



## Financial Services & Products ADVISORY ■

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### Under the CFPB's Watchful Eye: Phone Pay Fees

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On July 31, the Consumer Financial Protection Bureau (CFPB) issued [Compliance Bulletin 2017-01: Phone Pay Fees](#). The Bulletin addresses pay-by-phone services, defined to include (1) providing consumers with the option of making payments over the phone by using an automated system or speaking with a live representative; (2) providing consumers the option to make payments by using a credit card, debit card, or electronic check or to have their payment expedited; and (3) third-party service providers that handle and process payments on behalf of entities. The Bulletin does not prohibit phone pay fees altogether but alerts companies that it will be watching carefully for unfair, deceptive, or abusive acts or practices (UDAAPs). The CFPB also sets forth its expectation that entities should be closely reviewing and monitoring their practices in this area for potential violations of the law.

#### Examples of UDAAPs

The Bulletin provides the following non-exhaustive list of examples of conduct related to phone pay fees that may constitute or contribute to the risk of committing UDAAPs.

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

The CFPB notes as a potential UDAAP risk that entities “sometimes” send out general billing statements disclosing that “transaction fees may apply” for various payment methods but do not provide fee schedules to inform consumers about the various payment options available combined with the associated fees. The CFPB also highlights a potential risk for an “unfair practice” when relying on phone representatives to disclose options for payment because a phone representative “may potentially only reveal the higher-cost options or fail to inform consumers of the material price difference” of the options available.

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

The CFPB cites to two public enforcement actions where it found the payment options disclosure to be deceptive. In the first action, the CFPB 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.”

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In another enforcement action, the CFPB alleged that a mortgage servicer misrepresented to consumers, expressly and by implication, that the phone pay option for a fee was the only payment option available to avoid negative consequences, such as foreclosure, when in fact there were other payment options available that were free of charge.

***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.***

The CFPB explains that failing to disclose to a consumer that they will be charged a phone pay fee in addition to the otherwise applicable payment amount may be viewed as a deceptive act or practice because it may lead the consumer to believe there is no associated fee for the service. That information may be material to a consumer's choice of payment method.

***Lack of employee monitoring or servicer provider oversight may lead to misrepresentation or failure to disclose available options and fees.***

For example, a company may have policies and procedures requiring the use of phone scripts and requiring phone representatives to disclose to consumers all available phone pay options and fees. However, employees who deviate from those scripts may misrepresent the phone payment options and fees, and according to the CFPB, the consumer could be charged a higher fee than otherwise would be applicable. According to the CFPB, adequate monitoring could reduce this risk. Related to this concern, the CFPB cites to its [November 2016 Compliance Bulletin](#) regarding production incentives and cautions entities to consider the incentive programs used for employees that process phone pay fees.

## **Examples of FDCPA violations**

In the section of the Bulletin showing examples of Fair Debt Collection Practices Act (FDCPA) violations, the CFPB was fairly specific in only calling out mortgage servicers for what it views as FDCPA violations in the phone pay fee space. Specifically, it notes that it has found one or more mortgage servicers that meet the definition of "debt collector" under the FDCPA to have violated the Act by charging fees for taking mortgage payments over the phone for borrowers whose mortgage instruments did not expressly authorize collecting such fees, and the applicable state law also did not expressly permit such fee collection.

This is an issue that the CFPB has noted previously for mortgage servicers. In its [Fall 2015 \(Issue 9\) Supervisory Highlights](#), the CFPB stated that "One or more servicers violated the FDCPA when they charged fees for taking mortgage payments over the phone to borrowers whose mortgage instruments did not expressly authorize collecting such fees and/or reside in states that do 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 authorized by contract or state law." The FDCPA prohibits a debt collector from collecting any amount (including interest, fee, charge, or expense incidental to the principal obligation) unless the amount is "expressly authorized by the agreement creating the debt" or "permitted by law." There is sufficient ambiguity regarding what may be "permitted by law," but entities should review these issues as they arise on a case-by-case basis with counsel and not assume that fees are appropriate solely based on a consumer's verbal agreement to their imposition.

## **Bureau's Expectations**

The Bulletin states that the CFPB "does not mandate any particular method for informing consumers about the available phone pay options and fees," but then it goes on to list specific expectations for entities charging such fees.

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

When assessing compliance with the law, entities should be mindful of the varying requirements across states. In some states, fees associated with phone payments are expressly limited or prohibited, and in a few states these fees are expressly permitted. At the federal level, entities should assess compliance with the FDCPA, Electronic Fund Transfer Act (EFTA), and Truth in Lending Act (TILA) and assess the risk of UDAAPs as described in the Bulletin.

***Review underlying debt agreements to determine whether such fees are authorized by the contract.***

When assessing compliance with the law, entities should be mindful of the authorizing language in the contract and, for loans subject to the FDCPA, whether phone pay fees are expressly authorized in the agreement.

***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.***

From the CFPB's perspective, a strong compliance management system starts with clear policies and procedures and efforts to ensure that they are followed. Entities will be well-served to develop policies and procedures specific to phone pay fees and build the topic into routine compliance training for all employees who are positioned to process such fees. In order to ensure compliance with the policies and procedures, this issue should be added to quality assurance, quality control, and independent audit reviews.

***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.***

In addition to ensuring compliance with the applicable state and federal laws, entities should examine the contractual language provided to consumers for the underlying financial product. For many entities, the offering of a phone pay option is intended to be a convenience to consumers, and the original contractual language may be overlooked. It is important to ensure that there are no contractual impediments to offering the phone service for a fee in the first place. It is also important to be clear about how the associated fees are disclosed both in writing and orally during live phone calls, including appropriate and full disclosure of all payment option alternatives. Additionally, when phone pay fees are charged, the purpose of the fees should be clearly and conspicuously noted on the consumer billing statements.

***Incorporate pay-by-phone issues in regular monitoring or audits of calls with consumers.***

Since its inception, the CFPB has routinely reviewed call recordings during examinations to assess compliance with the law and to identify any pain points in consumer interactions. It views call monitoring to be an essential component of a well-functioning compliance management system and in previous enforcement actions has cited the failure to do so as a compliance risk. While call monitoring is not necessary for all financial products, if entities are offering phone pay fees through live call center conversations, the CFPB expects routine monitoring of those calls to make sure the fees are handled appropriately.

***Review consumer complaints regarding phone pay fees.***

Consumer complaints should be monitored closely for the issues related to phone payment fees. If consumers claim that they had insufficient information about payment options or the associated fees, entities should take a close look at the underlying transaction, including all oral and written disclosures. The CFPB has

repeatedly emphasized the notion that unknown risks often first surface through consumer complaints, and entities should view these complaints as an important compliance tool to help identify where weaknesses may reside.

***Perform regular reviews of service providers as to their pertinent practices.***

As we have seen through guidance issued and the enforcement actions taken to date, the CFPB will hold entities accountable for the shortcomings of their service providers. Debt collection and payment servicing is easily and often outsourced to service providers, which is precisely where phone pay fees typically arise. Monitoring and auditing the practices of these service providers is an essential component of a strong compliance management system, and entities should expect the CFPB to examine these efforts closely.

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

No matter how strong a compliance management system may be, deviations from compliant processes are inevitable. Entities should be prepared to respond to these issues when they arise by developing corrective action plans that pre-identify the steps to be taken to remediate any consumer harm. Here, the CFPB is putting entities on notice that it expects to see corrective action plans that are specific to phone pay fee issues that may arise.

***Review employee and service provider production incentive programs to see if there are incentives to steer borrowers to certain payment types or to avoid disclosures.***

The CFPB has repeatedly highlighted incentive-based compensation programs as an area of risk and focus for the agency (as we discuss in our March 2017 advisory, [CFPB Focuses on Incentive-Based Compensation](#)). Production incentives that reward employees or service providers based on consumers using a higher-cost phone pay option could result in UDAAPs by steering consumers to a higher-cost option when a lower-cost option is available. According to the CFPB, incentive programs that reward representatives who complete a large number of calls could cause the representatives to spend less time with consumers discussing available pay options and result in the consumer paying a higher fee because the consumer is not informed of the lower-cost alternative. Finally, entities should 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. Companies should be thoughtful about structuring production incentive models in all aspects of their businesses, but the CFPB is signaling that it will closely scrutinize those models that are associated with the charging and collection of phone pay fees.

## **Conclusion**

The CFPB's Compliance Bulletin 2017-01 is an important read. The Bureau has detailed its expectations for entities and their service providers. This is a complex area of law where the ability to collect phone pay fees may vary based on the product type, applicable law (including whether the entity and the loan are subject to the FDCPA), and contractual provisions. Entities should take a close look at their practices and consider updating their compliance management systems accordingly.

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