Community Banking
Legal Alert

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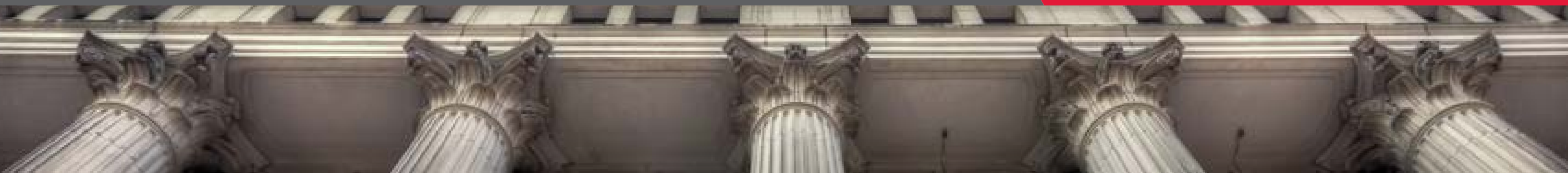
Legal Strategies. Business Solutions.



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Questions About this Issue?

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BANKS MAY NEED TO TAKE A SECOND LOOK AT "FREE" CHECKING ACCOUNT PROMOTIONS

When advertising or promoting "free" checking accounts, banks may want to take a closer look at how the advertisement or promotion is handled. Recent regulatory action by the Consumer Financial Protection Bureau ("CFPB") demonstrates that advertising an account as "free" carries risks if there are "strings attached" that are not disclosed in the advertisement. In particular, the failure to indicate in an advertisement an important condition that must be met in order for the account to remain free may subject an institution to liability based on the Dodd-Frank Act's prohibition on "unfair, deceptive, or abusive acts and practices" and the Truth in Savings Act. Not only is an institution subject to regulatory fines and penalties for such a violation, it is also subject to damage claims from customers.

Advertising a free checking account without disclosing a minimum activity or balance requirement that must be met in order for the account to remain free may be deemed "deceptive" based on recent regulatory action. Such advertising may also run afoul of the Truth in Savings Act's Regulation DD, which prohibits "misleading or inaccurate" advertising. The regulatory action reflects that disclosing the condition in separate account disclosure documents may not be enough; the focus is on the advertisements themselves. Banks may want to pay more attention to free checking account features and the content of their advertisements for such accounts in light of this development.

IS APPLE PAY IN YOUR FUTURE?

A number of our clients have signed up to offer Apple Pay services to their customers or are seriously considering doing so. Should you be considering Apple Pay for your customers?

Other past mobile wallet ventures – Google Wallet, for example – have enjoyed only modest success. But Apple Pay may be different. For one, Apple Pay hit the market this fall with unprecedented support from large banks, retailers, and credit card companies. It's hard to miss the Apple Pay logo at many established retail outlets these days. Second, this is Apple, a company whose iPhones and other products consumers (including your customers) adore. While it is too early to tell whether Apple Pay will take off like many experts suggest, there can be no doubt that the Apple brand changes the game. Apple's involvement may be the impetus that moves mainstream consumers to digital payments.

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Apple Pay is available to users of the new iPhone 6 and iPhone 6 Plus. It uses near-field communication (NFC) and tokenization technology with the iPhone's built-in fingerprint reader to provide what many believe is a more secure payment method than traditional credit cards. In a transaction using Apple Pay: i) the user opens the Apple Pay app on the iPhone to present to the merchant; ii) the iPhone connects to a payment terminal using NFC; iii) Apple Pay transmits payment information through a unique token number and a security code that is specific to that transaction; iv) the user approves the transaction through the touch identification fingerprint reader. The merchant does not receive any credit card information in an Apple Pay transaction. Because of this, and the other security features associated with Apple Pay, the service provides greater security against data breaches.

At the end of the day, consumer demand for Apple Pay will determine the degree to which the service is embraced by financial institutions and merchants who process payment transactions. If the success of the iPhone is any indication, Apple Pay could transform our payments system. Obviously, the risk for institutions that don't offer Apple Pay is the loss of customers who migrate to institutions that do.

MARKETING AGREEMENTS FOR MORTGAGE SERVICES REQUIRE CARE

Financial institutions and other providers of mortgage-related services routinely enter into marketing agreements with third parties to help promote their business. A recent Consumer Financial Protection Bureau enforcement action demonstrates that care should be taken in documenting how payments are made under such agreements.

The CFPB ordered a title company to pay $200,000 based on allegations that the company, which had entered into marketing agreements with real estate brokers, violated the Real Estate Settlement Procedures Act ("RESPA") in connection with payments under such agreements. According to the CFPB, the title company entered into the marketing agreements as a quid pro quo for the referral of settlement service business and paid fees based on the amount of business referred, or anticipated to be referred in the future, in violation of RESPA's prohibition on kickbacks. The consent order in the case states that the title company believed if it did not enter into the marketing agreements with the real estate brokers, the brokers would refer business to other companies. The real estate brokers who entered into the marketing agreements referred a "statistically significant" higher amount of business than brokers who had not entered into such agreements. Importantly, the CFPB concluded that the parties did not document the fair market value of the services rendered under the marketing agreements, and the title company did not diligently monitor the agreements to ensure it received those services.

The take away from this is that a party entering into such a marketing agreement needs to: (i) document in the agreement the actual services performed; (ii) ensure payments for such services represent fair market value; and (iii) monitor performance under the agreement to ensure compliance with RESPA.

FINANCIAL INSTITUTIONS CAN NOW POST ANNUAL PRIVACY NOTICES ON THEIR WEBSITES

Effective October 28, 2014, financial institutions can avoid the compliance costs associated with mailing annual privacy notices by posting such notices online if certain conditions are met. The CFPB has amended Regulation P, the regulation that implements the Gramm-Leach-Bliley Act privacy provisions, to provide this relief.

This alternative delivery method is available for annual privacy notices if:

i) no opt-out rights are triggered by the financial institution's information sharing practices[1];

ii) the information included in the privacy notice has not changed since the last notice; and

iii) the financial institution uses the model form provided in Regulation P as it annual privacy notice.

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A financial institution must continuously post the annual privacy notice in a clear and conspicuous manner on a page of its website without requiring a login or similar steps or agreement to any conditions to access the notice. Also, annual notices must be mailed to customers who request them by telephone within 10 days of the request. Finally, the financial institution must notify customers that the annual privacy notice is available online through a clear and conspicuous statement inserted at least once per year on an account statement, coupon book, or a notice or disclosure the institution issues under other provisions of law.

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[1]An opt-out notice must have been previously provided if such right was triggered under Section 603 of the Fair Credit Reporting Act

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