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CFPB Targets Convenience Fees

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On June 29, 2022, the Consumer Financial Protection Bureau issued an advisory opinion declaring that the Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from collecting "pay-to-pay" or convenience fees unless applicable law or the agreement creating the debt **expressly** authorizes the fee. According to the opinion, debt collectors also may be acting in violation of the FDCPA when using a third-party payment processor that charges such fees, if the processor remits to the collector any amount in connection with that fee. The CFPB considers convenience fees to include any fees incurred by consumers to make payments to a debt collector through a particular channel, such as by phone or online.

The CFPB's opinion and accompanying press release follow a number of recent pronouncements by the agency focusing on what it considers to be "junk fees." The opinion also serves as a signal to debt collectors and original creditors that the CFPB may subject convenience fees to more exacting scrutiny, whether under the FDCPA or the prohibitions against unfair, deceptive, or abusive acts or practices (UDAAP) in the Consumer Financial Protection Act (CFPA).

Overview of CFPB's advisory opinion

The CFPB's advisory opinion builds on the agency's prior statements in Bulletin 2017-01. It also provides new insight into the CFPB's narrow interpretation of when the FDCPA allows the collection of convenience fees and scope of potential liability when using a payment processor that collects convenience fees.

Section 1692f(1) of the FDCPA prohibits debt collectors from collecting "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." In a view that the CFPB acknowledges departs from the interpretation of some courts, the advisory opinion reaffirms the CFPB's position that:

- Convenience fees are "amounts" subject to Section 1692f(1).
- Debt collectors may collect convenience fees under Section 1692f(1) only when "(1) the agreement creating the debt expressly permits the charge and some law does not prohibit it; or (2) some law expressly permits the charge, even if the agreement creating the debt is silent." When the law neither expressly authorizes nor expressly prohibits a fee, it is not "permitted by law." In that circumstance, a debt collector may not collect the fee unless the agreement creating the debt expressly permits the fee.
- Debt collectors violate Section 1692f(1) when they use a payment processor that collects a convenience fee from a consumer and remits to the debt collector any amount in connection with that fee.

Further, the opinion rejects the notion adopted by some courts that state contract law permits debt collectors to collect fees that are the subject of a separate agreement. In the CFPB's view, the FDCPA "only permits collecting amounts authorized by contract when the amount is expressly authorized by the contract 'creating the debt.'"

CFPB's opinion may signal scrutiny beyond debt collectors subject to FDCPA

The CFPB's advisory opinion purportedly speaks to just "debt collectors" – those that regularly collect or attempt to collect debts

owed to another – under the FDCPA. However, the opinion's potential implications are much broader. Notably, earlier guidance suggests that the CFPB could take the view that the opinion reaches all covered persons, including original creditors, that collect or use a third-party payment processor that collects convenience fees.

The advisory opinion cautions that even if convenience fees comply with Section 1692f(1) of the FDCPA, debt collectors "must still take care to comply with … the [CFPA's] prohibition on [UDAAP], when assessing [convenience] fees." The CFPB in **Bulletin 2013-07** also took the position that original creditors collecting on their own debt – though not subject to the FDCPA – may violate the CFPA's UDAAP prohibitions by engaging in conduct prohibited by the FDCPA. Bulletin 2013-07 expressly identified a violation of Section 1692f(1) of the FDCPA as a potential UDAAP. Accordingly, the CFPB could take the position that covered persons under the CFPA that collect, or use a third-party payment processor that collects, convenience fees not allowed by Section 1692f(1) violate federal law, regardless of whether they are subject to the FDCPA.

The CFPB's announcement is yet another reminder that institutions must understand their fee assessment practices – and those of their vendors. This includes not just understanding what fees are charged and when, but also how those fees are disclosed and whether there is a basis for doing so.

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