

CFPB issues guidance on pay-by-phone fees

By John L. Culhane Jr., Esq., *Ballard Spahr*

AUGUST 21, 2017

The CFPB has issued a new compliance bulletin (2017-11)¹ to provide guidance on pay-by-phone fees. The guidance includes examples of conduct relating to pay-by-phone practices identified by the CFPB in its supervision and enforcement activities that may violate or risk violating the Dodd-Frank UDAAP prohibition or the FDCPA.

The enforcement actions cited in the guidance involving alleged UDAAP violations arising from pay-by-phone practices date from 2015 and, while recent CFPB supervisory highlights have discussed potential FDCPA violations arising from “convenience fees” charged by debt collectors to process payments by phone, recent supervisory highlights have not discussed potential UDAAP violations arising from pay-by-phone practices.

As a result, the CFPB’s issuance of the guidance suggests that it intends to give pay-by-phone practices closer scrutiny in examinations and in enforcement actions.

We have been reviewing and suggesting revisions to many clients regarding their pay-by-phone practices since the CFPB began focusing on this area in examinations. It is important for creditors and debt collectors to be mindful that such practices may also create a risk of state law violations.

Examples provided of conduct that may violate the UDAAP prohibition include:

- Failing to disclose the prices of all available pay-by-phone services when different options carry materially different fees. According to the CFPB, while many companies disclose in periodic billing statements or elsewhere that a transaction fee may apply to various payment methods, they do not disclose the fee amounts and instead depend on phone representatives to do so. The CFPB observes that phone representatives risk engaging in an unfair practice by only revealing higher-cost options or failing to inform consumers of material price differences between available options.
- Misrepresenting the available payment options or that a fee is required to pay by phone. The CFPB observes that some companies charge a fee for expedited phone payments but also offer no-fee phone payment options that post a payment after a processing delay. According to the CFPB, some of such companies offer their fee-based expedited payment option as their default pay-by-phone option, with the result that

consumers could be misled to believe that a fee is always required to pay by phone and cause consumers to be charged for expedited payment even if such consumers did not need to post a payment on the same day.

- Failing to disclose that a pay-by-phone fee would be added to a payment. According to the CFPB, a company may risk engaging in a deceptive act or practice by failing to disclose that a pay-by-phone fee will be charged in addition to a consumer’s otherwise applicable payment amount and indicating that only the otherwise applicable payment amount will be charged. In the CFPB’s view, such conduct may create the misimpression that no pay-by-phone fee is charged.

The CFPB’s issuance of the guidance suggests that it intends to give pay-by-phone practices closer scrutiny in examinations and in enforcement actions.

- Failing to adequately monitor employees or oversee service providers. The CFPB observes that although a company may have policies and procedures requiring phone representatives to disclose all available pay-by-phone options and fees, deviations from call scripts may cause phone representatives to misrepresent available options and fees. According to the CFPB, companies can reduce the risk of misrepresentations through adequate monitoring and references its November 2016 compliance bulletin (2016-03)² on production incentives. The CFPB suggests that companies should consider the impact of incentives for employees and service providers may have on compliance risks relating to potential UDAAP violations.

Examples of conduct that may violate the FDCPA:

- The CFPB notes the FDCPA prohibition on the collection of any amount by a debt collector unless such amount is expressly authorized by the agreement creating the debt or permitted by law. The CFPB states that its examiners found that one or more mortgage servicers meeting the FDCPA “debt collector” definition violated the FDCPA by charging fees for taking mortgage payments by phone to borrowers whose mortgage instruments did not expressly authorize such fees and who resided in states where applicable law did not expressly permit collection of such fees.

The guidance indicates that the CFPB expects companies to review their practices on charging pay-by-phone fees for potential risks of UDAAP or FDCPA violations and provides suggestions for companies to consider in assessing whether their practices present a risk of constituting a UDAAP or FDCPA violation.

It also advises companies to consider whether production incentive programs create incentives to steer consumers to certain payment options or avoid disclosures. According to the CFPB, such incentives could enhance the potential risk of UDAAPs if they reward employees or service providers based on consumers using a higher-cost pay-by-phone option or based on the number of daily calls completed.

NOTES

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

² <https://www.consumerfinancemonitor.com/2016/11/29/cfpb-issues-bulletin-on-incentive-programs-ballard-spahr-to-conduct-dec-12-webinar/>

This article appeared in the August 21, 2017, edition of Westlaw Journal Bank & Lender Liability.

ABOUT THE AUTHOR



John L. Culhane Jr. is a partner in **Ballard Spahr's** Philadelphia office. His compliance practice emphasizes counseling clients on federal and state consumer financial services laws. His regulatory practice includes preparing clients for examinations and defending against agency enforcement actions. He can be reached at culhane@ballardspahr.com. This article was first published Aug. 2 on the firm's Consumer Finance Monitor blog. Copyright 2017 by Ballard Spahr LLP. The content is intended for general information purposes only. It should not be construed as legal advice or legal opinion on any specific facts or circumstances. Republished with permission.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.