

PUBLICATION

CFPB Warns Against "Tricking Consumers" with Pay-by-Phone Fees

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Regulated entities should be prepared to defend their policies and practices surrounding fee-based pay-by-phone options in light of new guidance issued by the Consumer Financial Protection Bureau (CFPB).

The CFPB released a compliance bulletin on July 31 to provide guidance on charging pay-by-phone fees. In a press release, the CFPB touts the bulletin as a warning against "tricking consumers into expensive pay-by-phone fees," which is also a succinct way to describe the CFPB's take on the conduct it identifies in the bulletin. The bulletin highlights the risks of potential violations of Dodd-Frank's UDAAP prohibition or the FDCPA posed by charging pay-by-phone fees.

The CFPB notes several examples of unfair or deceptive conduct related to offering a fee-based pay-by-phone option, including referring consumers by default to fee-based expedited payment options, when other no-fee pay-by-phone options were available or consumers did not need to expedite payment. The CFPB points out the importance of adequately monitoring phone representatives, on top of having policies in place requiring representatives to list all pay-by-phone options or all expedited options, noting that deviations from a script should be anticipated and representatives should be adequately trained to avoid steering consumers to fee-based options. Likewise, the CFPB suggests that employee incentive programs or incentives created by agreements with third parties related to pay-by-phone fees increase the risk of UDAAP violations. Entities that use such incentive programs or have a financial incentive to steer consumers to fee-based pay-by-phone options because of agreements with service providers should expect a high level of scrutiny from the CFPB and should be prepared to show that representatives and written correspondence to consumers do not push consumers to the fee-based option, despite the incentive.

The CFPB also noted that charging pay-by-phone fees may violate Section 1692f(1) of the FDCPA, which prohibits debt collectors from "collect[ing] any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 14 U.S.C. Section 1692f(1). The bulletin points out that its examiners "found that one or more mortgage servicers that met the definition of 'debt collector' under the FDCPA violated the Act when they charged fees for taking mortgage payments over the phone to borrowers whose mortgage instruments did not expressly authorize collecting such fees and who reside in states where applicable law does not expressly permit collecting such fees." Although we believe the case law on this issue does not hold up to scrutiny, the CFPB seems to be throwing its weight behind the position that charging a pay-by-phone fee violates Section 1692f(1) of the FDCPA unless the fee is authorized by consumer's contract or state law. Specifically, the CFPB states that it expects entities that meet the definition of 'debt collector' under the FDCPA to review state and federal laws, "including the FDCPA," to determine whether they are even authorized to charge pay-by phone fees.

The CFPB has raised the issue of pay-by-phone fees previously, having taken up the issue in enforcement actions during 2015 and including it in its fall 2015 Supervisory Highlights. The CFPB's decision to release a guidance directly addressing the compliance risks associated with pay-by-phone fees and its prior enforcement actions regarding such fees indicates that it will scrutinize any such practices in examinations and will continue to look for associated UDAAP violations.

If the CFPB considers it a violation to offer a fee-based payment option to a consumer protected under the FDCPA, procedures and policies to manage associated risks will be critical, possibly by going so far as to avoid offering such options to consumers protected under the FDCPA because of their account status or account history.