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Quarterly Report

Mississippi Regulatory Compliance Group

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NEW CFPB GUIDANCES ON DEPOSIT ACCOUNT "JUNK FEES"

On October 26, the Bureau issued Consumer Financial Protection Circular 2022-06 regarding the assessment of overdraft fees and Compliance Bulletin 2022-06 regarding returned deposited item fees. The Circular and Bulletin were issued in coordination with President Biden's announcement of a White House initiative targeting "junk fees" in a host of industries including, among others, auto dealers, banks, hotel resorts, airlines and cable providers.

Consumer Financial Protection Circulars are statements of policy used by the CFPB to advise other parties with authority to enforce federal consumer financial law, including other federal and state banking supervisors and state attorneys general, about the Bureau's interpretation of the law and approach to enforcement. Compliance Bulletins are also statements of policy intended to notify supervised entities about how the Bureau intends to exercise its supervisory and enforcement authorities. From a compliance standpoint, both forms of guidance are equally important.

CFP Circular 2022-06. The Circular presents and responds to a very basic question – can the assessment of overdraft fees constitute an unfair act or practice even if the entity complies with Reg. Z and Reg. E. Unsurprisingly, the short answer is "yes." The Circular stated that "overdraft fees assessed by financial institutions on transactions that a consumer would not reasonably anticipate are likely unfair" because they are likely to impose substantial injury on consumers that consumers cannot reasonably avoid and that are not outweighed by countervailing benefits to consumers or competition. The Bureau refers to this practice as imposing "surprise overdraft fees."

The Bureau said that, as a general matter, consumers cannot reasonably avoid unanticipated overdraft fees which, by definition, are assessed on transactions that a consumer would not reasonably anticipate would incur such fees. According to the Bureau, consumers are likely to reasonably expect that a transaction that is authorized at point of sale with sufficient funds will not later incur overdraft fees. Widespread use of mobile banking and debit cards could create a consumer expectation that account balances can be closely monitored. Consumers who make use of these tools may reasonably think that the balance shown in their mobile banking app, online, by telephone, or at an

ATM accurately reflects their available balance, and those consumers may also reasonably assume that when they have a sufficient available balance in their account at the time they enter into a transaction, they will not incur overdraft fees for that transaction.

The Circular appears to be aimed directly at authorize positive/settle negative (APSN) transactions where a debit card transaction is authorized based on sufficient available funds at the time of authorization but results in an overdraft and overdraft fee when the transaction is actually posted. These types of transactions have been the subject of a recent enforcement action by the Bureau against a large bank and have been cited as a UDAP violation in examinations by the other federal banking regulators.

The Circular gives two examples of the types of transactions that may be deemed unfair, although the Bureau said this is not an exhaustive list. In the first example, a debit card transaction was authorized based on a sufficient positive available balance. After the debit card transaction is authorized but before it actually posts to the consumer's account, an intervening ACH debit transaction posts to the account. In the Bureau's example, the ACH debit exceeded the account's ledger balance at the time of posting resulting in an overdraft fee. When the debit card transaction posted the next day, that transaction also resulted in an overdraft fee. The Bureau said that consumers may not reasonably be able to navigate the complexities of the delay between authorization and settlement of overlapping transactions. If a consumer is presented with a balance that can be viewed in real-time, it is reasonable for a consumer to rely on it, rather than having to anticipate that overdraft fees may be assessed based on the financial institution's use of different balances at different times and intervening processing complexities for fee-decisioning purposes.

In the second example, the financial institution uses available balance rather than ledger balance for both authorizing transactions and assessing overdraft fees. On day one, a debit card transaction is authorized which reduces the available balance. On day two before the debit card transaction posts, an ACH debit transaction is posted. The amount of this ACH transaction exceeds the available balance of the account but not the ledger balance. Since the institution uses available balance for OD fee purposes, the ACH debit results in an overdraft fee. The next day, the debit card transaction posts which results in a second overdraft fee. The Bureau said that use of the available balance for assessment of overdraft fees exacerbates the injury from unanticipated overdraft fees. In these APSN situations, a financial institution's assessment of overdraft fees based on the consumer's available balance reduced by debit holds, rather than the ledger balance, leads to the consumer being assessed multiple overdraft fees when they may reasonably have expected only one.

Note that the existence of a Reg. E opt-in for payment of overdrafts on point-of-sale debit card and ATM transactions has no impact on the practices being criticized. While financial institutions must obtain a consumer's "opt-in" before it can charge overdraft fees on one-time debit card and ATM transactions, the Bureau said this does not mean that the consumer intended to make use of those services in transactions where the consumer believed they had sufficient funds to pay for the transaction without overdrawing their account.

Compliance Bulletin 2022-06. In this Bulletin, the Bureau stated that blanket policies of charging fees for deposited items that are returned unpaid, irrespective of the

circumstances, are likely unfair, and it is putting regulated entities on notice that the agency plans to exercise its supervisory and enforcement authorities on this point. The Bureau explained that a returned deposited item is a check that a consumer deposits into their checking account that is returned to the consumer because the check could not be processed against the check originator's account for various reasons such as nonsufficient funds, stop payment, closed account, or an incomplete check.

The Bureau said the practice is unfair because consumers cannot reasonably avoid the harm, and the harm is not outweighed by countervailing benefits to consumers or to competition. According to the Bureau, consumers in many instances have no control over whether, and no reason to anticipate that, a deposited check would be returned. Also, consumers generally have no way to verify a check prior to depositing it. Certain entities, such as lenders and landlords, may be able to recoup returned item fees from the person issuing the check, but consumers generally cannot. An injury is not reasonably avoidable unless consumers are both fully informed of the risk and have a practical means to avoid it. Disclosures of the existence of the fee may inform consumers of the risk, but they still have no practical way to avoid it.

However, the Bureau also said that charging returned item fee in particular circumstances may not be unfair if the bank's policy and practices are targeted to situations where a depositor should have reasonably anticipated that the check may be returned and deposits it anyway, such as when a depositor repeatedly deposits bad checks from the same originator.

Finally, the Bureau is giving advance warning of its intentions regarding enforcement actions on this point. It said that "as a matter of prosecutorial discretion", the CFPB does not intend to seek monetary relief for potential unfair practices regarding returned deposited items fees assessed prior to November 1, 2023.

Compliance Thoughts. The Circular regarding so-called surprise overdraft fees does not appear to create new compliance concerns. Both practices, assessment of overdraft fees on authorize positive/settle negative transactions and use of available balance in assessing overdraft fees in APSN situations, have been criticized in examinations and the subject of enforcement actions. Still, the issuance of the Circular is a good reason to review your practices on these points and document your review. The Bulletin on returned deposited items fees raises a new concern. These fees are commonplace for both consumer and commercial deposit accounts. While the Bulletin is directed at CFPB supervised entities, it seems likely the other agencies will also raise this issue as a UDAP concern. If a fee is charged, consideration may need to be given to dropping it or, if system capabilities permit, tailoring it to circumstances where return of the deposited check might reasonably be anticipated.

These guidances are part of the Bureau's Junk Fee Initiative launched in January 2022. The CFPB has taken steps to restrict payment convenience fees (so-called "pay-to-pay" fees) and has announced an advance notice of proposed rulemaking requesting input from credit card issuers, consumer groups, and the public regarding credit card late payment fees and card issuers' related revenue and expenses. We will continue to watch this area for further developments.

<Cliff Harrison>

CFPB ADVISORY OPINION ON JUNK DATA IN CREDIT REPORTS

On October 20, the CFPB issued an advisory opinion regarding the duties of consumer reporting agencies to screen for and eliminate obviously false "junk data" from consumer credit reports. Under the Fair Credit Reporting Act, consumer reporting agencies have an obligation to maintain reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates. The Bureau said companies must have policies and procedures to screen for and eliminate junk data. Specifically, the policies and procedures should be able to detect and remove:

- Inconsistent account information. According to the CFPB, consumer reports sometimes show two or more pieces of information that cannot all be true. For example, an account is paid in full but still shows a balance, a date of first delinquency predates the account's opening or where the account records reflect no delinquency, or an account that reflects an "original loan amount" that increases over time.

- Information that cannot be accurate: Again, according to the Bureau, information on consumer reports sometimes reflects obvious impossibilities. For example, if a tradeline includes a date that predates the consumer's date of birth or if just one of many tradelines indicates a consumer is deceased.

The Bureau said that a consumer reporting agency's policies, procedures, and internal controls should further identify and prevent reporting of illegitimate credit transactions for minors. A minor generally cannot legally enter into a contract for credit except in certain limited circumstances, such as an application for a student loan, an emancipated minor, or as a credit card authorized user.

The opinion is a reminder to consumer reporting agencies that the failure to maintain reasonable procedures to screen for and eliminate logical inconsistencies in order to prevent the inclusion of facially false data in consumer reports is a violation of FCRA. While this opinion is aimed at credit bureaus, banks and other furnishers of information to credit bureaus might also consider it as a general reminder of their obligations under the FCRA to maintain written policies and procedures regarding the accuracy and integrity of consumer information they furnish to help ensure that the information provided correctly reflects the terms of and liability for the account, the consumer's performance on the account, and correctly identifies the appropriate consumer.

<Cliff Harrison>

SECTION 1071 TIMELINE

In a recent status report filed with the U.S. District Court for the Northern District of California, the CFPB indicated that it is on schedule to issue a final rule implementing Section 1071 by March 31, 2023. This date is also the deadline set by the same District Court earlier this summer by court order in connection with a settlement reached in a 2019 lawsuit that sought to compel the Bureau to issue a final rule on Section 1071.

As you know, Section 1071 of Dodd Frank amended the Equal Credit Opportunity Act to mandate HMDA-like reporting requirements for lenders making business loans. Specifically, Section 1071 requires financial institutions to identify woman-owned, minority-owned, and small businesses and to

collect data related to race, sex, and ethnicity of business owners, as well as the loan's purpose, the action taken on the loan, the business's gross annual revenue, and "any additional data" that would aid the CFPB in fulfilling the purposes of Section 1071. The proposed rule issued by the Bureau in September of 2021 included 23 data points.

In its proposed rule, the CFPB noted that the compliance date for Section 1071 would be approximately 18 months following publication of a final rule. So, it seems likely that if a final rule is forthcoming in March of next year, the compliance date may be as early as September 2024. If that becomes the case, it would mean the Bureau likely will require financial institutions to begin collecting for the fourth quarter of 2024 and report that data by June 1, 2025. After 2024, financial institutions would be required to collect data on a calendar year basis and report it by June 1 of the following year.

<Doug Weissinger>

A LITTLE OF THIS AND THAT (aka a "hodge-podge")

It has been fairly quiet on the regulatory "new rules and requirements" front lately, so we thought it would be good to have a discussion on various compliance issues at the November meeting, a "hodge-podge" session if you will, based on questions we have received and things we have seen in recent reviews as well as recent activity by the CFPB.

We don't talk much about Regulation O in our meetings since it is has become routine for most, but several issues have arisen lately, and it appears a refresher course may be needed. Some items require annual information collection, such as related interests. We have seen issues in reviews relating to director overdrafts, how to calculate loan numbers to ensure borrowings have not exceeded the applicable lending limits, proper designation of executive officers, and identification of all insiders including executive officer, directors, and principal shareholders for both the bank and holding company and related interests.

There are also a few things to discuss on BSA. First, it appears that the numbers of non-resident aliens (NRAs) customers are increasing. BSA requirements have not really changed, but reminders may be helpful on things like CIP requirements and options, monitoring for expired passports, VISAs and other documents, and identifying potential suspicious activity.

Also, the CFPB has been active in areas like deposit account fees and is starting a new rulemaking process on personal financial data rights. We want to give our outside speakers as much time as possible, but time permitting we plan to discuss these topics and others at the November meeting.

<Patsy Parkin>

DODD-FRANK SECTION 1033

The CFPB recently released a lengthy outline covering various proposals and alternatives under consideration by the Bureau in its Section 1033 rulemaking under the Dodd-Frank Act. Like Section 1071, Section 1033 is a here-to-fore unimplemented provision of Dodd-Frank. It generally requires providers of consumer financial services to make available to consumers in electronic format information financial products and services obtained by the consumer from the provider, subject to implementing regulations to be promulgated by the CFPB.

The outline marks the beginning of the end for the Bureau's Section 1033 rulemaking efforts, which have been ongoing for several years. The CFPB released an advanced notice of proposed rulemaking regarding Section 1033 in the fall of 2020 and included Section 1033 efforts in both the Fall 2021 and Spring 2022 rulemaking agendas.

The outline includes a series of discussion questions and a list of topics, including:

Coverage of Data Providers subject to the Proposals under Consideration. The proposals require a defined subset of "covered persons" under Dodd-Frank (as defined in 12 U.S.C. 5481(6)) that are data providers to make consumer financial information available to a consumer or an authorized third party. For our purposes, this definition includes financial institutions (as defined in Reg. E (12 CFR § 1005.2(i)). The proposal defines "accounts" covered by Section 1033 broadly and the same as that term is defined in Reg. E (12 CFR § 1005.2(b)). The CFPB also clarified that it is considering potential exemptions for certain data providers.

Recipients of Information. The CFPB is considering proposals that would address a covered data provider's obligation to make information available upon request directly to a consumer ("direct access") and to authorized third parties ("third-party access").

Under the proposals, to be considered an authorized third party, a third party must: (i) provide an "authorization disclosure" informing consumers of key terms of access; (ii) obtain consumers' informed, express consent to the key terms of access contained within the authorization disclosure; and (iii) certify to consumers that it will abide by certain obligations related to the collection, use, and retention of a consumer's information.

The Types of Information a Covered Data Provides Would Be Required to Make Available. The outline proposes six categories of information data providers would have to make available with respect to covered accounts, including (i) periodic statement information; (ii) information regarding prior transactions and deposits that have not-yet-settled; (iii) information about prior transactions not typically shown on periodic statements or online account portals; (iv) online banking transactions that the consumer has set up but that have not yet occurred; (v) account identity information; and (vi) other information, such as consumer reports, fees, bonuses, discounts, incentives, and security breaches that exposed a consumer's identity or financial information.

The outline provides four exceptions to the requirement for making information available: (i) any confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors; (ii) any information collected by the data provider for the purpose of preventing fraud or money laundering, or detecting, or making any report regarding other unlawful or potentially unlawful conduct; (iii) any information that is required to be kept confidential by any other provision of law; or (iv) any information that the data provider cannot retrieve in the ordinary course of its business with respect to that information.

The CFPB is considering proposing that a covered data provider would need to make available the most current information that the covered data provider has in its control or possession at the time of a request for current information. With respect to historical information that may be requested, the CFPB noted that Section 1033 should not be construed to impose a duty on a data provider to maintain or keep any information about a consumer. Accordingly, the CFPB is

considering proposals under which a covered data provider would be required only to make available information going as far back in time as that covered data provider makes transaction history available directly to consumers, such as, but not limited to, through the covered data provider's online financial account management portal.

How and When Information Would Need to be Made Available. The proposals state the Bureau is considering ways to define the methods and the circumstances in which a data provider would need to make information available with respect to both direct access and third-party access.

Third Party Obligations. The Bureau is examining proposals to limit authorized third parties' collection, use, and retention of consumer information to that which is reasonably necessary to provide the product or service the consumer has requested. This includes (i) limitations on the duration and frequency of collecting consumer information and authorization, (ii) providing consumers a simple way to revoke authorization at any point; (iii) limiting a third party's secondary use of consumer-authorized information; (iv) limiting retention of consumer-authorized information; (v) requiring third parties to implement data security standards; (vi) requiring authorized third parties to maintain reasonable policies and procedures to ensure the accuracy of the data that they collect and use to provide the product or service the consumer has requested; and (vii) requiring third parties to comply with certain disclosure obligations, as well as a mechanism for consumers to request information about the extent and purposes of a third party's access to their data.

Record Retention Obligations. The CFPB is considering proposing record retention requirements for covered data providers and authorized third parties to demonstrate compliance with certain requirements of the rule.

Implementation Period. The Bureau is seeking to ensure consumers are able to benefit from a final rule on a short timeframe, while also ensuring that covered data providers and authorized third parties have sufficient time to implement the rule. The CFPB is soliciting feedback until January 25, 2023.

Also, the outline contains an appendix with examples of ways the proposals would apply to hypothetical transactions involving consumer-authorized data access to an authorized third party.

Under the process established by the Small Business Regulatory Enforcement Fairness Act of 1996, the Bureau is required to consult with representatives of small businesses likely to be affected directly by the regulations the Bureau is considering proposing and to obtain feedback on the likely impacts the rules the Bureau is considering would have on small entities.

In announcing the rulemaking outline, CFPB Director Rohit Chopra stated that "dominant firms shouldn't be able to hoard our personal data and appropriate the value to themselves." Additionally, Director Chopra noted that a report will be published in the first quarter of 2023 based on comments received during the process, and a proposed rule is scheduled to be issued later in 2023. Chopra said the Bureau hopes to finalize the rule in 2024. We will continue to watch for developments.

<Doug Weissinger>

5th CIRCUIT FINDS CFPB FUNDING STRUCTURE UNCONSTITUTIONAL

A three-judge panel of the U.S. Court of Appeals for the Fifth Circuit held unanimously that the CFPB funding structure created under the Dodd-Frank Act violates the Appropriations Clause of the U.S. Constitution because the Bureau obtains its funds from the Federal Reserve rather than the U.S. Treasury and is not included in the annual appropriations process by Congress. The case of Consumer Financial Services Association v. Consumer Financial Protection Bureau involved a challenge to the Bureau's 2017 payday lending regulation. While rejecting other challenges to the regulation, the court vacated it on the basis that the Bureau could not have issued it but for the unconstitutional funding method.

If upheld, the court's ruling presents a significant threat to the Bureau's continued existence. Bureau examinations, enforcement actions and rulemaking actions all depend upon the expenditure of funds. The Bureau will surely seek further review of this decision which may be by asking for a rehearing by the full Court of Appeals or an appeal to the U.S. Supreme Court. And, several other courts, including the Court of Appeals for the D.C. Circuit, have reached the opposite conclusion when presented with this same issued.

What does this mean to all of us today? Nothing, really, for the moment at least. The Bureau will no doubt continue all of its rulemaking, supervision and enforcement activities while this plays out. However, should the U.S. Supreme Court hear an appeal down the road and then uphold the ruling, it would likely take Congressional action to cure the problem. Many speculate that would open the door to other changes to Bureau, such as changing its single director structure to a commission form. Time will tell.

<Cliff Harrison>

MSRCG MEETING TO BE HELD ON NOVEMBER 15, 2022

The MSRCG will hold its Annual Meeting on Tuesday, November 15, 2022, at **Memphis Botanic Garden** in the Goldsmith Room located at 750 Cherry Road, Memphis, Tennessee. Registration will begin at 9:00 a.m. with the meeting to begin at 9:30 a.m. Directions to Memphis Botanic Garden can be found by going to their website (https://www.memphisbotanicgarden.com/) and clicking directions and parking at the bottom right corner of their home page.

Our November meeting is our annual meeting and we always invite the regulators to speak. Diane Torneire from the Federal Reserve Bank of St. Louis will address CRA Reform. Tim Evans from the FDIC will speak on compliance "hot topics," including 2022 flood Q & A's, 3rd party relationships, representment, deposit insurance, CRA and branch closures, and fair lending. The meeting will also include a discussion on several miscellaneous items, including Regulation O requirements and forms, general BSA issues we are seeing, CFPB guidance on bank fees, the CFPB Dodd Frank 1033 rulemaking process, and a few other things.

Bob Moran with the Federal Reserve Bank of Atlanta will be speaking on various compliance topics at the MRCG meeting on Thursday, Nov. 17 in Jackson via a live video presentation. Since our speakers from the Federal Reserve are covering different topics at the two meetings, we wanted to make both presentations available to both groups. In order for you to hear the presentation by Mr. Moran during the Jackson meeting, Liz will

send out a webinar link and call in number so that you can connect to that presentation on Thursday. Technology and our audiovisual staff are great! Since we are not permitted to record the regulator presentations, this will be your only opportunity to hear both presentations from the Federal Reserve.

As always, the dress code for this occasion is casual, and lunch will be provided. We ask that you fax or e-mail your registration to Liz Crabtree no later than Thursday, November 10th, so that arrangements for lunch can be finalized. We look forward to seeing you there.

<Patsy Parkin>

MRCG MEETING TO BE HELD ON NOVEMBER 17, 2022

The MRCG will hold its Annual Meeting on Thursday, November 17, 2022, at the **Mississippi Sports Hall of Fame & Museum Conference Center**, 1152 Lakeland Drive, Jackson, Mississippi. Registration will begin at 9:00 a.m. with the meeting to begin at 9:30 a.m.

Our November meeting is our annual meeting and we always invite the regulators to speak. Bob Moran from the Federal Reserve Bank of Atlanta will address several compliance topics. Tim Evans from the FDIC will speak on compliance "hot topics," including 2022 flood Q & A's, 3rd party relationships, representment, deposit insurance, CRA and branch closures, and fair lending. The meeting will also include a discussion on several miscellaneous items, including Regulation O requirements and forms, general BSA issues we are seeing, CFPB guidance on bank fees, the CFPB Dodd-Frank 1033 rulemaking process, and a few other things.

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<Patsy Parkin>

MRCG-MSRCG COMPLIANCE CALENDAR

08/01/2022 – Comments due on CFPB advance notice of proposed rulemaking on credit card late fees due	09/21/2023 - Joint MRCG/MSRCG Steering Committee Meeting
08/05/2022 – Comments due on interagency proposed rule on CRA modernization	02/16/2023 – MRCG Quarterly Meeting
08/22/2022 – Comments due on CFPB request for information on bank customer service	03/01/2023 – Implementation on date for Fannie Mae/Freddie Mac Supplemental Consumer Information form for secondary market loans
10/01/2022 – Mandatory compliance date for revised standard QM loans; GSE QM loan category removed	05/25/2023 - MRCG Quarterly Meeting
11/15/2022 – MSRCG November Quarterly Meeting	08/17/2023 - MRCG Quarterly Meeting
11/17/2022 - MRCG November Quarterly Meeting	11/16/2023 - MRCG Quarterly Meeting
11/22/2022 -Comments due on CFPB request for information on ways to facilitate mortgage loan refinances and reduce risks for consumers with financial difficulties	02/14/2023 – MSRCG Quarterly Meeting
01/19/2023 – Joint MRCG/MSRCG Steering Committee Meeting	05/23/2023 - MSRCG Quarterly Meeting
04/20/2023 - Joint MRCG/MSRCG Steering Committee Meeting	08/22/2023 - MSRCG Quarterly Meeting
07/20/2023 - Joint MRCG/MSRCG Steering Committee Meeting	11/14/2023 - MSRCG Quarterly Meeting