

# ZEROING IN ON SERVICER CONVENIENCE FEES

The CFPB and state regulatory bodies are closely scrutinizing all mortgage-related fees, from the start of a loan to the ongoing servicing of the loan, to ensure compliance with the Fair Debt Collection Practices Act.

On January 26, 2022, the Consumer Financial Protection Bureau (CFPB) launched an initiative to “save Americans billions in junk fees” charged by banks and financial companies. The CFPB requested the public’s input, as well as feedback from financial institutions in order to issue guidance and rules to target the most pressing concerns. In addition to long-time targets like overdraft and late fees, the Bureau was also looking at unexpected fees—sometimes labeled as “service charges” or “convenience fees”—that seem too high for a service.

In April, Attorneys General (AGs) from 21 states and Washington, D.C., weighed in on this issue, sending letters to the CFPB requesting the agency to limit servicers from charging convenience fees for using payment methods to pay bills. The AGs argued that convenience

fees are unfair and abusive within the context of servicing, because most borrowers cannot select their mortgage servicer, mortgages have a long duration, and convenience fees are not usually authorized by the original loan documents. The AGs believe that borrowers are effectively forced

to pay a fee to stay current.

On June 29, 2022, after taking into consideration the requested public’s input and input from AGs and institutions, the CFPB issued an advisory opinion affirming that federal law often prohibits debt collectors from charging “pay-to-pay” fees. These charges, commonly described by debt collectors as “convenience fees,” are imposed on consumers who want to make a payment in a particular way, such as online or by phone.

“Federal law generally forbids debt collectors from imposing extra fees not authorized by the original loan,” CFPB Director Rohit Chopra said. “Today’s advisory opinion shows that these fees are often illegal and provides a roadmap on the fees that a debt collector can lawfully collect.”



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—Joshua Fieldgrove, VP of Servicing Oversight, Clayton

The advisory opinion interprets the language in Section 808 of the Fair Debt Collection Practices Act (FDCPA), which prohibits debt collectors from collecting any amount that is not expressly authorized by the underlying agreement or permitted by law. The advisory opinion states the collection of any fee is prohibited unless the fee amount is in the contract or permitted by law. It also states that silence is not authorization, and therefore, the fee can only be collected if it is actually "permitted by law."

#### **SERVICERS CAUGHT IN THE MIDDLE**

Since this opinion speaks to the terms of the original mortgage documents and whether or not they authorized the convenience fees, servicers are finding themselves caught in the middle. That's because the language in many of the documents was written at a time when borrowers only mailed payments to a specific location, and no other payment options were available.

Our group at Clayton conducts servicer evaluations on behalf of investors. This year, we began asking questions on the fees each servicer is assessing and collecting in addition to the borrower's monthly mortgage payments. Here are a few preliminary observations:

There are typically no fees for payments that are made through a website.

Many servicers charge and collect a fee when a payment is made while talking to a representative and/or when they make a payment through an Interactive Voice Response (IVR) over the phone (fees range from \$5 to \$25).

Nontraditional, biweekly payment plans can also generate fees. For example, one servicer charges a \$50 setup and \$2 draft fee for a biweekly payment set up because it uses a third-party vendor and is forced to pass on the costs.

Another large known servicer indicated that it stopped charging fees in the state of California altogether.

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#### **BEST PRACTICES**

From an industry best practice standpoint, going forward, financial institutions will need to ensure that all fees—overdraft as well as

convenience fees, phone fees, website pay fees, etc.—are clearly disclosed, allowed, and legally fair as prescribed by federal and state law/requirements.

The CFPB's recent leadership changes has led to a crackdown on junk fees, which will likely result in a large drop in fee revenue for mortgage servicers. The CFPB is taking a broader view of all fees including origination and title fees at the start of the mortgage loan process, including convenient payment options for ongoing mortgage payments.

Another thing to pay attention to will be that states may push to make any new agreements unlawful. Following the CFPB's advisory opinion, Maryland's mortgage regulator subsequently issued an advisory putting lenders and servicers on notice of the decision, "Attempts to circumvent this fee restriction by directing consumers to a payment platform associated with the lender or servicer that collects a loan payment fee or requiring consumers to amend their loan documents for the purposes of inserting such fees could also violate Maryland law."

All fees should be reviewed under a risk assessment initiative by the institutions or by a third-party, so the financial institutions are aware of potential risks. Financial institutions may push for updated forms for origination documentation to allow convenience fees, or it will need to have a new form/addendum executed prior to charging convenience fees if it wishes to continue with the fee assessment process.

Moving forward, Clayton's Servicing Oversight Group will begin to test for these convenience fees in our loan-level testing offerings related to payment processing and fee collection. We will also look to continue to validate the processes in place in this area through policy and procedure reviews included in our Operational Assessments. The goal will be to help financial institutions reduce the risk of any enforcement actions related to charging these convenience fees.



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