# Consumer Finance Monitor (Season 6, Episode 50): The Biden Administration's "Junk Fees" Initiative Continues: What the Latest Actions Mean for the Consumer Financial Services and Rental Housing Industries, Part II

Speakers: Alan Kaplinsky, Reid Herlihy, Kristen Larson, John Culhane, Mike Gordon, and Roger Winston

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer finance and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, former practice group leader for 25 years, and now Senior Council of the Consumer Financial Services Group at Ballard Spahr. I'll be moderating today's program.

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted our blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. To subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com.

And if you like our podcast, please let us know about it. Leave us a review on Apple Podcasts, Google Play, Spotify, or wherever you obtain your podcasts. Also, please let us know if you have ideas for other topics that we should consider covering or speakers that we should consider as guests on our show. I'm very pleased to tell our listeners today that our podcast show on November 30 of this year was ranked by Good2bSocial, a very prominent consultant that focuses on social media and law firms.

It was ranked as the number one podcast among law firm podcast shows in the United States devoted exclusively to consumer financial services, and we were ranked number 11 overall among all types of podcast shows presented by law firms. We are extremely gratified by this recognition from one of the country's leading social media consultants for law firms.

Today, our show is part two of a two-part podcast series of a repurposed webinar that we did on Tuesday, November 28th, entitled The Biden Administration's Junk Fees Initiative Continues: What the Latest Actions Mean for the Consumer Finance and Housing Rental Industries. For those of you who missed part one of this two-part series regarding junk fees, you should definitely download part one, because it very much compliments what you heard today as part two.

Let me introduce my colleagues. First of all, Roger Winston. Roger is the leader of our firm's mixed-use condominium and multifamily development team. He's in the Washington DC office, and of course, he is part of the real estate department. He has been very heavily involved in counseling our housing rental clients that rent out apartment buildings and other types of rental housing, because that is very much a target of the Federal Trade Commission.

Also, want to introduce Kristen Larson. Kristen is in our Consumer Financial Services Group. She came to us from having practiced for many years in-house at a couple of banking institutions, where one of our focuses was on various fees charged by banks to deposit account holders. Particularly, checking account holders. We're going to be talking and Kristen will be discussing what's going on in the world of overdraft fees and fees that are related to overdraft fees.

John Culhane is no stranger to any of you. He's probably been on more webinars than any of us probably other than myself. John is a very experienced consumer financial services lawyer, has practiced for decades with me. Whenever I introduce John, I hesitate to say what he specializes in or focuses on, because it's really everything in the consumer finance world. Junk fees is just part of his, I guess you could say, expertise that he has.

And then, Michael Gordon. Michael is one of the more recent people that has joined us. Although Michael's been with us for well over a year. He came to us after having spent quite a bit of time at the Consumer Financial Protection Bureau, where he reported directly to Richard Cordray. He had a very senior position there and has brought to our clients the expertise and the experience he's had with the CFPB, and most importantly, how the CFPB thinks about things like junk fees.

Last but not least is Reid Herlihy. Reid is in our mortgage banking group, and Reid also is focused very much on various kinds of fees that are charged by mortgage originators and servicers. A lot of fees that the regulators don't happen to like. Now. I would like to turn the program over to my colleague, Mike Gordon.

Mike Gordon:

Thank you. I wanted to very briefly touch on an issuance from the CFPB that relates to fees. It's a slightly different kind of animal than some of the other things we've seen, but I wanted to just briefly mention it. The good news is if you're not a large bank or credit union supervised by the CFPB, then legally, technically this one doesn't cover you. The bad news is it represents part of a theme here about fees that the Bureau is very focused on and will be scrutinizing for all players in the consumer finance industry.

And so, I think there are themes here that are relevant for everybody. What makes this one different is that there is a specific statutory hook here in the Dodd-Frank Act that the Bureau is interpreting in this advisory opinion. And that statutory hook is up on the screen and talks about consumers requesting information about their accounts and the requirement that large depositories respond to those requests.

What's a little unusual is that there is no regulation for this and the Bureau didn't propose one. Instead, they did an advisory opinion here, which as we know, could be reversed at the drop of a hat if the leadership of the Bureau changes. And it's unlike the other advisory opinions they've issued, which really build on perceived ambiguities or points of emphasis in existing regulations. Here, we just have statutory language, which the Bureau is interpreting, as you might imagine, in a very broad consumer friendly way.

This overlaps the junk fees theme with another big theme that we're seeing out of the Bureau recently, which is a focus on customer service. Here again, unlike other initiatives or pronouncements in the customer service area, this one has a statutory hook to some extent. And then, the Bureau is interpreting that very generously. The statutory language is right here, the advisory opinion by the Bureau interprets it to prohibit charging a fee for consumers who request this information.

In other words, you get the request, you have to honor it, and you can't charge a fee for it. Furthermore, the Bureau goes to lengths to say that you can't unreasonably impede the customer's ability to exercise this right. They provide a little more gloss on what that means to them, but it basically boils down to having to provide the information promptly. And it includes examples of what sound like customer service issues that could amount to an impediment that the Bureau would object to.

For example, making them wait. Excessively long wait times to make the request. Making it necessary to make the request more than once. Having to deal with a chatbot that does not quickly and efficiently answer the question asked and provide the information. Or pawning the request off and directing the consumer to a third-party. These are examples that the Bureau has outlined of things that might be impediments that would be unreasonable.

So I'll pause briefly on the chatbot notion, because we've seen the Bureau raise this chatbot idea and sort of AI generally in multiple different contexts. And this is an example where they're honing in on it as a potential sore spot for them. Here, based on this particular statutory authority, but in other cases, really based on a UDAP notion. They're concerned about reliance on chatbots, and that representing a sort of poor customer service that they're trying to disincentivize.

Some questions raised by this advisory opinion are, "What is a request?" The Bureau didn't really define what the customer has to do to avail itself of this right, and it leaves institutions having to interpret that relatively broadly. Certainly, you'd want to take a look at your policies and procedures to make sure that they address the issue, so that employees can recognize when these requests come in and respond appropriately.

I think there's also this hanging question of, "Where does the line get drawn on customer service?" In this example, what's an unreasonable impediment in the Bureau's eyes? How long a wait time is too long? What kind of information problems in a chatbot will cross the line for the Bureau, if other avenues are available for the consumer to get information?

That's a brief overview of this. I would just say, as I mentioned at the top, it's directed at large depository institutions, but all providers who are charging a fee for accounts and account information should probably be cognizant of this and the atmospherics of it and the Bureau's skepticism of that kind of fee.

Kristen Larson:

Thanks, Mike. Next, we're going to cover CFPB supervisory and enforcement actions. First, we're going to talk a little bit about the CFPB spotlight on NSF fees. As you know, since late '21, the CFPB has been closely monitoring everyone's practices for overdraft and NSF fees. They've even resorted to what we like to call public shaming, where they post everyone's NSF and fee practices, trying to influence financial institutions in reducing the amount of NSF and overdraft fees that they charge.

Even though we've seen the trends of fees being eliminated, fees going down, as discussed earlier, this is something that still is on their rulemaking agenda. Even though it doesn't really seem like there's a need, in light of the fact that a lot of institutions have removed the fees. And then, in their most recent supervisory highlights, again, their original one on junk fees was issued in March of '23, which we covered at our last webinar.

And then, this Fall issue expands some of those findings. Specifically, with respect to deposit fees. Examiners found UDAPs related to multiple NSF fees for the same transactions. For this, they were going after both core processors and supervised institutions, because the issue is a lot of you are dependent on core processors, and if the core is not making a change, it's very tough for you to make a change on how you assess the fee when that's outside of your control.

The continued attacks on authorize positive, settle negative fees, and those fees they say are unanticipated and also a UDAP because the customer can't avoid them. Again, we believe that these fees can be avoided by maintaining a sufficient balance and tracking your purchases and withdrawals. And then, paper statement fees and return mail fees for paper statements that weren't actually delivered.

Sometimes you put someone in your system as it's a bad address, but then yet you're still charging them for those statements that you didn't mail to the bad address. Also, they had concerns about return deposit fees, which they've also previously addressed. They also in their guidance ... I just cite these here for background. And I cited some of their prior guidance that they did on authorize positive, settle negative overdraft fees, and their bulletin on unfair return deposit item fees, and their advisory opinions on not liking when debt collectors charge a fee to make a payment.

And then, finally, before I turn it over to John, I wanted to cover the guidance on reopening closed deposit accounts and some recent litigation. Now, I know we covered it briefly at the prior webinar, but I just wanted to remind people that this is still on their radar and it looks like it's also transitioned over to the plaintiff's bar as well.

Again, they think it's an unfair practice if you reopen on account that was previously closed to accept either debits or deposits. The National Bank that recently finalized a settlement for a $4.9 million class-action, the allegation was that they reopened their accounts without their consumer's authorizations and transactions posted.

Essentially, what the CFPB is concerned about here is that consumers could be harmed by the reopening of accounts. The fees that could be charged after an account is reopened or transactions or fraud that could happen when the consumer doesn't realize their account is reopened. Now, I'll turn it over to John Culhane to talk a little bit about the auto servicing supervisory observations.

John Culhane:

Thanks, Kristen. I'm going to briefly run through auto servicing, remittance transfers, and payment processing. And then, one item in the supervisory highlights identified as a remedial action that also is auto-related, but it's not entirely clear how it involves junk fees. Most of the auto servicing observations in the supervisory highlights focus on the servicing related to add-on products. In particular, the failure to provide appropriate refunds when financing is terminated early.

The CFPB focused on two bad actions here. One, not actually acting to make sure that you, the servicer, get the money in the first place, which seems to be more of a vendor management issue than a junk fee issue, but it's in here as junk fees. And then, making a mistake in calculating the appropriate amount of the product refund when the loan or credit is terminated early.

Again here, relying on service providers, which would seem to be a vendor management issue, is again swept in under the junk fee category.

This isn't really the assessment of a fee on a service. It's arguably charging more for a product or service, or charging for a product or service that isn't actually being delivered. But as I mentioned at the outset, that's clearly now within the ambit of the junk fee category. The remittance fee part is a little clearer in that the violations in supervisory exams were fairly clear-cut involving the failure to disclose fees that would be assessed before funds were wired.

Obviously, reducing the amount of the funds going to the sender, and then also failing to comply with the provision of Reg E ... That slaps the hand of the remittance transfer provider, if it promises to deliver funds within a particular timeframe and is unable to do so. Regardless of the reason, if the funds aren't received by the promised date, then related fees have to be refunded. We've included here a consent order. It's not actually part of the supervisory highlights, but it seems to be in the same vein.

This is a consent order against Chime that was doing business as Sendwave. And it's somewhat similar to some of the comments about the supervisory examinations and the violations found there, in that it really focuses on misrepresenting the speed and cost of remittance transfers. But also, part of the consent order are actions that the company was taking that the CFPB didn't like requiring customers to waive their rights.

Here, there's not really a fee being assessed, but what the company was doing was limiting its liability for losses and also limiting damages to $1,000. The CFPB asserted those were violations of Regulation E, failing to provide disclosures, failing to provide timely disclosures, failing to investigate errors. These are more mainstream violations of Regulation E. Interestingly, although this seems very similar to some of the actions that are mentioned in the supervisory highlights regarding remittance transfers, there's no mention of junk fees in the press release or in the consent order. But this clearly seems to be within the ambit of conduct the CFPB will object to.

In terms of payment processing, I think what we now are seeing, if we hadn't realized this before, is just how far the CFPB is willing to push its jurisdiction over payment processors. Because here, it's gone after online payment platforms that are involved with school meal programs and assesses fees for adding money to student meal accounts. There's a requirement under federal law for any company that assesses fees in this circumstance to also make free options available.

And the CFPB has noted in this supervisory highlights that it learned about payment processors, payment platforms, that were involved in these functions and that weren't complying with either disclosures or with providing free options. In which case, it felt the consumers would've paid fees that they would not have paid if they'd known of the existence of free options, which apparently made those fees, even though disclosed, junk fees.

Then, there's a throwaway comment that's not directly related to junk fee issues, but the CFPB points out that the fees that were assessed disproportionately affected lower income families that must use smaller amounts more often. It's not clear what the message is here regarding fees, assessing fees in these circumstances ... Whether they're supposed to be adjusted based on the population or whether this is just another concern that the CFPB had about the practice.

And then, lastly, in the CFPB supervisory highlights on junk fees, the CFPB notes in its section on remedial actions a lawsuit brought against an automobile loan servicer around a host of illegal practices that it asserted harmed individuals. Really, these are about disabling vehicles, and then improper wrongful repossessions, double billing.

Again, none of these are specifically identified either in the press release or in the complaint in the lawsuit as being junk fees, but it seems pretty clear that the CFPB would consider double billing to involve junk fees, because it's payment for a service that isn't provided. Misallocating payments may be in junk fees, because it may trigger additional interest or late fees. And then, failure to return unearned gap insurance premiums, we know from the auto servicing section examination matters, but that involves junk fees.

It's unclear how disabling vehicles or activating late payment warning tones would clearly be tied to junk fees. Although perhaps the warning tone might be encouraging a payment that's not due, or suggesting that a late fee is going to be assessed, when that's not the case. We have the CFPB pushing the envelope here on what exactly is covered by its junk fee rhetoric, both fees in and of themselves, and then conduct or the failure to properly deliver goods and services. Let me turn it over to Reid to talk about some of the enforcement actions in this area. Reid?

Reid Herlihy:

Thanks, John. So I'm going to cover some of the more recent enforcement activity from the Bureau involving these junk fee issues. Along the lines of what John just described, I use that term pretty liberally. These really cover a wide range of costs that you wouldn't necessarily consider a typical fee. It really seems to constitute anything other than principal on the loan or interest paid on that principle, but here we see a lot of interesting angles for alleged improper conduct.

First, from August of this year, the Bureau filed a suit alleging UDAP violations by a brick and mortar, high-cost installment lender. They alleged company-wide practices from underwriting sales and servicing activity that were really designed to channel financially vulnerable and struggling borrowers into a cycle of fee-heavy refinances. This included underwriting practices that were allegedly designed to enable the origination of loans to borrowers, who were likely to struggle with payments and that would have to refinance multiple times so they could collect those fees.

According to the complaint, by way of background, the company's installment loans had a median annual interest rate of 92%. The median loan principal amount was $585. The complaint stated that nearly 10% of the company's borrowers refinanced their loans with the company 12 times or more, but the refinance activities for that ... Roughly 10% of the company's borrowers produced 40% of its net revenue.

The next example is more along the lines of what we typically think of as a fee issue, but we saw in July this year multiple consent orders against the National Bank. That included one of the consent orders pertaining to their NSF fee practices. We all know they've signaled for a long time that NSF fees were a focus. The complaint alleged UDAP violations for the practice of charging multiple NSF fees on the same transaction, whether they're checks or ACH payments.

They were charged first when the payment was initially submitted and declined. And then, again, on the resubmitted payment or the re-presenting transaction. The Bureau stated that the practice was unfair and imposed a pretty extensive remediation against the bank. The third example here was from May. The Bureau entered into a consent order with a personal loan installment lender alleging UDAP violations related to certain add-on insurance and identity theft products.

The central conduct at issue involved misleading consumers into thinking they were required or couldn't get out of purchasing add-on products at the time of origination. Or sort of coercing them to do so. And to further assuage the borrowers, the company told them they could simply cancel the add-on products within a certain timeframe after origination at no cost at all. And the Bureau indicated through the complaint that that meant they were conveying to the borrowers they would be returned to the financial position that they would've been in had the product never been added to the loan.

However, for the loans eligible for a full refund, while the lender refunded the premiums paid, the full interest on those amounts were not refunded that would be needed to return the borrowers to the same financial position. And that failure to refund the amount of interest either involved miscalculations of the interest amount, or no attempt to refund the interest at all, depending on the product. According to the order, this was both deceptive and unfair and also abusive.

And the abusive theory was that it interfered with the consumer's ability to understand the add-on products were optional, and that the lender charged non-refundable interest during the purported full refund period. Those are the examples of enforcement. I'm going to quickly move on to some state activity. We're also at the point where you can click on the slide here to confirm you're still attending. The state junk fees laws. I want to start with a law in California.

Governor Newsom signed into law a statutory amendment addressing junk fees focused on what they call the practice of, "Drip pricing." Advertising a price that's less than the actual price that they're going to pay. It's similar to what the FTC has proposed or one aspect of the FTCs proposal. Thankfully, here in California, they did give some thoughtful time to addressing and enacting some pretty broad exemption provisions that should exclude a large range of regulated consumer financial transactions.

This goes into effect on July 1st, 2024. Similar to that component of the FTC proposed rule, the law prohibits displaying or advertising a price for a good or service that doesn't include all mandatory fees or charges other than taxes or delivery charges. I believe there's an existing private right of action for the law, where this was included in addition to regulatory enforcement.

Again, the good part here is thankfully we have a wide range of exemptions for regulated financial service providers. First, the exemption provision defines the term, "Financial entity," by referencing a different provision from the California Consumer

Financial Protection Law. A financial entity would include depository institutions as well as a range of state license entities, escrow agents, finance lender licensees, residential mortgage lender licensees, broker dealers, et cetera.

And then, providing a company meets the criteria to be a, quote, "Financial entity," under that definition, that entity is exempt from the junk fee law requirement for a particular transaction, if it's required to provide disclosures in compliance with a range of federal or California laws in connection with that same transaction.

And so, those disclosure requirements include the Truth and Savings Act, EFTA and Reg E, Section 19 of the Federal Reserve Act, TILA and Reg Z, RESPA and Reg X, HOPA, the California Finance Lenders Law, the California Residential Mortgage Lending Act, or the California Real Estate Law. These exemptions should thankfully cover most of you out there, but obviously, you want to pay very close attention and review them for the range of transactions you may provide. Because again, it's transaction-specific and not just an entity-wide exemption for certain types of companies.

I should also note, and I didn't really touch on it in the slide, but there's some additional nuance here as they apply to vehicle dealers, lessors, and vehicle manufacturers. There are some distinct disclosure requirements for vehicle lessors that are added in a different provision that you have to follow to avoid violation under the general prohibition here. For vehicle dealers, you can continue to omit in the advertised price certain fees and costs that you're otherwise permitted to omit by existing law, like vehicle registration fees or document processing charges.

There's also a provision that specifies that a vehicle manufacturer or another party can advertise the MSRP without violating, again, this general prohibition that I previously outlined on the previous slide. Without running foul of that. That's California. One other example of state legislation, this hasn't passed yet, but Pennsylvania, their house passed House Bill 636, which they've dubbed the Pay the Price You See Act. This bill has only passed the house, and we know Republicans hold a majority in the Senate, so the prospects of it being active may not be that strong.

As for the terms of the law, it's similar to California in that aspect of the FTC proposal, prohibiting advertising, displaying, or offering a price of goods that doesn't include all mandatory fees or charges other than taxes. They only carve out governmental taxes here, not things like delivery charges as we see in California. The bill doesn't appear to include yet, at least, the types of broad exemptions found in the California law. But again, it has only passed the house. With that, I'll move on to talk about some additional observations and future rulemaking.

Mike Gordon:

Thanks, Reid. We're getting close to the end here, and I wanted to just step back and provide a few higher level observations and maybe look around the corner a little bit to what to expect in the near future. As you can tell from the myriad of ways in which the Bureau is talking about fees and coming after fees, there is no end to the Bureau's creativity and interest in this topic. We see it every day in our practice and exam requests and other types of market monitoring requests and other information requests. We see it in enforcement activity and we'll see it in future.

I would say, in addition to the credit card late fee rule, there's press out today indicating perhaps before the end of year, in addition to the credit card late fee rule, an overdraft late fee proposal. One topic that we haven't ... I don't know that anyone's really focused on, but that I just wanted to flag because we see it sometimes in the exam context. It's the relationship between the service or function that the provider is giving and what the Bureau refers to as the, "Marginal cost," to that institution of providing that service.

The Bureau, as we know, doesn't have, in general, any authority to set fees or set rates for financial products, but they'd like to get close to that by this notion of criticizing whether the fee itself is out of whack with the costs incurred. We see this happening. And if you haven't gotten requests like that, it's something you might want to think about and prepare for.

It's troubling. There may not be authority for the Bureau to specifically dictate any fee in the abstract, absent some statutory provision, as in the CARD act, for the credit card late fee rule. But it doesn't stop them from trying and from looking more closely at those fees that they think aren't justifiable. I mentioned earlier the focus on customer service.

When thinking about fees, it's not just the fee itself, but it can be the surrounding activity about informing customers at a point in time that a fee is coming, giving them an opportunity to avoid it if it's avoidable, and the like. As to the credit card late fee rule itself, we expect that to come any day, frankly. And the proposal has been out for a while.

For those who aren't covered by that, this may be new. Essentially, under the applicable statute, the Bureau is proposing to reset a safe harbor amount for a credit card late fee at $8, which is a large reduction. It would still permit credit card companies to charge late fees that are above $8, but then you would have to prove that the fees are in line with the collection costs.

Litigation is very likely once the rule becomes final, because commenters have focused on a number of procedural problems that they see with how the rule was written. One notable example of that has to do with the impact of the rule on small businesses, both small providers and small entities that are affected as consumers. There's a process for gathering input on those kinds of impacts on small entities, and the Bureau kind of bypassed that in this process. Even the Small Business Administration commented critically on that oversight in the process.

There are other procedural problems and concerns about the data underlying the Bureau's analysis here that we can expect to see in challenges to the rule once it becomes final. I won't get into more detail about that. That's been the subject of other discussions and webinars we've had. There has been a notable uptick in litigation in recent years against the Bureau for its rulemaking, and courts certainly in certain jurisdictions being more open to hearing arguments that the Bureau has overreached or has procedural problems in how it's issuing its rules.

Finally, I just wanted to briefly address what you can do to mitigate your risk in this area. I would just say, we often get asked to help clients conduct a compliance review of their fee structure and their fee practices. There's no substitute for that, because a lot of this is fact-specific about how you interact with your consumers at various points in time. From our experience with exams and enforcement activity, we have a good sense of the kinds of questions and issues that the Bureau is likely to focus on.

We also have developed somewhat of a framework for analyzing fees in light of the regulatory risks, asking questions like those on the screen about the underlying authority for the fee, whether there's implied or expressed authority under federal or state law or the agreement in itself. Here, the business rationale for charging the fee. And I would add, it's useful to review the correlation, as I mentioned, between fee and the costs of the service provided.

Disclosure issues, of course, are always part of any kind of review. And then, just keeping tabs on what the Bureau has found to be abusive or said is a high priority for them in the fee universe. Examine your customer service models with a fresh set of eyes. Emphasize transparency when you can with respect to fees. Not just the amount of fee, but the purpose for the fee and the timing of when it's going to be imposed. These are all helpful hints that go into a sound review for compliance risk of a fee structure. With that, we have finished our formal presentation. I'll turn it back to Alan to close.

Alan Kaplinsky:

Well, thank you, Mike. And I want to thank my other colleagues, Reid Herlihy, John Culhane, Kristen Larson, and Roger Winston. Let me just mention two things in closing that I'm not sure we really got into during the program. And that is the relationship to state law. The FTC has said that this rule, if and when it becomes final, will only preempt state law to the extent that state law is inconsistent with the final FTC rule.

Inconsistency basically means that it's impossible to comply both with the FTC rule and state law. That is a very narrow test for determining if there is any preemption. The likelihood is that there won't be preemption and that other state laws that get passed or that exist already, you may have to comply with them.

They may be old state laws. Not necessarily Pennsylvania or California that Mike talked about, but there could be laws on the books from long ago that deal with the same subject matter that the federal regulators are now very focused upon. One other final thing, and it occurred to me to mention this when I saw the slide that Reid presented dealing with the new California law. There is an exemption in there for transactions that are covered under other federal statutes.

The FTC has indicated that it is willing ... They would like comments on that subject, on whether there should be some kind of transactional exemption. Which if they were to agree to that, depending upon your situation, you may not be covered by the final FTC rule, but I certainly wouldn't count on it right now. There is no indication that the CFPB has a feeling one way or another on that issue, but they have opened it up for comment.

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