

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin.

SUMMARY: A Returned Deposited Item is a check that a consumer deposits into their checking account that is returned to the consumer because the check could not be processed against the check originator's account. Blanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances or patterns of behavior on the account are likely unfair under the Consumer Financial Protection Act (CFPA). The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing this bulletin to notify regulated entities how the Bureau intends to exercise its enforcement and supervisory authorities on this issue.

DATES: This bulletin is applicable as of [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Sonya Pass, Senior Legal Counsel, Legal Division, at 202-435-7700. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A Returned Deposited Item is a check that a consumer deposits into their checking account that is returned to the consumer because the check could not be processed against the

check originator's account. There are many reasons deposited items can be returned unprocessed. For example, the check originator may not have sufficient funds available in their account to pay the amount stated on the check; the check originator may have directed the issuing depository institution to stop payment; the account referenced on the check may be closed or located in a foreign country; or there may be questionable, erroneous, or missing information on the check, including with respect to the signature, date, account number, or payee name.

Consumers often rely on payments made by check for personal, family, or household purposes. The check may be from another consumer or from a business or entity and may represent a gift, a refund, a payment, or a public benefit. In many circumstances, as discussed below, the check depositor has no control over whether, and likely no reason to anticipate that, the deposited check would be returned. Nor as a general matter can the check depositor verify with the check originator's depository institution prior to depositing a check whether there are sufficient funds in the issuer's account for the check to clear. Yet, many depository institutions have blanket policies of charging fees to the check depositor for Returned Deposited Items for every Returned Deposited Item, irrespective of the circumstances of the particular transaction or patterns of behavior on the account. While certain entities, such as lenders and landlords, may be able to recoup such fees from the check originator, consumers generally cannot.

Under the blanket policies of depository institutions, Returned Deposited Item fees are often in the range of \$10-\$19. The fees are typically charged in a flat amount on a per-transaction basis. Notably, in the case of checks that are returned for insufficient funds, Returned Deposited Item fees are charged in addition to any non-sufficient funds fees charged by the originating bank to the check originator. Assuming a typical Returned Deposited Item fee of

\$12 and a non-sufficient funds fee of \$35, when the depositor’s bank charges a Returned Deposited Item fee to the depositor consumer, and the check originator’s bank charges a non-sufficient funds fee to the check originator for the same check, those banks collectively generate \$47 in fees from each returned check—\$12 to the depositor’s bank, \$35 to the originator’s bank.

II. Violations of the Consumer Financial Protection Act¹

The Consumer Financial Protection Act (CFPA) prohibits covered persons from engaging in unfair acts or practices.² Congress defined an unfair act or practice as one that (A) “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable,” and (B) “such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”³

Blanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances of the transaction or patterns of behavior on the account are likely unfair.

Fees charged for Returned Deposited Items cause substantial injury to consumers. Under the blanket policies of many depository institutions, Returned Deposited Item fees cause monetary injury, in the range of \$10-19 for each returned item. Depository institutions that charge Returned Deposited Item fees for returned checks impose concrete monetary harm on a large number of customers.

In many of the instances in which Returned Deposited Item fees are charged, consumers would not be able to reasonably avoid the substantial monetary injury imposed by the fees. An injury is not reasonably avoidable unless consumers are fully informed of the risk and have

¹ As a matter of prosecutorial discretion, the CFPB does not intend to seek monetary relief for potential unfair practices regarding Returned Deposited Item fees assessed prior to November 1, 2023.

² 12 U.S.C. 5536(a)(1)(B).

³ 12 U.S.C. 5531(c)(1).

practical means to avoid it.⁴ Under blanket policies of many depository institutions, Returned Deposited Item fees are charged whenever a check is returned because the check originator has insufficient available funds in their account, the check originator instructs the originating depository institution to stop payment, or the check is written against a closed account. But a consumer depositing a check would normally be unaware of and have little to no control over whether a check originator has funds in their account, will issue a stop payment instruction, or has closed the account. Nor would a consumer normally be able to verify whether a check will clear with the check originator's depository institution before depositing the check or be able to pass along the cost of the fee to the check originator.

Liability under the prohibition on unfair acts or practices depends on the particular facts and circumstances. The CFPB notes that it is unlikely that an institution will violate the prohibition if the method in which fees are imposed are tailored to only charge consumers who could reasonably avoid the injury. For example, if a depository institution only charges consumers a fee if they repeatedly deposit bad checks from the same originator, or only charges consumers a fee when checks are unsigned, those fees would likely be reasonably avoidable.

Regulation DD, which applies in relevant part to depository institutions except for credit unions,⁵ requires depository institutions to disclose fee information on depository accounts to consumers before an account is opened or a service is provided.⁶ The returned item fee is among the fees required to be disclosed in the fee schedule when the consumer first opens the account.⁷ In applying the CFPB's unfairness prohibition, the Bureau finds persuasive the reasoning of the

⁴ See *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010).

⁵ The National Credit Union Administration has rules governing disclosures for credit unions at 12 CFR 707 *et seq.*

⁶ 12 CFR 1030.4.

⁷ See comment 4(b)(4)-1.iv (listing "fees associated with checks returned unpaid" as a type of fee that must be disclosed); Reg DD Sample Form B-4 (describing a fee of \$5 for "Deposited checks returned").

D.C. Circuit and the Federal Trade Commission (FTC) in *American Financial Services Ass'n v. F.T.C. (AFSA)*.⁸ The FTC issued the Credit Practices Rule, which determined that creditor remedies of certain irrevocable wage assignments and non-purchase, non-possessory security interests in household goods are unfair acts or practices. Although the creditor remedies were disclosed and agreed upon in credit contracts, the FTC determined, and the D.C. Circuit upheld, that the provisions were not reasonably avoidable because “(1) consumers are not, as a practical matter, able to shop and bargain over alternative remedial provisions; and (2) default is ordinarily the product of forces beyond a debtor’s control.”⁹ Similar unfairness principles likely apply to account opening disclosures of blanket policies of imposing fees for Returned Deposited Items because, similarly, consumers have limited ability to bargain over specific fee terms in selecting deposit accounts, and consumers are charged these fees in circumstances beyond their control.

The CFPB advises institutions that it may be difficult to show that the injury from blanket policies of charging Returned Deposited Item fees is outweighed by countervailing benefits to consumers or competition. Check processing is a service made broadly available to all depositors of checks, and there is no separate benefit to consumers from having a deposited check returned, as opposed to paid. Benefits to the depository institutions themselves are not necessarily benefits to consumers or competition. Even if they were, the costs to the depository institution of developing and maintaining a reliable check processing system for account holders likely is not attributable to Returned Deposited Item transactions, as those costs are necessary to provide payment services to all check users. Returned Deposited Item fees are also not well-tailored to recoup costs from the consumers actually responsible for the costs to depository

⁸ 767 F.2d 957, 972 (D.C. Cir. 1985).

⁹ *Id.* at 976.

institutions of expected losses for the limited circumstances in which the institution cannot recoup funds made available to the depositor on a check that is later returned. Instead, the fee is charged to depositors even where the depository institution incurs no such loss from the returned transaction, and institutions usually do not collect the fee in those limited circumstances where they actually incur a loss (entities only incur a loss because they cannot collect). Depository institutions may argue that consumers may also receive a benefit from a fee to the extent that the fee leads to a decrease in front-end or other costs to the consumer for the product or an increase in the availability or quality of services. However, to the extent the revenue generated by Returned Deposited Item fees charged pursuant to blanket policies causes any discernable consumer benefits in terms of lower front-end costs or better quality or more available services, it is unlikely that a financial institution would be able to show that any such benefits would outweigh the substantial injury to the consumer even in terms of the total amount of such fees paid by the consumer. Indeed, even assuming a 100% pass through of the fee to lower front-end costs for consumers charged the fee, that pass through would not be greater than the total cost of the fees to those consumers.

Deterring consumers from depositing checks in instances where the checks will be returned may benefit consumers and the public interest if the institution's policy and practice are well-tailored to address the issue, do not harm consumers in some other way, minimize losses to the depository institution that would be passed through to consumers, bolster the integrity of the banking system through loss avoidance, and, in the case of fraud, prevent conduct that offends public policy as embodied in statutes and common law. However, deterrence can only be accomplished through the collection of fees in circumstances where the consumer anticipates that a check will be returned but deposits it anyway, such as where a consumer knowingly deposits a

counterfeit check. As noted, however, this bulletin is focused on Returned Deposited Item policies that indiscriminately impose fees in circumstances where the consumer does not know the check would be returned. In other words, blanket Returned Deposited Item policies are not targeted to address patterns of behavior indicative of fraud or other circumstances where the consumer reasonably should have anticipated that the check would be returned.¹⁰ With respect to fraud, it is also not apparent that the nature or amount of the fees would result in deterrence beyond other available mechanisms, such as reviewing depositors' accounts, criminal penalties, or more tailored Returned Deposited Item fee policies aimed at consumers who deposit bad checks intentionally or negligently.¹¹

As to benefits to competition, economic research suggests that add-on fees may have a distortionary market effect by making it more difficult to compete on transparent front-end prices and reducing the portion of the overall cost that is subject to competitive price shopping.¹² The concern is especially heightened for back-end penalty fees which are often not subject to the competitive process: firms typically have not competed for customers based on penalty fee pricing and consumers do not shop on the basis of fees they do not intend to incur. Indeed,

¹⁰ As noted above, policies that are tailored to only charge consumers who could reasonably avoid the injury likely would not violate the prohibition on unfairness.

¹¹ See *F.T.C. v. Amazon.com*, No. C14-1038-JCC, 2016 WL 10654030, at *10-11 (W.D. Wash. July 22, 2016) (finding no countervailing benefits where the purported benefits could be achieved without engaging in the conduct that caused substantial injury).

¹² See Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, Quarterly Journal of Economics, Vol. 121, Issue 2 (May 2006), pp.505-40, available at <https://pages.stern.nyu.edu/~xgabaix/papers/shrouded.pdf>; see also Steffen Huck & Brian Wallace, *The impact of price frames on consumer decision making: Experimental evidence* (2015), available at <https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf>; Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards*, Quarterly Journal of Economics, Vol. 130, Issue 1 (Feb. 2015), pp. 111-64, at p.5 & 42-43, available at <https://academic.oup.com/qje/article/130/1/111/2338025?login=true>; Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, *A Simple Framework for Establishing Consumer Benefits from Regulating Hidden Fees*, Journal of Legal Studies, Vol. 43, Issue S2 (June 2014), pp.S239-52, available at https://nmahoney.people.stanford.edu/sites/g/files/sbiybj23976/files/media/file/mahoney_hidden_fees_jls.pdf; Glenn Ellison, *A Model of Add-On Pricing*, Quarterly Journal of Economics, Vol. 120, Issue 2 (May 2005), pp.585-637, available at <https://economics.mit.edu/files/7605>.

economic research suggests that consumer decision making is impaired by hidden or shrouded pricing regimes.¹³ Given these harms to competition, the CFPB advises institutions that there is a substantial risk of violating the prohibition on unfair acts or practices with respect to this practice.

III. Regulatory Matters

This is a general statement of policy under the Administrative Procedure Act. It provides background information about applicable law and articulates considerations relevant to the Bureau's exercise of its authorities. It does not confer any rights of any kind. The Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis for general statements of policy.¹⁴ It also does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.¹⁵

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

¹³ See Gabaix & Laibson, *supra* note 12; Huck & Wallace, *supra* note 12; Agarwal *et al.*, *Regulating Consumer Financial Products*, *supra* note 12; Agarwal *et al.*, *A Simple Framework*, *supra* note 12; Ellison, *supra* note 12.

¹⁴ 5 U.S.C. 603(a), 604(a).

¹⁵ 44 U.S.C. 3501-3521.