LEGAL ALERT

March 14, 2011

FDIC Sanctions World's Foremost Bank[1]

Even though its exercise must await a Senate-confirmed Director, much has been made of the power of the new Bureau of Consumer Financial Protection to prohibit "unfair, deceptive or abusive acts or practices" with respect to consumer financial products and services.[2] What may have gone unnoticed, however, is that banking regulators have regularly used a similar general standard in Section 5 of the Federal Trade Commission (FTC) Act to sanction "unfair and deceptive" consumer credit practices. The recent action of the FDIC in sanctioning World's Foremost Bank is a reminder that the new powers of the Bureau are not so new at all.

On March 8, 2011, the FDIC issued a consent order against World's Foremost Bank for violations of Section 5 of the FTC Act and the Truth in Lending Act relating to the credit card practices of the bank. The FDIC assessed a $250,000 civil money penalty against the bank and ordered it to pay approximately $10.1 million in restitution to current and former cardholders.[3]

Sources of FDIC Authority

Section 5 of the FTC Act (15 U.S.C. § 45) prohibits "unfair or deceptive acts or practices" in commerce. The Act excludes banks, however, from FTC enforcement authority. For some time, banking regulators have interpreted the enforcement ban against the FTC to mean that banking regulators themselves should enforce Section 5 under Section 8 of the Federal Deposit Insurance (FDI) Act (12 U.S.C. § 1818), which permits "the appropriate Federal banking agency" to bring enforcement actions against banks that are "violating or [have] violated, or … [are] about to violate, a law, rule or regulation."[4]

The FDIC action against World's Foremost Bank was based on the general principles contained in a Section 5 advisory issued by the FDIC and the Federal Reserve Board on March 11, 2004, describing the standards by which the agencies would determine that acts or practices in consumer services were unfair or deceptive under Section 5.[5] Under the advisory, an act or practice is ***unfair*** within the meaning of Section 5 if it "causes or is likely to cause substantial injury to consumers … cannot be reasonably avoided by consumers, and … is not outweighed by countervailing benefits to consumers or to

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[1] This is not a reference to a money center or a "too-big-to-fail" bank, but instead to a bank not lacking in confidence.

[2] *See* Sutherland's March 8, 2011 Legal Alert, "The Consumer Financial Protection Bureau: Structure, Mission and Limitation of Authority Prior to the Appointment of a Director," for further discussion of the authority of the Bureau prior to the confirmation of a Director by the Senate.

[3] In the Matter of World's Foremost Bank, Sidney, Nebraska, Nos. FDIC-10-775b and FDIC-10-777k (Consent Order and Order to Pay), Mar. 8, 2011, available here; Press Release, FDIC, FDIC Announces Settlement with World's Foremost Bank, Sidney, Nebraska, for Unfair and Deceptive Practices, Mar. 8, 2011, available here.

[4] *See* FDIC Financial Institution Letter, Guidance on Unfair or Deceptive Acts or Practices, FIL-57-2002 (May 30, 2002) (stating the FDIC's intent to enforce Section 5 of the FTC Act under authority granted by Section 8 of the FDI Act), available here.

[5] FDIC Financial Institution Letter, Unfair or Deceptive Acts or Practices by State-Chartered Banks, FIL-26-2004 (Mar. 11, 2004), available here.

competition." A financial institution practice is ***deceptive*** if it is material and misleads or is likely to mislead a reasonable consumer under the circumstances.

On May 22, 2009, President Obama signed the Credit Card Accountability Responsibility and Disclosure Act of 2009, now referred to as the CARD Act.[6] The CARD Act amended the Truth in Lending Act, the Fair Credit Reporting Act and the Electronic Fund Transfer Act to eliminate certain credit card practices deemed unfair to consumers, including "double-cycle" billing, inadequate notice of "significant" changes in credit card terms, interest rate increases due to universal default, and the marketing of credit cards to consumers under the age of 21.

Violations by World's Foremost Bank

The CARD Act, as well as Section 5 of the FTC Act, form the basis for the FDIC's finding that Section 8 violations of law had occurred in the following practices cited by the corporation:

- Assessing fees for being over the credit limit on the first day of a billing cycle when a cardholder had exceeded his or her credit limit during the prior billing cycle, had been assessed an over-limit fee during the prior billing cycle, and was over limit at the end of the prior billing cycle;
- Contacting cardholders at their place of employment for debt-collection purposes after a cardholder or his or her employer had notified the bank that such calls were prohibited by the employer and had requested that the calls cease;
- Imposing over-limit fees when such fees were imposed as a result of applying reduced credit limits to balances that preceded the date of the credit limit reduction or imposing such fees as a result of credit line decreases at the end of a billing cycle without adequate notice;
- Establishing minimum periodic payments in amounts insufficient to avoid recurring over-limit fees;
- Assessing penalty interest rates on balances existing prior to the events giving rise to the imposition of the penalty interest rate;
- Assessing late fees when the due date for periodic payments fell on Sundays or holidays and the payment posted the following business day; and
- Implementing increases in penalty rates without adequate notice to cardholders.

[6] Pub. L. No. 111-24 (2009).

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