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# Preparing For CFPB 'Junk Fee' Push Into Mortgage Industry

By **Nicholas Gess, Allen Denson and Ari Selman** (July 8, 2024, 3:16 PM EDT)


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The Consumer Financial Protection Bureau is on the cusp of further expanding its already vast "junk fee" initiative through a recently announced inquiry into mortgage closing costs. If past initiatives are any indicator, the mortgage origination ecosystem should be on high alert.[1]

The announcement is a continuation of the Biden administration's multiyear push to restrict financial services providers and other companies — including ticket sellers, travel companies and businesses in the entertainment and hospitality industries — from "dripping" fees incrementally during the transaction flow.[2]

With this latest foray,[3] the CFPB and Biden administration[4] are setting their sights on the already heavily regulated mortgage industry, and indeed raising concerns about services that are often required by federal and state law.

**Background**

Mortgage closing costs include various charges, separate from any down payment, that home buyers must pay prior to completing their purchase of a property. These charges often include fees for the application, appraisal, legal, credit report, employment verification, title search, title insurance, loan origination, recording and other services that vary from transaction to transaction and location to location.

These processes all have the common aim of ensuring that all parties to a transaction derive the benefit of their bargain and that the property conveys seamlessly.

The CFPB asserts[5] that its research establishes that closing costs have risen sharply in recent years, with median borrowers paying just under $6,000 in closing costs in 2022, up 21.8% from 2021. This increase in closing costs is even more acute in refinance transactions, jumping 49.3% from $3,336 to $4,979 over that same period.

It is unclear whether these increased costs are associated with better diligence and compliance, or whether they are simply "inflated," however one might define that term.

Recent data compiled by the CFPB[6] also purportedly reflects a growing number of borrowers paying so-called discount points — i.e., mortgage interest paid at closing in exchange for a lower annual percentage rate on the mortgage loan that is paid over time. While the bureau characterizes these points as having "uncertain value," that is presumably true of all aspects of a real estate transaction, the specific, intrinsic value of which is uncertain.

Accordingly, the CFPB has issued a request for information[7] seeking comments on various closing costs from the public, including consumers, industry participants, interest groups and other stakeholders, with comments due on or before Aug. 2.

**Focus of the RFI**

The RFI focuses on three broad areas.

***1. Competition***

The bureau is interested in the specific types of closing costs subject to competitive pressure as part of its effort to understand any market factors limiting competition or contributing to observed fee growth.

However, if there is unfair conduct in pricing or service, such an inquiry is arguably more appropriately overseen by federal and state antitrust enforcers, such as the U.S. Department of Justice, the Federal Trade Commission and the state attorneys general.

***2. Fee Setting***

The CFPB wishes to untangle the closing fees set by the lender and third parties, respectively, to better understand which entities principally profit from those fees and whether such fees are justified.

However, in most supply chains, there is some marginal profit earned at each step in the process. In the consumer mortgage lending space, the ecosystem consists of multiple third parties, each of which is an expert in its own part of the process. There might well be trade-offs in quality versus pricing where the end-use consumer is ambivalent.

***3. Consumer Impact***

As rising closing costs are supposedly a potentially significant obstacle to consumers contemplating a home purchase, the bureau seeks information on the specific costs with the greatest impact on first-time homeownership, housing affordability and home equity.

Even if these are important and interesting questions, it is difficult to discern how these considerations fall within the CFPB's remit, and as a result what, no matter the RFI results, the bureau could lawfully do under the major questions doctrine as most recently interpreted by the U.S. Supreme Court in West Virginia v. U.S. Environmental Protection Agency in 2022.

**Next Steps**

While the CFPB presently seeks information only, this inquiry is a likely prelude to formal or informal rulemaking, guidance, enforcement activity or supervisory activity by the bureau, as well as by state financial services regulators and attorneys general.

We observed a similar progression concerning credit card late fees,[8] auto-finance sales,[9] "buy now, pay later" transactions,[10] and other areas that the bureau targeted under its authority to address unfair, deceptive or abusive acts and practices, or by states under their common authority except as to abusiveness — unfair or deceptive acts or practices.

We expect future activity to focus on the following key types of closing fees:

- Credit reporting fees;
- Origination fees;
- Settlement services fees, including appraisal fees, fees for preparing and notarizing documents, and settlement processing fees; and
- Title insurance costs.

While the bureau is unlikely to outright prohibit the above fees and associated services, it could conceivably use the cudgel of junk fees to examine pricing, just as the bureau did with late fees.[11]

Additionally, state lawmakers and regulators possess their own unfair, deceptive and abusive practices authority and may also set their sights on the above types of closing fees.[12] State legislatures also may create private rights of action, as California recently did with its Consumer Legal Remedies Act,[13] to address what the regulators have pejoratively characterized as junk fees.

**Concrete Actions**

Advance planning is essential. It may be that the RFI does not generate any action by the CFPB, but it may also be a harbinger of far-reaching or unprecedented rulemaking or enforcement by federal and state agencies.

It's sensible to follow the adage, "Hope for the best and plan for the worst." Lenders, vendors and third parties should develop plans that reflect potential rulemaking or enforcement activity in this space.

Additionally, mortgage lenders should consider the following steps:

- Review the costs they charge at closing to ensure they are accurately disclosed to borrowers, preferably as early in the mortgage-lending process as possible.
- Monitor third parties, including third-party vendors, to ensure that the costs they pass on to consumers are legitimate.
- Survey the industry to determine whether the fees they charge are typical and in line with industry practice.
- Analyze their practices concerning discount points to ensure that there is a clear consumer benefit for paying those amounts at closing.

Third parties and vendors should consider the following additional steps:

- Consider submitting comments in response to the RFI, including potential policy or data-driven comments, as well as comments on the underlying authority of the bureau to engage in this process.

- Examine the fees they charge to determine whether they are appropriate and reasonable for the service provided.

- Ensure that the mortgage lenders with whom they work properly disclose to consumers the fees charged for the lenders' services.

The CFPB is proceeding fresh from its victory in a major challenge to the constitutionality of its structure — a lingering question that had dogged the bureau for most of its existence. There is no time better than the present to expend capital — and that is precisely what the bureau appears to be doing now.

But the agency's constitutional structure does not mean that every attempted exercise of its statutory authority is lawful. Holding the bureau to the plain meaning of its authorizing legislation is one way to ensure that the agency does not exceed its statutory authority.

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[1] See Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, et seq.

[2] The effort is neither limited to the Biden administration nor the federal government.  Many states, such as California, are undertaking "junk fee" initiatives under new and existing consumer protection laws.  Moreover, the Texas Attorney General, hardly an ally of this administration, has taken strong enforcement measures in this space.

[3] CFPB, Request for Information, 89 FR 48400 (June 6, 2024): https://www.federalregister.gov/documents/2024/06/06/2024-12443/request-for-information-regarding-fees-imposed-in-residential-mortgage-transactions.

[4] "Recent Crackdown on Junk Fees: Federal, State and Private Actions," (Morgan, Lewis & Bockius LLP – January 30, 2024): https://www.morganlewis.com/pubs/2024/01/recent-crackdown-on-junk-fees-federal-state-and-private-actions.

[5] "Data Point: 2022 Mortgage Market Activity and Trends" (CFPB – September 2023): https://files.consumerfinance.gov/f/documents/cfpb_data-point-mortgage-market-activity-trends_report_2023-09.pdf.

[6] "CFPB Finds Americans are Paying Upfront Fees Seeking to Lower Interest Rates on Mortgages," (CFPB – April 5, 2024): https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-americans-are-paying-upfront-fees-seeking-to-lower-interest-rates-on-mortgages/.

[7] See fn 3, infra.

[8] "CFPB Proposal Targets Limiting Credit Card Late Fees," (Morgan, Lewis & Bockius LLP – February 7, 2023): https://www.morganlewis.com/blogs/finreg/2023/02/cfpb-proposal-targets-limiting-credit-card-late-fees.

[9] "FTC's Final 'CARS Rule' On Dealer Sales Practices: Implications for Banks, Auto Finance, and 'Captives." (Morgan, Lewis & Bockius LLP – January 18, 2024): https://www.morganlewis.com/pubs/2023/12/ftcs-final-cars-rule-on-dealer-sales-practices-implications-for-banks-auto-finance-and-captives.

[10] "CFPB Takes Action to Ensure Consumers Can Dispute Charges and Obtain Refunds on Buy Now, Pay Later Loans." (CFPB – May 22, 2024): https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-ensure-consumers-can-dispute-charges-and-obtain-refunds-on-buy-now-pay-later-loans/.

[11] The CFPB's recent rule effectively reducing credit card late fees for certain large banks eliminates a significant profit center.  The Bureau's authority to promulgate the rule is currently in litigation.

[12] "Mitigating the Risk From 'Junk Fees.'" (Morgan, Lewis, & Bockius LLP – February 23, 2024): https://www.morganlewis.com/pubs/2024/02/mitigating-the-risk-from-junk-fees.

[13] California SB 478 (October 7, 2023): https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB478.