

# Client Alert

August 31, 2017

## CFPB and Card Issuers Resolve ECOA Action Involving Cards Offered in U.S. Territories and Cardholders with Spanish Language Preference

By **Obrea O. Poindexter, Donald C. Lampe, and Ryan J. Richardson**

### BACKGROUND

On August 23, 2017, the Consumer Financial Protection Bureau (CFPB) announced the resolution of an administrative action under the Equal Credit Opportunity Act and its implementing regulation, Regulation B (collectively, "ECOA"), against American Express Centurion Bank and American Express Bank, FSB (collectively, the "Issuers"). In the proceeding, the CFPB alleged the Issuers violated ECOA by (i) offering credit and charge card products and services to consumers and small businesses in Puerto Rico and other U.S. territories on less favorable terms than it offered similar products and services to consumers and small businesses in U.S. states, and (ii) conducting collection activities with consumer cardholders with Spanish language preferences without making available to such cardholders collection offers and programs comparable to the offers and programs that it made available to cardholders without Spanish language preferences.

The Issuers agreed to the entry of a consent order ("Consent Order") but did not admit to any findings of fact or conclusions of law. Importantly, the CFPB noted favorably the Issuers' cooperation with the CFPB's investigation, self-reporting, and voluntary provision of approximately \$95 million in remediation to affected consumers. To resolve the action, the Issuers agreed to provide at least \$1 million in monetary redress to affected consumers beyond the borrower relief that was already voluntarily provided and to develop a plan to enhance the Issuers' compliance management systems to better control the risk of similar fair lending violations in the future. In light of the Issuers' cooperation, self-reporting, and voluntary remediation, however, the CFPB did not levy a civil money penalty or lodge allegations of unfair, deceptive, or abusive acts and practices.

### THE CONSENT ORDER

According to the Consent Order, in 2013, the Issuers self-reported to the CFPB certain differences in the terms of credit and charge cards offered in Puerto Rico and the U.S. Virgin Islands (the "PRVI Cards") and the terms of comparable credit and charge cards offered in U.S. states (the "Mainland Cards"). In coordination with Issuers, the CFPB identified statistical discrepancies between PRVI Cards and Mainland Cards with respect to (i) pricing, rebates, and promotions; (ii) underwriting and credit line assignment; (iii) customer service and account management; and (iv) debt collection and mitigation.

- *Pricing, Rebates, and Promotions.* According to the allegations in the Consent Order, the pricing for PRVI Cards was higher than for the Mainland Cards. For instance, one PRVI Card had a \$45 annual fee and higher average annual percentage rates (APRs) than comparable Mainland Cards, which had lower APRs and no annual fee. Additionally, the CFPB alleged that promotions on PRVI Cards, such as introductory zero percent (0%) APR offers and first-year annual fee waivers, were not as widely available as they were on Mainland Cards. For example, the CFPB alleged that 29% of PRVI Cards had a zero percent APR introductory offer, while 90% of corresponding Mainland Cards had a zero percent APR introductory offer. Similarly, promotions on Mainland Cards issued to residents of Guam, American Samoa, and the Northern Mariana Islands (the

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“Pacific Territories”) were not as valuable as promotions on Mainland Cards issued to residents of the 50 U.S. states or the District of Columbia.

- *Underwriting and Credit Line Assignment.* According to the allegations in the Consent Order, the Issuers declined certain applications for PRVI Cards that would have been approved for comparable Mainland Cards and assigned lower initial credit lines to new PRVI Card cardholders than it assigned to similarly situated cardholders of new Mainland Cards. Additionally, the CFPB alleged that the Issuers offered one or more Mainland Cards for small business customers, but did not offer a PRVI Card for such customers.
- *Customer Service and Account Management.* According to the allegations in the Consent Order, the Issuers imposed certain adverse credit actions on certain PRVI Card cardholders, including credit line reductions and spending limits on charge card accounts, that it did not impose on comparable Mainland Card cardholders. The CFPB further alleged that the Issuers processed credit action appeals and card reinstatement requests differently for PRVI Card cardholders than it did for Mainland Card cardholders.
- *Collections and Debt Mitigation.* The CFPB alleged that the Issuers settled with delinquent PRVI Card cardholders for an average of 73% of the total amount owed and settled with comparable delinquent Mainland Card cardholders for an average of 55% of the total amount owed. The CFPB also alleged that the Issuers excluded Mainland Card cardholders resident in the Pacific Territories and all PRVI Card cardholders from certain debt relief and debt management programs offered to Mainland Card cardholders resident in the 50 U.S. states and the District of Columbia. Furthermore, the CFPB separately alleged that the Issuers excluded both PRVI Card cardholders and Mainland Card cardholders who indicated a Spanish language preference from offers for established debt management programs.

Substantively, the CFPB appeared to build its ECOA allegations upon both disparate treatment and disparate impact theories, but this was not stated expressly in the Consent Order. In this regard, the Consent Order cited U.S. census data showing that Puerto Rico’s population is 99% of either Hispanic or Latino origin, while the U.S. Virgin Islands’ population is 76% black or African-American, and the Pacific Territories have a majority population of Asian Pacific Islanders. In each case, these percentages are in excess of those in the U.S. states for these protected groups. Though precise theories of liability were not articulated in the Consent Order, it appears the basis for the alleged pattern or practice of discrimination was national origin in the case of consumers in Puerto Rico and race and ethnicity in the case of consumers in the U.S. Virgin Islands and the Pacific Territories. In the Consent Order, the CFPB concluded that the alleged disparities were not intentional, but they also were not justified by a legitimate business need under ECOA.

As noted above, the Issuers responded to the CFPB’s concerns by voluntarily providing approximately \$95 million in remediation to affected consumers. Of that total, approximately \$55.7 million in consumer relief was for disparities in pricing, rebates, and promotional offers; approximately \$3.2 million was for disparities in underwriting; and approximately \$35.7 million was for disparities in customer service, account management, collections, debt mitigation, and business unit assignment.

## TAKEAWAYS FOR FAIR LENDING COMPLIANCE

- The Consent Order is a reminder that the application of U.S. consumer financial laws and regulations and the jurisdiction of U.S. financial regulators are not limited to the 50 U.S. states and the District of Columbia. Indeed, the Consent Order is the most recent in a series of settlements to involving comparison of credit products and services offered in U.S. territories with products and services offered in U.S. states.<sup>1</sup> Financial

<sup>1</sup> See, e.g., *In re Synchrony Bank f/k/a GE Capital Retail Bank*, 2014-CFPB-0007 (June 19, 2014). Find our client alert on this consent order [here](#).

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institutions operating across the U.S. and in the U.S. territories should be mindful of the inherent risks of credit discrimination based on the race, national origin, and ethnicity of populations in U.S. territories and strive to seek parity among product and services offerings across credit origination and servicing platforms.

- The Consent Order highlights the CFPB's emphasis on policies and procedures for consumer financial products and services offered to consumers who express a language preference other than English.<sup>2</sup> If a financial institution supports a product or service in a language other than English, there may be an expectation at the CFPB that the financial institution should support the entire product or service lifecycle in that language. From the Consent Order, this appears to be particularly the case with respect to servicing and collection activities.<sup>3</sup>
- To date, there have been mixed views of the value of self-reporting and concomitant self-correction and remediation as relates to the initiation and outcome of CFPB investigations and enforcement actions. The CFPB has issued guidance on how "responsible business conduct," such as self-reporting, may impact the exercise of its "enforcement discretion,"<sup>4</sup> and the CFPB has recognized the value of self-reporting and related activities in other enforcement cases.<sup>5</sup> However, self-reporting potential violations of the magnitude in this proceeding would seem to make a CFPB public enforcement action inevitable. This means that a financial institution's decision to self-report and voluntarily provide consumer remediation would depend, at least in part, on the extent of anticipated remedies and penalties in an ensuing enforcement action. On balance, it appears that imposition of the full range of remedies and penalties available to the CFPB can be mitigated through voluntary remediation, particularly if commenced either before or upon self-reporting. Though the CFPB imposed on the respondents extensive corrective measures relating to policies, procedures, and controls, the agency did not impose other common remedies in cases of this magnitude, such as civil money penalties. Moreover, the CFPB did not allege that the Issuers violated the CFPB's unfair, deceptive, or abusive acts or practices statute.<sup>6</sup> Such allegations appear in a significant percentage of CFPB enforcement proceedings.

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<sup>2</sup> See, e.g., [Fair Lending Report of the Consumer Financial Protection Bureau](#) (April 2017); see also [CFPB Supervisory Highlights: Winter 2016](#) at 28-29 (Mar. 8, 2016); [CFPB Examination Procedures, ECOA Baseline Review Modules](#) at 13, 21-22 (Oct. 2015).

<sup>3</sup> See [CFPB Examination Procedures, ECOA Baseline Review Modules](#) at 21-22 (Oct. 2015); see also [Fair Lending Report of the Consumer Financial Protection Bureau](#) (April 2017). The extent of the requirements for dealing with LEP borrowers who express a preference for communicating in a foreign language was not spelled out in the Consent Order. Rather, these requirements are to be covered in a compliance plan that must be submitted to and approved by the Bureau.

<sup>4</sup> CFPB Bulletin 2013-06, "Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation" (June 25, 2013). Find our client alert on this guidance [here](#).

<sup>5</sup> See, e.g., *In re U.S. Bank, N.A.*, 2013-CFPB-0003 (June 26, 2013); *In re Dealers' Financial Services, LLC*, 2013-CFPB-0004 (June 26, 2013) (collectively, levying no civil money penalty in part on grounds that the respondents, a national bank and its service provider, proactively revised potentially problematic practices and cooperated with the CFPB to implement consumer remediation).

<sup>6</sup> 12 U.S.C. § 5531(a).

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