

## CFPB Announces First Enforcement Action

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### Introduction

On July 18, 2012, the Consumer Financial Protection Bureau (“CFPB”) announced its first public enforcement action. Citing deceptive tactics in the marketing of certain credit card “add-on” products, the CFPB fined Capital One Bank (U.S.A.), N.A. \$25 million and ordered it to refund an additional \$140 million, plus interest, to two million customers. Simultaneously with the announcement of the Capital One action, the CFPB issued a compliance bulletin advising institutions within its supervision of the CFPB’s expectations regarding the marketing of these and other similar consumer financial products.

While it remains to be seen whether this action is representative of the manner in which the CFPB will exercise its enforcement authority, it is notable that it took the opportunity of its first enforcement action to issue broad guidance to the industry on its expectations regarding the type of conduct implicated by the enforcement action. Such guidance, if it becomes a standard part of CSFB enforcement practice, will be a valuable source of information about the CFPB’s views on what constitutes a deceptive practice and may effectively become a form of informal rule-making.

### The Consent Order

In the course of conducting an examination of Capital One, the CFPB found that the bank had misled certain of its customers with low credit scores or low credit limits in the sale of credit-card-related products, including (1) “payment protection,” which would cancel up to 12 months of minimum payments in the event of the customer’s unemployment or temporary disability; (2) debt forgiveness in the event of death or permanent disability; and (3) “credit monitoring,” which provided protection against identity theft, access to “credit education specialists,” and in some cases daily monitoring and notification.

Specifically, the CFPB found that Capital One, through its vendors, had:

- Misled customers about the benefits of products, such as representing that the products would help to improve credit scores and increase credit limits;
- Misled customers about the nature of the products, such as not telling customers that the products were optional, or that they had to purchase the product in order to receive full information about it;
- Misled customers about their eligibility, by selling payment protection plans to customers who were already unemployed or disabled and were subsequently denied benefits because such circumstances arose prior to enrollment in the plans;
- Misled customers about the cost of the products, by sometimes leading customers to believe that the products were free; and
- Enrolled customers without their consent.

Based on these findings, the CFPB ordered Capital One to pay the penalty and restitution amounts described above, cease the improper practices, reform its marketing practices and compliance system in accordance with CFPB directives, and hire an independent auditor to verify compliance with the agreement. Notably, the CFPB did not require Capital One to admit wrongdoing.

The consent order marks the first time the CFPB has imposed a penalty under sections 1053 and 1055 of the Consumer Financial Protection Act, which prohibit any person that offers or provides consumer financial products and services from “engag[ing] in any unfair, deceptive, or abusive act or practice.” 12 U.S.C. § 5536(a)(1)(B). The enforcement action was taken in coordination with the Office of the

Comptroller of the Currency (“OCC”), which separately ordered approximately \$150 million in restitution (including the \$140 million described above) and imposed a \$35 million civil penalty.

### The Compliance Bulletin

In the compliance bulletin issued concurrently with the Consent Order, the CFPB states, as a general matter, that it is informed by the FTC’s standard for deception, as well as the FTC’s guidance on the factors to be considered in evaluating the effectiveness of disclosures in preventing consumers from being misled.

With respect to the specific credit card “add-on” products at issue in the Capital One consent order, the CFPB bulletin advises institutions to ensure that:

- Marketing materials are not deceptive or misleading;
- Employee compensation programs do not create incentives for employees to provide inaccurate information;
- Scripts used by telemarketing and customer service centers are clear, complete, and accurate;
- Telemarketers and customer service representatives do not deviate from approved scripts;
- Applicants are not required to purchase add-on products as a condition of obtaining credit; and
- Cancellation requests are handled in a manner consistent with the product’s terms and conditions and that does not mislead the consumer.

The bulletin further provides guidance on the CFPB’s views about the components of effective compliance management programs.

Institutions within the CFPB’s supervision that offer credit card products and services, as well as similar products in connection with other forms of credit or deposit services, should carefully review this compliance bulletin for further guidance. According to the bulletin, the CFPB will continue to closely review the operations of credit card issuers and service providers to assess whether additional enforcement actions may be necessary.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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