DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

July 2, 2014

CFPB PENALIZES ANOTHER BANK FOR DECEPTIVE MARKETING PRACTICES RELATED TO ADD-ON PRODUCTS

On June 19, 2014, the Consumer Financial Protection Bureau ("CFPB") and the Department of Justice ("DOJ") ordered Synchrony Bank, formerly GE Capital Retail Bank, to pay an estimated $225 million to consumers affected by alleged unauthorized credit card practices. The bank must repay $56 million to approximately 630,000 consumers for deceptive marketing practices regarding add-on products and must pay $169 million to 108,000 borrowers excluded from settlement promotions because of their national origin. The credit card discrimination settlement is the largest to date. The add-on product sales settlement follows a number of similar consent orders. *See* our Alerts of July 19, 2012, July 23, 2012, and September 23, 2013; *see also* CFPB consent orders against Capital One, Discover and American Express and CFPB Bulletin 2012-06 on the Marketing of Credit Card Add-On Products (July 18, 2012).

The CFPB specifically addressed four main areas in which telemarketers misrepresented add-on products to consumers: (1) improperly stating that the products were free of charge, (2) failing to disclose to consumers that they were ineligible for the products, (3) failing to make clear to consumers that they were purchasing products and (4) marketing the products as a limited time offer when the availability of the products was not actually limited.

The bank stopped all telephone-based enrollments for add-on products in October 2012, and as of July 2012 was selling only one add-on product: card security. The CFPB has prohibited the bank from marketing, soliciting, offering for sale, or selling any add-on products by telephone unless the bank submits an add-on compliance plan. Among other things, the CFPB's proposed add-on compliance plan requires the bank to do the following:

- Address the manner in which the bank informs its cardholders of all fees, costs, expenses, and charges associated with add-on products;
- Describe how the bank will inform cardholders of any material conditions, benefits, and restrictions related to the add-on product; specifically, how the bank will notify cardholders who disclose conditions that make them ineligible for benefits;
- Describe how the bank will explain to cardholders that by purchasing an add-on, they are purchasing an optional product with a cost, rather than just updating their account; and
- Describe how the bank will accurately represent the add-on product's availability (i.e. not representing the product as a "limited time offer" when it is typically available).

As part of the proposed add-on compliance plan, the bank is required to create a vendor management policy regulating the bank's relationship with any third-party service providers. The vendor management policy would require the following:

- A pre-contract analysis of the ability of the service providers to perform services for the add-on products in compliance with federal law and the bank's internal policies and procedures;
- Written contracts between the bank and the service providers including the responsibilities of each party, such as:
  - o The service providers' responsibility to maintain adequate internal controls regarding services for the add-on products;
  - o The service providers' duty to provide adequate training on federal consumer financial law and the bank's policies;
  - o Granting the bank the authority to conduct onsite reviews of the service providers' controls, performance and information systems; and
  - o The bank's right to terminate the contracts if the service providers fail to materially comply; and
- The bank must have the authority to conduct onsite reviews of the service providers' controls, performance, and information systems as they relate to add-on products.

The proposed add-on compliance plan must also include a written Unfair, Deceptive, or Abusive Acts or Practices Policy (UDAAP Policy) for any add-on products. The UDAAP policy requires a written analysis to be conducted on the UDAAP risks associated with each add-on product and the adequacy of the bank's controls related to the product. Additionally, the UDAAP Policy must require, among other things:

- The recording of telephone calls in which add-on products are marketed or sold by the bank or a third-party service provider (retained for 25 months);

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- The recording of telephone calls in which a customer indicates he wants to cancel an add-on product (retained for 25 months);
- Written procedures for training bank employees and service provider representatives;
- Written policies and procedures for identifying and reporting any violation of the law or the bank's internal policies;
- Development of training materials related to identifying and responding to violations of applicable federal consumer financial law;
- Independent telephone call monitoring by qualified personnel and reporting by those conducting the monitoring; and
- Written policies and procedures to ensure that these programs have authority within the bank so that deficiencies are properly remedied.

As this order demonstrates, any institution/company marketing or selling any type of add-on product is strongly advised to institute a compliance program aimed at forestalling penalties from the CFPB (see our *Alert: Marketing and Selling Ancillary Products*, dated July 23, 2012).

Regarding the discrimination settlement, the bank had two specific promotions allowing credit card customers with delinquent accounts to settle their balances. The bank did not extend these offers to two groups of customers: (1) those that indicated they preferred to communicate in Spanish and (2) those that had a mailing address in Puerto Rico. Notably, the bank self-reported the discrimination violation, initiated remediation for harm done to consumers and cooperated with the CFPB throughout the investigation. The discrimination is a new issue and notable as the largest discrimination settlement to date; again, this consent order follows other cases but underscores the need to be vigilant when choosing to offer differentiated disclosures based on foreign language to ensure that equal opportunities are provided.

We can assist in reviews of programs and policies. ❑

✧ *Mike Tomkies and Emily Barlage*

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