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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

Consumer Financial Protection Circular 2023-02: Reopening Deposit Accounts That Consumers Previously Closed

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) has issued Consumer Financial Protection Circular 2023-02, titled, "Reopening Deposit Accounts That Consumers Previously Closed." In this circular, the CFPB responds to the question, "After consumers have closed deposit accounts, if a financial institution unilaterally reopens those accounts to process a debit (i.e., withdrawal, ACH transaction, check) or deposit, can it constitute an unfair act or practice under the Consumer Financial Protection Act (CFPA)?"

DATES: The Bureau released this circular on its website on May 10, 2023.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to Circulars@cfpb.gov.

FOR FURTHER INFORMATION CONTACT: Terry J. Randall, Senior Counsel for Policy and Strategy, Office of Enforcement, at (202) 435-9497. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

Question presented

After consumers have closed deposit accounts, if a financial institution unilaterally reopens those accounts to process a debit (i.e., withdrawal, ACH transaction, check) or deposit, can it constitute an unfair act or practice under the Consumer Financial Protection Act (CFPA)?

Response

Yes. After consumers have closed deposit accounts, if a financial institution unilaterally reopens those accounts to process debits or deposits, it can constitute an unfair practice under the CFPA. This practice may impose substantial injury on consumers that that they cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.

Background

Consumers may elect to close a deposit account for a variety of reasons. For example, after moving to a new area, a consumer may elect to use a new account that they opened with a different financial institution that has a branch close to their new home. A consumer also might close an account because they are not satisfied with the account for another reason, such as the imposition of fees or the adequacy of customer service.

The process of closing a deposit account often takes time and effort. For example, closing an account typically involves taking steps to bring the account balance to zero at closure. The financial institution typically returns any funds remaining in the account to the consumer at closure and the consumer typically must pay any negative balance at closure. Some institutions require customers to provide a certain period of notice (e.g., a week) prior to closing the account to provide time for the financial institution to process any pending debits or deposits. Deposit account agreements typically indicate that the financial institution may return any debits or deposits to the account that the financial institution receives after closure and faces no liability for failing to honor any debits or deposits received after closure.

Sometimes after a consumer completes all of the steps that the financial institution requires to initiate the process of closing a deposit account and the financial institution completes the request, the financial institution unilaterally reopens the closed account if the institution receives a debit or deposit to the closed account. Financial institutions sometimes reopen an account even if doing so would overdraw the account, causing the financial institution to impose overdraft and non-sufficient funds (NSF) fees. Financial institutions may also charge consumers account maintenance fees upon reopening, even if the consumers were not required to pay such fees prior to account closure (*e.g.*, because the account previously qualified to have the fees waived).

In addition to subjecting consumers to fees, when a financial institution processes a credit through an account that has reopened, the consumer's funds may become available to third parties, including third parties that do not have permission to access their funds.

The Consumer Financial Protection Bureau (CFPB) has brought an enforcement action regarding the practice of account reopening under the CFPA's prohibition against unfair, deceptive, or abusive practices.[1] The CFPB found that a financial institution engaged in an unfair practice by reopening deposit accounts consumers had previously closed without seeking prior authorization or providing timely notice. This practice of reopening closed deposit accounts caused some account balances to become negative and potentially subjected consumers to various fees, including overdraft and NSF fees. In addition, when the financial institution reopened an account to process a deposit, creditors had the opportunity to initiate debits to the account and draw down the funds, possibly resulting in a negative balance and the accumulation of fees. These practices resulted in hundreds of thousands of dollars in fees charged to consumers. The CFPB concluded that the institution's practice of reopening consumer accounts without obtaining consumers' prior authorization and providing timely notice caused substantial injury to consumers that was not reasonably avoidable or outweighed by any countervailing benefit to consumers or to competition.

Analysis and Findings

A financial institution's unilateral reopening of deposit accounts that consumers previously closed can constitute a violation of the CFPA's probation on unfair acts or practices.[2]

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[1] USAA Federal Savings Bank, File No. 2019-BCFP-0001 (Jan. 3, 2019).

[2] Depending on the circumstances, reopening a closed deposit account may also implicate the CFPA's prohibition on deceptive or abusive acts or practices. 12 U.S.C. 5531, 5536. *See generally* "Statement of Policy Regarding Prohibition on Abusive Acts or Practices," 88 FR 21883 (Apr. 12, 2023). This conduct may also violate other applicable laws, including State law. *See, e.g., Jimenez v. T.D. Bank, N.A.*, 2021 WL 4398754, at *16 (D.N.J.,

Under the CFPA, an act or practice is unfair when it causes or is likely to cause consumers substantial injury that is not reasonably avoidable by consumers and the injury is not outweighed by countervailing benefits to consumers or to competition.[3]

Unilaterally reopening a closed deposit account to process a debit or deposit may cause substantial injury to consumers.

Substantial injury includes monetary harm, such as fees paid by consumers due to the unfair practice. Actual injury is not required; significant risk of concrete harm is sufficient.[4] Substantial injury can occur when a small amount of harm is imposed on a significant number of consumers.[5]

After a consumer has closed a deposit account, a financial institution's act of unilaterally reopening that account upon receiving a debit or deposit may cause monetary harm to the consumer. Financial institutions frequently charge fees after they reopen an account. For example, consumers may incur penalty fees[6] when an account that they closed is reopened by the financial institution after receiving a debit or deposit. Since financial institutions typically require a zero balance to close an account, reopening a closed account to process a debit is likely to result in consumers incurring penalty fees.

In addition to fees, reopening a consumer's account to accept a deposit increases the risk that an unauthorized third party may gain access to the consumer's funds (e.g., a person with the consumer's account information who pulls funds from the account without the consumer's

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2021) (private plaintiff stated a claim for unfair practices under Massachusetts law where bank allegedly "either opened a new account in her name or reopened a previously closed account, without her knowledge and without seeking or obtaining her authorization" and then charged her fees).

[3] 12 U.S.C. 5531(c)(1).

[4] *See, e.g., F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015) (interpreting "substantial injury" under the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(n), which uses the same language as the CFPA, 12 U.S.C. 5531(c)(1)).

[5] *See, e.g., Orkin Exterminating Co. v. Fed. Trade Comm'n*, 849 F.2d 1354, 1365 (11th Cir. 1988) (interpreting "substantial injury" under the FTC Act).

[6] In these circumstances, because there generally are no benefits to charging fees on reopened accounts (see countervailing benefits discussion below), such fees generally would function as penalty fees which cause substantial injury.

authorization).

And if reopening the account overdraws the account and the consumer does not repay the amount owed quickly, the financial institution may furnish negative information to consumer reporting companies, which may make it harder for the consumer to obtain a deposit account in the future. Because reopening accounts that the consumer closed gives rise to these risks of monetary harm, this practice may cause substantial injury.

Consumers likely cannot reasonably avoid this injury.

An injury is not reasonably avoidable by consumers when consumers cannot make informed decisions or take action to avoid that injury. Injury that occurs without a consumer's knowledge or consent, when consumers cannot reasonably anticipate the injury, or when there is no way to avoid the injury even if anticipated, is not reasonably avoidable.[7]

Consumers often cannot reasonably avoid the risk of substantial injury caused by financial institutions' practice of unilaterally reopening accounts that consumers previously closed because they cannot control one or more of the following circumstances: a third party's attempt to debit or deposit money, the process and timing of account closure, or the terms of the deposit account agreements.

First, without the consumer's consent or knowledge, a third party may attempt to debit from or deposit to the closed account, prompting their previous financial institution to reopen the account. For example, a payroll provider may inadvertently send a consumer's paycheck to the closed account, even if the consumer informed the payroll provider about the account closure and directed them to deposit their paycheck in a new account. Similarly, a merchant may take an extended amount of time to process a refund to a customer's account for a returned item or may use the wrong account information to process a recurring monthly payment. Consumers cannot reasonably avoid these types of injuries resulting from these types of actions by a third party.

[7] *See FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010) (interpreting whether consumer's injuries were reasonably avoidable under the FTC Act); *Orkin Exterminating Co.,* 849 F.2d at 1365-66 (same); *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985) (same).

Second, financial institutions may require consumers to complete a multi-step process before closing a deposit account, which can involve completing paperwork in person, returning or destroying any access devices, bringing the balance to zero, and fulfilling waiting periods. When consumers begin this process, they likely will not know exactly when the financial institution will fulfill their request to close the account. Consumers, for example, do not control waiting periods or the length of time it takes a financial institution to settle transactions to bring a balance to zero. Consumers' lack of control over the financial institution's account closure process and timeline may make it more difficult for them to prevent debits and credits that will reopen the account, since the account may close earlier than they expect.

Finally, consumers may not have a reasonable alternative to financial institutions that permit this practice because most deposit contracts either permit or are silent on this practice. Further, to the extent that deposit account agreements allow or disclose such practices, these agreements typically are standard-form contracts prepared by financial institutions that specify a fixed set of terms.[8] Consumers have no ability to negotiate the terms of these agreements. Instead, financial institutions present these contracts to consumers on a take-or-leave-it basis. Thus, even if deposit account agreements reference this practice, consumers also have limited ability to negotiate the terms of such contracts, and consumers can incur injuries in circumstances beyond their control. Moreover, even if the financial institution informs the consumer at the time that the account is closed that the institution may reopen the account, pursuant to the account agreement, the consumer will still generally lack the practical ability to control whether the account will be reopened and to avoid fees and other monetary harms.

This injury is likely not outweighed by countervailing benefits to consumers or competition.

Reopening a closed account does not appear to provide any meaningful benefits to consumers or competition. To the extent financial institutions are concerned about controlling

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[8] *See American Fin. Servs. Ass'n*, 767 F.2d at 977 (concluding that certain practices were unfair even though disclosed and agreed to in agreements because consumers had no ability to negotiate the terms of form contracts).

their own costs to remain competitive, they have alternatives to reopening a closed account upon receiving a debit or deposit that could minimize their expenses and liability. For example, the financial institution could decline any transactions that they receive for accounts consumers previously closed. In addition to minimizing the institution's costs, not reopening these accounts may protect the financial institution against the use of closed accounts to commit fraud.

Moreover, consumers do not generally benefit when a financial institution unilaterally reopens an account that consumers previously closed. Since financial institutions typically require consumers to bring the account balance to zero before closing an account, reopening an account in response to a debit will likely result in penalty fees rather than payment of an amount owed by the consumer. While consumers might potentially benefit in some instances where their accounts are reopened to receive deposits, which then become available to them, that benefit does not outweigh the injuries that can be caused by unilateral account reopening. Such benefits are unlikely to be significant because consumers can generally receive the same deposits in another way that they would prefer (such as through a new account that they opened to replace the closed account). And those uncertain benefits are outweighed by the risk that deposited funds will be depleted before the consumer can access (or is even aware of) the funds (e.g., through maintenance or other fees assessed by the financial institution as a result of the reopening or debits from the reopened account by third parties).

Further, not reopening accounts may benefit consumers in certain circumstances. For example, declining a deposit submitted to a closed account alerts the fund's sender that they have incorrect account information and may encourage the sender to contact the consumer to obtain updated account information. Declining a debit also provides an opportunity for the sender of the debit to inform the consumer of any erroneous account information, providing the consumer with the opportunity to make the payment with a current account or through another process.

For these reasons, government enforcers should consider whether a financial institution has violated the prohibition against unfair acts or practices in the CFPA if they discover that a financial institution has unilaterally reopened accounts that consumers previously

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce Federal consumer financial law. The CFPB is the principal Federal regulator responsible for administering Federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other "enumerated consumer laws," 12 U.S.C. 5481(12). However, these laws are also enforced by State attorneys general and State regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.*, 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with $10 billion or less in assets). Some Federal consumer financial laws are also enforceable by other Federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure Federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4).

Consumer Financial Protection Circulars are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See*, *e.g.*, 12 U.S.C. 5552(b) (consultation with CFPB by State attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the Bureau's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce Federal consumer financial law. They do not restrict the Bureau's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.

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Director, Consumer Financial Protection Bureau.

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