

# Client Alert

June 20, 2014

## CFPB & DOJ Consent Orders with Former GE Capital Retail Bank: Something Old and Something New

By Nancy R. Thomas and Angela E. Kleine

Yesterday, the CFPB announced a \$225 million settlement of two major credit card enforcement matters with Synchrony Bank, formerly known as GE Capital Retail Bank. First, the “Add-On Matter” targets alleged deceptive marketing of credit card add-on products in violation of the deceptive prong of Dodd-Frank’s UDAAP prohibition. Second, the “Offer Exclusion Matter” addresses alleged discrimination against Hispanics in connection with debt relief offers to credit card customers, which excluded certain Spanish-speaking customers and all customers in Puerto Rico. The settlement underscores the Bureau’s ongoing focus on UDAAP violations, particularly with respect to add-on products and potentially “deceptive” marketing by employees and third parties. Digging beneath the \$225 million headline, the agreements also highlight the upsides of self-reporting done right – not only did the Bank not pay any civil monetary penalty (CMP) for its potentially serious violations in the Offer Exclusion Matter, but it appears to be paying nothing more than it had already offered to proactively pay in remediation.

### THE ADD-ON MATTER

During an examination, the CFPB identified alleged UDAAP violations in connection with the Bank’s credit card add-on products. The Bank offered five debt cancellation add-on products, which “it promoted as providing debt cancellation of a certain percentage of the consumer’s balance in the event of certain hardships.” The Bureau does not assert that the products themselves were unfair, deceptive, or abusive. Instead, it alleges that the Bank’s “telemarketers” misrepresented the products in four main ways:

- (1) **Marketing the product as free of charge** so long as the consumer paid off the monthly balance in full, when in fact “consumers could only avoid the fee in very specific circumstances;”
- (2) **Failing to disclose consumers’ ineligibility** for “key benefits” of the products – for instance, selling the products to consumers who were retired or disabled;
- (3) **Failing to disclose that consumers had to pay for the product**, implying consumers were “receiving a benefit” or that the telemarketer was simply “updating their accounts” or “handling other administrative tasks;” and
- (4) **Falsely marketing products as a limited time offer**, which “may have created a false sense of pressure.”

The CFPB noted that the Bank did not require customer service representatives to follow any scripts for most of the relevant period and asserted that the Bank’s monitoring of compliance and of its service providers was inadequate.

In the [Consent Order](#), the Bank agreed to pay a \$3.5 million CMP and refund \$56 million to about 638,000 affected consumers. The Bank also agreed to implement an extensive Compliance Plan, which must include a written UDAAP Policy and Vendor Management Policy.

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## TAKEAWAYS FROM THE ADD-ON MATTER

- **Continued Focus on Add-On Products:** As Director Cordray noted in yesterday's press call, this is the sixth enforcement action in which "the Bureau has taken on credit card add-on products," "put[ting] roughly \$1.5 billion back in the pockets of consumers."<sup>1</sup> Unlike some of the previous consent orders, the focus here is exclusively on marketing and not on the alleged unfairness of the products themselves. But in other material respects, the alleged deceptive practices and other provisions of the orders are strikingly similar. For example, the detailed "UDAAP Policy" requirements are substantially similar to those in other consent orders entered this year.<sup>2</sup> And, of the four "deceptive" findings in the Synchrony consent order, only the "limited time offer" allegation is novel. The other allegations mirror the allegations in past consent orders.<sup>3</sup>
- **Vendor Management:** The Vendor Management Policy required by the Consent Order tracks similar provisions in the consent orders with other banks, as well as guidance from the CFPB and other agencies. For example, in its Compliance Bulletin on Marketing of Add-On Products, the CFPB advised institutions to ensure that marketing materials and scripts clearly and accurately disclosed product terms, including any material limitations on eligibility. The Compliance Plan required by the Consent Order must address the ways in which the Bank will inform customers of all material terms, including eligibility requirements, and will disclose that customers are purchasing an optional product.<sup>4</sup>

In its Bulletin, the CFPB recommended that issuers ensure, "to the maximum extent possible," that representatives do not deviate from approved scripts, but did not provide any further guidance on how issuers should meet this standard.<sup>5</sup> The Consent Order specifies that the UDAAP Policy must require "independent telephone monitoring by qualified personnel who have training in identifying and reporting" violations of applicable laws and the Bank's policies. It further provides for at least monthly reporting of findings by the independent unit responsible for conducting the monitoring.<sup>6</sup> It would appear that these provisions spell out the CFPB's expectations regarding compliance obligations with respect to whether telemarketers are following approved scripts.

The Vendor Management Policy tracks provisions in the vendor management guidance issued by the OCC and the Federal Reserve Board. For example, in the OCC's Third-Party Relationships: Risk Management Guidance, the OCC focuses on due diligence in third-party vendor selection and on contract negotiation. The Consent Order similarly requires that the bank conduct an analysis of the Service Provider's ability to perform Add-On Product services in compliance with law and that the Bank ensure that any new or renewed contracts with Service Providers set forth both parties' responsibilities, including for critical functions such as the

<sup>1</sup> *Prepared Remarks of Richard Cordray, Director of the CFPB on GE Capital* (June 19, 2014), available at <http://www.cbinsight.com/press-release/prepared-remarks-of-richard-cordray-director-of-the-cfpb-on-ge-capital>.

<sup>2</sup> See *In re JPMorgan Chase Bank*, Docket No. 2013-CFPB-0007, Consent Order (Sept. 19, 2013); *In re Bank of America*, Docket No. 2014-CFPB-0004, Consent Order (Apr. 9, 2014).

<sup>3</sup> *In re American Express* matters, Docket Nos. 2013-CFPB-0011 - 13, Consent Orders (Dec. 24, 2013); *In re Capital One Bank, (USA) N.A.*, Docket No. 2012-CFPB-0001, Stip. and Consent Order (July 18, 2012); *In re Bank of America*, Docket No. 2014-CFPB-0004, Consent Order (Apr. 9, 2014). For additional information regarding the add-on allegations in prior Consent Orders, see *The CFPB & UDAAP: A "Know It When You See It" Standard?* (June 9, 2014), at <http://media.mofo.com/docs/pdf/140604-cfpb-udaap/>.

<sup>4</sup> Consent Order ¶ 43(b)-(e).

<sup>5</sup> CFPB Bulletin 2012-06, *Marketing of Credit Card Add-on Products* (July 18, 2012), available at [http://files.consumerfinance.gov/f/201207\\_cfpb\\_bulletin\\_marketing\\_of\\_credit\\_card\\_addon\\_products.pdf](http://files.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf).

<sup>6</sup> Consent Order ¶ 45(g), (h).

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Service Provider's obligation to maintain adequate internal controls and training and to grant the Bank access to conduct periodic onsite reviews.

These provisions provide a detailed roadmap for regulated entities that rely on third-party vendors to market or service any product, not just add-on products.

- **Exams as Key Source for Enforcement:** As with numerous prior Consent Orders, the Bureau identified the Add-On Matter during an exam, which led to an enforcement proceeding. Although enforcement attorneys are no longer attending exams, enforcement is still top of mind for Bureau examiners.

## THE OFFER EXCLUSION MATTER

Separately, the Bank had self-identified and reported the Offer Exclusion Matter to the CFPB. Between 2009 and 2012, the Bank had made offers to (1) credit certain consumers' accounts if those customers paid the amount required to bring their accounts current in three payments and (2) waive certain consumers' remaining account balance if they paid a certain percentage of the amount owed. Thousands of otherwise eligible Hispanic consumers did not receive the debt relief offers because the Bank did not extend either of these offers to any customers with a Puerto Rico mailing address or who had indicated that they preferred to communicate in Spanish.

The Bank identified the matter and alerted the CFPB in 2013. The CFPB reviewed it from May through November 2013, and referred it to the DOJ in March 2014. The CFPB and DOJ engaged in a further, short joint investigation and, on June 19, 2014, filed, respectively, the Consent Order in a CFPB administrative proceeding and a complaint and proposed consent decree in the District of Utah. Both settlements are based on an alleged violation of the Equal Credit Opportunity Act (ECOA), making this the first public ECOA credit card enforcement matter by the CFPB.

The Bank's proactive remediation is ongoing. When completed, the Bank will have paid at least \$169 million to approximately 108,000 cardholders, largely in the form of credits and waivers on charged-off accounts. In addition, the Bank agreed to contact credit reporting agencies to "ensure that any negative information associated with the . . . accounts as a result of these violations will be deleted" from the consumers' credit history.

## OFFER EXCLUSION TAKEAWAYS

- **CFPB Use of Enforcement Instead of Rulemaking.** As we've seen with other Consent Orders, the cryptic terms of the Consent Order make it difficult for regulated entities to determine what the Bureau considers to be the appropriate measure of redress. It appears, though, that the remediation is based on the assumption that every eligible consumer who was excluded would have taken the offer. Given that most of the relief went to customers with charged-off accounts, it seems unlikely that all of the excluded customers could have met the offer terms, either bringing their accounts current in three payments or paying up to 55% of the outstanding balance.
- **Potential Benefits of Self-Reporting.** The CFPB did not assess any CMP for this Matter, noting the Bank's self-reporting, remediation, and cooperation during the investigation.
- **Cooperation with Other Agencies:** According to the CFPB, this is the third joint enforcement action taken with the DOJ – "together [they] have addressed over \$280 million in consumer harm caused by discrimination."<sup>7</sup>

<sup>7</sup> Prepared Remarks of Richard Cordray, Director of the CFPB on GE Capital (June 19, 2014), available at <http://www.cbinsight.com/press-release/prepared-remarks-of-richard-cordray-director-of-the-cfpb-on-ge-capital>.

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- **Liability for Prior Practices & Products.** The Bank ended one of the credit offers and started including the previously excluded customers in the other credit offer by March 2012. That the challenged practices had ended more than two years before entry of the Consent Order, though, did not stop the CFPB or DOJ from pursuing the enforcement action or requiring the Bank to pay restitution.

The same was true for the Add-On Matter – the Bank stopped enrollment by phone for the Covered Add-On Products in October 2012, stopped marketing and selling all but one of the Covered Add-On Products by July 2012, and completed a remediation plan that refunded or credited about \$11 million in fees and charges. As was the case with several of the other Consent Orders involving add-on products, though, the CFPB investigated and required payment of restitution and a CMP.

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