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CFPB Prosecutes Credit Card Add-On Products

It has been one year since the Consumer Financial Protection Bureau ("CFPB") opened its doors for business. While the agency has not made headlines on a frequent basis, it has initiated five matters against three credit card issuers and obtained significant fines against these companies. Credit card issuers should take note that the CFPB is particularly focused on add-on services offered to existing customers.

Who Is The CFPB

The CFPB's self-proclaimed mission is to protect consumers in the financial marketplace. Along that vein, the CFPB regulates the provision of credit card services to consumers. The agency examines credit card marketing, enrollment, and billing practices by credit card issuers to ensure "that consumers are protected from deceptive sales and marketing practices, including those resulting from failures to adequately disclose important terms and conditions, or other violations of Federal consumer financial law."[1] And, the CFPB is particularly concerned about the means through which credit card issuers and services solicit add-on products.

One way the CFPB protects consumers is by enforcing certain statutes that govern the marketing, enrollment and billing of credit cards to consumers:

- ***The Consumer Financial Protection (CFP) Act (as part of the Dodd Frank Act)***. Under the CFP Act it is unlawful for providers of consumer financial products (including credit cards) to engage in unfair, deceptive or abusive practices. Violative practices may include those that cause substantial injury to consumers, that are not reasonably avoidable by consumers, and that produce a harm to consumers that does not outweigh the benefit.
- ***The Truth in Lending Act (Regulation Z)***. The Trust in Lending Act mandates numerous disclosures that credit card companies must make when soliciting customers or communicating with current customers.
- ***The Equal Credit Opportunity Act (Regulation B)***. The Equal Credit Opportunity Act requires credit card issuers to make credit card products available to all consumers equally regardless of race, color, religion, nationality, sex, marital status or age.

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[1] CFPB Bulletin 2012-06, July 18, 2012.

- ***Section 5 of the Federal Trade Commission (FTC) Act.*** Section 5 of the FTC Act prohibits unfair methods of competition.

CFPB interpretations of these statutes state that a practice is deceptive if it contains a representation that is materially misleading or likely to mislead and which would reasonably lead consumers to be misled.

The CFPB identified three situations where deceptive behavior often occurs with regard to credit cards: employing deceptive promotional practices when marketing products (e.g., failing to adequately disclose important product terms and conditions); enrolling consumers in programs without their affirmative consent, without their realizing that they were enrolled, or without the consumer understanding that they had to pay for the programs; or billing for services that were not performed or activated.

Why Does The CFPB Matter To Credit Card Issuers?

The CFPB brought five significant actions in its first year against three credit card issuers: Discover, American Express, and Capital One. Each of these issuers settled via consent order as summarized below.

Discover.[2] . The CFPB alleged that Discover violated Section 5 of the FTC Act and Sections 1031 and 1036 of the CFP Act in the marketing, sale and operation of Discover's payment protection, identity theft protection, wallet protection and credit score tracking products ("Discover Products"). According to the consent order, scripts used by Discover's telemarketers:

- Contained material misrepresentations including misrepresenting that the Discover Products were free and that Discover was calling the consumer as a courtesy;
- Failed to indicate that enrollment in a certain program involved purchasing some or all of the Discover Products;
- Solicited enrollment before disclosing the Discover Products'' terms or pricing;
- Implied that the customer was not purchasing the Discover Products when they were; and
- Required customers to purchase the products before seeing comparative terms and conditions.

Additionally, Discover billed the customers' Discover credit cards for the Discover Products, which added to customer confusion. Discover was forced to refund the majority of the fees it received from the Discover Products, paying approximately $200 million to the affected 3.5 million customers, and to pay a $14 million civil penalty.

American Express.[3] The CFPB brought three actions against American Express-related companies, each alleging violations of Sections 1002, 1025 and 1053 of the CFP Act and Section 5 of the FTC Act. The CFPB alleged that American Express:

- Told customers that payment of certain debts would be reflected on their credit scores when it was not;
- Misrepresented that certain remaining debt would be forgiven or waived;
- In soliciting credit card customers, misrepresented that $300 cash would be given to the consumer, when it was not;
- Charged consumers late fees in excess of the permitted fees under Regulation Z;
- Employed an improper second look for card applicants 35 years old and under; and
- Failed to report certain credit disputes to the credit reporting agencies.

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[2] *In re Discover Bank, Greenwood, Delaware*, Docket Nos. FDIC-11-548b, FDIC-11-551k, and 2012-CFPB-0005.
[3] *In re American Express Centurion Bank, Salt Lake City, Utah*, Docket Nos. FDIC-12-315b, FDIC-12-316k, 2012-CFPF-0002; *In re American Express Bank, FSB, Salt Lake City Utah*, Docket No. 2012-CFPB-0003; *In re American Express Travel Related Service Co.*, Inc., Docket No. 2012-CFPB-0004.

According to the consent, the alleged conduct of American Express harmed approximately 250,000 consumers and amounted to $85 million in collections for American Express. In addition to correcting the alleged conduct, the consent order required American Express to create restitution accounts amounting to at least $85 million and to pay a civil penalty of $18 million.

Capital One [4] The CFPB charged that Capital One violated Sections 1031 and 1036 of the CFP Act. According to the consent, Capital One improperly solicited to a discriminatory group of customers certain credit monitoring and payment protection products, and while soliciting these customers engaged in improper sales practices, and misrepresenting the terms and conditions of the products involved. Among the alleged misrepresentations were statements that:

- Misleadingly stated the products would improve credit scores;
- Incorrectly implied that the products activated automatically;
- Implied that the products were free, when they were not;
- Used unsubstantiated statistics in the sale of the products; and
- Described the products as a benefit of existing accounts.

Additionally, Capital One improperly required consumers to purchase the product before receiving requested information, failed to verify employment status of consumers, and enrolled customers without consent. The consent order required Capital One to pay approximately $140 million to the 2 million affected customers. In addition, Capital One was required to pay a civil penalty of $27.5 million.

In each of the above matters, the CFPB alleged that the company operated with an inadequate compliance management system, inappropriate supervision by the Board of Directors and senior management, and without sufficient internal audit systems and internal controls. The consent orders required the companies to implement an onerous program of compliance that included correcting the violative behavior, implementing a compliance management system and internal control system, and instituting Board supervision of the compliance efforts.

The above actions demonstrate that the CFPB is willing to prosecute credit card issuers and services that fail to comport with financial protection regulations and the ability of the agency to obtain significant monetary penalties from alleged violators. In the words of the CFPB: "We continue to expect that more such actions will follow."[5]

What Can A Credit Card Issuer Do To Lessen The Risk?

Credit card issuers should be aware of what constitutes improper practices under the law and ensure that such practices are not employed. Putting aside the financial penalties and costs of restitution, complying with a CFPB can be a burdensome, costly and disruptive process. Implementing the compliance, audit and supervisory programs mandated by CFPB consent orders can be time and resource intensive.

Six practical measures that might be implemented to lessen the risk include:

- Training those responsible for developing marketing products on the requirements of the financial protection laws;
- Having legal counsel or compliance team members review and approve telemarketer scripts to ensure compliance with the CFP Act and Truth In Lending Acts;

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[4] *In re Capital One Bank (USA) N.A.*, Docket No. 2012-CFPB-0001.
[5] CFPB Press Release, *Prepared Remarks By Richard Cordray On The Press Call On FDIC And CFPB Joint Enforcement Action* (Sept. 24, 2012).

- Developing and implementing training and compliance programs for telemarketers that address what sales practices are improper;
- Auditing telemarketer calls to ensure compliance;
- Having legal counsel or compliance team members review the marketing practices employed by your financial institution with regard to credit cards; and
- Having periodic reports made to the Board of Directors and Senior Management regarding the results of audits and the robustness of compliance training.

If the above reveal a problem, the company should consult counsel and develop a plan to correct the action, determine the pervasiveness of the problem, assess the risk and consider how to deal with the CFPB.

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