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Consumer Financial Protection Bureau Fall 2012 Quarterly Update

The beat (cop) goes on. Since the Consumer Finance Protection Bureau's (CFPB) first enforcement action on July 18, 2012 ordering Capital One to pay \$210 million for deceptive marketing tactics, the CFPB has dominated headlines for similar actions against Discover Bank, and American Express totaling \$313 million. Headlines, however, are just the tip of the iceberg. Which is why the Brownstein Hyatt Farber Schreck, LLP CFPB Task Force focuses on what is driving the headlines. We are constantly watching the enforcement probes, the court filings, and the proposed rule-making. This quarterly update will address some of the most significant recent developments:

Increased Number of Complaints

Between July 2011 and September 2012, approximately 79,200 complaints were submitted to the CFPB (including more than 33,570 since June 1, 2012). Eighty-two percent of these complaints had been sent by Consumer Response to the complained of "Companies" for their review; 10 percent were referred to other regulatory agencies and the remaining eight percent were either found to be incomplete or were pending with the consumer or the CFPB. According to published statistics, Companies have responded to 94 percent of the complaints sent to them for a response. Twenty-one percent of the Companies' responses have been disputed by consumers. As previously reported, it is important to note that the CFPB's investigators are prioritizing complaints where the Companies miss the response deadlines.

On October 22, 2012, the CFPB sought to move another of its priorities forward and announced that it was accepting complaints related to credit reports. The Bureau advises consumers that it will work on complaints dealing with incorrect information on a credit report, a consumer reporting agency's investigation, improper use of a credit report, being unable to get a copy of a credit score or file, and problems with credit monitoring or identity protection services. Consumers are advised to file a dispute and get a response directly from the credit reporting company and to then file a complaint with the CFPB if the consumer is dissatisfied with the response.

Enforcement Actions

On September 24, 2012, Discover Bank was ordered to return \$200 million to customers and pay \$14 million in fines for allegedly deceptive marketing policies. One of the most important things to note about the recent enforcement actions taken by the CFPB is the Order that the Discover Bank Directors participate directly in the compliance program. The CFPB's position was that the Board did not adequately supervise the products being offered. The CFPB has required the Board to not only participate and supervise the products being offered, but also to take full responsibility that appropriate policies and procedures are in place. While to the public, this may seem like an ordinary duty, corporate directors and senior officers must closely examine the potential precedent of the Order and consider the issue in terms of their D & O insurance policies and Board procedures.

Similarly, on October 1, 2012, American Express was ordered to return \$85 million to customers and pay \$27.5 million in fines split among the CFPB, the Federal Deposit Insurance Corp. (FDIC), the Federal Reserve, and the Office of the Comptroller of the Currency. According to the CFPB, the FDIC and the Utah Department of Financial Institutions discovered the improper activities during a routine examination of an American Express subsidiary and transferred the investigation to the CFPB, which then concluded that many of the same violations occurred at two other American Express subsidiaries. As with the

Always There

Discover Bank Order, the American Express Stipulated Order holds the American Express Board responsible for the approval of sound policies and objectives and for the supervision of all the Bank's compliance related activities. The Order requires the creation of a Compliance Committee which must report directly to the Board, and the Board minutes must document the review and approval of all items raised by the Compliance Committee and record the names of dissenting directors. American Express was also ordered to schedule independent audits of the Company's CMS and Compliance Program to be conducted at least annually to ensure compliance with the Consumer Protection Laws.

Amicus Brief Rulings

The CFPB website has a Law and Regulations tab at the top of the homepage. The dropdown menu has a section called "Amicus Program." The CFPB's Amicus Program not only lists the six amicus briefs that were filed, but also provides an opportunity for consumers and their attorneys to suggest a case where the CFPB should file an amicus brief.

The U.S. Supreme Court granted certiorari of a Tenth Circuit case in which the CFPB submitted an amicus brief, *Marx v. General Revenue Corporation*. In *Marx*, the Court of Appeals affirmed the district court's judgment finding no violation of the Fair Debt Collection Practices Act. Following a petition for rehearing, the CFPB filed an amicus brief arguing that the FDCPA generally bars debt collectors from contacting third parties in connection with the collection of a debt even if the third party does not actually realize that the contact relates to debt collection and that a defendant who wins an FDCPA suit may recover costs from the plaintiff only if the plaintiff brought suit in bad faith and for the purpose of harassment. The petition for rehearing was denied by the Tenth Circuit. It remains to be seen what will happen at the Supreme Court.

Separately, Courts of Appeal have reached the point where the CFPB's amicus briefs are being considered. Oral arguments have occurred and the decisions in most cases are still pending. However, in the first seemingly final decision in a case where the CFPB submitted an amicus brief, the Tenth Circuit departed from the CFPB's requested relief. In the Tenth Circuit case of *Rosenfield v. HSBC Bank, USA*, the Court of Appeal affirmed the District Court's dismissal of the case on the basis that the consumer's rescission must both be noticed and (if ignored or rejected by the lender) be sued upon within three years. The CFPB argued that the lawsuit was not necessary within the three year time limitation; arguing against established case precedent.

Challenging Subpoenas

Another important issue that has arisen for companies around the country is CFPB's subpoena power. More than 100 subpoenas demanding data, testimony and marketing materials from companies including credit card lenders, mortgage services, and colleges, can amount to millions of pages.

According to the CFPB, the Bureau carefully considers what to request in each Civil Investigative Demand (CID). While the recipient of a CID may challenge a CID by petitioning the CFPB's Director, the Director can respond by reaffirming the Bureau's decision to obtain the information, modify the demand, or set it aside altogether. But subpoena recipients should not expect much reconsideration. On September 21, 2012, Director Richard Cordray issued his first ruling on a petition by the mortgage lending company, PHH Corporation challenging a CFPB subpoena as overbroad. Perhaps not surprisingly, he refused to modify the CID in any way, and ordered PHH Corporation to comply with the Civil Investigative Demand within 21 days.

Student Loans Are Source of Unsecured Consumer Debt

On October 16, 2012, the CFPB released its report on student loans. According to the CFPB's recent report, student loans have now surpassed credit cards as the largest source of unsecured consumer debt. In March 2012, the CFPB began accepting complaints related to student loans. From March 2012 to September 2012, the Bureau reported 2,857 complaints. The CFPB report recommended that the Bureau along with the Secretary of Education and the Secretary of the Treasury assess whether efforts to correct problems in mortgage services could be applied to improve the quality of student loan servicing, and that the Bureau continue initiatives to increase adoption of the income-based repayment program for federal student loans. As we know from the current political campaign season, student loans are likely to remain a high profile issue for the CFPB over the next year.

Conclusion

Brownstein's CFPB Task Force will continue to monitor the CFPB's actions on behalf of its clients. Thorough and timely responses will be critical for any targeted company's efficient and successful interactions with the CFPB. Implementation of the most up to date and timely policies are an essential tool for companies and it is the mission of Brownstein's Task Force's to make sure that clients remain proactive and prepared.

This document is intended to provide you with general information CFPB developments. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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