

July 2012 / Special Alert

A legal update from Dechert's Financial Institutions Group

U.S. Consumer Financial Protection Bureau Couples First Enforcement Action With Warning to Financial Services Industry

The Consumer Financial Protection Bureau (CFPB) on July 18, 2012 announced its first enforcement action, which was taken in regard to allegations that approximately two million customers of Capital One Bank (Capital One) were misled into buying credit card “add-on products.” In an action that underscores our expectation that the CFPB will seek to utilize enforcement actions to send broad messages to the financial services industry about the type of conduct the agency will be looking to discourage, the CFPB at the same time released a bulletin to the industry describing its concerns in regard to the marketing of credit card add-on products.

The CFPB issued a consent order, as to which Capital One neither admitted nor denied the CFPB's allegations. Significantly, the CFPB based its allegations on its much discussed authority to prohibit unfair, deceptive or abusive acts or practices. The CFPB alleged that its examination of Capital One led it to find that Capital One focused on credit card customers with low credit scores or low credit limits in marketing certain payment protection and credit monitoring services (Products). The CFPB alleged that Capital One engaged in a range of deceptive marketing practices in connection with the Products. The alleged practices included: misleading consumers about their eligibility for the Products, misleading consumers about the benefits of the Products and misinforming consumers about the costs of the Products.

Under the Consent Order, Capital One is to refund an estimated \$140 million in fees paid by customers for the Products. Capital One is

prohibited from marketing any of the Products until it submits a compliance plan that is acceptable to the CFPB and must take steps to address consumer law compliance, and unfair, deceptive and abusive practices across the consumer products offered by the Bank. Finally, Capital One was required to pay a \$25 million civil money penalty.

Also on July 18, the CFPB issued a bulletin on the marketing of credit card add-on products. The CFPB expressed concern that its supervisory experience indicates that some credit card issuers have employed deceptive promotional practices when marketing add-on products. It also stated that some consumers had been enrolled in products without the affirmative consent or were billed for services that were not performed or activated. The CFPB indicated that the foregoing practices could violate the prohibition on deceptive practices, Regulations B and Z.

In regard to the CFPB's authority with respect to unfair, deceptive or abusive acts or practices, the CFPB stated that it considers the following factors in evaluating the effectiveness of disclosures in preventing consumers from being misled in connection with add-on products.

- Is the statement prominent for the consumer to notice?
- Is the statement presented in an easy to understand format that does not contradict other information in the package and at a time when the consumer's attention is not distracted elsewhere?
- Is the information in a location where consumers can be expected to look or hear?
- Is the information in close proximity to the claim it qualifies?

The CFPB indicated that institutions should, among other things: ensure that marketing materials and scripts will be accurate and not misleading; and that

incentive compensation programs tied to the sale of add-on products do not create incentives for employees to provide inaccurate information to customers.

At the same time as the CFPB action, the Office of the Comptroller of the Currency (OCC) issued a consent order against Capital One for the same alleged practices addressed in the CFPB order. The OCC's order was based on the unfair or deceptive acts or practices provisions of section 5 of the Federal Trade Commission Act. It also addressed allegations relating to certain of Capital One's billing practices. The OCC order requires Capital One to reimburse customers \$150 million, which largely overlaps with the payments required under the CFPB order. Capital One must also pay a \$35 million civil money penalty.

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