The CFPB Fires a Shot Across the Bow of Financial Services Companies Charging Convenience Fees

August 15, 2017

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The Consumer Financial Protection Bureau (the "CFPB" or the "Bureau") recently issued Compliance Bulletin 2017-01: Phone Pay Fees (the "Bulletin"), [1] and an accompanying Press Release,[2] warning covered persons and service providers[3] that charging convenience fees in exchange for offering pay-by-phone services may violate the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act") prohibition against Unfair, Deceptive, Abusive Acts or Practices ("UDAAP"), [4] and the Fair Debt Collection Practices Act (the "FDCPA") prohibition against "unfair practices." [5]

This Client Alert will provide a brief summary of the Bulletin, and recommended steps to ensure financial institutions remain in compliance.

THE BULLETIN

I. When charging a convenience fee may be an Unfair, Deceptive, or Abusive Act or Practice

The Dodd-Frank Act prohibits unfair, deceptive, or abusive acts or practices in violation of the Act. An act or practice is unfair when (i) it causes or is likely to cause substantial injury to consumers; (ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition. An act or practice is deceptive when (i) the act or practice misleads or is likely to mislead the consumer; (ii) the consumer's interpretation is reasonable under the circumstances; and (iii) the misleading act or practice is material.[6]

The Bulletin provides a list of practices the CFPB believes may constitute a UDAAP violation, including:

- Failing to disclose the prices of all available phone pay fees when different phone pay options carry materially different fees;
- Misrepresenting the available payments options or that a fee is required to pay by phone; and
- Failing to disclose that a phone pay fee would be added to a consumer's payment and creating the misimpression that there was no service fee.

While the Bureau falls short of labeling these practices per se UDAAP violations, they note,

"Whether conduct similar to the conduct described in this Bulletin violates these laws may depend on additional facts and analysis. The Bureau will closely review conduct related to phone pay fees for potential violations of Federal consumer financial laws."

Exactly how the CFPB intends to determine conduct associated with convenience fees is or isn't a UDAAP violation may not become apparent to financial services companies for some time.

II. When charging a convenience fee may violate the Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act (the "FDCPA") prohibits a debt collector from using unfair or unconscionable means to collect or attempt to collect any debt. The Bulletin warns that convenience fees may be an "unfair practice" in the context of 15 U.S.C.A. § 1692f (1) which provides, "The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

The Bulletin provides examples of conduct that may constitute unfair practices under the FDCPA based on instances in which the Bureau has previously found mortgage servicers to meet the definition of a "debt collector" and to have charged convenience fees without express agreement between the parties or statutory authorization. The Bulletin refers to findings from the Fall 2015 Supervisory Highlights,[7] in which the CFPB asserts, "Mortgage servicers are generally debt collectors under the FDCPA if the loan was in default at the time the servicer obtained the loan." [8]

The Bulletin provides the following recommendations for FDCPA compliance when charging a convenience fee:

- Review applicable State and Federal laws, including the FDCPA, to confirm whether entities are permitted to charge phone pay fees;
- Review underlying debt agreements to determine whether such fees are authorized by the contract;
- Review internal and service providers' policies and procedures on phone pay fees, including call scripts and employee training materials, and revise policies and procedures to address any concerns identified during the review, as appropriate;
- Review whether information on phone pay fees is shared in account disclosures, loan agreements, periodic statements, payment coupon books, on the company's website, over the phone, or through other mechanisms;
- Incorporate pay-by-phone issues in regular monitoring or audits of calls with consumers;
- Review consumer complaints regarding phone pay fees;
- Perform regular reviews of service providers as to their pertinent practices; and
- Review that the entity has a corrective action program to address any violations identified and to reimburse consumers when appropriate.

RECOMMENDED ACTION ITEMS

If you currently charge a convenience fee in connection with pay-by-phone, you should:

- Carefully review the Bulletin and implement all recommended compliance practices;
- Review state laws in those states you currently conduct business to identify areas of potential risk; and

- Review all loan documents and agreements for the presence of language authorizing the collection of a Convenience Fee.

If you are currently charging a convenience fees absent state statutory authority or contractual agreement, you should review recent case law on this issue in your jurisdiction. ***The vast majority of recent court decisions have found convenience fees in the absence of state statutory authority or agreement between the parties to violate the FDCPA. Financial services companies receiving a financial benefit from a convenience fee are at particular risk for attention from the plaintiff's bar on this issue.***

Krieg DeVault's Financial Institutions lawyers are available to assist you comply with the Bulletin, assess potential risk under various state and federal laws, and if need be provide litigation defense for alleged violations of the Dodd-Frank Act or the FDCPA.

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[1] http://files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf

[2] https://www.consumerfinance.gov/about-us/newsroom/cfpb-warns-companies-against-tricking-consumers-expensive-pay-phone-fees/

[3] Dodd-Frank Act §§ 1002(6); 12 U.S.C. 5481. The term "covered person" means: (A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of such person described in subparagraph (A) if such affiliate acts as a service provider to such person.

[4] Under the Dodd-Frank Act, all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices in violation of the Act. An act or practice is unfair when (i) it causes or is likely to cause substantial injury to consumers;(ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition. An act or practice is deceptive when (i) the act or practice misleads or is likely to mislead the consumer; (ii) the consumer's interpretation is reasonable under the circumstances; and (iii) the misleading act or practice is material.

[5] 15 U.S.C.A. § 1692f. A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is in violation of this section: (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

[6] Dodd-Frank Act §§ 1031, 1036, 12 U.S.C. 5531, 5536.

[7] http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf

[8] While the scope of the FDCPA with respect to loans purchased in default may have been in doubt at the time of the 2015 Fall Supervisory Highlights, this reference is curious given the recent U.S. Supreme Court decision in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017). In unanimous opinion written by Justice Gorsuch, the Court held that the FDCPA does not apply to financial services companies who are servicing a debt that they have purchased, regardless of whether the debt was in default at the time of the purchase.