DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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JPM CHASE'S OCC AND CFPB ORDERS AND NEW OCC "HEIGHTENED EXPECTATIONS" GUIDELINES LIKELY TO CHANGE INDUSTRY PRACTICES

JPMorgan Chase Bank, N.A. and certain affiliates ("Chase") entered into orders with the Office of the Comptroller of the Currency ("OCC") and Consumer Financial Protection Bureau ("CFPB") for alleged unfair billing of certain add-on identity theft products, which included credit monitoring and credit report retrieval, and unsafe and unsound practices in connection with the bank's non-home loan debt collection litigation practices and non-home loan compliance with the Servicemembers Civil Relief Act ("SCRA"). The orders go beyond correction and remediation to provide detailed instructions for contracting and dealing with third party vendors and for sales of charged-off debt. These are likely to change industry practices generally. For example, Chase must now notify its customers when it sells their debt.

Because the new policies, procedures and practices are not imposed by clear rule, what level of compliance is to be expected from industry and how soon changes should be adopted are unclear. Industry should be prepared for the answers "fully" and "as soon as practicable." Importantly, while the bank's mortgage lending operations were not included, all of the bank's installment lending, including credit cards, auto lending and student lending, are covered.

Unlike Chase's recent "whale" action, the bank neither admitted nor denied wrongdoing but did acknowledge problems in its September 19, 2013, press release. Substantively, Chase agreed to pay $60 million to the OCC, $20 million to the CFPB and $309 million to consumers in restitution in connection with the billing practices. Much of the restitution was distributed to consumers as credits to accounts in 2012. The CFPB estimated that 2.1 million customers were affected by the billing practices (less than 1% the bank's customers, according to a bank spokesperson).

The OCC's action on billing practices was brought under Section 5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a)(1), while the CFPB's action was brought under Sections 1031 and 1036 of the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. §§ 5531, 5536. Customers who bought add-on products were given materials for them to provide express consent to credit report access. Some materials were not returned or could not be processed, resulting in some customers being charged for services they never actually received.

In addition to remediation, and the establishment of adequate internal policies, procedures and practices, auditing and oversight governing such add-on products, the OCC consent orders lay out detailed requirements for vendor management risk and debt sales.

At a minimum, Chase's vendor management policy now must require, among other things:

(1) An analysis, to be conducted prior to the bank entering into a contract with the vendor, of the ability of the vendor to perform the marketing, sales, delivery, servicing, and fulfillment of services for the product(s) in compliance with all applicable consumer protection laws and bank policies and procedures; and

(2) New and renewed written contracts that set forth:

  (i) The vendor's specific performance responsibilities and duty to maintain adequate internal controls;

  (ii) The vendor's responsibilities and duty to provide adequate training on applicable consumer protection laws and bank policies and procedures;

  (iii) Authority for the bank to conduct periodic onsite reviews of the vendor's controls, performance, and information systems; and

  (iv) The bank's right to terminate the contract if the vendor materially fails to comply with the terms specified in the contract.

The bank's board is required to ensure oversight of the policy by the bank's senior risk managers and senior management.

At a minimum, Chase's risk management program must require, among other things:

(1) A written comprehensive assessment, conducted on an annual basis, of the unfair and deceptive practices ("UDAP") risk for products and for changes to products, including, but not limited to the UDAP risk of the governance, control, marketing, sales, delivery, servicing, and fulfillment of services for new products and existing products, including the UDAP risk of marketing and sales practices;

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(2) The recording of all telephone calls in which products are marketed or sold by the bank or through a vendor to bank customers, which recordings must be retained for a period of at least twenty-five (25) months from the date of the call;

(3) Independent telephone call monitoring by qualified personnel who have training in identifying and reporting violations of applicable consumer protection laws and bank policies and procedures, including, but not limited to, the FTCA;

(4) Revised policies and procedures to ensure that the bank's sales of charged-off consumer accounts are consistent with the OCC's expectations regarding the bank's debt sales activities as described in any OCC guidance [*see, e.g.,* "OCC" Best Practices For Debt Sales By Banks" in our Alert of July 15, 2013] and must include, but not be limited to, the following:

   (i) Processes, systems, and controls to ensure the accuracy and integrity of all information provided to any third party in connection with the sale of charged-off debt;

   (ii) Processes to ensure that appropriate initial and ongoing due diligence is performed on all parties that purchase charged-off debt from the bank, including an evaluation of the debt buyers' past performance with respect to consumer protection and debt collection laws and regulations and a thorough understanding by the bank of the scope of the debt buyers' anticipated debt collection activities;

   (iii) Processes to monitor complaints about debt buyers and any allegations of adverse treatment of debtors by debt buyers;

   (iv) Processes to ensure notification to customers regarding the sale of their debt to a debt buyer;

   (v) Processes to ensure that credit bureau reporting is up to date and accurate reflecting the sale or transfer of the debt to a debt buyer; and

   (vi) Processes to ensure that information provided to debt buyers is sufficient and appropriate for debt collection activities in compliance with federal and state laws and regulations, and to ensure that procedures are in place for debt buyers to request and receive additional information when necessary, such as during litigation; and

(5) Processes to perform appropriate due diligence on potential and current provider qualifications, expertise, capacity, reputation, complaints, information security, document custody practices, business continuity, and financial viability, and to ensure adequacy of provider staffing levels, training on bank standards and legal requirements as appropriate, and work quality.

Chase's policies and procedures for third-party management must include, among other things:

(1) A review of fee structures for providers to ensure that the method of compensation considers the accuracy, completeness, and legal compliance of litigation filings and is not based solely on increased volume and/or meeting processing timelines;

(2) An approval process for [collection] law firms (and reapproval of existing law firms), on a periodic basis, as qualified to serve as providers to the bank, including a process to review customer complaints, legal action, and investigations about provider services; and

(3) A detailed assessment of provider system vulnerabilities, including interface between provider and bank systems and information security.

The federal orders do not resolve all outstanding issues concerning Chase's debt collection practices as Chase still faces inquiries into alleged "robo-signing" from state attorneys general, and a broader investigation into Chase's conduct by the CFPB. A coalition of state attorneys general also continue a broader investigation into industry-wide collection practices.

Like other recent enforcement actions by federal regulators, the Chase consent orders are likely to become *de facto* industry standards in the eyes of federal and state regulators. All participants in the financial services industry, whether chartered financial institutions or nonbank creditors, servicers, debt buyers, collection agencies or outside collection law firms, should review their current contracts and practices in light of these orders and take appropriate steps to enable compliance in the future. Such preparation may include new information and data management systems, new contract templates and the development of more concrete service level standards. Creditors and debt sellers may also need to develop more formal detailed and robust due diligence and audit procedures than they may have utilized in the past. No longer may a creditor or seller simply rely on the "expertise" of providers and "independent contractor" clauses.

The Chase orders and recent statements by the Comptroller of the Currency add clarity to the expectations of regulators generally. *See, e.g.,* CFPB Bulletin 2012-03 on Service Providers (Apr. 13, 2013); *see also* prior 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). On September 23rd, the Comptroller of the Currency stated in speech at the American Banker's Regulatory Symposium that large banks can no longer do the bare minimum to meet their regulatory responsibilities and that the OCC will be issuing new "heightened expectations" guidelines that establish enhanced supervisory standards for large banks. According to the Comptroller of the Currency, the OCC will insist that internal controls and audit be raised to the standard of "strong" and expect boards of directors to be significantly engaged and to have the knowledge and focus to present a credible challenge to management.

Let us know if we can be of assistance to your efforts. ❑

✧ *Mike Tomkies and Chuck Gall*