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CFPB Compliance Bulletin 2017-01

Date: July 31, 2017

Subject: Phone Pay Fees

The Consumer Financial Protection Bureau (CFPB or Bureau) issues this Compliance Bulletin to provide guidance to covered persons and service providers regarding fee assessments for pay-by-phone services (phone pay fees) and the potential for violations of sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act) prohibition on engaging in unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) when assessing phone pay fees. This Bulletin also provides guidance to debt collectors about compliance with the Fair Debt Collection Practices Act (FDCPA) when assessing phone pay fees.

This Bulletin summarizes the current law, highlighting relevant examples of conduct observed during supervisory examinations and enforcement investigations that may violate Federal consumer financial law. 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.

Background

Across various consumer financial products and services, many entities provide consumers multiple payment options. For instance, many provide consumers the option of making payments over the phone by using an automated system or speaking with a live representative. Many entities also provide consumers the option to make phone payments by using a credit card, debit card, or electronic check, or to have their payment expedited. A number of entities also use third-party service providers to handle and process the payments. State and Federal laws may restrict fees related to phone payments.¹ Entities are advised to review applicable laws to determine whether they may charge phone pay fees. In the course of its Supervision and Enforcement activities, the Bureau has identified conduct that may violate or risks violating Federal consumer financial laws relating to phone pay fee practices.

¹ For example, as implemented by Regulation Z, a Credit CARD Act amendment to the Truth In Lending Act provides that for credit card accounts under an open-end consumer credit plan, a creditor (including a third party that collects, receives, or processes payments on behalf of a creditor) may not impose a separate fee to allow consumers to make a payment by any method (including telephone payments) unless the payment method involves an expedited service by a service representative of the creditor. See 15 U.S.C. 1637(l); 12 CFR 1026.10(e).

Report of Supervisory or Enforcement Findings

Examples of Conduct That May Violate or Risk Violating the Prohibition on UDAAPs

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.²

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.³

Depending on the facts and circumstances, the following non-exhaustive list of examples of conduct related to phone pay fees may constitute UDAAPs or contribute to the risk of committing UDAAPs.⁴ Accordingly, the Bureau will be watching these practices closely.

Failing to disclose the prices of all available phone pay fees when different phone pay options carry materially different fees

Many entities charge different phone pay fees depending on the payment method used by the consumer. Prior to charging such fees, entities sometimes send periodic billing statements or other documentation that discloses that "transaction fees may apply" to various payment methods, but that do not disclose the relevant fees to be charged for those methods.⁵ In some of these instances, entities may depend solely on phone representatives to disclose the relevant fees to consumers before the charge is imposed. Yet, the phone representatives may fail to inform consumers of the material price difference between available options. This conduct poses a risk of an unfair practice: it may cause substantial harm to consumers, who are pushed into materially higher-cost options; this harm may not be reasonably avoidable if consumers are unable to select lower-cost alternatives because they do not have the necessary information to know that such options are available; and countervailing benefits to consumers or competition may not warrant the entity's failure to disclose the materially different prices of the available phone pay options to its consumers.

² Dodd-Frank Act §§ 1031, 1036, 12 U.S.C. 5531, 5536.

³ See CFPB Exam Manual at UDAAP 5 (noting that the standard for "deceptive" practices in the Dodd-Frank Act is informed by the standards for the same terms under Section 5 of the FTC Act).

⁴ The Bureau will also review whether phone pay fee conduct may violate the Dodd-Frank Act's prohibition on abusive acts or practices. An act or practice is abusive when it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or takes unreasonable advantage of (i) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service; (ii) a consumer's inability to protect his or her interest in selecting or using a consumer financial product or service; or (iii) a consumer's reasonable reliance on a covered person to act in his or her interests. Dodd-Frank Act § 1031(d), 12 U.S.C. 5531(d). See CFPB Bulletin 2013-07: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the collection of Consumer Debts, available at http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf for additional guidance on UDAAPs.

⁵ Where applicable, 12 CFR §§ 1026.7(a)(6)(ii) and 1026.7(b)(6)(iii) of Regulation Z will require disclosure in subsequent periodic billing statements of the amount of such fees paid in connection with prior billing periods.

Misrepresenting the available payments options or that a fee is required to pay by phone

Entities sometimes charge a fee for expedited phone payments, but also offer consumers no-fee phone pay options that post after a processing delay. Some entities in turn offer their fee-based expedited payment option as their default pay-by-phone option. In such cases, disclosures in connection with the default option may risk misleading consumers into believing that a fee is required under all circumstances to make any payment by phone.

For example, in a public enforcement action, the Bureau alleged that an entity and its service provider engaged in deceptive acts or practices when it gave delinquent credit card holders the false impression that they had to pay \$14.95 to make payment by phone when, in fact, the sole purpose of that fee was to expedite phone payments. Specifically, the Bureau alleged that the entity or its service provider: (i) misrepresented in credit card agreements that the fee's purpose was to allow payment by phone, when its purpose was solely to ensure payment posted the same day it was made; (ii) failed to disclose during collection calls that the fee's purpose was solely to expedite payment, and in certain circumstances misrepresented that the fee was a "processing fee"; (iii) volunteered that consumers could make payment using a checking account and triggered the fee by setting such payments to post immediately by default; and (iv) failed to disclose the existence of no-cost payment alternatives, including free next-day payment.⁶

In another public enforcement action, the Bureau alleged that a mortgage servicer engaged in a deceptive practice by misrepresenting to consumers, both expressly and by implication, that a particular pay-by-phone option was the only available payment method, or that consumers must use the particular pay-by-phone option in order to avoid negative consequences, including incurring a late fee or even facing foreclosure. In fact, the servicer accepted several payment options free of charge. In many instances, consumers could have used these other payment methods to make timely payments and avoid late fees.⁷

Failing to disclose that a phone pay fee would be added to a consumer's payment could create the misimpression that there was no service fee

An entity may risk engaging in a deceptive act or practice when it fails to disclose that a phone pay fee will be charged in addition to a consumer's otherwise applicable payment amount and indicates to that consumer that only the otherwise applicable payment amount will be charged.⁸ This conduct may leave the misimpression that there is no service fee, when in fact the entity does charge the consumer a fee. This potential misrepresentation may be material to consumers because a consumer who knows about the fee may inquire whether there is an alternative payment option with a lower fee or may choose a payment method that requires no fee.

⁶ See *In re Citibank, N.A. et al.*, No. 2015-CFPB-0015 (July 21, 2015).

⁷ See *FTC and CFPB v Green Tree Servicing, LLC*, No. 15-cv-02064 (April 23, 2015).

⁸ An example would be as follows: A consumer owes a payment of \$250. The consumer calls and tells the customer service representative that she will pay by phone. The customer service representative confirms that the borrower authorizes a payment of \$250. In fact, the consumer's bank account is debited \$265 ... \$250 for the otherwise applicable payment amount and \$15 for a pay-by-phone fee.

Lack of employee monitoring or service provider oversight may lead to misrepresentations or failure to disclose available options and fees

A number of entities have policies and procedures in place requiring phone representatives to disclose all available phone pay options and fees to consumers, including requiring the use of detailed phone scripts. But deviations from call scripts may potentially cause phone representatives to misrepresent the available phone payment options and fees resulting in a consumer being charged a higher fee than otherwise would have been applicable. Entities can reduce the risk of misrepresentations through adequate monitoring.

In November 2016 the Bureau issued a separate bulletin on detecting and preventing consumer harm from production incentives.⁹ Companies may wish to consult that bulletin when considering incentive programs for employees that process phone pay fees. Companies should also consider the impact that incentives created by contracts and agreements with service providers might have on compliance risk relating to potential UDAAPs associated with phone pay fees.

Examples of Conduct that May Violate or Risk Violating the FDCPA

Under the FDCPA, a person defined as a “debt collector” is prohibited from charging fees, including phone pay fees, in certain instances.¹⁰ Under Section 808(1) of the FDCPA, a debt collector may not collect 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.¹¹

Supervision has found that one or more mortgage servicers that met the definition of “debt collector” under the FDCPA violated the Act when they charged fees for taking mortgage payments over the phone to borrowers whose mortgage instruments did not expressly authorize collecting such fees and who reside in states where applicable law does not expressly permit collecting such fees. Supervision directed one or more servicers to review mortgage notes and applicable state law, and to only collect pay-by-phone fees where expressly authorized by contract or state law.¹²

The Bureau’s Expectations

The Bureau expects entities to review their practices on charging phone pay fees for potential risks of committing UDAAPs or violating the FDCPA. While the Bureau does not mandate any particular method for informing consumers about the available phone pay options and fees, entities should consider the following suggestions in assessing whether their practices may present a risk of constituting a UDAAP or FDCPA violation:

- Review applicable State and Federal laws, including the FDCPA, to confirm whether entities are permitted to charge phone pay fees.

⁹ CFPB Compliance Bulletin 2016-03 (Nov. 28, 2016), available at <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/cfpb-compliance-bulletin-2016-03-detecting-and-preventing-consumer-harm-from-production-incentives/>.

¹⁰ Debt collectors sometimes charge “convenience fees” or fees for processing consumer payments through a particular channel.

¹¹ 15 U.S.C. 1692f(1).

¹² See Supervisory Highlights, Fall 2015 edition at pp. 20-21.

- 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.¹³
- 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.¹⁴
- Review that the entity has a corrective action program to address any violations identified and to reimburse consumers when appropriate.

Entities should also consider reviewing employee and service provider production incentive programs to see if there are incentives to steer borrowers to certain payment types or to avoid disclosures. As discussed in more detail in CFPB Compliance Bulletin 2016-03,¹⁵ the Bureau acknowledges that production incentives have been common across many economic sectors and can affect a wide range of outcomes for employees or service providers, from their compensation levels to whether they will continue to be employed or retained at all. The Bureau has also highlighted the risks posed to consumers by production incentive programs, especially when they create an unrealistic culture of high-pressure targets or when the activities of employees or service providers are not adequately monitored for compliance with the law.

In the context of phone pay fees, production incentives may enhance the potential risk of entities engaging in UDAAPs. Production incentives that reward employees or service providers based on consumers using a higher-cost phone pay option may potentially lead entities to steer consumers to a higher-cost option despite the availability of lower-cost alternatives. Similarly, incentive programs that reward representatives who complete a large number of daily calls may potentially cause these representatives to spend less time discussing the available phone pay options and fees resulting in the consumer paying a higher fee because the consumer is not informed of the lower-cost alternatives. Entities should review these programs accordingly.

The Bureau will continue to review closely the practices of entities assessing phone pay fees for potential UDAAPs and FDCPA violations, including the practices described above. The Bureau will use all appropriate tools to assess whether supervisory, enforcement, or other actions may be necessary.

Regulatory Requirements

This Compliance Bulletin is a non-binding general statement of policy articulating considerations relevant to the Bureau's exercise of its supervisory and enforcement authority.

¹³ Entities should refer to CFPB Compliance Bulletin and Policy Guidance; 2016-02, Service Providers (Oct. 31, 2016), available at https://www.consumerfinance.gov/documents/1385/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf.

¹⁴ *Id.*

¹⁵ See CFPB Bulletin 2016-03, Detecting and Preventing Consumer Harm from Production Incentives (Nov. 28, 2016), available at https://www.consumerfinance.gov/documents/1537/201611_cfpb_Production_Incentives_Bulletin.pdf

It is therefore exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a). The Bureau has determined that this Compliance Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 USC 3501 *et seq.*