



Marketing and Sales of Consumer Add-On Products: UDAAP Issues - CFPB Guidance

Executive Summary

The Bureau of Consumer Financial Protection (“CFPB” or “Bureau”) has released Bulletin 2012-06 to provide guidance to banks and nonbanks under the CFPB’s supervision and enforcement authority (“supervised banks and nonbanks”), their affiliates and service providers on the Bureau’s expectations regarding the marketing and sales of add-on products to credit card consumers. In general, the CFPB expects supervised banks and nonbanks and their service providers to offer credit card add-on products in a manner that limits the potential for statutory and regulatory violations of Federal consumer financial laws and the potential for consumer harm. The CFPB is particularly focused on deceptive practices related to the marketing and sales of add-on products, including failure to disclose all product terms and conditions, covered by the unfair, deceptive and abusive acts or practices (“UDAAP”) provisions.

The CFPB notes that although Bulletin 2012-06 is directed toward credit card add-on products, the guidance should also be considered when offering similar products for other credit products or deposit services.

Background

Credit card add-on products include debt protection, identity theft protection, credit score tracking, and other products that are supplementary to the credit provided by the card itself. The marketing and sales practices used to offer such products are covered by the Federal consumer financial laws, including UDAAP rules.

The CFPB states that through its supervisory examinations and consumer complaints database, it has become aware of a number of potentially deceptive practices that have been employed within the credit card industry including:

- Failing to disclose important terms and conditions;
- Enrolling consumers in programs without receiving affirmative consent; and
- Billing for services not performed or activated.

The CFPB further identifies the following Federal consumer financial laws, among others, as containing provisions applicable to the marketing and sales of consumer financial products:

- The *Dodd-Frank Wall Street Reform and Consumer Protection Act* (“Dodd-Frank Act”) governing UDAAP. Certain Dodd-Frank Act provisions apply to providers of consumer financial products and services, their service providers, and others that

- provide “substantial assistance” to the supervised entity or service provider.
- Regulation Z, which implements the *Truth-in-Lending Act* (“TILA”). For open-end credit, TILA provisions cover account opening disclosures and periodic statements. For credit cards specifically, TILA provisions address transactions, the treatment of payments and credit balances, procedures for resolving credit billing errors, annual percentage rate calculations, and advertising. Other provisions address credit and charge card solicitation and application procedures.
 - Regulation B, which implements the *Equal Credit Opportunity Act* (“ECOA”). Regulation B and the ECOA prohibit creditors from discriminating against an applicant in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, or age. In addition, creditors are prohibited from discriminating against a consumer whose income is derived from a public assistance program or a consumer that has exercised any right under the *Consumer Credit Protection Act*, which encompasses, among other rules, the TILA, the *Fair Credit Billing Act*, the *Fair Credit Reporting Act*, and the ECOA in addition to provisions for credit transaction disclosures and advertising and restrictions on wage garnishment.

Description

As outlined in Bulletin 2012-06, the CFPB expects supervised banks and nonbanks, and their service providers, to ensure they market and sell credit card add-on products in a manner that limits the potential for statutory or regulatory violations and the potential for consumer harm. Such efforts should include, but not be limited to, ensuring that:

- Marketing materials, including direct mail promotions, telemarketing scripts, internet and print ads, radio recordings, and television commercials, reflect the actual terms and conditions of the product and are not deceptive or misleading to consumers;
- Employee incentive or compensation programs tied to the sale and marketing of add-on products require adherence to institution-specific program guidelines and do not create incentives for employees to provide inaccurate information about the products;
- Scripts and manuals used by the institution’s telemarketing and customer service centers:
 - Direct the telemarketers and customer service representatives to accurately state the terms and conditions of the various products, including material limitations on eligibility for benefits;
 - Prohibit enrolling consumers in programs without clear affirmative consent to purchase the add-on product, obtained after the consumer has been informed of the terms and conditions;
 - Provide clear guidance as to the wording and appropriate use of rebuttal language and any limits on the number of times that the telemarketer or customer service representative may attempt to rebut the consumer’s request for additional information or to decline the product; and
 - Where applicable, make clear to consumers that the purchase of add-on products is not required as a condition of obtaining credit, unless there is such a requirement.
- To the maximum extent practicable, telemarketers and customer service representatives do not deviate from approved scripts;

- Applicants are not required on a prohibited basis to purchase add-on products as a condition of obtaining credit; and
- Cancellation requests are handled in a manner that is consistent with the product's actual terms and conditions and that does not mislead the consumer.

In addition, institutions that offer credit card add-on products should employ compliance management programs that include:

- Written policies and procedures governing credit card add-on products designed to ensure compliance with prohibitions against deceptive acts and practices, TILA, ECOA, and any other applicable Federal and state consumer financial protection laws and regulations;
- A system of periodic Quality Assurance reviews, the scope of which includes, but is not limited to, reviews of training materials and scripts, as well as real-time monitoring and recording of telemarketing and customer service calls in their entirety, consistent with applicable laws;
- Independent audits of the credit card add-on products which address the items listed above and consider whether these products present elevated risk of harming consumers;
- Oversight of any affiliates or third-party service providers that perform marketing or other functions related to credit card add-on products so that these third-parties are held to the same standard, including audits, quality assurance reviews, training, and compensation structure;
- An appropriate channel for receiving, investigating, and properly resolving consumer complaints related to add-on products; and
- A comprehensive training program for employees involved in the marketing, sale, and operation of credit card add-on products.

Coincident with the release of Bulletin 2012-06, the Bureau and the Office of the Comptroller of the Currency announced they had entered into separate consent agreements related to certain alleged deceptive marketing and sales practices.

Commentary

The release of CFPB Bulletin 2012-06 signals to the industry the Bureau is looking closely at UDAAP, and in particular, marketing and sales practices in the credit card markets. Supervised banks and nonbanks that market and sell add-on products are strongly encouraged to review the CFPB Bulletin and related agency enforcement actions and evaluate their own practices in light of the guidance provided, taking remedial actions as needed. Particular consideration should be given to processes for assessing whether a product and its terms and conditions provide tangible value and "suitability" for an individual consumer who agrees to purchase it as well as sufficiently documenting that assessment to satisfy regulatory concerns about the potential for consumer harm. Though not expressly stated in this guidance, suitability is once again at the forefront of industry and regulatory discussions.

Consistent with CFPB Bulletin 2012-03 (please refer to Regulatory Practice Letter 12-13), supervised banks and nonbanks subject to Bulletin 2012-06 will be expected to have programs in place that hold their third party service providers to the same standards they must meet to comply with the Federal consumer financial laws. Accordingly, supervised banks and nonbanks must have compliance management programs that provide oversight of their affiliates and third party service providers

that perform marketing or other functions related to add-on products to ensure they are held to the same standards including audits, quality assurance reviews, training and compensation structures. The earlier CFPB Bulletin 2012-03 also requires supervised banks and nonbanks to employ programs to actively monitor and test the capability of service providers to comply with Federal consumer financial laws and to protect consumers. CFPB-supervised banks and nonbanks should review their third-party provider practices to ensure expectations for compliance with Federal consumer financial laws are clearly stated and “appropriate and enforceable” consequences for violating any compliance-related responsibilities, including UDAAP, are in place. Financial service providers should also begin appropriate consumer regulatory monitoring and testing of their service provider activities.

Bulletin 2012-06 notes that the guidance should also be considered when offering similar products for other credit products or deposit services, which could significantly widen the CFPB’s focus on UDAAP violations associated with add-on products and practices, presumably guided through consumer complaints and / or examinations. As such, CFPB-supervised banks and nonbanks, even if they do not offer credit card products, should consider reviewing all of their add-on product offerings to assess whether the products present an elevated risk of harm to consumers and to ensure that the related marketing and sales practices meet the CFPB’s expectations (e.g., full disclosure of terms and conditions, affirmative consent of the consumer, value commensurate with cost, eligibility/suitability, appropriate compensation incentives).

With the release of Bulletin 2012-06, CFPB Director Richard Cordray stated, “The compliance bulletin puts all financial institutions on notice about these prohibited practices and reinforces that they must make sure their service providers are complying with the law...the best time for all institutions to be reviewing and ensuring their practices in this area is right now.” Supervised banks and nonbanks should begin immediately to assess their add-on product offerings for credit and deposit products, giving consideration to an:

- Enterprise-wide program designed to ensure that all products and services sold by the entity or its service providers do not violate UDAAP.
- Assessment of the internal controls and policies and procedures to identify, measure, monitor and control (including documentation) UDAAP risks.
- Analysis of the governance, control, marketing, sales, delivery, servicing, and fulfillment of services (i.e., value to consumers) for products and services sold by the entity or its service providers considered to be at high risk for UDAAP.
- Enhancement of third-party vendor management, evaluations of each vendor’s compliance capabilities and expanded monitoring/testing of the vendor’s activities.

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