The Rise of UDAAP as an Enforcement Tool: An Examination of Recent CFPB Actions

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Bank Fees and Charges as UDAAP Violations

A prominent regulatory initiative for the CFPB has been its efforts to address what it has characterized as excessive or exploitative fees, including certain fees for overdrafts and returned items, that the CFPB has determined are likely unfair practices prohibited by the Consumer Financial Protection Act's (CFPA's) prohibition on unfair, deceptive, or abusive acts or practices (UDAAP).

February 2022 CFPB Request for Fees Information:

The CFPB issued an RFI requesting stories, data, and information from the public on how “exploitative and excessive” fees imposed by providers of consumer financial products or services have impacted people's lives. The RFI focused on fees associated with deposit accounts, credit cards, remittance and payment services, prepaid accounts, and mortgage and other lending products and referenced the following:

- late fees, overdraft fees, non-sufficient funds fees, convenience payment processing fees, minimum balance fees, returned item fees, stop payment fees, check image fees, paper statement fees, lost card replacement fees, out-of-network ATM fees, foreign transaction fees, ACH transfer fees, wire transfer fees, account closure fees, inactivity fees, fraudulent investigation fees, and ancillary fees in mortgage closings, such as monthly property inspection fees, new title fees, legal fees, appraisals and valuations, broker price opinions, force-placed insurance, foreclosure fees, and corporate advances.
Bank Fees and Charges as UDAAP Violations

Overdraft Fees:

The CFPB issued Circular 2022-06 on October 26, 2022, to address whether overdraft fees can constitute a UDAAP violation, even if the bank charging the fee has complied with the Truth in Lending Act (TILA) and Regulation Z or the Electronic Fund Transfer Act (EFTA) and Regulation E.

The CFPB concluded that while overdraft practices must comply with TILA/Regulation Z and EFTA/Regulation E, they must separately comply with the CFPA's prohibitions against UDAAP.

The CFPB determined that overdraft fees are likely UDAAP violations if the customer could not reasonably anticipate a fee would be assessed as the fees are likely to impose substantial injury to customers that they cannot reasonably avoid and that are not outweighed by benefits to consumers or competition.

The CFPB asserted that bank overdraft practices are complex, not uniform across the industry, and not understood by customers. As a result, the CFPB concluded that a customer is not reasonably likely to anticipate an overdraft fee would be charged if its account online shows sufficient funds available at the time the charge is initiated but not at the time of settlement due to timing gaps or order of processing of transactions (known as authorize positive, settle negative or APSN transactions).
Bank Fees and Charges as UDAAP Violations

Returned Item Fees:
At the same time, the CFPB assessed the fairness of APSN transactions, it also issued a compliance bulletin (Bulletin 2022-06) outlining how it intends to exercise its enforcement and supervisory authority over bank practices related to charging returned deposited item fees to consumers.

The CFPB concluded that blanket bank policies charging fees to customers for returned checks that could not be processed by the originator’s account (due to missing information on the check, stop payment orders, or for insufficient funds) are likely UDAAP violations. The CFPB asserted that customers have no control over, or ability to know, whether a deposited check will be returned.

The bulletin focused on blanket policies that would charge fees for any returned item but noted that charging fees to a customer who repeatedly attempts to deposit a bad or unsigned check may not be a UDAAP violation, depending on the facts and circumstances.
CFPB Asserts its Authority to Address Discriminatory Practices as UDAAP Violations

On March 16, 2022, the CFPB published revised examination procedures for unfair, deceptive, or abusive acts or practices.

Among other purposes, the procedures were intended to provide CFPB examiners with guidance on understanding the interplay between these practices and consumer protection and antidiscrimination statutes.

The procedures noted that examiners should assess an entity’s

- compliance program for inclusion of processes to analyze and monitor its decision-making processes to address any potential UDAAP or discrimination concerns;
- policies, procedures and practices to ensure they do not target or exclude consumers from products and services, or offer different terms and conditions, in a discriminatory manner; and
- training for customer service employees to prevent discrimination.

On September 28, 2022, the US Chamber of Commerce, and other trade associations, filed a lawsuit against the CFPB and its Director alleging the updated examination procedures violated the CFPB’s statutory authority and the APA.
Chamber of Commerce of the United States of America, et. al., vs. Consumer Financial Protection Bureau and Rohit Chopra, in his official capacity, U.S. District Court for the E.D. of Texas, Case No. 6:22cv381

The Plaintiffs alleged:

- statutory authorities distinguish between unfair and discriminatory practices, and the CFPB exceeded its statutory authority by taking the position that it could examine entities for discriminatory conduct using its UDAAP authority;
- the updated manual was arbitrary and capricious; and
- the manual was a rule that failed to go through the APA's procedural requirements.

In addition, the Plaintiffs alleged that the CFPB's funding structure, which allows it to obtain funding directly from the Federal Reserve without Congressional oversight, violates the U.S. Constitution's Appropriations Clause requiring legislative appropriations prior to executive expenditures.

This is not the only constitutional challenge to the CFPB's funding structure. In a separate lawsuit challenging the CFPB's payday lending rule (Consumer Financial Services Association of America et. al. v. CFPB), the U.S. Court of Appeals for the Fifth Circuit held that the CFPB's funding structure was unconstitutional. In late February of this year, the Supreme Court agreed to hear the CFPB's appeal of the Fifth Circuit's opinion.
CFPB Asserts its Authority to Address Inadequate Information Security Practices as UDAAP Violations

In Circular 2022-04, the CFPB considered whether inadequate security practices could give rise to a claim not only under federal data security laws like the Gramm-Leach-Bliley Act (“GLBA”), but also under the Dodd-Frank Act’s UDAAP prohibitions.

The CFPB concluded that although information security practice requirements under UDAAP principles may often overlap with the requirements under GLBA, the requirements are not wholly identical.

The CFPB indicated that a failure to implement “common” data security practices increases the risk of a UDAAP violation and identified the following practices as likely triggering UDAAP liability:

- the failure of the company to offer multi-factor authentication as an option for systems and account access;
- the failure of the company to have adequate password management policies and practices; and
- the failure to update and patch systems, software, and code routinely and when critical vulnerabilities are announced, to have inventories of software system dependencies, and to discontinue use of software versions that are no longer actively maintained by the vendor.
SOURCE MATERIALS
SOURCE MATERIALS

Bank Fees and Charges as UDA(A)P Violations:

CFPB Request for Information Re: Fees Imposed by Providers of Consumer Financial Products or Services (February 2, 2022)

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

CFPB: Circular 2022-06 Unanticipated overdraft fee assessment practices

FDIC August 2022 Supervisory Guidance on Multiple Re-Presentment NSF Fees
SOURCE MATERIALS

Discrimination as potential UDAAP violation:

CFPB March 2022 Examination Procedures for Unfair, Deceptive, or Abusive Acts or Practices
https://www.consumerfinance.gov/compliance/supervision-examinations/unfair-deceptive-or-abusive-acts-or-practices-udaaps-examination-procedures/

Chamber of Commerce of the United States of America, et. al., vs. Consumer Financial Protection Bureau and Rohit Chopra, in his official capacity, U.S. District Court for the E.D. of Texas, Case No. 6:22cv381

Data Security Practices as UDAAP Violations:

CFPB Circular 2022-04: Insufficient data protection or security for sensitive consumer information