

PUBLICATION

CFPB Takes Action for Deceptive Advertisement of "Free Checking"

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Although the CFPB has focused its rulemaking and enforcement actions on mortgage servicing and lending, it recently entered into a consent order with M&T Bank regarding the deceptive advertising of free checking. The deceptive activity arose from advertisements made by M&T Bank about its free checking account, which indicated that the free checking account had no fees or minimum balance requirements. While these representations were true, the CFPB found that the ads were deceptive because they failed to disclose that the free checking accounts had a minimum activity requirement, or that the free accounts would be automatically converted into an account with a monthly fee if the account activity requirements were not met. Despite the fact that consumers opening free checking accounts received a document disclosing the minimum account activity requirement and automatic conversion feature, the CFPB still found the advertisements to be deceptive. In addition, consumers whose accounts were converted for a lack of account activity did not receive a formal notification of the conversion and the only notification of the change was that the account type changed on the monthly statement.

The CFPB found that this constituted deceptive acts and practices under 12 U.S.C. §§5531(a) and 5536(a)(1)(B). The omission of a disclosure regarding the account conversion was considered a violation of Regulation DD, 12 C.F.R. § 1030.8(a)(1). The CFPB found that approximately 80,903 accounts had been converted from free checking accounts and that monthly maintenance fees were assessed from 59,041 accounts. A total of \$2.045 million dollars in fees was collected. The CFPB ultimately required M&T to refund all of the fees earned off of account conversions, correct credit where appropriate and pay a \$200,000 fine.

One key aspect of this consent order is that the regulatory action did not arise from M&T Bank's free checking program itself being deceptive or improper. The CFPB did not find that the activity requirement or the automatic conversion was improper. Instead, the issue arose from the manner and means by which the program was advertised. If the respective advertisements had contained a satisfactory warning of the activity requirement and automatic conversion process, the CFPB would have taken no action. This is a stark reminder that the CFPB does examine advertisements as part of its supervisory examination process. All advertisements should be vetted to ensure that any necessary warning or disclaimer is included.