"Fair-Fee" Policy

Cite
CFPB, Request for Information (RFI) regarding Fees by Providers of Consumer Financial Products or Services

Recommended Distribution:
Consumer Finance, Payment Services, Credit Cards, Mortgages, Retail Brokers, Policy, Legal, Government Relations

Website:
https://files.consumerfinance.gov/f/documents/cfpb_fees-imposed-by-providers-of-consumer-financial-products-services_rfi_2022-01.pdf

Impact Assessment

- A new set of federal consumer-finance fee standards may emerge via new rule, guidance, and/or supervisory actions superseding an array of legal fee-disclosure standards in order also to bar "excess" profit across the spectrum of consumer-finance products.
- Although the RFI covers banks and nonbanks, statements accompanying it target only large banks. If fee-based actions govern only them, then utility-style pricing would prevail with adverse competitive implications for large banks and a resulting increase in providers outside much of the regulatory perimeter. Lower fees might thus come at greater consumer and financial-stability risk.
- "Fair fees" would reflect only marginal costs and at least some provider risk. These calculations rest often on subjective and/or proprietary data and thus may be challenging to the Bureau and pose an array of unintended consequences to the marketplace.

Overview

Taking action to advance President Biden's competition order,[1] the CFPB is seeking views on fees which it believes exploit consumers by virtue of unfair competition. Although many of the fees it cites are covered by statutory disclosure regimes designed to ensure both front- and back-end fee transparency, the Bureau believes that many of these fees are unfair due to large-bank market power. Unfairness is in part judged by the extent to which a fee exceeds the provider's marginal cost with some recognition of possible risk, but how much of a profit margin above these break-even thresholds is neither specified nor discussed. Another unfairness criterion is whether consumers can avoid and/or negotiate fees, but how this would be determined is also not made

[1] See *Client Report* **MERGER9**, July 9, 2021.

clear. However, the Bureau's inquiry is a request for information, not a preliminary rulemaking, giving the agency the opportunity to gather views, data, and evidence that may inform the future policy and/or supervisory action the agency appears to contemplate.

Impact

This RFI is premised on the view that market power results in product pricing that is unfair to consumers that thus warrants express price regulation and/or changes to the financial-service marketplace. Indeed, the Bureau states that consumers only realize competition's benefits if providers transparently advertise "true" prices and the "full price" is also subject to the competitive process. The agency is particularly concerned with back-end pricing that it says disguises complete product cost, but it also asserts that consumers have insufficient provider choice.

The only actual cited example of "junk fees" are hotel bills. However, the Bureau asserts that the new "fee economy" also and demonstrably has adverse financial-services implications. Indeed, it says that bank and nonbank "junk fees" are now pervasive.

Building on this framework, the RFI describes an array of fees as having junk characteristics. These include late, NSF, overdraft, convenience, minimum-balance, return-item, "stock-payment," check image, paper-statement, card-replacement, some ATM, foreign-transaction, ACH-transfer, wire-transfer, account-closure, inactivity, fraud-investigation, ancillary mortgage-closing, and many more fees. As a result, this initiative could have significant pricing impact -- its goal -- and profit impact -- incidental damage about which the Bureau appears unconcerned. The extent to which business migrates to smaller competitors who are also unregulated and thus potentially risky to consumers, the financial system, and/or the payment system should large banks exit the market is not addressed in the Bureau's analysis or questioning.

Indeed, this inquiry is so broad and the Bureau's charges so extensive that actions taken based on the RFI could have sweeping implications for each targeted consumer-financial product or service. The Bureau is already planning stringent actions limiting overdraft and NSF fees in some way, with the RFI making clear that recent anti-overdraft decisions by large banks will not deter it. Given that the banks that derive the greatest amount of profitability from these fees are generally small, it is unclear how the pro-competition goals espoused in the RFI will fit with the additional consumer-protection ones laid out on overdrafts. The Bureau's recent announcement that it is also targeting credit-card banks is more clearly aimed at large providers and will presumably proceed on its own track despite the requests related to these banks in the RFI. Notably, many of the fees cited here as problematic are governed by extensive disclosures required in 2009 law.[2]

The Bureau's focus on mortgage lending and servicing has of late focused principally on forbearance, but it has an extensive body of rule governing both

2 See *Client Report* **CREDITCARD34,** May 7, 2009.

sectors.[3] As with credit cards, these fees and the disclosures related to them are also extensively governed by law. The Bureau's discussion of mortgages in the RFI suggests a new focus: ensuring consumer access to mortgage refinancing. However, research in this area suggests that refinancing obstacles are based not on fees, but on disparate impact. Some believe this is best addressed not only via fair-lending enforcement, but also new mortgage products.[4]

The RFI also deals with the consumer-finance marketplace as a whole, laying out how in its view market power blurs both "true" and "full" price transparency. This analysis also references both banks and nonbanks even though the initiative appears at least initially aimed at large banks. There is no indication of how the CFPB would directly use the RFI's findings to target actions at market competition in addition to consumer protection. However, Director Chopra has made clear his views on large-bank mergers in connection with a statement and RFI from FDIC Democrats on bank-merger policy.[5] To the extent he influences FDIC merger decision-making -- and he will -- transactions he believes adversely affect fair pricing may face additional hurdles.

In his competition order, the President expressly charged the Bureau with implementing standards increasing consumer ability to transport personal data from one provider to the next. This is intended to enhance competition by reducing barriers to consumer choice. To date, the CFPB has taken only preliminary action on consumer-data portability,[6] and the question does not seem to figure into the RFI's fee-based goals. However, the extent to which consumers can quickly and easily change providers would presumably increase their ability to avoid or negotiate fees, a key goal specified in this RFI.

Although not made clear in this RFI, the CFPB also plans under its new director to review all of the laws under its jurisdiction.[7] It of course cannot change law, suggesting that this inquiry will result in a combination of regulatory rewrites reflecting conclusions about fees as well as other consumer-protection and competition considerations. Although the agency's governing law includes the goal of competitive consumer finance in its mission, no director has yet contemplated it in the body of Bureau rules nor was it taken into consideration when the banking agencies, from whom the CFPB inherited many standards, did so. The extent to which Director Chopra is able to recast consumer-protection regulation also to govern market competition will have also far-reaching impact on market structure and product availability.

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3 See **MORTGAGE120**, *Financial Services Management,* April 30, 2021.

4 See **GSE-012422,** *GSE Activity Reports***,** January 24, 2022.

5 See **MERGER9**, *Financial Services Management*, December 16, 2021.

6 See *Client Report* **DATA2,** September 21, 2021.

7 See **CONSUMER14**, *Financial Services Management,* July 19 2010.

What’s Next

The RFI was issued on January 26; comments are due by March 31. The Bureau is particularly inviting comments from individuals, especially minorities and those otherwise considered to be at greatest junk-fee risk. "Stories" and other forms of experiential or subjective comment are also expressly solicited.

Analysis

Apart from the conclusions described above, the RFI is principally a set of questions for public comment. These address:

- individual-consumer experiences with what are viewed as abusive fees and those that were "too high";
- the types of products that obscure true cost by, for example, exceeding the financial institution’s cost of providing a product or service and/or risk to;
- companies and sectors obtaining significant revenue from back-end fees;
- obstacles to building back-end fees into transparent pricing;
- data and evidence on consumer-product choice;
- disclosure practices; and
- CFPB policy and/or oversight tools.