Banking and Finance Law Daily Wrap Up, BANKING OPERATIONS—Navy Federal Credit Union agrees to refund $80 million in 'junk fees', (Nov. 8, 2024)

Banking and Finance Law Daily Wrap Up

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The CFPB said consumers had no way of knowing how to avoid the fees given the complexities of transaction settlement and lack of disclosure about when person-to-person payments received would post and be available for use.

Without admitting or denying any wrongdoing, the Navy Federal Credit Union (NFCU) entered into a consent order and stipulation with the Consumer Financial Protection Bureau resolving concerns about NFCU overdraft practices and "illegal overdraft fees." The CFPB is ordering NFCU to refund more than $80 million to consumers, to stop charging illegal overdraft fees, and to pay a $15 million civil money penalty to the CFPB victim relief fund. The CFPB said this was the largest monetary order ever obtained from a credit union for illegal activity. (*In the Matter of: Navy Federal Credit Union*, No. 2024-CFPB-0014 (C.F.P.B. Nov. 7, 2024)).

CFPB Director Rohit Chopra touted the consent order as part of its effort to rid the market of illegal junk fees, an effort that has saved American families billions of dollars. National Credit Union Administration Chairman Todd M. Harper issued a separate statement, agreeing with the CFPB's assessment that NFCU's practices were unfair and harmed consumers. NFCU issued a statement emphasizing its non-profit status, its focus on its member-owners, compliance with evolving expectations, and elimination of "non-sufficient fund fees for personal checking accounts" as of Q1 2025.

Background. NFCU is an insured credit union based in Vienna, Virginia. It has a National Credit Union Administration (NCUA) charter. Individuals with ties to the armed forces, Department of Defense, or National Guard and their families or household members are eligible for NFCU membership. With over $171 billion in assets and more than 13 million members at the end of 2023, it is the largest retail credit union in the United States. NFCU takes consumer financial product deposits, including checking account deposits, so it is a Consumer Financial Protection Act "covered person. 12 U.S.C. § 5481(6). The CFPB initiated an enforcement matter to address certain NFCU practices surrounding "authorized positive, settle negative" and Original Credit Transaction overdraft fees.

Identified violations. The consent order stated that CFPB review identified the following violations of law:

- NFCU overdraft fees were unfair where consumers had sufficient balance when they authorized their transactions but the transactions later settled with an insufficient balance; and
- overdraft fees were unfair where consumers reasonably believed an OCT would have established sufficient funds to cover all debits in the absence of a disclosure about a cutoff time for same-day posting.

Authorized-Positive fees. In the consent order settling the matter, the CFPB described at length the circumstances such that NFCU consumers "do not control, and have no way to know" when transactions will settle. The merchant controls the process, and the salient issue is that consumers do not know in which order merchants will submit their transactions for settlement.

The consent order stated that NFCU collected an average of $236 million per year in overdraft fees. Of that, about 20 percent, or around $80 million over the relevant period, were the result of Authorized-Positive Overdraft Fees where the consumers thought they had a sufficient balance when they authorized their transaction, but

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ultimately did not have a sufficient balance based on the order of settlements. Consumers complained, and in January 2023, NFCU began to refund the Authorized-Positive Overdraft Fees.

OCT fees. Original Credit Transaction (OCT) postings presented a second issue. OCTs are person-to-person payments which NFCU members received, for example, through PayPal. On receipt of an OCT payment, consumers would see a more or less immediate balance increase; however, in some cases the funds would not post and be available for use until the following business day. NFCU did not amend its disclosures about OCT posting until December 2020. Around the same time, NFCU also took steps to address posting delays. According to the CFPB, NFCU's "permanent fix" involved posting all OCTs received before 8 P.M. Eastern time during the night's batch processing.

CFPB reasoning. The CFPB found NFCU was charging consumers overdraft fees where accounts had insufficient funds at time of settlement, even though some debit card transactions "can settle days or even weeks later." The CFPB said unexpected overdraft fees caused "significant losses for consumers." The CFPB explained that NFCU was "aware" that consumers were not likely to understand how overdraft fees are assessed due to complexity and "inherent uncertainties" surrounding the timing of transaction settlement.

With respect to OCTs, the CFPB reasoned that NFCU customers did not have sufficient disclosure from NFCU to understand that OCT payments received would not necessarily post the same day. When making other payments, customers would then rely on a balance that had not yet posted. The consent order stated that until NFCU made an appropriate disclosure, consumers had "no way of knowing, and no reason to suspect" that the displayed available balance resulting from an OCT receipt was not available for immediate use unless the OCT occurred before an undisclosed cutoff time. NFCU's collection of Authorized-Positive Overdraft Fees caused substantial injury because consumers paid at least $80 million in such fees during the relevant period.

Overdraft focus. The CFPB emphasized that it has made overdraft fees a "point of focus in combatting illegal junk fees." The Bureau proposed a rule in January 2024 to treat overdraft loans like credit cards and limit overdraft fees to an established benchmark amount. The CFPB stated it issued a report in December 2023 showing how overdraft fees cause consumer surprise. It also said it issued a circular in 2002 "stating that unanticipated overdraft fees are likely illegal."

NCUA statement. National Credit Union Administration Chairman Todd M. Harper agreed with the CFPB that NFCU's "authorize positive, settle negative practices and the subsequent charging of overdraft fees were not only unfair, but they also caused substantial harm to consumers." He described NFCU's posting processes as "complex" with low consumer awareness of that. He said the settlement "underscores the importance of ensuring fair and responsible treatment of consumers and protecting consumers from predatory business practices."

NFCU statement. In its statement, NFCU said it "fully cooperated" with the CFPB and "will continue to comply with all applicable laws and regulations, just as we always have and as we believe we did here." The statement continued that the settlement would help NFCU "focus on serving our members and their families."

The statement otherwise emphasized NFCU's member-owned, not-for-profit status and its avowed focus on putting members first. NFCU offered "additional context" that its overdraft services help members make necessary purchases without incurring long-term debt, a "lifeline to its members and an alternative to payday lenders." NFCU said it works to help members "avoid overdrawing their accounts in the first place and has long invested in specific programs designed to help members reduce their chances of incurring overdraft fees." It said it has "continued to comply with evolving expectations" such as by "automatically refunding certain overdraft fees since January 2023." NFCU said its members currently save an average of $461 per year by choosing it over alternatives. It said it will "continue to refine its processes[,]" and, as previously announced, it will eliminate "non-sufficient fund fees for personal checking accounts starting in Q1 2025."

The case is No. 2024-CFPB-0014.

Companies: Navy Federal Credit Union

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