. Obviously, some regulation is good, but what's the right level of regulation. Particularly, if you're interested in the cost of the product.

Rich Andreano:

Another concept the bureau says is, well, at closing, you get these inflated and padded fees added at closing. Well, again, we've addressed under the trade rule, you simply can't go and willy-nilly add fees at closing, very much limited. But what about padding? Can I pad third-party fees? Well, let's take a look at that. Regulation Z, this section is part of the trade rule and expressly says the amount that you're disclosing for a third-party charge in the trade rule must be the actual amount of the third-party charge. You can't pay out the fee that is disclosed under the trade rule. States and agencies in fact will look at that. A lot of times in an exam, states will come in, they'll say, "Give me the closing disclosure. Give me the invoice for every third-party fee." If an invoice is $1 less than the fee you charge the consumer, you're writing a check for that $1 to the consumer, states are very focused on this. So, this concept of padding really, they may be thinking about practices that did exist in the past, but nowadays frankly, have been regulated pretty much out of existence.

Rich Andreano:

So, I think the Bureau's writing comments based on the way the industry perhaps appeared 20, 25 years ago, not the way the industry appears today. And so, it's very puzzling. It doesn't cast the bureau in a very good light, based on current practices and the significant regulation in the origination area. Now, let's switch to servicing. This is a little different, and the bureau does note, the consumer doesn't shop for the servicer and that's true. Most loans are sold and you end up with a larger company that services the loan, the servicer doesn't pick that. However, whereas servicing used to be relatively unregulated, now it's very much regulated. And particularly, with fees, if you go on services websites, they will have information on the various fees they charge.

Rich Andreano:

And importantly, mostly the fees they charge are for when the borrower hasn't complied with the terms of the obligation, or they want an optional service that's the servicer simply is not required to provide. Here we have initial bureau statement, "Homeowners can find themselves forced to pay for making payments over the phone or online, even for the services bill pay service."

Rich Andreano:

Well, late fees, they also point out. Typically, the consumer is going to engage in that optional payment service in order to avoid a late fee. And remember, typically there's a 15-day or so grace period from the first of the month to make that payment before incurring a late fee. Consumer comes right up to the deadline, wants to avoid a late fee, contacts the servicer, servicer's happy to provide, "We'll disclose the fee. Look, we're happy to do this. We offer various free payment methods, but you're not sure the payment will get to us on time via the various methods, so you want to use this expedited method. Fine, happy to do that." Often the servicer engages a third-party that the service is paying to help facilitate that service. The consumer clearly could have avoided that fee had they simply paid earlier.

Rich Andreano:

So again, why should the service should be required to offer this optional service to help a consumer avoid a late fee and do it for free? If the bureau wants them not to impose any charge for that, what do you think the results going to be? They're not going to go out of pocket. They simply will cease offering the service and the consumer will be hit with a late fee. Oh, but the bureau doesn't want there to be any late fees anyway, there seems to be something bad about that.

Rich Andreano:

Well, particularly with mortgage loans, late fees are designed to get the consumer to pay on time. Mortgages provide for scheduled interest. In other words, the interest I pay, doesn't matter whether I pay on the first, the 15th, or the 30th of a month. If there were no late fees, a lot of consumers would simply pay on the 30th of the month. And how do you think the industry would react? They would increase the interest rates on loans going forward. So, everyone would be paying more for those consumers who choose not to pay on time. That's not exactly a good way to make mortgages more affordable for everyone.

Rich Andreano:

So, let's look at some of these other fees that the bureau points out, property inspection fees, new title fees, legal fees, appraisal valuations, broker price opinions, forced place insurance, foreclosure fees, and miscellaneous specified corporate advances, which they say can price the consumer out of a home. Now, how default related fees prevent a consumer from buying a home, someone's going to have to explain that to me. Bureau's correct in noting that they could make it harder for a consumer to bring themself current. But is the choice not imposing any fees for all of these services that are only triggered because the consumer defaulted and the servicer has obligations under the Bureau's regulations, under state law, under investor and agency requirements to make sure that property is maintained and protected, to assess the value of the property, to determine what loss mitigation options might make the most sense, to make sure the property is insured, to when necessary, if it can't be avoided, engage foreclosure council, to advance monies to make sure insurance is paid, taxes are paid. That's what advances are for.

Rich Andreano:

So they're suggesting with the advance some of this is all mysterious, it's to preserve and protect the property and the loan holder's rights in that property, which also in the end protects the consumer by keeping the value of the property as best you can, should you need to go to a short sale or a foreclosure. But again, apparently the bureau thinks all of this should be done for free. That's going to be done, where's the only way to get the cost? Increase the interest rate for everyone. How is that going to improve the cost of home ownership?

Rich Andreano:

Now, again, when I return to late fees, particularly, and some other of the default related fees, late fees are often the exact amount specifically authorized under state law, under FHA/VA requirements, specifically provided for in Fannie Freddie documents, security and servicing guides address this additionally. All of these provisions address a lot of foreclosure, default related fees, either specifically regulating the amount or requiring that the amount be a reasonable amount. So it's not like this is unregulated. And again, it's triggered because the borrower defaulted. And, the servicers have to comply with the preservation and maintenance of the property and pursuing foreclosure according to agency and investor requirements, and pursuing loss mitigation options, all of those things, they need to know the price of the property. They need to know the property's protected. These are things that are standard and the bureau seems to think all of this should be done for free, and that just isn't workable.

Rich Andreano:

So, this is going to be something that clearly the industry has to focus on and make clear to the bureau that these are not hidden and improper fees, but they are fees often triggered by borrower conduct. Now, other settlement service fees, they note that advocates and reporters have noted that many closing costs like title insurance, and we'll get into title insurance, are not always subject to standard or appropriate competitive forces.

Rich Andreano:

Well, what do they cite for that? Two things. 2006 testimony, 2006, not 16, 2006 testimony of the Consumer Federation of America on title insurance costs before the House Financial Services Committee. And an article, and this is the article... It actually wasn't all caps, the title, as you could see, entitled to profit in Texas title insurance is a total scam. Take that for what it was. Now, there are 50 states, there's D.C., there's Puerto Rico, this article cited the title rates in one state, Texas. Do you know who sets the title insurance rates in Texas? Texas sets the title insurance rates in Texas, they're state regulated. In mostly the other 49 states, the model is typically filed rates. Title insurers file their rates with the state regulator, which does have some supervision over that. But it's to ensure that they stick with those rates and are not discriminatory in the way they apply those rates.

Rich Andreano:

Outliers, Iowa, where you don't have traditional title insurance, the only state where that is the case. Now, what's really going on here. The bureau does not like title insurance. It thinks it's too expensive, doesn't like the service. Problem for the bureau, it's insurance. Insurance pretty much is left to the regulation of the states. The bureau can get the title insurance under the Real-Estate Settlement Procedures act, because it is a settlement service covered by RESPA. But that really doesn't give it price regulation authority over title insurance. That is a state function. So, if the bureau attempts to use its UDAP authority here, not only I think will the title insurance industry push back, I think you might see pushback from various state insurance commissioners saying, "Stay out of our turf bureau. You don't have price control regulation. You don't have regulation over the insurance industry. We do." So the bureau has to be very, very careful here.

Rich Andreano:

Then, last statement that I have to get at, the hidden cost of junk fees. In addition to the original omissions, that wasn't enough. They have to come out with a February 2nd blog, which extols the value of home ownership, which no question it is, helps bill wealth. But, speed associated with closing a home, such as dot, prep, or title insurance fees, connect a significant barrier for people trying to buy a home or refinance and significantly cut into household equity. I mentioned title insurance, the only thing I mentioned now is a doc prep fee. Can I have a show of hands of how many people think a doc prep fee has stopped someone from buying a home. Again, it's almost, bureau, did you really think about that when you wrote it and then you published it for public exposure?" That's not a particularly intelligent statement for them to make that a doc prep fee prevents someone from buying a home. With that, I'd like to turn the presentation back to Alan who will address the service we offer, a CFPB readiness review.

Alan Kaplinsky:

Okay. Now, I'm just going to give you a very quick overview of what we are doing for our clients and other companies that have come to us recently wanting to know what should they be doing right now? And, this is a very quick summary of what we are recommending. The first thing is for each product or service that is offered to a consumer, be it on the lending side, or whether it's on the deposit side, be it a mortgage transaction, an auto finance transaction, a student loan, unsecured loan, closed-end opened-end, what we have been doing is to catalog all the fees that are charged on each of the products. And then, for each fee to determine whether it's authorized under state or federal law. Many of these fees are expressly authorized under state law, and sometimes under federal law. And then, for each fee determine whether it is included in the contract with the consumer. Is it expressly mentioned in the contract?

Alan Kaplinsky:

And then, for each fee determine whether it's adequately disclosed to the consumer, or is it hidden somewhere within a very lengthy contract where a consumer would be unlikely to be aware of the fee. And then, for each fee we opine on what a company or bank ought to do. Should it be omitted? Should it be reduced in amount? Or should the way in which it's disclosed be changed in some fashion?

Alan Kaplinsky:

Okay. We have wrapped up our program for today. And, just want to remind you about our podcast show, Consumer Finance Monitor, goes by the same name, by the way, as our blog, Consumer Finance Monitor. That blog has been ongoing since is the very day that the CFPB got stood up in July of 2011. Our podcast show is a weekly show that has been going on now for about three and a half years. And it's available, whatever platform you may use to access your podcast. We're on Spotify, Google Play, and we're also of course, on our Ballard Spahr website. And we cover a broad range of subjects. As long as it deals with consumer finance, we cover it. And, you should listen, not only to our podcast show, but also a lot of the same topics we cover in even more detail within our blog. So, with that, I want to thank John Culhane, Rich Andreano, and Ron Vaske for participating today. And I want to particularly thank all of you for downloading our show today.