

CFPB Fines Bank for Improper Overdraft Practices

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The Consumer Financial Protection Bureau (“CFPB”) recently ordered Santander Bank, N.A. to pay a \$10 million fine relating to its overdraft service practices, claiming the Bank’s telemarketing vendor deceptively promoted the Bank’s overdraft service to consumers and enrolled customers for the service without their consent. The CFPB’s action is consistent with the Bureau’s increased focus on overdraft protection products and fees collected by financial institutions.

According to the CFPB, from 2010 to 2014, the Bank’s vendor promoted and enrolled consumers in the Bank’s “Account Protector” overdraft service for ATM and one-time debit card transactions, which charged consumers \$35 per overdraft. The Bank’s telemarketing vendor would call customers to encourage them to opt-in to Account Protector and these telemarketers would then be rewarded with a higher hourly rate associated with specified sales targets. The problem, however, was that the Bank’s telemarketing vendor often enrolled customers in the service without receiving the customer’s affirmative consent.

The Bank’s practice was found to violate the CFPB’s Regulation E, which implements the Electronic Fund Transfer Act and prohibits banks and credit unions from charging overdraft fees on ATM and one-time debit card transactions unless the consumer has affirmatively opted-in to the overdraft program. If the consumer does not opt-in, the bank and credit unions may reject the transaction due to insufficient or unavailable funds but cannot charge an overdraft fee.

Among those the practices of the Bank which the CFPB determined to be improper are the following:

- *Signing consumers up for overdraft services without their consent:* the Bank’s telemarketing vendor would often describe the Account Protector program and enroll consumers without obtaining their consent by simply asking for the last four digits of their social security numbers. Alternatively, other telemarketers would enroll consumers even after the consumer explicitly stated they did not want to enroll in the program.
- *Deceiving consumers that overdraft services were free:* Consumers were often misinformed that the Account Protector program was free when it could cost consumers hundreds of dollars in overdraft fees. Some Bank telemarketers would deceptively suggest that a consumer would not be charged an overdraft fee if their account was made current within five (5) business days. Other telemarketers incorrectly stated the fees would only apply for “emergency transactions.”
- *Deceiving consumers about the fees they would face if they did not opt-in:* The Bank’s telemarketing vendor would falsely tell consumers that the Bank would charge overdraft fees on ATM and one-time debit card transactions regardless of whether they enrolled in Account Protector. Other representatives went as far as

to wrongly state that consumers risked additional fees if they did not sign up for Account Protector.

- *Falsely claiming the call was not a sales pitch:* Telemarketers would dishonestly tell consumers that “this is not a sales call” and the reason for the call was the change of the bank’s name when the purpose of the call was only for the Account Protector program.
- *Failing to stop its telemarketer’s deceptive tactics:* The Bank did not stop their telemarketing vendor’s deceptive tactics and went as far as to offer financial incentives for the telemarketers to hit certain sales targets.

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB has the authority to take action against financial institutions engaging in unfair, deceptive or abusive practices. The Bank was found to have violated the Electronic Fund Transfer Act and the Dodd-Frank Act. In addition to the \$10 million penalties, the CFPB’s order requires the Bank to:

- *Validate all opt-ins associated with the telemarketer:* The Bank must contact all consumers enrolled in the Account Protector program and ask them whether they would like to be opted-in.
- *Not use a vendor to telemarket overdraft service:* The Bank is prohibited from utilizing vendors to “conduct outbound telemarketing of overdraft service to consumers.” The Bank also may not require its employees to generate target numbers or any financial incentives in connection with opt-ins.
- *Increase oversight of all third-party telemarketers:* The Bank must develop a revised policy governing vendor management in connection with consumer financial products and services.

The CFPB’s order is consistent with the agency’s tough stance regarding overdraft fees and services tied to checking accounts and debit cards. The CFPB has indicated that regulations will be forthcoming to deter, if not eliminate, the use of overdraft products as they are now structured.

The Federal Deposit Insurance Corp. (“FDIC”) in 2010 also issued guidance directing its regulated financial institutions to monitor their overdraft programs and to be vigilant in avoiding consumers’ overuse of overdraft products. The FDIC’s guidance on overdraft products can be found here:

<https://www.fdic.gov/news/news/financial/2010/fil10081.html>

In addition to scrutiny by regulators, in recent years there have been numerous lawsuits based on alleged defects in the procedures utilized for overdraft protection programs, which have caused banks to reevaluate the structure of these services.

If you have any questions regarding the CFPB’s Order or overdraft services and practices in general, please feel free to contact Kevin Patterson at 516-296-9196 or via email at kpatterson@cullenanddykman.com, Joseph D. Simon at 516-357-3710 or via email at jsimon@cullenanddykman.com, or Diana R. Acosta at 516-357-3739 or via email at dacosta@cullenanddykman.com.

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