

Client Alert

August 2017

A Shot Across the Bow: CFPB Warns Companies About Practices Concerning Pay-By-Phone Fees

Introduction and Compliance Bulletin Summary:

Last Monday (July 31, 2017) the Consumer Financial Protection Bureau (CFPB) issued a Compliance Bulletin providing guidance on pay-by-phone fees and associated practices. The guidance was accompanied by a clear statement of intent from the CFPB: “The Bureau is warning companies about tricking consumers into more expensive fees when they pay bills by phone,” said CFPB Director Richard Cordray. “We are concerned that companies are misleading consumers about pay-by-phone fees or keeping them in the dark about much cheaper or no-cost payment options.” The guidance employs the bureau’s supervisory authority to expand on previous enforcement actions and identify certain practices related to pay-by-phone fees that may violate the Dodd-Frank Act’s prohibition on unfair, deceptive or abusive acts or practices (UDAAPs) as well as the Fair Debt Collection Practices Act (FDCPA).

The Landscape of Pay-By-Phone Fees:

Most financial services companies provide consumers with more than one option for making payments. For example, many companies provide consumers the option to pay bills by phone either by using an automated system or speaking directly with a customer representative. However, companies may, and often do, charge different pay-by-phone fees depending on which method the consumer chooses. A different fee may again apply depending on the customer’s preferred method of payment, be it a credit card, debit card or electronic check. Further, consumers may also be charged an additional fee to expedite phone payments, though many companies offer the option to post the payment after a delay at little or no additional charge. The CFPB has concluded that the application of these fees, combined with insufficient disclosures to consumers, often leads to consumers’ unnecessarily selecting more expensive options.

How Can Pay-By-Phone Fees Amount to Unfair, Deceptive or Abusive Acts or Practices (UDAAPs)?

Under Dodd-Frank, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive or abusive acts or practices. 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.¹ 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.²

Expanding on recent enforcement actions, the CFPB concluded the following examples of pay-by-phone practices may violate the Dodd-Frank Act’s prohibition on UDAAPs:

¹ Dodd-Frank Act §§ 1031, 1036, 12 U.S.C. 5531, 5536.

² CFPB Exam Manual at UDAAP.

- Failing to disclose the prices of all available pay-by-phone fees when different pay-by-phone options carry materially different fees.
- Misrepresenting the available payments options or that a fee is required to pay by phone.³
- Failing to disclose that a pay-by-phone fee would be added to a consumer's payment could create the misimpression that there was no service fee.
- Lack of employee monitoring or service provider oversight may lead to misrepresentations or failure to disclose available options and fees.

How Can Pay-by-Phone Fees Violate the FDCPA?

Financial services companies that meet the definition of a “debt collector” under the FDCPA must also account for the impact pay-by-phone fees may have on FDCPA compliance. Under the FDCPA, a person defined as a “debt collector” is prohibited from charging fees, including pay-by-phone fees, in certain instances.⁴ 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. Thus, companies that meet the definition of “debt collector” under the FDCPA may only charge pay-by-phone fees in the event that those fees are specifically authorized by either contract or state law.

What Should Financial Services Companies Do?

While UDAAP and FDCPA concerns have been relevant to pay-by-phone fees, the new guidance indicates that the bureau will be placing more scrutiny on related practices and compliance. Financial services companies should respond by reviewing their policies and procedures relevant to pay-by-phone fees to ensure they are sufficient to promote UDAAP and FDCPA compliance. Companies should prioritize those policies and procedures related to disclosures made to consumers. Furthermore, companies should also undertake the following where applicable:

- Review applicable state and federal laws, including the FDCPA, to confirm whether entities are permitted to charge pay-by-phone fees.
- Review underlying debt agreements to determine whether such fees are authorized by the contract.
- Review internal and service providers' policies and procedures on pay-by-phone 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 pay-by-phone 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 pay-by-phone fees.
- Perform regular reviews of service providers as to their practices.
- Review that the entity has a corrective action program to address any violations identified and to reimburse consumers when appropriate.

³ See *In re Citibank, N.A., et al.*, No. 2015-CFPB-0015 (July 21, 2015) (alleging that an entity and its service provider engaged in deceptive acts or practices when that entity gave delinquent credit card holders the false impression that they had to pay a certain fee to make a payment by phone when that fee was only for the purpose of expediting phone payments).

⁴ CFPB Compliance Bulletin 2016-03 (Nov. 28, 2016).

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