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Banks that Reopen Closed Deposit Accounts May Be Engaged in Unfair Practices

by Ross M. Speier

The Consumer Financial Protection Bureau ("CFPB") has issued a warning to financial institutions regarding the reopening of deposit accounts that had been closed by consumers. In Circular 2023-02 (the "Circular"), the CFPB concluded that if a financial institution unilaterally reopens a deposit account previously closed by a bank customer to process debits or deposits, this action could constitute an unfair practice under the Consumer Financial Protection Act ("CFPA"). As a result, depository institutions should consider examining their account reopening policies and procedures to ensure they align with the CFPB's recent guidance.

Under the CFPA, an act or practice is unfair when (i) it causes, or is likely to cause, consumers substantial injury, (ii) the injury is not reasonably avoidable by consumers, and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition.

Risk of Substantial Injury to Consumers

The CFPB provided an analysis of how the reopening of closed deposit accounts could constitute unfair acts or practices in violation of the CFPA. Unilaterally reopening an account can be problematic when overdraft fees or other penalty fees may be assessed on the reopened account, and this can constitute substantial injury to the consumer. The CFPB observed that monetary harm, such as fees, can meet the "substantial injury" prong under the CFPA, that actual injury is not required (significant risk of concrete harm is sufficient), and that substantial injury can occur when a small amount of harm is imposed on a significant number of consumers.

The bureau noted that the risk of consumer harm goes beyond the wrongful imposition of fees on the customer's account. Specifically, it stated that reopening a consumer's account to accept a deposit increases the risk that a third party may gain access to the consumer's funds if such party obtains the consumer's account information and pulls funds from the account without authorization. Moreover, the CFPB cited the fact that if reopening a closed account results in the account becoming overdrawn, the financial institution could then furnish negative information to credit reporting agencies which could harm the consumer's credit and make it harder for the consumer to obtain a deposit account in the future.

Injury is Not Reasonably Avoidable by Consumers

Under the CFPA, an 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.[2]

The CFPB identified several reasons why consumers may not be able to reasonably avoid the risk of substantial injury caused by a financial institution unilaterally reopening a closed account. For instance, the bureau noted that after an account is reopened without a consumer's knowledge or consent, a third

party may attempt to debit from or deposit to the closed account, prompting their previous financial institution to reopen the account. This could occur, for example, where an employer inadvertently sends a consumer's paycheck to the closed account or where a merchant is delayed in processing a refund to a customer's account or uses the wrong account information to process a recurring monthly payment. The CFPB concluded that consumers cannot reasonably avoid these types of injuries resulting from these types of actions by a third party.

Additionally, the CFPB noted that it is not sufficient for a financial institution to merely disclose at account closure that the account may be reopened to process debits or deposits, or to provide in its consumer agreements that it is permitted to reopen an account. In the case of disclosing possible reopenings at the time of closure, the CFBP noted that "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." Regarding deposit agreements with provisions permitting a bank to reopen account, the bureau referenced a case where certain practices were considered unfair even though the practices were disclosed and agreed to in contracts because "consumers had no ability to negotiate the terms of form contracts.

Injury Not Outweighed by Countervailing Benefits

In addressing the third prong of the CFPA's unfairness standards, the CFPB concluded that reopening a closed account does not provide any meaningful benefits to consumers or competition.

From the consumer's perspective, the CFPB found that reopening a closed account in response to a debit will likely result in penalty fees rather than payment of an amount owed by the consumer since financial institutions typically require consumers to bring the account balance to zero before closing an account. The bureau acknowledged that while some consumers could benefit in instances where their accounts are reopened to receive deposits, that benefit does not outweigh the injuries that can be caused by unilateral account reopening. Moreover, keeping closed deposit account closed may actually benefit consumers in certain circumstances, such as where declining a deposit submitted to a closed account alerts the funds' sender that they have incorrect account information, or where declining a debit alerts the sender of the debit that they do not have the correct account information so they can inform the consumer.

From the financial institution's perspective, the bureau commented that banks have alternatives to reopening a closed account upon receiving a debit or deposit that could minimize their expenses, such as declining any transactions that they receive for accounts consumers previously closed. Additionally, not reopening these accounts may limit the financial institution's liability by preventing the use of closed accounts to commit fraud.

Enforcement and Other Potentially Applicable Laws

A finding that such practices constitute a UDAAP violation is not unprecedented. The CFPB noted in its Circular that it had previously brought an enforcement action regarding the practice of account reopening under the CFPA's prohibition against unfair, deceptive, or abusive practices.[3] In that action, the CFPB found that the bank reopened deposit accounts consumers had previously closed without seeking prior authorization or providing timely notice, which enabled creditors to initiate debits to the account and caused account balances to become negative, and subjected consumers to various fees, including overdraft and NSF fees. The CFPB concluded the bank engaged in an unfair practice under the CFPA by reopening the accounts without customer authorization because the practice caused

substantial injury to consumers that was not reasonably avoidable or outweighed by any countervailing benefit to consumers or to competition.

In addition to potentially violating the CFPA's prohibition on "unfair" acts, the CFPB further noted in its Circular that reopening a closed deposit account could also violate the CFPA's prohibition on "deceptive" or "abusive" acts or practices,[4]and could also violate other applicable laws, including state law[5]

Conclusion and Recommendations

In its Circular, the CFPB has made clear that it will view the unilateral reopening of deposit accounts closed by consumers as a violation of the CFPA's prohibition against unfair acts or practices, and indicated such practices may also be deemed to be in violation of other laws.

The Circular recommends that financial institutions seek prior express authorization from a consumer to reopen a previously closed deposit account and provide timely notice that the reopening will take place to avoid unfair practice concerns.

Based on the risks of CFPA violation outlined in the CFPB's policy statement, financial institutions should also consider reviewing their account closing procedures to ensure customers understand what an account closing entails and what process (if any) a customer needs to follow in order to reopen a closed account, as well as ensuring that the account closing policies and procedures are designed to prevent any unintentional reopening of closed accounts without the consumer.

[1] 12 U.S.C. § 5531(c)(1)

[2] 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. v. Fed. Trade Comm'n,* 849 F.2d 1354, 1365-66 (11th Cir. 1988) (same); *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985) (same).

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

[4] 12 U.S.C. 5531, 5536.

[5] See, e.g., *Jimenez v. T.D. Bank, N.A.*, 2021 WL 4398754, at *16 (D.N.J., 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).